ORIGINAL 53

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TIMOTHY TANSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CA. No. 18796
	)	
TRADE SHOW NEWS NETWORKS, INC. DAVID LARKIN, DOUGLAS EMSLIE, TARSUS PARTNERS and TARSUS GROUP PLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 2,2001
Date Decided: November 27, 2001

Ronald A. Brown, Jr., Esquire, of PRICKETT, JONES & ELLIOTT, Wilmington, Delaware, Attorney for Plaintiff.

Jesse A. Finkelstein and Thad J. Bracegirdle, Esquires, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; Of Counsel: Steven T. Gersh, Esquire, of KREINIK, AARON & GERSH, New York, New York, Attorneys for Defendants.

STRINE, Vice Chancellor

Plaintiff Timothy Tansey owned a minority block of shares in Trade Show News Network, Inc. ("TSNN"). In January 2001, TSNN purported to consummate a merger with another company, Tarsus Group, PLC, in which the stockholders of TSNN were to receive a combination of cash and Tarsus securities in exchange for their TSNN shares. TSNN and Tarsus failed to comply with several of the steps required by 8 Del. C. § 25 1 for the effectuation of a merger. Not only that, the merging parties failed to give Tansey the required notice of his statutory appraisal rights and any financial information to help him decide whether to exercise his (undisclosed) appraisal rights or to take the merger consideration. In April 200 1, Tansey filed a complaint in this court challenging the merger on several grounds, including that the merger worked an unlawful conversion of his TSNN shares.

When confronted with Tansey's claims, the defendants quickly acknowledged the invalidity of the merger. They did not, however, return to Tansey his TSNN shares. Instead, TSNN and Tarsus consummated a second merger following the statutorily required steps, which involved a structure and economic terms similar, but not materially identical, to the prior invalid merger.

Tansey has pressed a motion for summary judgment on his conversion claim. In this opinion, I conclude, based on the uncontested facts, that the defendants' consummation of an invalid merger resulted in an unlawful conversion of Tansey's TSNN shares. This intrusion on Tansey's ownership rights was unauthorized by law and persisted for several months. As a result, Tansey easily satisfies the test for conversion set forth in *Arnold v. Society for Savings Bancorp, Inc.'*

By contrast, I reject Tansey's request that I enter a damages award on his conversion claim based on the current state of the record. Tansey claims that the value of his TSNN shares in January 200 1 was at least $1.15 per share, which was the value that TSNN used in a very different transaction occurring in the summer of 2000. The ordinary measure of damages for conversion is the value of the converted stock on the date of conversion.[2] The record evidence permits the inferences that the market value of TSNN shares was lower in January 2001 than in the summer of 2000, and that the transactions Tansey claims are comparable involved other elements of economic consideration, thus rendering them an invalid comparison. As a

[1] Del. Supr., 678 A.2d 533, 536 (1996).

[2] *Wyndham, Inc. v. Wilmington Trust* Co., Del. Super., 59 A.2d 456,459 (1948). As discussed later, the ordinary rule is subject to alterations in certain circumstances not relevant to the disposition of this motion.

result, I deny Tansey's motion to the extent that it asks me to grant him a specific monetary judgment.

I. Factual Background[3]

As of the summer of 2000, plaintiff Timothy Tansey owned 7% of the shares of the common stock of Trade Show News Network, Inc. ("TSNN"). TSNN was a non-public company with twenty stockholders, and was in the business of acting as a resource for the trade show and exposition industries. Its business included the creation of an Internet searchable database providing information for businesses interested in TSNN and expositions.

As of summer 2000, defendant David Larkin was TSNN's chief executive officer and a director of the company. Larkin's three siblings were also directors of TSNN at that time and are defendants in this action. In a communication to plaintiff Tansey, however, Larkin indicated that the only two directors of TSNN were himself and defendant Douglas Emslie.[4] That was false.

What was true was that Emslie was added to the TSNN board in June 2000, and served alongside his three siblings for all relevant time periods.

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[3] These facts are largely undisputed, and I draw all inferences in favor of the defendants, as the non-moving party on this motion for summary judgment. In all other respects, I also apply the well-settled procedural standard applicable to a motion for summary judgment. See, e.g., *Williams v. Geier,* Del. Supr., 671 A.2d 1368, 1375 (1998).

[4] PX 3.

Emslie joined the TSNN board in connection with a transaction between TSNN and Tarsus Group, PLC.[5] He is an officer of Tarsus.

In its summer 2000 transaction with TSNN, Tarsus purchased 217,800 (or approximately 10%) of the TSNN common shares for $1.15 per share, or $250,000. Tarsus also loaned TSNN $250,000, which was repayable in stock equaling 9.9% of TSNN's outstanding shares as of the date the loan was due. Tarsus procured other consideration in exchange for its willingness to invest its capital in TSNN. A provision of the transaction required that Emslie be added to the TSNN board. Tarsus was also given a right of first refusal in the event a third party made an offer to acquire more than 5 1% of TSNN's shares, and pre-emptive rights to participate in any offering of newly issued TSNN stock.[6] The agreement also provided for Tarsus and TSNN to exchange their database information, and to participate in joint marketing and public relations efforts.

In November 2000, David Larkin informed Tansey that he had negotiated a deal to sell all of TSNN to Tarsus. Larkin handled all of the negotiations for TSNN. Emslie negotiated for Tarsus.

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[5] Tarsus Group formed a Delaware partnership to effect the transaction. That distinction is not material for present purposes.

[6] PX 5 at §§ 5, 11.

Larkin asked Tansey to sign a stock purchase agreement, which contemplated that Tarsus would purchase all of TSNN's shares for a combination of cash and stock in two installments under a complex formula.[7] According to Tansey, it was impossible to determine exactly what Tarsus would have paid because the formula involved factors not disclosed to Tansey.

Larkin also asked Tansey to sign an acknowledgement and authorization form recognizing that Larkin had previously loaned $900,000 to TSNN and authorizing the repayment of the loaned amount. The stock purchase agreement provided that Larkin would remain CEO of TSNN after the Tarsus purchase, and would become CEO of another Tarsus division. The stock purchase agreement also referred to a "Globe Warrior" letter agreement between Tarsus and Larkin.[8]

Larkin leaned on Tansey to go along with the deal, sending him this communication on November 17, 2000:

> My point simply is that the deal is non-negotiable. I already did the negotiating on behalf of the shareholders, 93% of whom have signed off. What can't happen is that your lawyer says that Tim will sign if we change x-y-and-z. The deal is the deal. So feel free to have [your lawyer] review it, and you should understand it fully. But if you sign it, it will be as is.

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[7] PX 6.

[8] PX 6, § 5

> There is no point into getting what will happen if you don't sign it, since I think your attorney should tell you it is in your best interests, but to quote from my penultimate e-mail "It would obviously be in everyone's best interest for you to sign this ASAP. While it is certainly possible to accomplish this transaction without your consent[,] it will be time consuming and more expensive for me, while not changing the result to you except perhaps that you will not get to participate in the buyout as the market for TSNN.com shares seems to be limited to Tarsus. . . ."[9]

Tansey was unpersuaded and did not sign. As a result, the stock purchase agreement was never consummated. Strangely, Tarsus had already announced its purchase of TSNN by press release on November 14, 2000, three days before Tansey wrote his e-mail trying to convince Tansey to support the agreement. That release stated in part that "Tarsus Group plc (TRS London Stock Exchange), the international Internet-led media group has created the world's leading on-line exhibition industry's resource with the acquisition of TSNN.com . . . last Thursday in the United States.""[10]

After Tansey refused to go along, Tarsus and TSNN decided to proceed by way of a merger agreement (the "First Merger Agreement"). The parties realized that this method of proceeding would give rise to appraisal rights on Tansey's part.[11] Indeed, Larkin and his siblings agreed to assume the risk that Tansey would obtain a favorable appraisal award, by

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[9] PX 8.

[10] PX 9.

[11] See, e.g., PX 26.

indemnifying Tarsus for any damages or litigation costs it incurred as a result of the merger.[12]

Tansey received a January 30, 2001 letter from Larkin informing him of the First Merger Agreement. According to Larkin's letter, the "First Merger" had already been consummated:

> The TSNN.com and Tarsus Group, PLC merger is complete. The enclosed check is the difference between the negotiated Tarsus share price and the actual price of the Tarsus stock at time of closing, pursuant to section 2.3(a) of the agreement. You will receive 6,997 shares of Tarsus Stock to replace your TSNN.com stock pursuant to section 2.3(a) of the agreement in the very near future. Also, pursuant to the terms of the deal, TSNN.com will receive an additional payment at the end of 2001 based on the performance of TSNN.com.[13]

Larkin's letter was accompanied by not only a check, but by a "Notification to Stockholders," which stated:

> On January 19, 2001 and pursuant to Section 228 of the Delaware General Corporation Law, the holders of a majority of the issued and outstanding shares of capital stock of Trade Show News Network, Inc. (the "Company"), in lieu of a special meeting, consented in writing to the execution and delivery to Tarsus-TSNN Acquisition Corp. ("Tarsus") of an Agreement and Plan of Merger whereby the Company would merge with and into Tarsus and the separate corporation [sic] existence of the Company would terminate. Copies of the written consent and the Agreement and Plan of Merger are attached hereto. On January 24, 2001, the merger was consummated and a Certificate of Merger was filed with the State of Delaware pursuant to Section 251(c).[14]

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[12] PX 14.

[13] PX 16.

[14] PX 16.

Contrary to its text, the Notification of Stockholders was not accompanied by a written consent executed by a majority of the TSNN stockholders. Instead, a certificate of amendment to the certificate of incorporation of the Tarsus acquisition vehicle used in the First Merger was enclosed. The Tarsus acquisition vehicle was the surviving corporation in the First Merger. The certificate of amendment changed the acquisition vehicle's name to TSNN.

Although the First Merger was a transaction that triggered appraisal rights for Tansey, the Notification to Stockholders did not contain any mention of appraisal rights. Nor did the Notification include any substantive information about TSNN's financial condition or prospects.

The Notification did indicate that Tansey would receive 6,997 shares of Tarsus stock to replace his old TSNN shares. But those shares were never sent to him.

In connection with the First Merger, Larkin obtained many of the benefits he had secured in the aborted stock purchase agreement. For instance, Tarsus was to repay the loans Larkin had supposedly made to TSNN and was to employ Larkin as CEO of TSNN and one of its divisions. The Globe Warrior side letter was also perpetuated, and turned out to be an

agreement by Tarsus to invest in a new business venture Larkin wished to establish."

The record is clear that Tarsus and TSNN did not comply with at least three requirements of the Delaware General Corporation Law in effecting the First Merger. As Tansey points out, 8 Del. C. § 251 requires three different actions to occur in a specific sequence to approve and implement a merger. First, the boards of the merging corporations must approve a merger agreement.[16] Second, the "agreement so adopted shall be executed and acknowledged in accordance with § 103 of [the DGCL]."[17] Third, the executed and acknowledged agreement must be approved by the stockholders of the merging corporations at a stockholder meeting or, if permitted by the relevant certificate(s) of incorporation, by written consent under 8 Del. C. § 228.[18]

The First Merger did not comply with these steps in several respects. While the Notification said that the First Merger Agreement was approved by written consent on January 19, 2001, the First Merger Agreement was not

[15] PX 19.

[16] 8 Del. C. § 251(b).

[17] 8 Del. C. § 251(b).

[18] 8 Del. C. § 251(c).

executed until January 24, 2001. As a result, the written consent could not have approved an executed and acknowledged merger agreement.

As important, the TSNN board never approved the First Merger Agreement. The board purported to approve it by a unanimous written consent, but that consent was not signed by Emslie.[19] Because only a unanimous board can act by written consent under 8 Del. C. § 141(f) and because the TSNN board never met to consider the First Merger, the First Merger was never validly approved by the TSNN board in accordance with 8 Del. C. § 251(b).

The parties to the First Merger Agreement also violated 8 Del. C. § 262. The notice and information required to be sent to Tansey under § 262(d)(2) was never sent. The absence of the statutorily-required information was accompanied by a failure to make any attempt to disclose to Tansey the facts material to his decision whether to accept the consideration offered in the First Merger or to seek appraisal.

On April 4, 2000, Tansey filed this action, naming TSNN, Tarsus, and the former TSNN directors, including Larkin, as defendants. In his complaint, Tansey alleged that the First Merger was invalid for the reasons just explained. Tansey also pled breach of fiduciary duty claims premised

[19] PX 20.

on the lack of adequate disclosure and the alleged unfairness of the First Merger's terms. He accompanied these claims with a count alleging that the First Merger constituted an unlawful conversion of his TSNN shares.

Days after filing his complaint, Tansey moved for summary judgment. The defendants promptly recognized that they were in an untenable position, and formulated a "Second Merger Agreement" between TSNN and Tarsus. The Second Merger Agreement was similar but not identical to the First Merger Agreement, and some of the differences were economically material. Several actions were taken to consummate the Second Merger Agreement:

- On April 27, 2001, certificates of correction were filed with the Delaware Secretary of State restoring the name of Tarsus-TSNN Acquisition Corp. and voiding the certificate of merger filed in connection with the First Merger.

- On April 29, 2001, the board of directors of TSNN, by unanimous written consent pursuant to 8 Del. C. § 141(f), approved the terms of a new agreement of merger with Tarsus (the "Second Merger Agreement"), which was executed later the same day.

- On April 30,200 1, the holders of a majority of the outstanding shares of TSNN acted by written consent pursuant to 8 Del. C. § 228(d) to approve the merger of TSNN with Tarsus. On May 1, 2001, notice of the stockholders' action was properly sent to all TSNN stockholders, including plaintiff and his counsel.

- On April 30, 2001, TSNN tiled with the Delaware Secretary of State a new certificate of merger merging TSNN into Tarsus-TSNN Acquisition Corp.

- Finally, on May 3, 2001, plaintiff and the other TSNN stockholders were sent notices of appraisal in accordance with 8 Del. C. § 262.[20]

Soon thereafter, the defendants informed the court that they were willing to provide Tansey with appraisal rights, measured either by reference to the date of the First or Second Merger Agreement. The defendants also engaged in efforts to provide Tansey with financial information to enable him to make a decision whether to seek appraisal. To that end, Tansey was mailed a notice of appraisal rights on May 3, 200 1 along with certain TSNN financial information. In addition, the defendants offered to make other information available to Tansey for inspection and copying.

There then ensued much back and forth between counsel for Tansey and counsel for the defendants regarding the adequacy of the defendants' disclosure proffer and the time deadlines by which Tansey had to seek appraisal. On May 18, 200 1, the defendants agreed that if Tansey made an appraisal demand by May 24,200 1, that demand (or the withdrawal thereof) would not affect or prejudice any other claims he might pursue in connection with this action.[21] Tansey therefore filed his appraisal demand on May 2 1, 200 1. As of today, Tansey and the defendants are still tangling over whether the defendants satisfied their disclosure duties in connection with the Second

[20] Def.'s Supp. Br. at 8-9.

[21] PX 24.

Merger, although it is clear that the defendants have provided Tansey with a large volume of information.

II. Tansev's Motion For Partial Summarv Judgment

Tansey has moved for summary judgment on Count V of his complaint, which alleges that the invalid First Merger unlawfully converted Tansey's TSNN stock. He argues that the uncontested facts show the defendants exercised unlawful dominion over his TSNN shares by purporting to take them from him in the invalid First Merger in exchange for the consideration contemplated in the First Merger Agreement. From January 2001 until the time of the Second Merger, Tansey argues, the defendants claimed that Tansey's TSNN shares had been converted into Tarsus shares, cash and possible future consideration if TSNN met certain performance targets. Because the defendants had no legal authority to consummate the First Merger, Tansey claims that this exercise of dominion and control over Tansey's property was unlawful and establishes a conversion claim.

Furthermore, Tansey argues that the undisputed record evidence entitles him to a damage award on his conversion claim of $1.15 per share. According to him, the proper measure of damages is the highest value of the TSNN shares from a reasonable time after their conversion. In this case,

there is no trading market by which to establish that value. As a result, Tansey claims that there is persuasive authority that permits a court to establish a market price by looking at a comparable transaction in the relevant shares in a comparable time period. He further asserts that the Tarsus purchase in the summer of 2000 at $ I. 15 a share is indisputably a comparable transaction, and that nothing happened between the summer of 2000 and the time of the Second Merger to diminish the value of TSNN shares. Thus, Tansey submits that this court should enter a judgment for $1.15 a share on his conversion claim.

I will now resolve these contentions.

III. The Undisputed Facts Demonstrate That Tansev's Stock Was Converted

To demonstrate his entitlement to summary judgment, Tansey must point to undisputed facts that demonstrate that the defendants converted his TSNN shares. In *Arnold v. Society for Savings Bancorp,* Inc., the Delaware Supreme Court recently defined the tort of conversion in the context of a corporate merger thusly:

> Conversion is an "act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it." Drug, Inc. [v. Hunt, Del. Supr., 187 A. 87, 93 (1933)]. A stockholder's shares are converted by "'any act of control or dominion . . . without the [stockholder's] authority or consent, and in disregard, violation, or denial of his rights as a stockholder of the company."' *Id. (quoting Layman* v. *F.F. Slocomb &* Co., Del. Supr., 76 A. 1094, 1095 (1909). . . .

> One can assume that a merger results in the exercise of control and dominion over a stockholder's shares since they become, by operation of law, shares of the surviving company [or are extinguished in exchange for other merger consideration]. This exercise of control is not in derogation of a stockholder's rights, however, if the merger is given legal effect. A stockholder simply has no right to shares in a disappearing corporation after an effective merger. . . . Thus, to establish conversion, [a] plaintiff must show that the merger did not effectively exchange his . . . shares . . . [for the merger consideration].[22]

In this case, the record evidence demonstrates that the invalid First Merger resulted in a conversion of Tansey's TSNN shares. The First Merger was not simply tainted by the failure to provide Tansey with a notice of his appraisal rights (a statutory duty)[23] or with material information bearing on his decision whether to seek appraisal (an equitable fiduciary duty of the TSNN directors).[24] Instead, the First Merger was invalid because it was not preceded by an accomplishment of the statutorily required acts in the correct sequence. Under the teaching of *Arnold*, therefore, the First Merger worked a conversion because the defendants failed to "take the specific steps explicitly required under the merger statutes," rendering the merger "void *ab initio*."[25]

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[22] Del. Supr., 678 A.2d 533, 536 (1996).

[23] See n. 30, *infra.*

[24] *Arnold*, *678* A.2d at 536-37.

[25] *Id.* at 537.

The defendants do not dispute that the record evidence demonstrates that Tansey has met the test for conversion articulated in *Arnold*. But they argue that the court has discretion to limit any recovery Tansey would reap on his conversion claim here, because the First Merger was consummated in good faith and caused only a small impairment of Tansey's property rights. In support of this proposition, they cite the Restatement (Second) of Torts § 922(2) (1979), which states:

> The amount of damages may, in the discretion of the court, be diminished by a tender of return of the chattel to one entitled to its possession if
>
> (a) it was converted in good faith and under a reasonable mistake, and
>
> (b) its value to the one entitled to possession is not substantially impaired, and
>
> (c) the tender is made promptly after discovery of the mistake and is kept open.

The problem for the defendants is that this doctrine permits the exercise of judicial discretion only when certain circumstances absent in this case exist.[26] I put to the side the issue of good faith, because there are

[26] Section 922(2) could be useful in imaginable circumstances. Assume, for example, that a public corporation effects a merger with a wholly owned subsidiary, in which the resulting corporation will be domiciled in a different state. Assume that the public stockholders receive shares in the resulting entity proportionate to their prior holdings and that the only substantive difference in their rights is that the resulting corporation in which they own shares is domiciled in a different state. Assume further a technical mistake was made that invalidates the merger, even though it was approved by the stockholders of the public corporation after full disclosure. In such

arguably litigable issues regarding that factor. But the failure of the defendants to comply with the most basic elements of the merger statute (e.g., effective board approval) cannot be deemed a "reasonable mistake."[27] Nor did the defendants tender Tansey's TSNN shares back to him after learning of the invalidity of the First Merger in early April. Instead, they waited nearly a month and then consummated the Second Merger.

In light of the undisputed facts showing that the defendants consummated an invalid First Merger in late January and continued to exercise unlawful control over Tansey's property for three months until the Second Merger in late April,[28] this is not a case where the imposition of a conversion remedy would be an "over-drastic remedy for relatively inoffensive legal fault."[29] Instead, such a remedy will provide Tansey with the value of his shares as of the invalid First Merger — that is, the time at

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a circumstance, it could be that § 922(2) would operate if the board promptly corrected the mistake because the intrusion on the stockholder's ownership interests was so slight.

[27] *Id.*

[28] Restatement (Second) Torts, § 222A(2)(a) (duration of interference with property bears on whether a conversion occurred; illustrations to the section indicate that if a person took the wrong hat from a restaurant mistakenly and returned it within minutes, no conversion would occur, but a conversion would result if the same events occurred and the hat was not returned for three months).

[29] W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15 at 106 (1984).

which dominion and control was wrongly taken from him. This is a just remedy for the defendants' violation of the merger statute.[30]

IV. Tansev's Reauest That The Court Should Award Him Summary Judgment As To A Specific Remedy For His Conversion Claim Is Denied

When this motion was first presented, the court was confused about its purpose. In correspondence, the defendants had offered Tansey the option of measuring the value of his shares for appraisal purposes as of the time of either the First or the Second Merger. The traditional remedy for a conversion claim is to award the plaintiff the "value of the property at the time of conversion, with interest."[31] Therefore, the conversion remedy

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[30] A conversion remedy of this kind seems little different from the "quasi-appraisal" remedy this court suggested when a merger was effected without providing the required notice of appraisal rights under 8 Del. C. § 262. *Nebel v. Southwest Bancorp., Inc.,* Del. Ch., C.A. No. 13618, mem. op. at 12-13, Jacobs, V.C. (July 5, 1995). The court held that a failure to give such notice was insufficient alone to support a claim that the merger was invalid and that rescissory damages should be awarded; instead, a complete remedy vindicating the statute's purpose could be found in quasi-appraisal. *Id.*

[31] *Wyndham, Inc.* v. *Wilmington Trust Co.,* Del. Super., 59 A.2d 456, 459 (1948). The case law is replete with various approaches to dealing with situations where the value of the converted stock rose between the time of conversion and the time the plaintiff learned of conversion. Prior Delaware case law appears to have taken a pro-plaintiff position that awards the plaintiff "the highest value of the shares . from the time of their conversion up to a reasonable time after [plaintiff] acquired knowledge of such conversion." *DuPont v. Delaware Trust Co.,* Del. Ch., 364 A.2d 157, 161 (1975); *Wyndham,* 59 A.2d at 459 (same). Other cases suggest that our courts might look to the highest "intermediate" value between the date of conversion and a reasonable time after the plaintiff learned of the conversion. *Cahall v. Burbage,* Del. Ch., 121 A. 646, 649 (1923); see also *Duncan* v. *TheraTX,* Inc., Del. Supr., 775 A.2d 1019, 1022-24 (2001) (using this approach in an analogous context in which a plaintiff was denied the opportunity to trade his shares). These rulings are based on the premise that the wrongdoer ought to bear the risk of market fluctuations that occur during the period of conversion. *DuPont,* 364 A.2d at 161. That rationale does not logically extend to hold a wrongdoer responsible for market fluctuations that occur between the date of the last transaction in a particular stock and the date on which the plaintiffs shares in that stock were converted — that is, to fluctuations that occur before the date of conversion.

seemed at best duplicative of the appraisal option offered up by the defendants; at worst, the conversion remedy seemed inferior because it is not at all clear that the unique and largely petitioner-friendly "fair value" valuation rules that apply under 8 Del. C. § 262 would come into play in determining "fair market value" under the common law of conversion.[32]

In response to the court's inability to grasp the utility of the motion, Tansey was admirably candid about his reason for bringing it. Tarsus paid $1.15 for its initial blocks in TSNN in the summer of 2000. Because Tansey owned 142,941 shares, even a "home run" conversion or appraisal remedy valuing his shares at twice what Tarsus paid for its initial blocks in TSNN in the summer of 2000 would yield him a judgment (exclusive of interest) of only $328,764. Therefore, his counsel rightly fears that the expense of litigating an appraisal trial might end up eating up a large part of any

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The reader interested in this general subject should consult the cases cataloged in C.B. Higgins, Annotation, *Measure of Damages For Conversion of Corporate Stock or Certificate, 3 1* A.L.R.3d 1286 (1970).

[32] For example, in a statutory appraisal, the court may not apply a minority discount to determine the value of a minority block of shares. *Cavalier Oil Corp. v. Hartnett,* Del. Supr., 564 A.2d 1137, 1145 (1989) ("Discounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings. More important, to fail to accord to a minority shareholder the full proportionate value of [the petitioner's] shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result."). In the real world, fair market value will take into account the fact that a person is selling a minority block of shares in a company with a controlling stockholder. *Agranoff v. Miller,* Del. Ch., C.A. No. 16795, mem. op., 2001 WL 536917 at *11, Strine, V.C. (May 15, 2001).

recovery Tansey would achieve. To address that fear, Tansey has sought to convince me that I can enter a specific monetary judgment now, based on the paper record. This possibility exists, Tansey asserts, because the court has a great deal of leeway in a conversion case to fix a remedy and may impose on the defendants the burden of any evidentiary uncertainties.

To put it more concretely, Tansey acknowledges that the ordinary conversion remedy is based on the fair market value of the stock taken at the time of conversion. To the extent that stock is traded on a recognized market, the court therefore can derive the value from the trading price at the date of conversion.[33] In cases where the stock has no market value of that kind — as is the case here — the court must determine the market value by other means.[34] One of these means, says Tansey, is to look to comparable transactions in the stock occurring within a reasonable time period. If such transactions exist, Tansey contends that the court can use those to fix the remedy, and need not engage in a factual inquiry to "value" the stock as in an appraisal.[35]

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[33] Higgins, 31 A.L.R.3d § 3(a) at 1292.

[34] *Id.*, § 3(b) at 1295.

[35] *Id.* (indicating that when no market price can be determined, "the courts attempt to find its actual value — that is, the fair price someone who wants to buy would be willing to pay, taking into consideration the original capital, assets and liabilities, whether there has been a profit or loss, dividends paid, and generally everything that might affect its value"); 18 Am. Jur. 2d Conversion § 138 (1985) (same); Restatement (Second) Torts § 91 lcmt. f. ("In determining the

In this case, Tansey claims that the summer 2000 transaction in which Tarsus bought shares at $1.15 a share is a comparable one. Because he asserts that there is no evidence that TSNN's business prospects had declined between the summer of 2000 and the time of the invalid First Merger, Tansey argues that I can simply enter judgment for him in the amount of $1.15 per share because that figure represents a "responsible estimate" of the value on the date of conversion. To buttress this argument, he points to a venerable decision of the United States Court of Appeals for the Fifth Circuit. In *Atkins* v. *Garrett*,[36] that court affirmed a verdict in a conversion case involving corporate stock. The trial court awarded a per-share value that was equal to a market value based on a transaction occurring some five months before, plus an announced dividend and interest. In affirming, the Court of Appeals noted that the under the governing law of Louisiana, the trial court's focus was appropriately on the value of the stock as of the date of conversion. Because the trial court record contained evidence that the "company was in its most prosperous condition and showed its greatest earnings power" as of the time of conversion, it was not

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value of corporate shares [in which there is no ready market], the net worth of the corporation may be considered.").

[36] 270 F. 939 (5th Cir. 1921).

error for the trial court to make an award based on the prior transaction, which occurred at a time when the stock's value was presumably lower.[37]

Atkins does not aid Tansey's cause on this motion. As noted, *Atkins* involved an appeal from a *trial* decision in which the trial judge had the flexibility to make fact findings. The "responsible estimate" nomenclature Tansey borrows is also derived from the trial context, and refers to the trial court's discretion to enter a damages award *after considering all the relevant evidence.*[38] Court of Chancery Rule 56 does not afford me that discretion on a motion for summary judgment. The record contains several facts suggesting that the value of Tansey's stock in January 200 1 cannot be derived fairly from the Tarsus transaction in the summer of 2000. These include the other elements of consideration that Tarsus obtained in connection with its investment in TSNN, including preemptive and first refusal rights, and a board seat. They also include the sharp reduction in the stock market's valuation of "Internet companies" between the summer of 2000 and early 2001, a reduction that could bear on the value of TSNN's stock. Finally, the record suggests that TSNN's own financial and operating

[37] *270* F. at 942.

[38] *E.g., Bomarko* , Inc. *v. Int'l Telecharge, Inc.*, Del. Ch., C.A. No. 13052, mem. op. at 45, Lamb, V.C. (Nov. 4, 1999rev. Nov. 16, 1999).

performance might imply a lower valuation for its shares in January 2001 than in the summer of 2000.[39]

As tempting as it is to avoid an evidentiary hearing on valuation, the state of the record and the procedural posture of the case preclude that option.[40] In the final analysis, it may be that the prior Tarsus transaction will be the best evidence of the market value of TSNN shares in January, 2001. But that conclusion cannot be drawn at this stage of the proceedings.

V. Conclusion

For the foregoing reasons, Tansey's motion for summary judgment on his conversion claim is granted as to liability, and denied insofar as it seeks a specific monetary judgment. Within five days, Tansey shall submit a

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[39] Buchen Aff. ¶ 4. Tansey advances persuasive arguments to the contrary, but not so persuasive as to rule out the possibility of a finding contrary to his position after a trial.

[40] In his last reply brief, Tansey for the first time points to a July 2000 transaction in which TSNN's chief operating officer was granted the right to purchase 40,000 shares for $1.15 per share. This evidence was raised too late to sustain Tansey's burden, because the defendants have not had the opportunity to address it. Moreover, a transaction between a key officer and a company might involve considerations that make that transaction less than reliable as an indication of market value. In any event, the transaction occurred in July 2000, a time when stock market prices for companies in the information field appears to have been higher than in January 2001.

In that last vein, I reject Tansey's argument that the $1.15 per share price was deemed by defendants to be a reasonable price until the middle of 2001, simply because the $250,000 loan to Tarsus in summer 2000 was repayable on or before July 30, 2001 by issuing 9.9% of the company's outstanding shares *as of the date of repayment.* That percentage as of summer 2000 equaled a per share value of $1.15. As discussed, the loan was part of a larger transaction in which Tarsus received other elements of value, and those values bear on the comparability of the $1.15 per share price. The parties might also have decided to specify the repayment terms at a fixed percentage of TSNN's equity for many reasons (e.g., certainty). Therefore, it is impossible to conclude that the loan terms provide an uncontroverted value for TSNN's stock in January 2001 sufficient to warrant summary judgment for Tansey at $1.15 per share.

conforming order, approved as to form by the defendants. The parties shall promptly set up an office conference to discuss a schedule for the completion of this litigation.[41]

[41] The defendants have argued in this motion that Tansey must elect between a remedy for conversion measured as of the First Merger or an appraisal action based on the Second Merger date. This is an issue complicated by the defendants' own concession that Tansey could seek appraisal without prejudice to his other claims, including his claim for conversion, The parties should discuss this issue rationally and prepare to discuss it with the court at the conference, in view of the fact that there might be no material difference in the value of TSNN as of the date of the First and Second Mergers.