IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| IN RE: APPRAISAL | ) | Consolidated |
| OF THE ARISTOTLE CORPORATION | ) | C.A. No. 5137-CS |

MEMORANDUM OPINION

Date Submitted: December 16, 2011
Date Decided: January 10, 2012

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STRINE, Chancellor.

## I. Introduction

Lawrence Galler and Mitchell Partners L.P. filed appraisal actions. A trial on their appraisal was scheduled for December 5, 2011. Galler and Mitchell Partners then delayed the trial by belatedly filing a complaint for breach of fiduciary duty eighteen months into their appraisal case.[1] This late-arising development had the result of delaying the trial on the appraisal by at least five months, so that briefing on whether this new complaint stated a claim could be completed, and so that argument on the motion to dismiss could be heard and decided.[2] This is the decision on that motion to dismiss.

In their fiduciary duty complaint, the appraisal petitioners argue that the defendants – who were the then-parent company and directors of Aristotle Corporation[3] – breached their fiduciary duties by not disclosing all material facts in connection with a short-form merger under 8 *Del. C.* § 253 (the "Merger").[4] As a remedy for these

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[1] Plaintiff Lawrence Galler filed a petition for appraisal on December 11, 2009. Plaintiff Mitchell Partners filed its petition for appraisal on January 28, 2010. Together, they filed this verified complaint for breach of fiduciary duty on August 4, 2011.

[2] On October 5, 2011, this court agreed to the defendants' scheduling request to postpone the consolidated trial until May 2012.

[3] The individual defendants are Geneve Corporation, Steven Lapin, Barbara Netter, as Personal Representative of the Estate of Edward Netter, and Roy T.K. Thung.

[4] Compl. ¶ 18. The petitioners also argue that the Merger should not have been consummated without a stockholder vote as contemplated by § 253 of the DGCL, but rather was required to be preceded by a majority of the minority vote by virtue of a charter provision in Aristotle's Certificate of Incorporation. *Id.* This charter provision required a majority of the minority vote to approve certain interested transactions only in the event that the transaction failed to meet a specified "Price and Procedure" test, or that it was not approved by two-thirds of the "Continuing Directors" (who are those directors who are unaffiliated with the parent and who were in office before the parent acquired 10% beneficial ownership of Aristotle's stock). *See id.* Ex. B (Certificate of Incorporation) at 13-16. Here, the petitioners argue that the Proxy Statement issued in connection with the Merger was materially misleading because it did not say anything at all about whether the Merger met the Price and Procedure test or was approved by the

Continuing Directors (although it is unclear from the complaint or from the parties' briefing whether there were any directors who even met this definition). From the Proxy Statement's silence, the petitioners argue that it was inferable somehow that one of these exceptions was satisfied and thus a majority of the minority vote was not required. So lulled, the petitioners allege that they did not realize that a majority of the minority vote was required.

I note several problems with this argument. First, the petitioners do not plead a substantive count of the complaint based on the supposed failure to comply with the charter provision that the petitioners claim required a majority of the minority vote even as to a § 253 merger that by statute did not require any stockholder vote at all. Rather, they simply argue that the failure to disclose material facts about compliance with this provision is another failure in disclosure supporting a claim for quasi-appraisal.

As so pled, this claim must be dismissed for failure to state a claim. Crucially, the petitioners do not allege that the disclosures falsely stated that the board determined that the charter provision had been satisfied. Rather, the disclosures were silent on the issue altogether. Delaware law does not require directors to disclose what they did *not* do in the absence of a materially false or misleading statement that implies that the action in question was taken. *See, e.g.*, *In re Pennaco Energy, Inc.*, 787 A.2d 691, 710 n.38 (Del. Ch. 2001); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *20 n.12 (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999); *Zirn v. VLI Corp.*, 1995 WL 362616, at *11 (Del. Ch. June 12, 1995), *aff'd*, 681 A.2d 1050 (Del. 1996) (citing affirmatively the original trial decision's finding that "[b]ecause the Offer to Purchase *does not set forth any of AHP's reasons for proposing the change* from a merger to the Tender Offer, plaintiff's claim that AHP made only a partial, misleading disclosure is without merit.") (emphasis in original); *see also* 2 Stephen A. Radin, *The Business Judgment Rule* 1758 (6th ed. 2009) ("There is no obligation to disclose that a board 'did not do' something…where the lack of a statement that the board did do the 'something' makes it 'obvious' that the board did not do the 'something.'") (citing cases). Rather, if the material facts regarding what the board did are fairly disclosed, the directors' burden is met. *E.g.*, *Zirn*, 1995 WL 362616, at *8 ("[A] reasonable line has to be drawn or else disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their purpose.") (citation omitted). Of course, because the petitioners here filed for appraisal anyway, the lack of disclosure about this issue could not have harmed their ability to seek appraisal, and the only relief they seek in the fiduciary duty complaint is for quasi-appraisal. Thus, the standing and advisory opinion problems that affect the disclosure count as a whole pertain to this aspect as well.

Furthermore, the petitioners admit that they were indolent in addressing this issue. They admit that the Certificate of Incorporation was available to them before they filed their initial appraisal action. Silence in the Proxy Statement about the issue and the absence of any request of stockholders to hold a majority of the minority vote would have led any reasonable stockholder (particularly ones represented by experienced corporate litigation counsel as the petitioners here are) to inquire about the issue, or more commonly to sue immediately for an injunction or other relief, such as rescission, and ask questions later. But the petitioners and their counsel here admit they could have read the Certificate before the Merger, but apparently did not, and could certainly have read it before filing the appraisal petitions, but apparently did not. *In re: Appraisal of the Aristotle Corporation*, C.A. No. 5137, at 31, 37 (Del. Ch. Dec. 16, 2011) (TRANSCRIPT). To their credit, the petitioners acknowledge that it is far too late for them to breaches, the petitioners seek the difference between the fair value of their shares and the price of the Merger.[5] The petitioners seek to represent only themselves and not a class of other stockholders.

I have now received briefing on the obscure question of whether petitioners who already have dissented to a merger and perfected their appraisal rights, and who already have a right to a fair value determination, have standing or otherwise may seek to have this court adjudicate whether the disclosures in connection with the merger were deficient because they omitted material information, when the only meaningful relief the petitioners could receive for proving this new claim is identical to that which they are already seeking under the appraisal statute.[6] Put more simply, may petitioners who already have the right to seek appraisal in connection with a § 253 merger add an additional claim alleging that the directors breached their fiduciary duty to disclose the material facts necessary for the stockholders to determine whether to seek appraisal when the only purpose of pressing the disclosure claim is to give the petitioners the redundant right to a "quasi" version of something that they already possess?

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seek rescission or rescissory damages due to their own torpor. *Id.* at 41-42. Indeed, the petitioners waited nearly a year after raising this charter provision issue in discovery to include it in a proposed amended complaint. Thus, even if the petitioners had properly pled failure to comply with the charter provision as a contract claim – which they did not – their claim would have been barred by laches.

Because they did not plead a contract claim, I need not address the defendants' forceful argument that the majority of the minority vote requirement set forth by the charter provision does not apply to a § 253 merger.

[5] Compl. at 9 (Prayer for Relief).

[6] 8 *Del. C.* § 262 (appraisal petitioners are entitled to fair value of their shares).

II. The Petitioners Do Not Have Standing To Bring Their Disclosure Claim

Given the unusual nature of the question, it is not surprising that the case law is sparse and not squarely on point. No prior case has addressed this precise scenario. The prior decision of this court in *Andra v. Blount* is probably the closest analogy.[7] There, the plaintiff brought an action challenging the disclosures issued in connection with an agreement with a front-end tender offer and back-end merger structure negotiated between a special committee and the company's majority stockholder, and moved for expedited proceedings to prevent the consummation of the tender offer until corrective disclosures were issued. Rather than press forward with an injunction, however, the plaintiff changed her mind and withdrew her request to enjoin the tender offer in favor of waiting to bring a post-closing action for money damages, and the offer went forward unchallenged.[8] Based on the information disclosed to her – information which she already believed to be misleading and incomplete – the plaintiff did not tender into the tender offer.[9]

Through the offer, the majority stockholder acquired a sufficient number of shares to enable him to cash out the remaining stockholders through a short-form merger under § 253, which he did.[10] The plaintiff refused the merger consideration and preserved her appraisal rights.[11] After the merger dust had settled, the plaintiff then renewed prosecuting her fiduciary duty suit challenging the adequacy of the disclosures, and

[7] 772 A.2d 183 (Del. Ch. 2000).
[8] *Id.* at 184-85.
[9] *Id.* at 185.
[10] *Id.* at 188.
[11] *Id.* at 185.

added a claim that the terms of the tender offer and merger were unfair to the minority stockholders as a class. For present purposes, my focus will be on the disclosure claim. In support of her disclosure claim, the plaintiff alleged that the inadequate disclosures deprived the company's stockholders of the "ability to make an informed choice between tendering and seeking appraisal in the follow-up merger," and that the omission of certain information "deprived shareholders of essential information about the merits of seeking appraisal and the likelihood that such a proceeding would result in a materially higher per share payment for the shares."[12]

The court ruled that the plaintiff did not have standing to pursue her disclosure claim, because she could not have been injured by the allegedly misleading disclosures given her decision not to tender.[13] In so holding, the court reasoned thusly:

> Neither [the plaintiff's] second amended complaint nor her briefs on this motion explain how those disclosures could have possibly injured [her]. The theory of her complaint in this action is that the inadequate disclosures worked injury because they induced stockholders to tender rather than to seek appraisal. But [the plaintiff] herself sought appraisal and did not suffer injury of this nature.[14]

The court noted that a different result might have been obtained if the plaintiff had timely pressed her disclosure claim in a preliminary injunction proceeding *before* the tender decision.[15] This is because actions at that stage provide an opportunity for the court to

[12] *Id.* at 188.
[13] *Id.* This was so even though the plaintiff in *Andra* had decided not to prosecute an appraisal action. *Id.* at 185.
[14] *Id.* at 188. By contrast, the court held that the plaintiff did have standing to pursue her unfairness claim, under the principles articulated by our Supreme Court in *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099 (Del. 1985) and *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993). *Andra*, 772 A.2d at 195-96.
[15] *Id.* at 189.

order corrective disclosures, a remedy which would inure to the benefit of all stockholders by permitting them to make their decision fairly and with full information.[16] Thus, for that reason, the court recognized that it would make sound policy sense to allow for "some relaxation of traditional standing requirements" and to permit a plaintiff to continue to litigate her disclosure-based claim even though she decided to seek appraisal in the interim.[17] But because the plaintiff in *Andra* withdrew her preliminary injunction motion and advanced her disclosure claim only after the merger closed, the court declined to adopt a "relaxed" approach to its standing analysis and instead held her to the traditional requirement that she show that she was individually injured by the misleading disclosures[18] – a burden she was unable to meet because of her decision not to tender.[19]

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[16] *Id.*

[17] *Id.* at 189-90.

[18] *Id.* at 190 ("Andra, however, stands in a far different position. She had the opportunity to serve her fellow stockholders in that manner, but turned her back on it. Allowing her at this stage to press claims that do not involve injury to her would invite gamesmanship.").

[19] *Andra* is consistent with the few cases that have directly analyzed this peculiar standing issue. For example, in *Abajian v. Kennedy,* 1992 WL 8794 (Del. Ch. Jan. 17, 1992), Chancellor Allen held that the plaintiffs had no standing to press disclosure claims because they did not participate in the self-tender at issue and thus were not directly injured by the challenged disclosures. *Id.* at *8. Furthermore, Chancellor Allen distinguished the self-tender from the sort of tender offer that is used to obtain control of the corporation's voting power, thus creating a majority owner who can then force a cash-out merger on non-tendering stockholders. In such a circumstance, and where misleading disclosures induced other stockholders to tender, Chancellor Allen surmised that "a non-tendering stockholder may be dramatically if indirectly affected by deception in the tender offer document." *Id.*; *see also Freedman v. Restaurant Assocs. Indus., Inc.*, 1990 Del. Ch. LEXIS 142, at *26 (Del. Ch. Sept. 19, 1990) (Allen, C.) (opining that a non-tendering stockholder may not have standing to assert disclosure violations when the offeror already has control, because the non-tendering stockholder will not have suffered either a direct injury (i.e., he did not tender based on the misleading disclosures) or an indirect injury (i.e., he was not rendered a minority stockholder because other shareholders tendered into the offer)). The court in both *Abajian* and *Freedman* thus recognized that a non-tendering stockholder might be injured – and thus have standing – when he loses his position as a stockholder in a widely-held firm and becomes a minority stockholder subject to the control of a majority owner. The plaintiff in *Andra* could not claim this type of indirect injury because the majority stockholder owned 73%

I continue to believe that the reasoning of *Andra* is sound[20] and that it applies even more easily here, where it is apparent that the petitioners have never sought to represent

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of the company's stock before launching the tender offer at issue. Nor can the petitioners in the present action claim any indirect injury from the short-form merger, as Aristotle's parent corporation owned more than 90% of Aristotle's stock before the allegedly misleading disclosures were disseminated.

[20] Admittedly, there are cases that have allowed an appraisal petitioner to proceed with a fiduciary duty of disclosure claim. In most of those cases, however, standing was not an issue that was contested by the parties. *See Crescent/Mach P'ship, L.P. v. Turner*, 846 A.2d 963, 987-88 (Del. Ch. 2000) (where standing was not contested, appraisal petitioners could proceed with disclosure claim against controlling shareholder who effected a long-form merger); *Nagy v. Bistricer*, 770 A.2d 43, 48-49 (Del. Ch. 2000) (where standing was not contested, appraisal petitioner succeeded on his disclosure claim on summary judgment in an unusual case where the consideration to be offered to stockholders in a short-form merger would not even be set until after the time to seek appraisal had expired).

Similarly, in the class action context, the standing of the named plaintiff, or of the members of the purported class, to proceed with disclosure claims while concurrently seeking appraisal is an issue that is rarely addressed. But in most of these cases, the plaintiff-petitioners were seeking to represent a class of other stockholders and had swiftly sought relief on behalf of all stockholders. *See Nebel v. S'west Bancorp, Inc.*, 1999 WL 135259, at *1-2 (where standing was not contested, one of the named plaintiffs who alleged disclosure violations in a short-form merger was also seeking appraisal, and the class was composed of all minority shareholders, regardless of whether they sought appraisal); *Berger v. Pubco Corp.*, 976 A.2d 132, 135 (Del. 2009) (where standing was not contested, class members in an action against parent company for disclosure violations in connection with the short-form merger included those who sought appraisal); *cf. In re Unocal Exploration Corp. S'holders Litig.*, 793 A.2d 329, 333 n.5 (Del. Ch. 2000), *aff'd sub. nom.*, *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001) (relating that motion for expedited proceedings at outset of case challenging short-form merger had been refused by Chancellor Allen on among other grounds that quasi-appraisal remedy for disclosure claim could be available to class comprised of all minority shareholders if the disclosures were not adequate to allow them to fairly decide whether to seek appraisal); *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 307 (Del. Ch. 2005) (where standing was not contested, quasi-appraisal remedy available to shareholders whose shares were exchanged for cash in a short-form merger).

Importantly, here the petitioners did not plead this case as a class action and they do not seek to bestow the benefits of the successful prosecution of their claims on any shareholders other than themselves. Thus, the distinctive considerations that might apply in considering the standing of a party who started as a litigant challenging a deal on grounds that it was injurious to all stockholders as a class and who later filed for appraisal as an additional claim are not in play here. *But see Andra*, 772 A.2d at 196 (noting that the court would have to "give careful consideration" to whether an appraisal petitioner has standing to represent a class of non-tendering shareholders in a plenary fiduciary duty action for fairness claims due to the class representative's unique standing infirmities).

other investors and did not promptly seek to enjoin the Merger, challenge the disclosures being used to procure its approval or in connection with the decision to seek appraisal, and only sought appraisal when it was clear the Merger was going to close anyway.[21]

For the following succinct reasons, I believe that the present motion to dismiss should be granted because the petitioners have suffered no cognizable injury that can be redressed by this court. The American litigation environment is the subject of much international controversy and commentary. Although the American litigation system has much to be proud of, in terms of the chances it gives parties to peaceably decide disputes on a fair basis, and in terms of economics, the confidence it gives parties that they can invest capital and engage in commerce and have their rights fully and fairly protected, there is no doubt that our system of full discovery and appeal rights is subject to abuse and generates large costs.

When a litigant files a new claim that, if proven, would not entitle it to any relief that it does not already have a right to receive,[22] that litigant in my view has no proper standing.[23] The petitioners here were not deprived personally of any right to dissent by

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[21] The result in *Andra* also merits an arguably stronger application here where the petitioners have challenged disclosures issued in connection with a statutory short-form merger, given that these mergers are exempted from entire fairness review in the first instance. *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001).

[22] Because this was a short-form merger, the new parties that Galler and Mitchell Partners seek to sue are not substantially distinguishable from the surviving corporation, the respondent in the appraisal action. Rather, they are likely all affiliated. The plaintiffs do not allege that the respondent is insolvent and cannot pay a fair value award. *Compare Crescent/Mach I P'ship, L.P. v. Turner*, 2005 WL 3618279, at *3 n.13 (Del. Ch. Dec. 23, 2005) (noting that a fiduciary duty action may serve an independent purpose to an appraisal action where "the respondent in the appraisal action is unable to pay, [and] the defendant(s) in the fiduciary duty action may provide a source of at least some funding.").

[23] *See RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2000 WL 1706728, at *15 (Del. Ch.

any of the alleged disclosure inadequacies; they dissented based on what they knew already.[24] To put it simply, the alleged disclosure inadequacies did not in any way impair the petitioners' ability to seek appraisal, yet that is the theory on which they ground their claim.[25] Thus, they would have this court issue a merely advisory ruling in a genuine sense, with the adversity arising only because they have sought to amplify their own leverage by dragging other parties into an already longstanding litigation and to exert settlement leverage simply because of the additional costs that such a tactic would entail.[26] If that leverage also involves the threat that the counsel for the petitioners will

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Nov. 8, 2000) (dismissing disclosure claim when there was "no distinct harm caused by the alleged omission or misstatement…."); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 922-23 (Del. Ch. 1999) ("O'Reilly, therefore, fails to plead that the Defendants' misdisclosure of Transworld's purpose created a cognizable harm discrete from the alleged usurpation of corporate opportunity and unfair dealing that proper disclosure would have revealed."); *In re Tyson Foods, Inc.*, 919 A.2d 563, 597 (Del. Ch. 2007) ("For a disclosure claim to be viable, ….[p]laintiffs must at the very least allege some connection between the lack of disclosure and an actual harm."); *see also Guy v. Sills*, 1998 WL 409346, at *1 (Del. Ch. July 10, 1998) (standing requires that "a plaintiff must assert facts that he has been injured in a way that is unique to him in his individual capacity[.]").

[24] *See Andra*, 772 A.2d at 188; *Abajian*, 1992 WL 8794, at *8 (dismissing a disclosure claim for lack of standing because plaintiffs could not show that they were personally injured by inadequate disclosures issued in connection with a self-tender offer into which they did not tender and through which there was no transfer of control); *Freedman*, 1990 Del. Ch. LEXIS 142, at *26 (opining same).

[25] *Andra*, 772 A.2d at 188; *cf. Thornton v. Bernard Technologies, Inc.*, 2009 WL 426179, at *5 (Del. Ch. Feb. 20, 2009) (noting that "[d]amages are limited only to those 'that arise *logically and directly from the lack of disclosure*,' and without proving such nexus damages cannot be awarded" and the case must be dismissed) (emphasis added) (citing *In re Tyson Foods, Inc.*, 919 A.2d at 602)).

[26] This court in *Andra* also rejected the argument, raised by petitioners here, that a legally cognizable injury can arise from the failure of *other* shareholders to seek appraisal based on the misleading disclosures, the only result of which is an unduly small appraisal class over which to spread the costs of litigation. *Andra*, 772 A.2d at 188 n.10 (reasoning that such a theory would require the court to engage in the speculative exercise of determining how many other shareholders would have rejected the merger consideration for purposes of assessing the purported injury). The petitioners have offered no reason, nor do I see any, to hold otherwise today.

try to litigate this case against the backdrop that Galler and Mitchell Partners' counsel will prospect for additional clients to file follow-on suits, that is not a legitimate purpose. The reality that the petitioners seek to complicate an appraisal proceeding addressing a § 253 merger where appraisal is the exclusive remedy, with very rare exceptions not implicated by the complaint filed by these petitioners,[27] also reinforces the absence of standing and the imprudence of addressing questions whose answer will only yield the petitioners a right to a "quasi" version of something they already possess in its actual form.

Our Supreme Court has warned trial courts against the dangers of making advisory decisions.[28] Here, there is no legitimate need for this court to determine whether the disclosures in connection with the Merger were deficient or not. The appraisal case will give the petitioners a fair value determination – the same remedy they seek in their fiduciary duty complaint. To require the defendants and this court to go through a moot court determination in order to award the petitioners the right to a quasi version of something that they already have would be inequitable to the defendants and to the taxpayers and litigants who depend on this court.

Lest the petitioners think that I have forgotten the line of cases that sometimes allow for "nominal damages" for disclosure violations in circumstances where the stockholders' economic or voting interests are harmed, I have not.[29] For starters, the

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[27] *See Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001).
[28] *See, e.g.*, *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 480 (Del. 1989); *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973).
[29] *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 774 (Del. 2006); *Loudon v.*

petitioners here sought appraisal based on the disclosures they received and thus will get a fair value determination, their economic and voting interests were thus not injured, and therefore there is no need for something nominal. To conclude with this topic, the petitioners' very filing of their fiduciary duty count has already subjected the defendants to nominal damages. The defendants have expended tens of thousands of dollars litigating this motion at the petitioners' behest – a penalty the petitioners have exacted – and the petitioners have caused a five month delay in the trial schedule for the appraisal, and delay is disruptive and costly. Thus, any need for nominal damages to extract some flesh has already been achieved.

## III. Conclusion

Because these petitioners have not alleged that they have suffered any cognizable injury that gives rise to standing, and because they are therefore asking in these unique circumstances for an improper advisory decision, I accordingly GRANT the defendants' motion to dismiss.

IT IS SO ORDERED.

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*Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997).