IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SHIRLEY LEWIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 15255
	)	
MILTON H. WARD, ALLEN BORN, GERALD J. MALYS, ROCKWELL A. SCHNABEL, VERNON F. TAYLOR, JR., RUSSELL L. WOOD, CYPRUS AMAX MINERALS COMPANY, and AMAX GOLD, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: October 15, 2003
Date Decided: October 29, 2003

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STRINE, Vice Chancellor

The plaintiff in this derivative action lost her stockholder status in an arm's-length merger. Because she has failed to plead facts that support a reasonable inference that the merger that caused her to lose her status as a stockholder was a fraud perpetrated merely to deprive her of her ability to press her derivative claims, she lacks standing under the teaching of *Lewis v. Anderson.* Therefore, the court will grant the defendants' motion to dismiss her complaint.

I. Background

In this derivative action, the plaintiff alleges that in 1996 the then-majority stockholder of Amax Gold, Inc. provided Amax Gold with financing on terms that were unfair. The plaintiff was a stockholder of Amax Gold on October 8, 1996, when this suit was filed.

On June 1, 1998, Amax Gold merged with a subsidiary of Kinross Gold Corporation ("Kinross") in a reverse triangular merger. The plaintiff in this action never directly challenged the fairness of that arm's-length, third-party merger.[1] As a result of the merger, Amax Gold[2] became a wholly owned subsidiary of Kinross, and all of the shares of Amax Gold

[1] There was litigation filed by other stockholders of Amax Gold seeking, among other things, to enjoin consummation of the merger. ***Ratzersdorfer v. Ward,*** C.A. No. 16 189 (Del. Ch. filed Feb. 13, 1998). That case was not actively litigated and was dismissed pursuant to a stipulation of dismissal.

[2] Amax Gold was later renamed. I use its original name for the sake of clarity.

were converted into the right to receive shares of Kinross. Thus, the plaintiff lost her shares in Amax Gold and became a Kinross stockholder. Kinross was and remains an Ontario corporation.

After the merger, the defendants in this derivative action — who include Amax Gold's directors at the time of the financing and its then-majority stockholder Cyprus Amax Minerals Company — moved to dismiss the complaint on the grounds that the plaintiffs loss of her Amax Gold stockholder status deprived her of the right to press the derivative action, under the teaching of *Lewis* v. *Anderson*[3] and its progeny.[4]

This court, through then-Vice Chancellor Jacobs, granted the defendants' motion to dismiss, finding that the merger divested the plaintiff of standing to pursue her claims and that she had not pled facts demonstrating the applicability of what I will refer to as the "fraud exception" to *Lewis v. Anderson.*[5] To wit, he rejected the plaintiffs argument that she had "pled facts that bring this case within the exception

[3] 477 A.2d 1040 (Del. 1984).
[4] *E.g., Kramer v. W. Pac. Indus., Inc., 546* A.2d 348, 354-55 (Del. 1988); *In re First Interstate Bancorp Consol. S'holder Litig., 729* A.2d 85 1, 867-68 (Del. Ch. 1998), *aff'd sub nom. Bradley v. First Interstate Bancorp, 748* A.2d 913 (Del. 2000) (ORDER); *Parnes v. Bully Entm 't Corp., 722* A.2d 1243, 1244-45 (Del. 1999); 8 *Del. C.* § *327.*
[5] *Lewis v. Ward, 2000* WL 133672 1, at * 1 (Del. Ch. Aug. 28, 2000).

where the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive the plaintiff of derivative standing."[6]

Thus Vice Chancellor Jacobs held:

> The difficulty with the plaintiffs position is that the complaint does not plead facts from which it could be reasonably inferred that the defendants perpetrated the merger *merely* to deprive the plaintiff of derivative standing. Because the plaintiffs brief suggests that the plaintiff may be able to plead such a claim, however, the defendants' motion to dismiss will be granted with leave to amend.'

Vice Chancellor Jacobs's ruling is, of course, law of the case.[8]

On October 13, 2000, the plaintiff filed her. amended complaint in response to Vice Chancellor Jacobs's ruling and attempted to plead facts invoking the fraud exception to *Lewis* v. *Anderson.* The defendants then moved to dismiss arguing that the plaintiff had again failed to plead facts supporting application of that exception. But the defendants did not file their opening brief until March 30, 2001. The plaintiff took an equally luxurious period to answer, filing its brief on March 26, 2002. The defendants then replied in late January of 2003.

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[6] *Id.* (internal quotation marks and citations omitted). *See also Kramer,* 546 A.2d at 354-55; *Lewis v. Anderson,* 477 A.2d at 1046 n.10.

[7] *Lewis v. Ward,* 2000 WL 1336722, at * 1 (emphasis added).

[8] *E.g., Frank G. W. v. Carol M. W.,* 457 A.2d 715, 718 (Del. 1983).

By that time, Amax Gold had moved its corporate home from Delaware to Nevada. When Vice Chancellor Jacobs joined the Supreme Court, this case was assigned to me and the defendants' motion to dismiss was scheduled for argument.

II. Legal Analysis

The defendants' renewed motion to dismiss is based on a simple and direct argument: The plaintiff has failed to plead facts supporting a reasonable inference that the merger was a fraud designed merely to deprive her of derivative standing. As such, the complaint must be dismissed in accordance with Vice Chancellor Jacobs's prior ruling and *Lewis v. Anderson.*

In response, the plaintiff makes two arguments. First, she contends that her amended complaint does plead sufficient facts to invoke the fraud exception to *Lewis v. Anderson.* Second, she contends that regardless of whether that is the case, Nevada law and not Delaware law now governs her standing to pursue her suit because Nevada is now the home of Amax Gold. She asks me to conclude that Nevada would not follow *Lewis v. Anderson* but instead apply a more lenient approach that would permit a former stockholder in her position to continue a derivative suit.

I deal with these arguments in reverse order, starting with the choice-, of-law question.

A.

The choice-of-law question the plaintiff poses could be an interesting one in the right case. The issue of whether a derivative plaintiff should be permitted to press a cause of action on behalf of a corporation is, in key respects, a policy matter about the allocation of authority between the corporation's board and its stockholders and other constituencies. In this case, the plaintiff argues that the merger that divested her of her Amax Gold shares did not end her interest in the affairs of Amax Gold. As a Kinross stockholder, she retains an important ongoing interest in the financial health of Amax Gold, because Amax Gold has become a wholly owned subsidiary of Kinross. Because Amax Gold has chosen to become a Nevada corporation, the plaintiff argues that Nevada law — and not that of Delaware — should determine whether she can advance a claim derivatively on behalf of that Nevada corporation. She argues that this prudential matter

of public policy is one in which Delaware no longer has an interest.[9]

In answer, the defendants argue that once the plaintiff lost "standing" under *Lewis* v. *Anderson*, she lost it forever and that it cannot be revived by Amax Gold's later reincorporation into Nevada. In support of this argument, the defendants argue that there is a need for certainty as to the law that applies to derivative actions or otherwise directors will not be able to assess their own exposure to liability and stockholders will not know to what standards of accountability they may hold their directors.

This is a nice debate that I need not and therefore do not enter.[10] Although the plaintiff argues that "there is no reason to believe that Nevada would adopt the reasoning of *Lewis v. Anderson,*" she concedes that she was

[9] The debate is an even deeper one than the parties' papers explore. Arguably, the key issue is whether the plaintiff can cause a double derivative suit to be brought in the interest of Kinross, an Ontario corporation. That is, it is arguably Ontario that has the greatest interest in determining whether the plaintiff can proceed with a case brought in the interest of a wholly owned subsidiary of an Ontario corporation. In this regard, the plaintiffs pleas about equity are far less convincing because in the *five* years since the merger she never attempted to assert a double derivative action on behalf of Kinross or to demand that Kinross cause Amax Gold to press her claims. Nor, I note, has she argued that Ontario law is relevant to the resolution of this motion.

[10] The question is a subtle one. For example, it seems to me obvious that Delaware law would apply to determine whether the defendants had committed any breach of duty against Amax Gold in connection with the financing that is challenged in the amended complaint. To find that the change in domicile of Amax Gold changed the law that applied to the merits would be a highly troubling conclusion, disruptive of the defendants' settle&expectations. The proposition that the law of Kinross's or Amax Gold's home jurisdiction might govern whether a former Amax Gold stockholder could continue to press claims that belonged to Amax Gold before the merger when that stockholder continues to own Kinross stock is a less extreme one.

unable to find a judicial decision in Nevada taking a different approach than that Delaware decision. [11] Where there is no Nevada law on point, courts applying Nevada corporate law have traditionally looked to Delaware law

[11] Pl.'s Opp'n Br. at 3. Through independent research, I discovered some authority suggesting that Nevada would in fact follow *Lewis v.* Anderson. Nevada law, like that of many states, generally requires derivative plaintiffs to maintain stockholder status throughout the litigation. See Nev. R. Civ. P. 23.1; *Keever v. Jewelry Mountain Mines, Inc.*, 688 P.2d 317, 317 (Nev. 1984) ("Under the contemporaneous ownership requirements of NRCP 23.1, a representative plaintiff must have owned stock in the' corporation at the time of the transaction of which he complains *and throughout the pendency of the suit."* (emphasis added) (internal quotation marks and citations omitted)). Although there do not appear to be any Nevada cases directly addressing the precise issue before the court now, the Nevada Supreme Court has stated that former stockholders lack standing to pursue derivative claims. See *Cohen v. Mirage Resorts, Inc., 62* P.3d 720, 732 (Nev. 2003). As support for this proposition, *Cohen* cited two Delaware Supreme Court decisions following the holding of *Lewis v. Anderson* that a derivative plaintiff who loses stockholder status as a result of a merger loses standing to maintain the action. See *id.* at 732 & nn.70, 72 & 76 (Nev. 2003) (citing *Parnes v. Bally Entm 't Corp., 722* A.2d 1243, 1244-45 (Del. 1999) and *Kramer, 546* A.2d at 35 1).

Indeed, one of the authorities cited by the plaintiff actually undermines her argument that Nevada might choose not to follow *Lewis v. Anderson.* The plaintiff notes that the American Law Institute has proposed a rule in which a derivative plaintiff could maintain suit following the loss of stockholder status if that loss

> is the result of corporate action in which the holder did not acquiesce, and either (A) the derivative action was commenced prior to the corporate action terminating the holder's status, or (B) the court finds that the holder is better able to represent the interests of the shareholders than any other holder who has brought suit.

Principles of Corp. Governance § 7.02(a)(2) (2003). But, it is unlikely that Nevada would choose the AL1 *rule* over *Lewis v. Anderson,* because the comment to § 7.02 explicitly states that it departs from the majority approach to the continuous-ownership rule. See *id. § 702* cmt. a.

for guidance. [12] Moreover, scholars have noted the extent to which Nevada has attempted to conform its corporate law to that of Delaware.[13] Therefore, I have every reason to anticipate that the Nevada Supreme Court would adopt the rule of *Lewis* v. *Anderson* as Nevada law, and no reliable basis to infer that it would take another approach. Thus, the governing principles that apply are identical whether Delaware law or Nevada law applies to the question of whether the plaintiff may proceed to press claims belonging to Amax Gold.

[12] See Cohen, 62 P.3d at 726 n.10 ("Because the Legislature relied upon the Model Act [in the particular respect before the court] and the Model Act relies heavily on New York and Delaware case law, we look to the Model Act and the law of those states in interpreting the Nevada statutes."); *Hilton Hotels Corp. v. ITT Corp., 978* F. Supp. 1342, 1346 (D. Nev. 1997) ("Where, as here, there is no Nevada statutory or case law on point for an issue of corporate law, this Court finds persuasive authority in Delaware case 'law."); *Shoen v. AMERCO,* 885 F. Supp. 1332, 1341 n.20 (D. Nev. 1994) ("Where there is no Nevada precedent on point . . . this court must predict how Nevada's supreme court would decide the question. . . . On questions of corporation law, the Delaware Supreme Court and the Delaware Courts of Chancery are persuasive authorities.").

[13] See Jill E. Fisch, *The Peculiar Role Of The Delaware Courts in the Competition For Corporate Charters,* 68 U. Cin. L. Rev. 1061, 1067 (2000) ("In addition to adopting the Delaware statute, the Nevada legislature adopted Delaware case law. Moreover, courts construing Nevada law appear to follow Delaware precedent." (footnotes omitted)); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law, 98* Colum. L. Rev. 1908, 1911 (1998) ("[I]n fact, Nevada adopted Delaware law wholesale . . . ."); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law,* 65 Tex. L. Rev. 469,488 (1987) ("In fact, Nevada [has] adopt[ed] both the Delaware statutory and common law as it applies to corporations.").

B.

Having decided that ***Lewis v. Anderson governs,*** I now turn to the question of whether the plaintiff has pled facts invoking the fraud exception to the general rule that the loss of stockholder status in a merger divests a derivative plaintiff of standing. To be fair to the plaintiff, it is useful to set forth in full the relevant portions of her complaint:

> The Subsequent Merger
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> ***26.*** On or about February 9, 1998, a merger was announced between the Company [Amax Gold] and Kinross. The form of the merger contemplated that the Company would become a subsidiary of Kinross, and the common stockholders of the Company would receive shares of Kinross stock in exchange for their shares of Company stock.
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> ***27.*** The merger proxy statement, at p. 26, describes the discussions as leading potentially to a merger of equals. At p. 33, the merger proxy statement discloses that Kinross's contribution to the combined entity ranged from 3 1.0% to 57.7% on the equity value measures. However, Kinross stockholders would own approximately 50% of the combined entity on an equity value basis.
>
> ***28.*** At p. 38, it discloses that Kinross's total present value contribution would equal 45.5%. At p. 41, it discloses that the Company's contribution to the combined company ranged from 17% to 72% on equity measures and 57% to 134% on Enterprise measures. Under another analysis the Company's contribution was 45% to 53% to equity and 73% to 78% to Enterprise Value. The Company's stockholders would own

> approximately 50% of the equity and 67% of the Enterprise Value of the combined company.
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> 29. The merger became effective on June 1, 1998.
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> 30. The merger of the Company and Kinross was specifically structured and perpetrated in the form described in paragraph 26 merely to deprive the plaintiff and other common stockholders of standing to prosecute this action.
>
> 31. Moreover, there is no principled economic or equitable argument that plaintiff should lose standing here as a result of the merger between the Company and Kinross. Such loss of standing is inconsistent with basic economic principles as well as fundamental principles of equity and fairness.[14]

Distilled to their essence, these allegations assert that because 1) on some measures Kinross can be said to have gotten the better of the economic bargain between itself and Amax Gold in the merger; and 2) the merger could have been structured as a "straight" merger with Amax Gold as the surviving corporation (or as a triangular merger with Amax Gold surviving as the public parent entity), then a reasonable inference exists that the

[14] Am. Compl. ¶¶ 26-31.

merger was solely designed so as to deprive the plaintiff of her standing to press her derivative claims.[15]

As an initial matter, the parties clash over whether the sufficiency of the plaintiffs' pleading is governed by the notice pleading standard of Rule 12(b)(6) or the particularity standard of Rule 9(b). The defendants contend that the heightened standard of Rule 9(b) applies because the relevant *Lewis v. Anderson* exception involves an accusation of "fraud." By contrast, the plaintiff asserts that the Supreme Court did not intend by use of the term "fraud" to place such a heightened burden on derivative plaintiffs.

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[15] The plaintiff also argues that there is "no equitable or economic reason to dismiss a valid derivative suit brought pre-merger in order to compel a post-merger double derivative suit." Pl.'s Opp'n Br. at 6. In a double derivative suit, a stockholder of a parent corporation seeks recovery on behalf of a cause of action belonging to a subsidiary corporation. See *Sternberg* v. *O'Neil*, 550 A.2d 1105 (Del. 1988). Because the plaintiff might have been able to bring a post-merger double derivative suit (but did not attempt to do so), she contends, she should maintain standing to pursue the present suit.

But, the Delaware Supreme Court has already rejected this argument as inconsistent with Delaware law, and I am bound to its decisions. Nor am I free to ignore the law of the case as established by Vice Chancellor Jacobs's prior ruling. Although the Third Circuit accepted an argument similar to the plaintiffs in *Blasband v. Rules*, 971 F.2d 1034, 1040-46 (3d Cir. 1992) ("[T]he Delaware Supreme Court *sub silentio* recognized an indirect financial interest as a basis for standing *in . . . Sternberg . . . [by]* permit[ting] a plaintiff to pursue a double derivative suit."), both this court and the Supreme Court have rejected *Blasband*. *See In re First Interstate Bancorp Consol. S'holder Litig.*, *729* A.2d 85 1, 868 & n.18 (Del. Ch. 1998) ("*Blasband* is . . . inconsistent with *the clear* holding of *Lewis v. Anderson . . .* ."), *aff'd sub nom. Bradley v. First Interstate Bancorp, 748* A.2d 913 (Del. 2000) (ORDER); *Ash v. McCall*, *2000* WL 1370341, at * *13* & n.47 (Del. Ch. Sept. 15, 2000) *("First Interstate* clearly expressed the Delaware Courts' rejection of the Third Circuit's holding *in Blasband v. Rales . . .* . [*Blasband*] is not consistent with the Delaware Supreme Court's holding in *Lewis v. Anderson* and, for that reason, I am not free to follow it.").

In my view, the defendants have the better of this argument. The fraud exception to *Lewis* v. *Anderson* is just that — an exception that allows a plaintiff to show that a merger that was presented as having a legitimate business purpose was in fact entered into by one side of the deal solely for the purpose of immunizing corporate fiduciaries from liability in a pending derivative suit. In analogous contexts when a breach-of-fiduciary-duty claim is premised on an accusation of fraud, this court has examined the complaint against the particularized pleading standard of Rule 9(b). [16] Here, the plaintiff argues that an arm's-length merger of two public companies was not in fact consummated for the reasons contained in the merger proxy materials, but instead merely as a device to get rid of the plaintiffs derivative claims. That is, the plaintiff argues that the merger was a classic fraud perpetrated by the Amax Gold directors and Cyprus Amax.

As important, the plaintiff here seeks to defeat what is in essence a motion under Rule 23.1. It is traditional for a plaintiff seeking to have demand excused to have to plead particularized facts." There is no evident

[16] *See York Linings v. Roach,* 1999 WL 608850, at *2-3 (Del. Ch. July 28, 1999). See *also Dann* v. *Chrysler* Corp., 174 A.2d 696,700 (Del. Ch. 1961) (holding that particularity requirement of Rule 9(b) applies to claims of "constructive" as well as "actual" fraud).
[17] *Aronson v. Lewis, 473* A.2d 805,808 (Del. 1984).

reason why a plaintiff should be able to proceed with mere notice pleading in attempting to invoke an exception to the general rule of Lewis v. *Anderson* that stockholders who lose stockholder status in a merger also lose derivative standing. This is especially the case when a plaintiff attempts to overcome *Lewis* v. *Anderson's* general rule by accusing the defendants of having committed fraud, by ginning up a pretextual merger solely to deprive the plaintiff of standing. For these reasons, I therefore find that the plaintiff has to have pled particularized facts invoking the fraud exception to *Lewis v. Anderson* in order to avoid dismissal.

For reasons I now articulate, I further conclude that the plaintiff has not met that burden (or even the lesser burden that would apply under Rule 12). I begin my explanation with an obvious point. The mere fact that a merger was structured as a "triangular merger" provides no rational basis to infer that the merger was a fraud designed merely to deprive stockholders of the corporation that has lost its status as a public company of derivative standing. As the defendants point out, triangular mergers are common and

have a myriad of legitimate justifications.'* Similarly, there are numerous reasons for choosing one company rather than the other as the surviving public company, whether the transaction is structured as a straight or triangular merger. [19]

Nothing in the plaintiffs complaint reasonably supports the inference that Amax Gold structured the merger with Kinross the way it did solely to deprive the plaintiff of standing or that it was Amax Gold that sought this structure.[20] That is, no fact in the complaint buttresses the conclusory

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[18] In a triangular merger, the acquiror's stockholders generally do not have the right to vote on the merger, nor are they entitled to appraisal. See, e.g., 1 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations § 9.7, at 9- 10 (3d ed. Supp. 2003). If a reverse triangular structure is used, the rights and obligations of the target are not transferred, assumed or affected. See *id.* § *9.8,* at 9-1 1; James C. Freund, Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions 79 (1975). Because of these and other advantages to using a triangular structure, it is the preferred method of acquisition for a wide range of transactions. See 1 Lou R. Kling & Eileen T. Nugent, Negotiated Acquisitions of Companies, Subsidiaries, and Divisions § 1.02[11], at 1-19 (2001); Freund, ***supru,*** at 107.

[19] The parties to a merger might allocate the roles of "purchaser" and "target" for a variety of reasons, such as avoiding a high stockholder vote requirement or appraisal rights for stockholders in one merging entity's jurisdiction of incorporation, dealing with hold-out stockholders or not violating a provision in a contract of one of the merging entities that prohibits it from being a party to a merger or asset transfer, or for tax considerations. See 1 Kling & Nugent, ***supru*** note 18, § 1.02[7], at 1-12. Even in a "merger of equals," a variety of factors influence the decision of which company remains as the publicly owned entity, such as the relative size of the companies, which entity's shareholders will hold a greater percentage of the combined companies, which company's management will have the more senior positions in the combined company, or which company's directors will represent a majority of the board of the combined company. 1 *id.* § 1.02[8][a], at 1-14.

[20] See *Dell* v. *Grimm,* 1979 WL 175247, at *2 (Del. Ch. July 17, 1979) ("There is no hint in the record that the merger here was sought to be used to cover up the wrongful acts of management or to in any way circumvent what otherwise would appear to be a valid cause of action on behalf of the corporation and its shareholders.").

proposition that Amax Gold rather than Kinross would have been the surviving public company in the merger but was not solely because Amax Gold's controlling stockholder and directors wished to insulate themselves from liability in this derivative action. In focusing on Amax Gold, I take a pro-plaintiff point of view, which is to read *Lewis v. Anderson* as focusing the "fraud" inquiry on the board facing a derivative suit and whether it caused the company to merge with another party simply to avoid defending the derivative suit rather than for other valid business reasons.

But even taking that friendly point of view, the plaintiffs complaint falls far short of the mark. Its pleading of excerpted economic facts from the merger proxy statement suggests, at most, that Kinross's negotiators might have done a better job than Amax Gold's. Candidly, the complaint's recitation of the economic facts is so sketchy as to be unreliable even in that respect. The merger proxy statement that the complaint refers to and relies upon, and therefore incorporates, contains other facts that suggest that the merger exchange ratio was fair to Amax Gold. Indeed, it is noteworthy that a well-known investment bank gave a fairness opinion to that effect to a special committee of the Amax Gold board charged with protecting the minority stockholders. These facts accord with the reality that Kinross was an NYSE-traded company that had revenues of approximately $200 million

annually in the two years preceding the merger and that had a stock trading price exceeding that of Amax Gold immediately before the merger.

More important, even if one assumes that Kinross made out somewhat better in the merger negotiations than Amax Gold, that assumption does not get the plaintiff very far in proving that the fraud exception to *Lewis v. Anderson* applies. Remember that Cyprus Amax owned over 58% of Amax Gold. For it to be rational for Cyprus Amax to have entered into the merger solely for the purpose of getting rid of this derivative action, Cyprus Amax would have had to conclude that the potential liability it faced in this action exceeded the loss it would suffer from the inadequate price it was receiving for its majority ownership of Amax Gold. At oral argument, the plaintiffs counsel was unable to identify with any precision the magnitude of his client's claims regarding the unfair financing that Cyprus Amax allegedly provided to Amax Gold. Most critically, nothing in the complaint supports a rational inference that Cyprus Amax would have entered into a merger divesting itself of 58% of Amax Gold solely to insulate itself and its affiliated directors from liability in this derivative action. Given the magnitude of the merger transaction, the involvement of an Amax Gold special cornmitt-ee, and a third-party merger partner like Kinross, the absence of well-pled facts suggesting that the liability Cyprus Amax and its affiliated

directors faced was so substantial as to have motivated them to cause Amax Gold to enter into a pretextual merger with another publicly traded company at a sub-optimal price is fatal.

By its plain terms, the fraud exception to *Lewis v. Anderson* requires a showing that the sole basis for Amax Gold's decision to enter the merger was to divest the plaintiff of derivative standing. This is the reading of *Lewis v. Anderson* that was adopted by Vice Chancellor Jacobs and is law of the case. I am bound to that interpretation. The plaintiff was given a second chance to make the required showing. Her cursory effort to do so rests on a conclusory allegation that is not supported by well-pled facts and that seems implausible in light of the nature of the merger and Cyprus' Amax's strong interest in obtaining the right price for its equity interest in Amax Gold.

III. Conclusion

Because the plaintiff has failed to plead facts supporting the applicability of the fraud exception to *Lewis* v. *Anderson,* the defendants' motion to dismiss with prejudice is granted. IT IS SO ORDERED.