IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANDREW AND SUZANNE SCHWARTZ 2000 FAMILY TRUST; ANDREW MARC SCHWARTZ INVESTMENT TRUST; ANDREW SCHWARTZ; AND SUZANNE SCHWARTZ,	)	
Petitioners,	)	C.A. No. 3172-VCS
v.	)	
AM APPAREL HOLDINGS, INC., a Delaware corporation,	)	
Respondent.	)	

MEMORANDUM OPINION

Date Submitted: May 23, 2008
Date Decided: July 28, 2008

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STRINE, Vice Chancellor.

I. Introduction

The parties in this appraisal have gone to battle over whether the petitioners filed a timely demand for appraisal. After sorting through the procedural issues raised by the parties' failure to adhere to the applicable procedural standards, I conclude that the respondent corporation has not met its burden to show that the petitioners failed to make a timely demand.

Here, the merger giving rise to appraisal rights was effected by an acquisition affiliate of the respondent's controlling stockholder. The basic idea behind the merger was that the acquisition affiliate would acquire the respondent in exchange for agreeing to assume responsibility for its debts, because the respondent was in financial distress. The respondent sent out an information memorandum during the merger process that informed stockholders that the merger was likely to close on March 30, 2007 and that the merger was expected to be consummated simply on the support of the controlling stockholder's voting power. Importantly, stockholders were told that they would receive nothing in the merger, but could participate on a pro-rata basis with the controlling stockholder in investing in the acquisition affiliate. Stockholders were told that they had until March 29, 2007 to take advantage of that opportunity. For those stockholders who did not wish to take advantage of that chance, the information memorandum told them that they would have the right to seek appraisal. But the information memorandum did not inform them of how to exercise their appraisal rights, was not styled as a formal notice of appraisal rights, and did not include the information required by § 262(d)(2), the

portion of the Delaware General Corporation Law ("DGCL") applicable to mergers to be effected by written consent.

In response to this statement informing them that a merger was imminent, the petitioners filed an appraisal demand compliant with the requirements of § 262 on April 4, 2007, three business days after the merger was supposed to have closed.

But, the respondent tarried in effecting the merger and did not do so until April 20, 2007, three weeks after it had told the stockholders that it would. On April 26, 2007, it sent out essentially the same information memorandum as it had previously and this time accompanied it with a formal notice of the merger's approval by stockholder consent and of appraisal rights. That notice informed stockholders desiring to seek appraisal to do so on or before May 17, 2007. In response to this notice, the petitioners did nothing, relying on their previous demand, which the respondent had neither acknowledged nor rejected.

On this motion, the respondent argues that the petitioners' did not make a proper demand because they did not send it within the period between April 26, 2007 — the date of mailing of the second information memorandum and notice of appraisal rights — and May 17, 2007, twenty days after that notice.[1] I reject that argument in this particular case.

If the respondent had acted with greater clarity, it would have a good argument. But its communications with its stockholders were confusing. By its own terms, the March information memorandum told stockholders that a merger was imminent, the votes

[1] For consistency with the notice of the Merger that AM Apparel sent on April 26, 2007, I will refer to May 17 as the 20th day after April 26, 2007, even though it is in fact the 21st.

were secure, and that if they wished to invest in the acquisition affiliate they had to act by March 29. That same statement told stockholders that they could seek appraisal if they were dissatisfied. The petitioners' decision to act on this confusing statement by filing a prompt, conforming demand within three business days of the expected consummation of the merger was understandable. In these circumstances, any failure of the respondents to file yet another demand is excused by the respondent's own unclear communications. Having created the impression that stockholders needed to act on the initial information memorandum, the respondent should have informed stockholders of any need to reiterate their demand for appraisal when the second packet went out. That is especially so when the respondent has a handful of stockholders, knew that the petitioners had sought appraisal, and did nothing to inform them that they had to engage in a "do over."

II. Procedural History

On August 17, 2007, Andrew Schwartz, Suzanne Schwartz, the Andrew and Suzanne Schwartz 2000 Family Trust, and the Andrew Marc Schwartz Investment Trust (collectively, the "petitioners") filed a petition for appraisal of their shares of AM Apparel Holdings, Inc. ("AM Apparel"). On February 22, 2008, respondent AM Apparel moved for judgment on the pleadings. This motion has surfaced two critical issues. The first is whether this case should be dismissed in its entirety because none of the petitioners demanded appraisal between April 26, 2007 — the date when the notice of the Merger under § 262(d)(2) was mailed — and May 17, 2007 — the 20th day after that mailing. The second issue turns to some extent on the first. If I conclude that the answer is yes to the first question, two of the petitioners have argued that they were never

provided with proper service of the notice required by § 262(d)(2), and that the failure of the corporation to provide such service excuses their failure to demand appraisal between April 26, 2007 and May 17, 2007.

Regrettably, the parties have made a procedural hash out of this motion. The motion that brings this matter before the court was focused solely on the first issue and styled as a motion for judgment on the pleadings. But that motion was accompanied by several documents that were not referenced or incorporated in the complaint, including the statutory notice of the Merger sent on April 26, 2007 and an information memorandum describing the terms of the transaction. Those documents were put before the court to introduce the chain of events leading up to the filing of the appraisal petition in this court, and to demonstrate that the petitioners had not filed a proper demand within the time frame demanded by § 262(d)(2).

In response to AM Apparel's opening brief, the petitioners did not claim that the motion for judgment on the pleadings had been unfairly converted to a motion for summary judgment. Rather, they dropped in an affidavit and further documents of their own. These included the March 2007 "Information Memorandum" that preceded by over a month the formal notice of the April 20, 2007 Merger, as well as documents related to the equity that the petitioners owned in the corporation and the fact that although the petitioners received no consideration in the Merger for their common and preferred shares, the corporation was sold for $42.5 million some ten months after the Merger.

Importantly, the petitioners argued, by way of their brief and an affidavit from Suzanne Schwartz, one of the individual petitioners, that because there were no material

changes to the Merger between the time AM Apparel told stockholders about it in the Information Memorandum and the time it was ultimately approved, the equities require that I give effect to a demand that was sent to the corporation between those dates. The petitioners also argued that two of the petitioners — the Andrew and Suzanne Schwartz 2000 Family Trust, and the Andrew Marc Schwartz Investment Trust (the "Trusts") — had not received proper notice of the Merger. Rather, AM Apparel had simply mailed an omnibus notice to Suzanne Schwartz and not notices specific to the Trusts, which are stockholders in their own name, albeit ones with a strong connection to Suzanne Schwartz.[2]

In its reply brief, AM Apparel then argued that the petitioners' arguments regarding service to the Trusts were improper, as they were based on documents outside the pleadings and therefore not appropriate for consideration by the court in determining the motion for judgment on the pleadings. Likewise, AM Apparel would have me ignore the Schwartz affidavit or arguments relying upon it entirely, including the argument that it would be inequitable for AM Apparel to rely upon a strict application of the 20 day time frame. According to AM Apparel, the failure of the petitioners to plead these excuses in their original appraisal petition bars them from now claiming that they apply.

Unlike AM Apparel, I see no reason why the petitioners would have discussed these questions in the appraisal petition, as the petitioners were relying on the April 4, 2007 demand they made in response to the original Information Memorandum as the

[2] Suzanne Schwartz is the co-trustee of one Trust and the other Trust, which bears her name, has a relative, Harold Schwartz, serving as trustee. *See* Schwartz Aff. Ex. C.

basis for their standing. It was only when AM Apparel raised, as an affirmative defense, the issue of whether the petitioners had demanded appraisal after AM Apparel sent statutory notice of the Merger that these arguments became relevant to the petitioners. Similarly, I see no reason to favor AM Apparel by considering the documents it has introduced outside of the pleadings while simultaneously excluding from my consideration those that the petitioners have submitted through the Schwartz affidavit.

Under recent Supreme Court jurisprudence, there is a basis to simply deny the pending motion as procedurally flawed and allow discovery to proceed. In *Appriva Shareholder Litigation Company, LLC v. EV3, Inc.*, the Supreme Court held that the Superior Court had committed reversible error when it *sua sponte* converted a motion to dismiss for failure to state a claim under Superior Court Rule of Civil Procedure 12(b)(6) into a motion for summary judgment without a hearing and without giving the parties ten days notice of its intent to do so.[3] But I do not believe that *Appriva* mandates that I give the parties ten days of additional notice here before converting the motion.

The issue of whether the petitioners' claims are barred because they failed to demand appraisal of their shares between AM Apparel sending notice of the Merger under § 262(d)(2) on April 26, 2007 and 20 days after that date was the subject of

[3] *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1288 (Del. 2007). Although *Appriva* spoke in terms of allowing discovery to proceed in support of a motion to dismiss that was converted into a motion for summary judgment, the same practical result would be obtained by denying the motion and allowing the moving party to move for summary judgment after some discovery was conducted. *Cf.* Court of Chancery Rule 12(c) (allowing a motion under this rule to be converted to one under Rule 56); *id.* at Rule 56(f) ("Should it appear . . . that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition [to a motion for summary judgment], the Court *may refuse the application for judgment* . . . or may make such other order as is just.") (emphasis added).

extensive briefing by both parties based on documents outside the pleadings.[4] Both parties submitted such documents to the court and neither side has contested their authenticity or that most of the relevant documents are before the court. Even AM Apparel has suggested that I convert the motion to one for summary judgment.[5] Given this, I believe that both parties have consented to my determination of the issues under Rule 56.

Because I ultimately find for the petitioners on the first question, I find it unnecessary to address the second regarding the issue of notice to the Trusts, and, even if it were necessary, the second question should only be resolved after discovery on that subject. As a result, the remainder of this decision focuses solely on the first question, which affects all the petitioners. I answer that question after setting forth the undisputed facts relevant to it.

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[4] Other courts applying identical language in Federal Rule of Civil Procedure 12(b)(6) have determined that by filing affidavits and documents attached to briefs, litigants are deemed to have notice of the potential for conversion into a motion for summary judgment. *E.g.*, *Caldwell v. W. Atlas Int'l*, 871 F. Supp. 1392, 1394-95 (D. Kan. 1994) ("Generally, when a court determines that it must treat a motion to dismiss or for judgment on the pleadings as one for summary judgment under Rule 56, the parties are given notice and a reasonable opportunity to provide additional material before the court determines the outcome. . . . However, when both parties submit 'materials beyond the pleadings in support of or opposing a motion to dismiss, the prior action on the part of the parties puts them on notice that the judge may treat the motion as a Rule 56 motion.'") (quoting *Wheeler v. Hurdman*, 825 F.2d 257, 260 (10th Cir. 1987)); *Mezu v. Morgan State Univ.*, 264 F. Supp. 2d 292, 295 (D. Md. 2003) (finding that a party who "filed her own affidavit and several exhibits with her opposition to defendants' motion to dismiss" had "herself invited conversion" and that she "was clearly on notice of the possibility that [the court] would consider such affidavit and exhibits and convert the motion into one for summary judgment"), *aff'd sub nom*, *Mezu v. Dolan*, 75 F. App'x 910 (4th Cir. 2003).

[5] Transcript of Oral Argument at 22-23.

III. Factual Background

Petitioners Andrew and Suzanne Schwartz founded several corporations that manufactured and sold high-end outerwear apparel under the Andrew Marc and Marc New York labels. Together with the petitioner Trusts, they were the sole owners of those corporations. As their names suggest, Suzanne was involved with the Andrew Marc Schwartz Investment Trust and the Andrew and Suzanne Schwartz 2000 Family Trust as a trustee of the former and in some unspecified way with the latter.[6]

In November of 2004, the petitioners consummated a transaction with Gordon Brothers, a private equity firm, in which the petitioners contributed all of their equity in the outerwear companies in return for common and preferred shares of stock in a new corporation, AM Apparel.[7] In that transaction, Gordon Brothers acquired 67% of the new company and the petitioners acquired 33%.[8] Gordon Brothers received common stock of AM Apparel while each of the petitioners received a mix of common and two series of preferred stock.[9]

In the years following that transaction, Andrew Schwartz departed from management of AM Apparel at some unspecified date and Suzanne resigned in January of 2007. By the spring of that year, AM Apparel appears to have been in financial trouble. In March of 2007, AM Apparel sent an Information Memorandum soliciting

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[6] *See* Respondent AM Apparel Holdings, Inc.'s Reply in Further Support of its Motion for Judgment on the Pleadings ("Reply to Motion") Ex. A ("Stockholders Agreement") (listing Suzanne Schwartz as the contact person for the two trusts).
[7] Schwartz Aff. ¶ 3.
[8] Respondent AM Apparel Holding's, Inc.'s Motion for Judgment on the Pleadings Ex. 2 at 3.
[9] Schwartz Aff. ¶¶ 4, 6.

additional financing from AM Apparel stockholders. The record does not indicate precisely when that Information Memorandum was sent, but Suzanne Schwartz received it on March 19.[10] That Information Memorandum explained that AM Apparel was "facing a liquidity crisis," that it was "currently in default under each of its credit facilities," and predicted that "[b]ased on the Company's most recent projections, a new capital infusion of $8.0 million [wa]s required to avoid an immediate insolvency proceeding and maintain the minimum amount of working capital necessary to operate through the summer of 2007."[11] It detailed, in depth, a series of related transactions that Gordon Brothers had proposed through which $8 million would be raised from AM Apparel's existing stockholders and used to recapitalize AM Apparel (those transactions comprising the "Refinancing").[12] In support of the fairness of the Refinancing to AM Apparel's shareholders, the company had obtained a written fairness opinion from Mesirow Financial, Inc. that AM Apparel's equity was worthless and that the terms of the Refinancing were fair from the financial point of view of the stockholders.

Although the result of the Refinancing would be a recapitalization of AM Apparel, stockholders who chose to participate in it would first invest in a new corporation created for the Refinancing ("Newco"). Any investments in the Refinancing would be allocated equally between senior subordinated notes and what would ultimately become shares of AM Apparel common stock through a merger of Newco with and into AM Apparel, with

[10] *Id.* ¶ 5.
[11] *Id.* Ex B ("Information Memorandum") at 3.
[12] *Id.* at 4.

AM Apparel as the surviving corporation (the "Merger"). The Information Memorandum explained the key components of the Refinancing as follows:

> (a) a new corporation ("Newco") will be created by affiliates of Gordon Brothers;
> (b) Newco will be capitalized with $8.0 million . . . through the issuance of its common stock and . . . notes . . . having the terms set forth in the Term Sheet attached hereto . . . ; and
> (c) Newco will merge (the "Merger") with and into [AM Apparel], with [AM Apparel] as the surviving entity.[13]

As a result of the Merger, all of the existing equity in AM Apparel would be cancelled, holders of AM Apparel stock would receive no consideration for their shares, AM Apparel would assume Newco's obligations on the notes, and the common stock of Newco would be converted into common stock of AM Apparel.[14] As a practical matter, this meant that each stockholder's current equity position in AM Apparel would be wiped out as a result of the Merger, regardless of the stockholders' participation. Although the Information Memorandum did not say so, a reasonable stockholder could have concluded that the terms of the final merger agreement were set.

AM Apparel's stockholders could, however, remain owners of AM Apparel by investing in the Refinancing, which was open only to existing AM Apparel stockholders. Indeed, soliciting investments from the petitioners appears to have been a key purpose behind sending the Information Memorandum. All stockholders were given the opportunity to participate in the Merger pro-rata with other participating stockholders, although Gordon Brothers indicated its willingness to fund the entire Refinancing if other

[13] *Id.*
[14] *Id.* at 5.

stockholders did not choose to invest in it. But they had to elect to do so by March 29, 2007.

Thus, the Information Memorandum conveyed a sense that both the Merger and Refinancing were imminent. The reality was that Gordon Brothers was the controlling stockholder and that the petitioners could not influence the outcome of a transaction that Gordon Brothers intended to pursue. Gordon Brothers had proposed the Merger and Refinancing and, as the Information Memorandum stated, although approval of the board of directors and the stockholders was required, "[b]ased on discussions with Gordon Brothers (which holds a majority of the Company's common stock), the Company expects that the required approval from its stockholders will be received."[15] Similarly, another section of the Information Memorandum addressing the risks of the Merger explained that "[a]ffiliates of Gordon Brothers will continue to own a controlling percentage of the common stock, and *they will control all major corporate decisions*, including decisions with respect to a sale of the Company, and continue to have the ability to elect and remove directors."[16]

The Information Memorandum did not explicitly state that the Merger and Refinancing were final and, in fact, cautioned that the Merger and Refinancing were contingent on AM Apparel successfully obtaining various consents, amendments to financing agreements, and waivers of default from lenders.[17] Nevertheless, stockholders were informed that AM Apparel "anticipate[d]" that that the transaction would close on

[15] *Id.* at 6.
[16] *Id.* at 15 (emphasis added).
[17] *Id.* at 4.

"March 30, 2007 or as soon as practicable thereafter"[18] — eleven days after Suzanne Schwartz received the Information Memorandum. And as noted, stockholders had to inform the company no later than March 29, 2007 if they elected to participate in the Refinancing.[19] The Information Memorandum also implied, without stating explicitly, that stockholders who wished to participate in the Refinancing had to pay for the securities at the March 30, 2007 closing.[20] From the terms described in the Information Memorandum and its undertone, it was obvious that the terms of the Refinancing and the Merger were largely set, and that they would be consummated imminently, barring unforeseen complications.

At the end of the summary describing the Refinancing, the stockholders were told of their appraisal rights if they dissented from the Merger. The entire discussion of appraisal contained in the Information Memorandum is as follows:

> Any holder of the Company's shares issued and outstanding immediately prior to the effective time of the Merger who does not vote in favor of, or consent to, the Merger and who makes a demand pursuant to, and otherwise complies with the requirements of[] Section 262 of the [DGCL] will be entitled to an appraisal by the Delaware Court of Chancery of the fair value of their shares, exclusive of any element of value arising from the accomplishment or expectation of the Merger, in lieu of accepting the cancellation of their shares without consideration of the Merger.[21]

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[18] *Id.* at 18.
[19] *Id.* Although the term sheet directed stockholders to do so in writing "at the address contained in the attached Memorandum," no such address was contained in the Information Memorandum.
[20] *Id.* ("*On the effective date of the Transaction* we will deliver the Securities *upon receipt of payment therefor*. Should you elect to subscribe for Securities in this offering, we will notify you of the payment instructions.") (emphasis added).
[21] *Id.* at 6.

From the date the Information Memorandum was received by Suzanne Schwartz, the stockholders had 10 days to subscribe to the Refinancing and 11 days before the Merger would eliminate their existing equity in AM Apparel. The March 29 deadline came and went and the petitioners did not elect to participate in the Merger.

Believing that the Merger had closed as expected on March 30, 2007, the petitioners caused a letter purporting to demand appraisal for their shares of AM Apparel to be delivered on April 4 to AM Apparel's offices, two contacts at Gordon Brothers, and two attorneys who acted for Gordon Brothers (the "April 4 Demand").[22] The subject line of that letter read "Stockholders' Demand for Appraisal" and it stated that "[i]n connection with the merger of Newco into AM Apparel . . . the undersigned, pursuant to Section 262 of the [DGCL] hereby demand appraisal of the fair value of all shares . . . held by the undersigned."[23] Unknown to the petitioners, a merger agreement had not been signed or approved at that time.

Under § 262(d)(2) of the DGCL "either a constituent corporation *before* the effective date of the merger . . . or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger . . . and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation . . . . Such notice may, and, if given on or after the effective date of the merger . . . , shall, also notify such stockholders of the effective date

[22] Schwartz Aff. ¶¶ 9, 10.
[23] Schwartz Aff. Ex. C.

of the merger . . . ."[24] A stockholder entitled to appraisal who wishes to perfect her appraisal rights must demand appraisal from the surviving corporation "within 20 days after the date of mailing of such notice."[25] The parties dispute whether a demand for appraisal (a "Demand") made before a notice of the merger from the corporation is sent (a "Notice") complies with the time frame under the statute. As a practical matter, the Notice precedes the Demand in time because the Notice serves as the means by which the corporation communicates to the stockholders the terms of a proposed merger necessary for a stockholder to evaluate whether to seek an appraisal of their shares.

Because the March Information Memorandum did not attach a copy of § 262 of the DGCL and it did not contain specific instructions to its stockholders as to the correct manner of executing and filing a valid objection or demand for payment, it did not constitute an effective Notice under § 262(d)(2).[26] In addition, § 262(d)(2) does not contemplate a Notice being sent before approval of a merger.[27] But several factors make the petitioners' choice to send a Demand to AM Apparel on April 4, 2007 an understandable course of action.

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[24] 8 *Del. C.* § 262(d)(2) (emphasis added).
[25] *Id.*
[26] *Id.*; *Raab v. Villager Indus., Inc.*, 355 A.2d 888, 895 (Del. 1976) (announcing that a corporation must "issue specific instructions to its stockholders as to the correct manner of executing and filing a valid objection or demand for payment under the Statute, as construed by Delaware courts, including: (1) the general rule that all such papers should be executed by or for the stockholder of record, fully and correctly, as named in the notice to the stockholder; and (2) the manner in which one may purport to act for a stockholder of record, such as a joint owner, a partnership, a corporation, a trustee, or a guardian").
[27] *See* 8 *Del. C.* § 262(d)(2) ("If the merger . . . *was approved* pursuant to § 228 . . . of this title, then . . . [a] corporation . . . *shall notify* [stockholders] who are entitled to appraisal rights *of the approval* of the merger . . . and that appraisal rights *are* available . . . .") (emphasis added).

Put simply, given the circumstances and the Information Memorandum's modest discussion of appraisal, the appropriate time and manner of complying with the appraisal statute's Demand requirement was confusing from the perspective of a reasonable stockholder. As I have described above, the Information Memorandum conveyed a very real sense that the Merger was a done deal, that the petitioners would receive nothing as a result, and that their only alternative if they disagreed with the terms of the Merger would be to seek appraisal. Furthermore, the Information Memorandum could have informed stockholders that the Merger was at a preliminary stage, that the terms of the Merger were still being finalized, and that stockholders wishing to exercise appraisal rights would be receiving further notice informing them of how to perfect their appraisal rights. But it did not. Moreover, the expressed risks that the Refinancing would not occur as planned were largely confined to the cooperation of AM Apparel's lenders, in particular with regard to amending certain financing agreements and the terms of the notes,[28] and the possibility that Gordon Brothers, who had proposed the Refinancing and the Merger, would change its mind.[29] Because Suzanne Schwartz received the Information Memorandum on March 19, 2007, the April 4, 2007 Demand, received by AM Apparel 16 days later, would almost certainly have been a timely Demand had the Information Memorandum constituted a Notice. Had AM Apparel closed on the Merger on March 30 as it had stated it would in the Information Memorandum, the Refinancing and the Merger would have already taken place on March 30, 2007.

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[28] Information Memorandum at 12, 14, 18.
[29] *Id.* at 6, 15.

But as it turns out, AM Apparel's stockholders did not approve the Merger until April 20, 2007, when Gordon Brothers did so by shareholder consent under authority of § 228 of the DGCL.[30] The other AM Apparel stockholders had no reason to know this, of course, as they were not told of the delay in a timely manner. It turns out that it was not until April 20 that a "Merger Agreement" was formally entered between AM Apparel and AM Merger Corporation, a newly formed corporation. The Merger became effective the same day. Consistent with the terms of the Merger described in the March Information Memorandum, the petitioners' shares of common and preferred stock were cancelled and they received no consideration.[31] On April 26, 2007, AM Apparel sent two copies of various documents to the Schwartz's home address, one addressed to Andrew Schwartz, and the other to Suzanne Schwartz.

The documents AM Apparel sent on April 26, 2007 consisted of a "Notice of Action Taken by Less than Unanimous Consent of Stockholders, Merger and Appraisal Rights" (the "Merger Notice"), a copy of the Merger Agreement, amendments to certain financing agreements, various other supporting documentation, a copy of the same fairness opinion referenced in the March Information Memorandum, and an information memorandum (the "Second Information Memorandum"). A comparison of the Information Memorandum to the Second Information Memorandum reveals that the

[30] Respondent AM Apparel Holding's, Inc.'s Motion for Judgment on the Pleadings Ex. 1 ("Merger Notice") at 1.
[31] Respondent AM Apparel Holding's, Inc.'s Motion for Judgment on the Pleadings Ex. 1 ("Merger Agreement") at 1.

documents are materially the same, except that the latter memorandum reflects that the Merger and the Refinancing had taken place on April 20, 2007.

As a whole, the various documents informed the now former stockholders that the Merger had been approved and had become effective, and that Gordon Brothers was now offering AM Apparel's former stockholders the opportunity to purchase notes and stock in AM Apparel from Gordon Brothers on the same terms as Gordon Brothers had acquired notes and stock on April 20, 2007. AM Apparel was not a company with a large stockholder base. Rather, it appears that it had six stockholders, and that the petitioners owned one-third of the shares. Despite having received an appraisal demand on April 4, 2007 from the petitioners, representing a full 33% of the shares, the respondent never included any statement in the Merger Notice or Second Information Memorandum referring to the need for stockholders who acted in response to the prior Information Memorandum to file yet another demand for appraisal.

Instead, the Merger Notice simply directed stockholders who "wish[ed] to demand appraisal of [their] shares [to] make a written demand for appraisal *on or prior to May 17, 2007* (i.e., within 20 days after the date of mailing of this Notice)."[32] Although the clause within parentheses in that sentence tracked the statutory language and thus reflected whatever ambiguity the phrase "within 20 days after" in § 262(d)(2) might covey, the textual sentence seemed to contemplate that the April 4, 2007 Demand was effective because it was sent "on or prior to May 17." That is, AM Apparel told the petitioners to demand appraisal "on or prior to May 17, 2007" if they wished to perfect

[32] Merger Notice at 4 (emphasis added).

their appraisal rights and implied that the April 4 Demand met the statutory requirements of § 262(d)(2). Admittedly, the Merger Notice cautioned that any discussion of appraisal rights it contained "*is not a complete statement of the law . . . and is qualified in its entirety by the full text of Section 262*," and directed stockholders to "review the following discussion and [§ 262 of the DGCL] carefully because failure to timely and properly comply with the procedures specified will result in the loss of [their] appraisal rights."[33] But, given that they had filed a demand on April 4 and that AM Apparel did not say that stockholders who had reacted to the earlier Information Memorandum had to engage in a "do over," a diligent investor in the petitioners' position could have reasonably believed that they had already secured their place in the appraisal queue.

And in fact, the petitioners did not inquire whether their prior Demand for appraisal was adequate, believing that they had filed a proper Demand. They therefore sent in no new Demand, nor did they reaffirm their prior April 4 Demand, or seek assurances that the prior Demand was sufficient to preserve their right to appraisal. Likewise, AM Apparel did not tell the petitioners that their April 4 Demand was ineffective to support an appraisal petition.

Then, on August 17, 2007, the petitioners filed suit in this court seeking an appraisal of the fair value of their AM Apparel stock. Ten months after AM Apparel's Refinancing and Merger, Gordon Brothers sold AM Apparel for $42.5 million. The petitioners claim that this is a strong indication that the April 20, 2007 Merger that gave

[33] Merger Notice at 3 (emphasis in original).

them nothing for their common and preferred stock was unfair.[34] In response, AM Apparel points out that the petitioners had two opportunities to purchase shares in AM Apparel on the same terms as Gordon Brothers and that post-merger value may not be considered in appraisal.

IV. Legal Analysis

A. Is A Demand For Appraisal Made Before The Corporation Sends Notice "Within 20 Days After" That Notice Under § 262(d)(2)?

To proceed with their appraisal petition, the petitioners rely on their April 4, 2007 letter to AM Apparel to meet the appraisal statute's procedural requirements. The petitioners first argue, based on the language of the appraisal statute itself, that any Demand for appraisal of shares that is made before the corporation sends Notice of a merger giving rise to appraisal rights complies with § 262(d)(2)'s procedure for perfecting those rights. That subsection of the appraisal statute addresses how stockholders perfect their right to appraisal when a corporation approves a merger by stockholder consent under § 228 or by the procedures of the short form merger statute, § 253. Section 262(d)(2) provides, in relevant part:

> [E]ither a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation . . . . Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. *Any stockholder entitled to appraisal rights may, within 20 days after the date*

[34] Schwartz Aff. ¶ 15.

> *of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares.* Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares.[35]

The petitioners argue that the clause beginning with "within 20 days after," fixes only the end point after which dissenting stockholders to a merger cannot demand appraisal from the corporation because, they claim, "within" can and in this context does mean "not later than." But, as I read that clause, the particular choice of the word "within" suggests a bounded period of time for stockholders to demand appraisal of their shares, that is, one with both a beginning and an end.[36] Had the General Assembly intended to create a time period with only an ending, they could have easily done so by using "before" rather than "within."[37]

Were I to read within to mean before, there would be no natural beginning point for the period in which the corporation could expect to receive appraisal demands. Stockholders could theoretically demand appraisal months or even years before a merger giving rise to appraisal rights,[38] or present a blanket appraisal demand purporting to dissent from any merger approved by stockholder consent or the statutory short form that

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[35] 8 *Del. C.* § 262(d)(2) (emphasis added).
[36] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1355 (1988) (describing within as "used as a functional word to indicate enclosure or containment"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1976 (4th ed. 2000) (defining within as "inside the limits or extent of in time or distance").
[37] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 140 (1988) (defining before as "preceding in time: earlier than"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 161 (4th ed. 2000) (defining before as "previous in time; earlier than").
[38] Because § 262(e) allows dissenting stockholder to file an appraisal action "within 120 days after the effective date of the merger or consolidation," applying the same reading of "within" six sentences later would seemingly allow a stockholder to demand appraisal and then initiate suit at any time before the effective date of the merger.

the corporation might pursue. Furthermore, because the terms of a proposed merger might not be final, a corporation could disclose to stockholders a possible merger on particular terms only to have them change later, leaving the corporation to resolve which appraisal demands were effective and which were not.[39] In place of simply requiring that stockholders send a demand for appraisal after the corporation sends the statutory notice required by § 262(d)(2), courts would be required to resolve factual issues such as how far before a merger could a stockholder demand appraisal, and whether a demand for appraisal over a proposed merger was effective as to mergers with slightly different terms.

These factual inquiries can be avoided by reading § 262(d)(2) to require that stockholders demand appraisal after the corporation sends notice of the merger, thus serving the policy goal of § 262(d)(2)'s demand formalities by providing "'a[more] orderly method for withdrawal from a corporation by shareholders who dissent from a merger.'"[40] The statute's scheme of formalities required to perfect a stockholder's right to appraisal makes the most sense when it is read to contemplate the corporation first

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[39] This is particularly likely for those types of mergers that § 262(d)(2) addresses because, in such mergers, controlling stockholders can change the terms of a merger without any opportunity to vote on the part of dissenting stockholders. *See* 8 *Del. C.* § 228 (providing for approval of any action that may be taken at a stockholder meeting without requiring prior notice or a vote of all stockholders); *id.* § 253 (allowing approval of a merger under certain circumstances without a vote of all stockholders).

[40] *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 258 (Del. 1995) (quoting *Loeb v. Schenley Indus., Inc.*, 285 A.2d 829, 830 (Del. Ch. 1971)). Many appraisal decisions comment on this policy rationale. *See, e.g.*, *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 480 n.28 (Del. Ch. 2000) ("[S]trict compliance [with the appraisal statute] enables corporations to promptly learn the identity of all stockholders who have timely sought appraisal . . . ."); *Salt Dome Oil Corp. v. Schenk*, 41 A.2d 583, 589 (Del. 1945) ("The merging corporations are entitled to know who the objecting stockholders are so that the amount of money to be paid to them may be provided.").

notifying the stockholders of a particular merger that is approved or has recently become effective, the stockholders then evaluating for themselves the terms of that merger and what they will ultimately receive for their shares, and stockholders that choose to dissent next demanding appraisal if they believe their shares were undervalued. In this way, stockholders can make a decision about whether to demand appraisal on an informed basis, and the corporation can be assured that it has identified how many and which stockholders intend to pursue appraisal. Certainty is assured for the corporation because the test is quick, simple, and precise. The burden on a dissenting stockholder who sends a premature demand for appraisal is minimal because all she needs to do to comply with § 262(d)(2) is send the demand for appraisal at an appropriate time. This reading is also consistent with a respected corporate law treatise, and a decision interpreting an earlier version of § 262.[41]

Moreover, even if reading "within" to only create a deadline would be somehow desirable, the public policy mandate of the Supreme Court that any interpretation of the demand deadlines contained in § 262 be strictly construed according to the language in

[41] *See* EDWARD P. WELCH, ANDREW J. TUREZYN & ROBERT S. SAUNDERS, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 262.3 (5th ed.) ("The significance of the notice requirement for short-form mergers and mergers by consent is that the *20-day period* within which a dissenting stockholder must submit a written demand for appraisal *starts with the mailing of notice*.") (emphasis added); *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570, 572 (Del. Ch. 1974) ("The time period during which an objecting shareholder must perfect his rights after the merger *begins to run from the required statutory notice of the merger given such a shareholder*.") (emphasis added).

the statute further requires that I give the phrase "within 20 days after" its most natural reading, which contemplates both an end and also a beginning.[42]

B. Is There Nonetheless An Equitable Reason To Allow The Petitioners To Proceed?

Although I cannot agree with the petitioners that *any* Demand preceding a Notice is effective under § 262(d)(2), denying the petitioners their right to seek appraisal is not appropriate under these circumstances. Where the respondent's own confusing communications cause otherwise diligent stockholders not to meet the technical requirements of the statute, equity has excused the non-conformance.[43] That reasoning

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[42] *Frank E. Best Inc.*, 768 A.2d at 479 ("Delaware Supreme Court case law requiring a strict construction of 8 *Del. C.* § 262 demand deadlines further constrains me to adhere to the plainest reading of the statute, absent strong evidence of a contrary legislative intent."); *see also Alabama By-Products Corp.*, 657 A.2d at 258 ("[A] written demand for appraisal . . . must be timely filed with the corporation in order to perfect appraisal rights.").

[43] *See, e.g.*, *Nebel v. SW Bancorp, Inc.*, 1995 WL 405750, at *7 (Del. Ch. July 5, 1995) ("A complete remedy for [the corporation not including a full copy of § 262 with its statutory notice of a merger] would be to permit the plaintiffs either to commence an appraisal proceeding or to pursue a 'quasi-appraisal' remedy in this action."); *Steinhart v. Sw. Realty & Dev. Co.*, 1978 WL 2494, at *3 (Del. Ch. May 31, 1978) (holding that a corporation may not rely upon a failure of the stockholder to comply with the appraisal statute when the corporation itself did not meet "a strict technical application of the law"); *cf. Jackson v. Turnbull*, 1994 WL 174668, at *5-6 (Del. Ch. Feb. 8, 1994) (voiding a merger because of disclosure violations, in part because the "stockholders were given two different sets of rules to choose between at their own peril" when the corporation's notice of appraisal rights directed stockholders to demand appraisal and file an appraisal petition within 20 and 120 days respectively from the date that a valuation was mailed, rather than upon the events described in § 262); *Encompass Servs. Holding Corp. v. Prosero Inc.*, 2005 WL 332810, at *5 (Del. Ch. Feb. 3, 2005) (holding that when a corporation that was in bankruptcy consummated a merger, and the dissenting stockholders filed their appraisal petition in bankruptcy court under a reasonable and good faith belief that filing in the bankruptcy court was required by federal bankruptcy law, the 120 day filing requirement was equitably tolled until the stockholders filed an appraisal petition in the Court of Chancery several days after the bankruptcy court dismissed the appraisal petition). Although in several cases the appropriate remedy for a failure to disclose a material fact has been a quasi-appraisal, those cases have come to the court as class actions. *See, e.g.*, *Berger v. Pubco Corp.*, 2008 WL 2224107, at *1 (Del. Ch. May 30, 2008) (allowing a quasi-appraisal remedy because the corporation "failed both to attach a correct copy of the appraisal statute and to include all material information" in the proxy statement); *Nebel*, 1995 WL 405750, at *1, *7. I see no need to award the petitioners

applies here, and requires allowing petitioners who filed an otherwise statutorily conforming demand early simply because AM Apparel sent out a confusing Information Memorandum announcing 1) that a merger was imminent, 2) that stockholders had to make an important choice immediately, and 3) that stockholders had appraisal rights, but then delayed in consummating that Merger and failed to give clarifying communications to stockholders who acted on the first Information Memorandum. Here, the petitioners filed a demand within 20 days of the first notice they were given that they had appraisal rights and with five days of the date they were told the Merger was to have been closed. They also filed "on or prior to May 17, 2007" as articulated in the later Merger Notice. Given these realities, equity dictates that they be afforded the right to appraisal.

In so finding, I acknowledge the legitimate policy concerns raised by AM Apparel about the need for certainty in the appraisal demand process. Those concerns were fully embraced in my earlier rejection of the petitioners' argument that the word "within" in § 262(d)(2) has no beginning boundary. But respondent corporations and not just stockholders have responsibilities in the appraisal process. In particular, corporations giving stockholders notice of their appraisal rights have the responsibility to speak clearly if they wish to hold stockholders to strict compliance with the statute.[44] In this case, for example, AM Apparel has the chutzpah to argue that the April 4 Demand could not be accepted because it was uncertain what merger it pertained to because the Merger

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anything different that what they have asked for here, an opportunity for a statutory appraisal proceeding.

[44] *See Jackson*, 1994 WL 174668, at *6 ("Our Supreme Court has emphasized the need for stockholders to strictly comply with the formalities of § 262 when seeking to exercise their appraisal rights. Corporations should be held to the same standard.") (citation omitted).

Agreement for the Merger with Newco was not finalized until April 20, 2007. But how were the petitioners to know that at the time they sent in their appraisal demand, when they had been told that the Merger was to close on March 30? Corporations can easily avoid the predicament AM Apparel finds itself in now by communicating clearly with stockholders.

Nor, given the realities of AM Apparel's stockholder base, is it irrelevant that AM Apparel took no steps to inform the petitioners that it was rejecting their April 4 Demand as premature. Having received an appraisal Demand representing one-third of its shares and having crafted confusing disclosures, AM Apparel's management might have actually reached out to the petitioners and told them that if they wished to seek appraisal, then it was necessary for them to file yet another Demand. But, AM Apparel stayed inert and then sought to use this issue to avoid a hearing on the merits. Unfortunately for AM Apparel, because its own confusing communications created a reasonable basis for the petitioners to be uncertain about when they had to file a Demand, its technical defense fails.

V. Conclusion

For the foregoing reasons, AM Apparel's motion for summary judgment is DENIED.