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BEFORE THE UTAH COURT OF APPEALS

IRVING S. BRAUN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. NEVADA CHEMICALS, INC., et al., Defendants.	Case No. 20090493-CA

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
HON. SANDRA N. PEULER
Civil No. 080919636

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103, as this matter was appealed to the Utah Supreme Court from a final judgment of the Third District Court. (R.1148-1150; 1151-1153.)

ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court erred in holding that plaintiff's claims alleging misconduct in connection with a merger, breach of fiduciary duties, and omission of material information, are "derivative" rather than "direct" in nature and, consequently, must comply with procedures and rules governing shareholder derivative lawsuits. (R.507-709.)

Whether a lawsuit is "direct" or "derivative," while involving application of law to facts, presents essentially a legal determination reviewed for correctness. Thus, "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

2. Whether the trial court erred in granting defendants' motion to dismiss, holding that the sole remedy for plaintiff's claims is appraisal of his shares under Utah law. (R.507-709; 1104-1119.)

Whether a motion to dismiss was properly granted is a question of law. Accordingly, the appellate court "'give[s] the trial court's ruling no deference and review[s] it under a correctness standard.'" *Helf v. Chevron USA, Inc.*, 2009 UT 11, ¶ 14, 203 P.3d 962, 967.[1]

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[1] Unless otherwise noted, all emphasis is added, and all citations and footnotes are omitted.

Also, whether Utah Code Ann. § 16-10a-1302(5) provides the exclusive remedy for a non-controlling shareholder who dissents from a merger designed to eliminate his interest in the company is an issue of statutory interpretation that the court reviews de novo. *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 11, 108 P.3d 701, 706.

DETERMINATIVE PROVISIONS

Utah Code Ann. § 16-10a-1302(5)

§ 16-10a-1302. Right to dissent

(1) A shareholder, whether or not entitled to vote, is entitled to dissent from, and obtain payment of the fair value of shares held by him in the event of, any of the following corporate actions:

(a) consummation of a plan of merger to which the corporation is a party if:

(i) shareholder approval is required for the merger by Section 16-10a-1103 or the articles of incorporation; or

(ii) the corporation is a subsidiary that is merged with its parent under Section 16-10a-1104;

(b) consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired;

(c) consummation of a sale, lease, exchange, or other disposition of all, or substantially all, of the property of the corporation for which a shareholder vote is required under Subsection 16-10a-1202(1), but not including a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale; and

(d) consummation of a sale, lease, exchange, or other disposition of all, or substantially all, of the property of an entity controlled by the corporation if the shareholders of the corporation were entitled to vote upon the consent of the corporation to the disposition pursuant to Subsection 16-10a-1202(2).

(2) A shareholder is entitled to dissent and obtain payment of the fair value of his shares in the event of any other corporate action to the extent the articles of incorporation, bylaws, or a resolution of the board of directors so provides.

(3) Notwithstanding the other provisions of this part, except to the extent otherwise provided in the articles of incorporation, bylaws, or a resolution of the board of directors, and subject to the limitations set forth in Subsection (4), a shareholder is not entitled to dissent and obtain payment under Subsection (1) of the fair value of the shares of any class or series of shares which either were listed on a national securities exchange registered under the federal Securities Exchange Act of 1934, as amended, or on the National Market System of the National Association of Securities Dealers Automated Quotation System, or were held of record by more than 2,000 shareholders, at the time of:

(a) the record date fixed under Section 16-10a-707 to determine the shareholders entitled to receive notice of the shareholders' meeting at which the corporate action is submitted to a vote;

(b) the record date fixed under Section 16-10a-704 to determine shareholders entitled to sign writings consenting to the proposed corporate action; or

(c) the effective date of the corporate action if the corporate action is authorized other than by a vote of shareholders.

(4) The limitation set forth in Subsection (3) does not apply if the shareholder will receive for his shares, pursuant to the corporate action, anything except:

(a) shares of the corporation surviving the consummation of the plan of merger or share exchange;

(b) shares of a corporation which at the effective date of the plan of merger or share exchange either will be listed on a national securities exchange registered under the federal Securities Exchange Act of 1934, as amended, or on the National Market System of the National Association of Securities Dealers Automated Quotation System, or will be held of record by more than 2,000 shareholders;

(c) cash in lieu of fractional shares; or

(d) any combination of the shares described in Subsection (4), or cash in lieu of fractional shares.

> (5) A shareholder entitled to dissent and obtain payment for his shares under this part may not challenge the corporate action creating the entitlement unless the action is unlawful or fraudulent with respect to him or to the corporation.

STATEMENT OF THE CASE

Nature of the Case

Underlying this appeal is the sale of Nevada Chemicals, Inc. ("NCEM" or the "Company") to a fund managed by Oaktree Capital Management, L.P. ("Oaktree") and an affiliate of Cyanco Holding Corp. ("Cyanco") (collectively, with Oaktree, the "Buyout Group"), through a tainted merger process. Due to the defendants' own self-interest, NCEM was sold for inadequate and unfair consideration, and without full disclosure of all material information to its public shareholders via tender offer and short-form merger.

Motivated by insider benefits not shared with NCEM's public shareholders, the Board ran a flawed sales process directed to guarantee NCEM's sale to the Buyout Group. The Board did nothing to create any active competition for the Buyout Group and even agreed to certain deal protection devices to ensure acquisition by the Buyout Group. As a result, the Board failed to secure the highest price possible for shareholders from the Buyout Group and failed to provide NCEM's public shareholders with all material information necessary for them to make an informed decision on the proposed merger with the Buyout Group (the "Proposed Buyout").

Plaintiff brought a class action complaint against defendants and sought to enjoin the merger. Defendants moved to dismiss, asserting plaintiff's claims were derivative, rather than direct, in nature. The trial court agreed with defendants' position and concluded that

plaintiff's claims could only be brought derivatively. After plaintiff filed an amended complaint, defendants again moved to dismiss, asserting plaintiff lost standing to bring a derivative suit and that the exclusive remedy for his claims is appraisal of shares. The trial court granted defendants' motion to dismiss, holding plaintiff no longer had standing to sue on behalf of NCEM because the merger had been completed. The trial court further held that, in any event, plaintiff's only remedy for his breach of fiduciary duty and self-dealing claims is appraisal of his shares.

Plaintiff now appeals. In sum, as elaborated below, the trial court took an overly grudging view of shareholder access to the courts to challenge breaches of fiduciary duty. The court erred in holding plaintiff's claims were "derivative." Plaintiff attacks the fairness of the merger, and charges defendants with conflicts of interest and failure to disclose material information in connection with a flawed merger process. Courts hold overwhelmingly that these claims are properly brought as "direct" – rather than "derivative" – class action claims.

The trial court further erred in proclaiming that plaintiff is limited to the statutory remedy of appraisal of his shares under Utah law. Appraisal is not the exclusive remedy here due to the nature of plaintiff's allegations. Plaintiff alleges defendants breached their fiduciary duties and negotiated the merger for inadequate consideration due to their own self-interests, at the expense of NCEM's shareholders, and failed to make adequate disclosures. These claims cannot be adjudicated in an appraisal proceeding.

Course of Proceedings

Plaintiff filed his complaint on September 12, 2008, as a putative class action, charging defendants with conducting an invalid sales process by planning to cash out the Company's public shareholders for grossly inadequate consideration without complete disclosure of all material information, and in breach of their fiduciary duties of loyalty, candor, due care, independence, good faith and fair dealing. (R.1-15, ¶¶3-4, 22, 34, 37-40.) Plaintiff also brought a preliminary injunction motion, seeking to enjoin the merger. (R.180-183; 196-343.)

Defendants filed a motion to dismiss plaintiff's initial complaint on September 30, 2008, asserting plaintiff's complaint should have been filed derivatively and that plaintiff failed to meet the requirements governing shareholder derivative lawsuits. (R.114-116; 127-154; 167.) Plaintiff opposed defendants' motion to dismiss. (R.507-709.)

At a hearing on October 15, 2008, the trial court informed plaintiff that it agreed with defendants' position in their first motion to dismiss. (R.1167, p.12:11-17.) Plaintiff thereafter stipulated with defendants to file an amended complaint (R.1167, p.19:8-12), which was filed on October 22, 2008, derivatively on behalf of the Company and its shareholders. (R.949-971.)

On November 19, 2008, defendants moved to dismiss plaintiff's amended complaint, arguing that completion of the buyout nullified plaintiff's standing to prosecute a derivative suit and that plaintiff's exclusive remedy for his claims is appraisal. (R.989-1092; 1099-1103.) Plaintiff filed his opposition to the motion on January 20, 2009. (R.1104-1119.)

On May 11, 2009, the trial court granted defendants' second motion to dismiss. (R.1148-1150.) Plaintiff filed his notice of appeal on June 9, 2009. (R.1151-1153.)

Statement of Facts

The factual background is not belabored except to make one overarching point at the heart of this appeal. Plaintiff sought to challenge misdeeds by corporate insiders tainting the merger process – a grievance that is direct, not derivative.

A. The Parties

NCEM is a Utah corporation. NCEM's business is to supply its products to the gold mining industry in the western United States for use in leaching precious metals. As of April 22, 2008, the Company had 6.9 million shares of common stock outstanding. Forty-one percent of this stock is held by Company insiders and the remaining shares are held by hundreds, if not thousands, of public shareholders. (R.1-15, ¶¶8, 22.)

Through its subsidiary, Winnemucca Chemicals, Inc., NCEM owned a 50% interest in Cyanco, a non-corporate joint venture that engages in the manufacture and sale of liquid sodium cyanide. (R.1-15, ¶2.) NCEM jointly held Cyanco with a European corporate, Evonik Industries AG ("Evonik"). Evonik's half of Cyanco was known as CyPlus. As part of its contractual arrangement with Evonik, NCEM owned a right of first refusal to purchase CyPlus. (R.949-971, ¶38.) On February 8, 2007, NCEM made an offer to purchase CyPlus. (R.949-971, ¶38.) In response, Evonik set up a formal sales process to solicit competing offers for CyPlus, which NCEM ultimately chose not to partake in. (R.949-971, ¶38.)

Shortly thereafter, on July 6, 2007,[2] Oaktree Capital Management, L.P. contacted NCEM's President and Chief Executive Officer John T. Day, expressing an interest in acquiring NCEM on behalf of the Buyout Group. (R.949-971, ¶39.) Ten days later, on July 16, the Buyout Group had a follow-up call with Day where it disclosed its plans to buy both NCEM's and Evonik's halves of Cyanco. (R.949-971, ¶39.)

B. Background to the Proposed Buyout

Discussions between NCEM and the Buyout Group continued until September 7, when the Buyout Group made an initial offer that would have provided the Company's public shareholders with more consideration than the Company's insiders. (R.949-971, ¶40.) The Board, which is composed of Company insiders, rejected this offer outright. (R.949-971, ¶40.) On September 28, the Buyout Group made a second offer to purchase NCEM for $10.77 per share. (R.949-971, ¶42.)

During this time, two bidders – identified only as "Bidder 2" and "Bidder 3" in the Company's 14D-9[3] – entered into confidentiality agreements with the Company. (R.949-971, ¶¶41-45, 48-49.) Ultimately, Bidder 3 made more attractive offers to buy NCEM for $11.00 per share, and then for $11.25 per share. (R.949-971, ¶¶45, 48.) The Board rejected

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2 All further dates in the statement of facts are 2007 unless otherwise specified.

3 The Company filed a Schedule 14D-9 Solicitation/Recommendation Statement with the Securities and Exchange Commission ("SEC"), as required by the Commission's rules, in response to the Buyout Group's later commencement of the tender offer on September 19, 2008. (R.949-971, ¶5, 6, 50.)

both offers, yet the 14D-9 does not disclose whether the Board made any attempt to negotiate a higher offer with Bidder 3. (R.949-971, ¶¶45, 48.)

In the meantime, on March 10, 2008, Cyanco entered into a three-year contract with a major mining customer. (R.949-971, ¶46.) After Cyanco entered into this contract, the Buyout Group raised its offer to buy the Company from $10.77 to $13.00 per share. (R.949-971, ¶46.) As part of its offer of $13.00 per share, the Buyout Group discussed a "special dividend" for shareholders based on this cash on hand, subject to a "net working capital requirement." (R.949-971, ¶¶46-47.) The Board agreed to forego this special dividend in an exchange for an increase in consideration of only $13.37 per share – $2.30 per share less than the value of the Company's cash on hand. (R.949-971, ¶¶46-47.)

In conjunction with the Buyout Group's offer, the Board and the Company's CFO were to be given "bonus" payments in connection with the Proposed Buyout. (R.949-971, ¶53.) The Board also agreed to a number of deal-protection devices, including:

(a) a "no-solicitation" clause that prevents the Company from negotiating with or providing confidential Company information to competing bidders;

(b) a "matching rights" provision that gives the Buyout Group five days to match any competing proposal if, despite the preclusive effects of the "deal protection" devices, one is made; and

(c) a $2 million termination fee payable by the Company to the Buyout Group if a competing bid is accepted.

(R.949-971, ¶52.)

The Board also granted the Buyout Group a "top-up" provision that permitted the Buyout Group to buy enough newly-issued Company shares to close the tender offer and

"squeeze-out" the Company's minority shareholders as long as 80% of the Company's shares were tendered to the Buyout Group. (R.949-971, ¶52.) To further ensure acquisition by the Buyout Group, certain Company insiders entered into voting agreements that obligated them to tender their shares to the Buyout Group, resulting in 42% of the Company's shares committed to tender. (R.949-971, ¶52.) The combined effect of the voting agreement and the "top-up" provision permitted the Buyout Group to close the tender offer with only 38% of the publicly-held shares tendered. (R.949-971, ¶52.)

On June 13, 2008, Bidder 3 made a revised offer for $12.25 per share that the Board again rejected without any attempt to make a counteroffer or otherwise negotiate a higher price. (R.949-971, ¶¶45-48.) The 14D-9 states that on June 20, 2008, the Buyout Group completed due diligence, but there is no indication that Bidder 3 was provided access to the same due diligence information on equal terms with the Buyout Group. (R.949-971, ¶49.)

Thus, although obligated to maximize the merger price for stockholders, NCEM's Board focused on dealing with just one suitor, the Buyout Group, to the exclusion of other competitive bids. Defendants announced on September 5, 2008, that NCEM had entered into a merger agreement with the Buyout Group. (R.949-971, ¶50.) That same day, the Buyout Group entered into an agreement to purchase CyPlus for an undisclosed price. (R.949-971, ¶51.)

C. Plaintiff Files a Class Action Complaint and Defendants Move to Dismiss

On September 12, 2008, plaintiff, Irving S. Braun, filed his initial complaint, alleging the Proposed Buyout was designed to ensure that the Buyout Group completed the Proposed

Buyout despite the fact that the offer price was highly unfair and NCEM's public shareholders had not been provided with all material information necessary for them to make an informed decision on the Proposed Buyout. (R.1-15, ¶¶1, 37.) The complaint charged the defendants with carrying out an invalid merger process that sought to benefit themselves to the detriment of NCEM public shareholders. (R.1-15, ¶¶4, 19, 34, 37.) The complaint also charged the Buyout Group with aiding and abetting the defendants' breaches of fiduciary duties by negotiating with NCEM representatives with respect to the offer price. (R.1-15, ¶¶37, 40-43.) In his complaint, plaintiff sought, inter alia, to enjoin defendants from consummating the Proposed Buyout, rescission of the Proposed Buyout, as well as costs and disbursements. (R.1-15, p.11.)

On September 19, 2008, defendants commenced the tender offer and filed the 14D-9 referenced above, along with related tender offer documents, with the SEC on or about September 22, 2008. (R.949-971, ¶¶5, 6, 50.) In response, plaintiff sought to enjoin the merger. (R.180-183; 196-343.) Defendants filed a motion to dismiss on September 30, 2008. (R.114-116.) The primary basis for defendants' motion was their view that the complaint should have been filed derivatively instead of as a direct class action, and that plaintiff failed to meet the requirements necessary to bring a derivative action. (R.114-116.) Opposing this motion, plaintiff argued that his claims – which attack the fairness of the merger process in connection with the Proposed Buyout – were properly brought as direct class action claims. (R.507-709.)

D. The Trial Court Concludes Plaintiff's Claims Should Be Filed Derivatively, Rather than as a Direct Class Action

The parties went before the trial court on October 15, 2008. During discussion with the parties, the trial court informed plaintiff that it was inclined to grant defendants' motion to dismiss based on the then-existing record:

> I think number one, that the Motion to Dismiss is well taken. I think that the claim, if it's going to be brought, must be brought as a derivative action. So if I were to hear argument, and unless someone changed my mind for me this morning, which certainly could happen, I would be inclined to grant the Motion to Dismiss.

(R.1167, p.12:11-17.) Given the court's clearly-stated inclination, plaintiff entered into a stipulation with defendants to file an amended complaint. (R.1167, p.19:8-12.)

E. Plaintiff Files an Amended Derivative Complaint and Defendants File a Second Motion to Dismiss

The tender offer was completed on October 17, 2008, and the Proposed Buyout was consummated on October 22, 2008, when the Buyout Group acquired NCEM's remaining shares through short-form merger. (R.949-971, ¶5; 989-1091, pp.iii, v-vii.)

That same day, plaintiff filed his amended complaint – as the trial court instructed, derivatively on behalf of the Company and its shareholders. (R.949-971.) The amended complaint again charges the defendants with conducting a flawed sales process that did not yield an adequate purchase price for the Company's shares. (R.949-971, ¶¶1, 6, 8, 52-53, 58-60.) The amended complaint further alleges the defendants failed to provide all material information to NCEM's shareholders necessary for them to make an informed decision regarding the Proposed Buyout, including:

(a) information concerning the "bonus" payments being made to Company insiders;

(b) the decision not to pursue the Company's right to purchase CyPlus;

(c) the consideration, if any, paid for NCEM's right of first refusal for the sale of CyPlus;

(d) the negotiations with and provision of confidential Company information to the other bidders in the sales process;

(e) the Buyout Group's first offer to pay less to Company insiders than NCEM's public shareholders;

(f) the "special dividend" offered by the Buyout Group, but rejected by the Board;

(g) the Company's financial projections the Board's investment banker relied on when performing its discounted cash flow analysis of the Company; and

(h) the data and inputs underlying the financial analyses conducted by the Board's investment banker.

(R.949-971, ¶6.)

Following the filing of plaintiff's amended complaint, defendants again moved to dismiss. They argued this time that completion of the buyout nullified plaintiff's standing to prosecute a derivative suit. (R.989-1092.) Defendants further asserted that "[p]laintiff's sole remedy is to exercise his statutory right to an appraisal of his NCEM shares" because his complaint "boils down to nothing more than a complaint about stock price." (R.989-1092.) Opposing dismissal, plaintiff argued he had derivative standing and that appraisal of his shares was not the exclusive or appropriate remedy, where, as here, defendants allegedly violated their fiduciary duties in connection with the merger. (R.1104-1119.)

F. The Motion to Dismiss Hearing and Judgment

On April 24, 2009, the trial court held a hearing on defendants' second motion to dismiss. The court held that plaintiff lost standing to sue derivatively on behalf of NCEM because he was no longer a shareholder of the Company, and that his exclusive remedy for his claims was appraisal of his shares. (R.1146.)

On May 11, 2009, the trial court issued its order granting defendants' second motion to dismiss. (R.1148-1150.) Plaintiff filed a timely notice of appeal on June 9, 2009. (R.1151-1153.)

SUMMARY OF ARGUMENT

Plaintiff commenced this action to challenge the validity of the Proposed Buyout, charging defendants with conducting a flawed sales process designed to benefit various directors at the expense of the Company and its shareholders. The trial court concluded that plaintiff asserted "derivative" rather than "direct" claims. This was error because, while no Utah cases discuss the direct/derivative distinction in the context of mergers, it is widely held that challenges to the fairness or validity of a merger are properly brought as a direct action. Delaware's two-step analysis for distinguishing direct and derivative claims is consistent with Utah law, which focuses on whether a plaintiff asserts an injury that is distinct from the corporation. Delaware's test should be employed by this Court for added clarification on the distinction between direct and derivative claims, and fortifies the conclusion dictated by Utah law – plaintiff's case is direct.

Moreover, the trial court erred in finding appraisal was plaintiff's exclusive remedy. Plaintiff's claims challenging the merger process, and alleging self-dealing and breach of

fiduciary duties by defendants, cannot be adjudicated under Utah's dissenter's rights statute. This Court's opinion in *Bingham Consolidation Co. v. Groesbeck*, 2004 UT App 434, ¶ 28, 105 P.3d 365, 373, plainly holds that absent limited circumstances inapplicable here, breach of fiduciary duty claims should be determined "outside of the appraisal proceeding."

This Court should therefore reverse the trial court's conclusion that plaintiff's claims are derivative, rather than direct, and the trial court's further ruling that appraisal is plaintiff's exclusive remedy for his breach of fiduciary duty and self-dealing claims.[4]

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF'S CLAIMS ARE DERIVATIVE RATHER THAN DIRECT

Plaintiff's claims attack the fairness and validity of the merger process and allege defendants breached their fiduciary duties by failing to disclose material information to NCEM's shareholders in connection with the merger. Utah cases have not considered breach of fiduciary duty claims or the distinction between direct and derivative claims in the context of a merger transaction. Delaware courts, in contrast, have faced this issue on numerous occasions, and hold that a challenge to the fairness or validity of a merger constitutes a direct action. *See* §§ I.A-I.B.

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[4] Although he believes it was erroneous, to streamline the issues on appeal plaintiff does not challenge the trial court's ruling that completion of a merger eliminates derivative standing. (R.1148-1150.) More fundamentally, as discussed in the text, reversal is required because the case plaintiff brought is direct, not derivative.

While plaintiff is required under Utah law to show that his injuries are distinct from those of the corporation, he is not required to establish an injury that is distinct from ***other shareholders*** in order to bring a direct action. Delaware again provides guidance, as courts there have expressly rejected any requirement that a plaintiff seeking to bring a direct action must establish an injury distinct from other shareholders. Delaware's approach to distinguishing derivative and direct claims is a two-part test that focuses on who suffered the alleged harm and who would receive the benefit of any recovery. This framework is consistent with Utah law and provides helpful clarification when distinguishing a direct from derivative claim. This Court should therefore employ that test here and hold that plaintiff asserts direct, rather than derivative, claims. *See* § I.C.

A. Plaintiff's Claims Are Direct Under Utah Law Because His Injuries Are Distinct from Those Suffered by the Corporation

According to our Supreme Court, a derivative action "must necessarily be based on a claim for relief which is owned by the stockholder's corporation." *Richardson v. Arizona Fuels Corp.*, 614 P.2d 636, 638 (Utah 1980). In *Richardson*, the Court explained that derivative suits "'are those which seek to enforce any right which belongs to the corporation and is not being enforced, such as the liability of corporate officers or majority shareholders for mismanagement, to recover corporate assets and related claims, to enforce rights of the corporation by virtue of its contract with a third person, and to enjoin those in charge of the corporation from causing it to commit an ultra vires act.'" *Id.* at 639.

Utah allows shareholders to bring a direct action where "the injury is one to the plaintiff as a stockholder and to him individually, and not the corporation." *Id.* As noted by the *Richardson* Court:

> Shareholders of the corporation may, of course, have claims for relief directly against their corporation because the corporation itself has violated rights possessed by the shareholders, and a class action would be an appropriate means for enforcing their claims. A recovery in a class action is a recovery which belongs directly to the shareholders.

Id. at 638. Therefore, "if the injury is one to the plaintiff as a stockholder and to him individually, and not the corporation, as where the action is based on contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action." *Id.* at 639.

In contrast to a derivative action, in a direct action, the inquiry is whether the shareholder has suffered an injury that is "***distinct from that suffered by the corporation***." *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1280 (Utah 1998). Thus, to determine whether a shareholder has suffered a direct injury, "the shareholder must examine his injury in relation to the corporation and demonstrate that the injury was visited upon him and not the corporation." *Dansie v. City of Herriman*, 2006 UT 23, ¶ 11, 134 P.3d 1139, 1144.

Plaintiff here is able to show that his claims are direct under Utah's analysis, which focuses on whether his claims set forth injuries that are distinct from the corporation. Indeed, a shareholder challenging the fairness of the merger process is injured if the merger is completed. This is an injury that is properly classified as a direct or individual claim because the shareholder has lost his or her interest in the corporation. Likewise, shareholders

challenging the failure to disclose material information in connection with the merger are injured by the fact that they are unable to make a truly informed decision on the merits of the merger. This also is an injury that is not shared by the corporation because the nondisclosure impacts the stockholders whose votes are essential for the merger to proceed.

B. Claims that Attack the Validity or Fairness of a Merger Are Properly Brought as a Direct Action

Rather than focus on the appropriate inquiry of whether the plaintiff here has established an injury distinct from the corporation, defendants instead proclaimed below that ***all*** fiduciary duty causes of action are "classically derivative" in Utah. (R.117-126, pp.1-2.) To paint with such a broad brush, defendants relied on the Utah Supreme Court's statement that, "[a]ctions alleging mismanagement, breach of fiduciary duties, and appropriation or waste of corporate opportunities and assets ***generally*** belong to the corporation." *Aurora*, 970 P.2d at 1280. As appears, this was only a generalization. Importantly, no reported Utah decision has confronted the distinction between direct and derivative claims in the context of a merger transaction.

The factual setting is crucial. Plaintiff attacks the overall validity of the merger, alleging an unfair sales process and price resulted due to conflicts of interest among NCEM's directors who negotiated or approved the merger. (R.1-15, ¶¶1, 4, 19, 37.) Plaintiff also asserts the defendants failed to disclose material information that deprived shareholders of the ability to cast a truly informed vote on the merger. (R.1-15, ¶¶4, 19, 34.) These claims are quintessentially direct, not derivative.

Although Utah has not considered claims that challenge the fairness or process of a merger, courts from Delaware have repeatedly been presented with this issue. Delaware is often lauded as the "pacesetter" on questions of corporate law. *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 950 (3d Cir. 1998); *see also McMinn v. MBF Operating Acquisition Corp.*, 164 P.3d 41, 53 (N.M. 2007) (noting that Delaware is the "'fountainhead of American corporations' whose courts 'are known for their expert exposition of corporate law'"). Delaware's judiciary consistently holds that claims attacking the validity of a merger are properly brought as direct actions. *See Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1244-1245, 1247 (Del. 1999); *see also Crescent/Mach I Partners L.P. v. Turner*, 846 A.2d 963, 973 (Del. Ch. 2000); *In re Ply Gem Indus., S'holders Litig.*, No. 15779-NC, 2001 WL 755133, at *4-*6 (Del. Ch. Jun. 26, 2001); *Chaffin v. GNI Group, Inc.*, No. 16211-NC, 1999 WL 721569, at *7 (Del. Ch. Sept. 3, 1999).

In *Parnes*, for example, the complaint alleged that "[the Company's] directors breached their fiduciary duties by entering into a merger agreement that was the product of unfair dealing and provided . . . stockholders an unfair price." 722 A.2d at 1244. Reversing the lower court's decision that such claims were derivative, the Delaware Supreme Court held the stockholder had adequately set forth a direct, individual claim. The court explained that, "[a] stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated." *Id.* at 1245. The court continued: "In order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in

unfair dealing and/or unfair price." *Id.* Noting that at the pleading stage it "must accept all of [plaintiff's] factual allegations as true and give her the benefit of all inferences that may be drawn from those facts," the court held that plaintiff Parnes had stated a claim for a direct injury and reversed the trial court's order dismissing the case. *Id.* at 1247.

To similar effect is *Crescent/Mach.* In that case, plaintiffs challenged a merger by alleging the director defendants breached their fiduciary duties by approving and recommending the merger, the price and process of which they knew to be unfair and due to a director's own self-interest. Rejecting the defendants' contention that plaintiffs' claims were derivative, the court held that, "[a]ssuming the truthfulness of these allegations with the benefit of all reasonable inferences, it is clear to me that plaintiffs' fiduciary duty claims constitute a direct challenge to the fairness of the merger itself." 846 A.2d at 973.

The Nevada Supreme Court has similarly recognized that "[a] claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of the majority shareholders or directors is properly classified as an individual or direct claim." *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 732 (Nev. 2003). Numerous other state courts are in accord. *See, e.g.*, *Higgins v. New York Stock Exch., Inc.*, 806 N.Y.S.2d 339, 343, 353-354 (N.Y. Sup. Ct. 2005) (employing Delaware's approach when reviewing a shareholder challenge to a merger, and sustaining shareholder's direct class action challenging the fairness of a merger allegedly tainted by conflicts of interest and unfair price); *Kelly v. Englehart Corp.*, Case No. 1-241, 2001 WL 855600, at *9 (Iowa Ct. App. Jan. 31, 2001) ("Suits charging mismanagement that depresses the value of stock are

derivative in nature. In contrast, suits directly attacking the fairness or validity of a merger are direct.") (citing *Parnes*, 722 A.2d at 1245).

Thus, plaintiff's claims, which similarly attack the validity of the merger, were properly brought as a direct action. Dismissal was unwarranted and reversal is required.

C. On the Facts of This Case, This Court Should Employ Delaware's Two-Part Test for Determining Whether a Claim Is Direct or Derivative

In challenging the validity of the merger at issue here, plaintiff has properly established, as discussed, that his injuries are distinct from those suffered by the corporation. Plaintiff is not required to also establish that his injury is distinct from other shareholders. This point created some confusion in the trial court. Utah case law is somewhat unclear because almost all Utah cases require a plaintiff to establish only an injury distinct from the corporation (*see, e.g.*, *Dansie*, 2006 UT 23, ¶ 11; *GLFP Ltd. v. CL Mgmt. Ltd.*, 2007 UT App 131, ¶9, 163 P.3d 636, 640), while a few cases suggest a plaintiff must set forth an injury distinct from other shareholders (*see, e.g.*, *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 10, 20 P.3d 868, 872; *Bio-Thrust, Inc. v. Div. of Corp.*, 2003 UT App 360, ¶ 1, 80 P.3d 164, 165).

Delaware law is again able to provide guidance. Faced with similarly conflicting precedent, the Delaware Supreme Court has since clarified the direct versus derivative analysis by disapproving a so-called "special injury" requirement that a plaintiff seeking to bring a direct claim must set forth an injury that is distinct from other shareholders. In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), the court noted that "the concept of 'special injury' that appears in some [Delaware] Supreme Court and

Court of Chancery cases is not helpful to a proper analytical distinction between direct and derivative actions. We now disapprove the use of the concept of 'special injury' as a tool in that analysis." *Id.* at 1035. The court explained that a "special injury" requirement is "confusing" and "inaccurate" because:

> [I]t appears to have been intended to address the fact that an injury to the corporation tends to diminish each share of stock equally because corporate assets or their value are diminished. In that sense, the indirect injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings. It does not arise out of any independent or direct harm to the stockholders, individually. That concept is also inaccurate because a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, ***without the claim thereby becoming a derivative claim.***

Id. at 1037.

Seeking to simplify the inquiry, the Delaware Supreme Court held that whether a complaint alleges a direct or derivative claim "must turn ***solely*** on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033 (emphasis in original). The court also expressly reaffirmed the applicability of *Parnes* and its progeny to cases challenging the fairness of the price and process of mergers. The court stated that, "[t]he proper analysis had been and should remain that stated in . . . *Parnes* . . . The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.* at 1039.

The *Tooley* test, which focuses on who is injured and who will receive redress, is thus entirely consistent with Utah law. *See Dansie*, 2006 UT 23, at ¶ 1 ("The shareholder

must . . . demonstrate that the injury was visited upon him and not the corporation."); *Richardson*, 614 P.2d at 638 ("A recovery in a class action is a recovery which belongs directly to the shareholders."). To the extent there is any uncertainty over whether a plaintiff must plead a "special injury" distinct from other shareholders, this Court should reject such a requirement and apply the Delaware Supreme Court's analysis in *Tooley*.

Under the law of virtually every jurisdiction, and under *Tooley*'s two-part test, plaintiff's claims here are surely direct. First, as discussed above, a shareholder challenging the fairness of the merger process is injured if the merger is completed because the shareholder loses his shares. This is an injury that is properly classified as a direct or individual claim because "[t]he shareholder has lost unique personal property – his or her interest in a specific corporation." *Cohen*, 62 P.3d at 732. Similarly, a plaintiff who does not receive all material information in connection with the merger is injured by the fact that he or she is unable to make a truly informed decision on the merger. *See Big Lot Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1181 n.54 (Del. Ch. 2006) ("[N]on-disclosure claims are direct claims where a defendant has 'failed to disclose material information when they had a duty to disclose it.'"); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 139-140 (Del. 1997) (plaintiff's claims based on breaches of fiduciary duty of disclosure in connection with the solicitation of proxies for election were properly brought as a direct action).

Second, the remedies flowing from these wrongs will directly benefit the shareholders. The incomplete information received by shareholders does not injure the company in any way that a remedy can redress. Stated another way, if the shareholders

receive incomplete information before voting for a merger, the only redress available is for the individual stockholders. Thus, a claim relating to omission of material information is a direct injury, one entirely distinct from any harm or injury to the corporation.

Moreover, compelling practical reasons dictate that plaintiff's claims must be direct. If they are not, he is left without any meaningful remedy to hold corporate insiders accountable for breaches of fiduciary duty. If defendants are correct in their assertion that all challenges to the validity of the merger must be derivative, then plaintiff would also be bound to comply with Utah's 90-day waiting period under Utah Code Ann. § 16-10a-740(3). Because most mergers close within this time frame, as occurred here, a plaintiff would effectively be prevented from bringing a derivative claim to challenge the fairness or validity of a merger. Holding that the claim is direct avoids a result that would effectively close the courthouse doors to shareholders.

II. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF'S EXCLUSIVE REMEDY FOR HIS CLAIMS IS APPRAISAL OF HIS SHARES UNDER UTAH LAW

The trial court also stated that "[p]laintiff's remedy for the claims alleged in the Amended Derivative Complaint is to exercise his statutory right to an appraisal of his shares as provided by Utah law." (R.1148-1150.) This issue was unnecessary to the disposition, as the court had already held that plaintiff lacked standing. In any event, this ruling is error because plaintiff's claims – which assert breach of fiduciary duties and challenge the validity of the merger process due to defendant's self-dealing and conflict of interest – are not bound by an appraisal proceeding under Utah law.

A. An Appraisal Remedy Does Not Apply Where Director Breach of Fiduciary Duties, Conflict of Interest, and Self-Dealing Are Alleged

Under Utah Code Ann. § 16-10a-1302, a shareholder is entitled to dissent from, and obtain payment of the fair value of his shares, if he challenges certain corporation actions, including mergers. The underlying purpose of Utah's so-called "dissenter's rights statute" is to protect minority shareholders who dissent from major corporate change, by ensuring they are provided the actual worth or "'fair value'" of their stock. *Oakridge Energy, Inc. v. Clifton*, 937 P.2d 130, 132 (Utah 1997). Similar to dissenter's rights statutes found in other states, Section 16-10a-1302 provides:

> A shareholder entitled to dissent and obtain payment for his shares . . . may not challenge the corporate action creating the entitlement ***unless the action is unlawful or fraudulent with respect to him or to the corporation***.

Utah Code Ann. § 16-10a-1302(5).

Under the statute's express language, a shareholder is thus not bound to seek appraisal where he asserts "unlawful" or "fraudulent" action in connection with a merger. This Court, in *Groesbeck*, held that breach of fiduciary duty claims fall within the statute's stated exception and are therefore not appropriate for consideration within an appraisal proceeding.

In *Groesbeck*, dissenting shareholders alleged the majority shareholder breached its fiduciary duties by exploiting the absorbed corporation's mining claims before the majority shareholder proposed a merger between the absorbed corporation and its wholly-owned subsidiary. 2004 UT App 434, at ¶¶ 2-12. The shareholders brought two separate actions, one for appraisal and one seeking compensatory and punitive damages, alleging lost value due to the majority shareholder's self-dealing in connection with the absorbed corporation's

mining claims. *Id.* The *Groesbeck* court considered whether the shareholder's breach of fiduciary duty allegations could be included as part of the appraisal proceeding. While noting that "[i]n most jurisdictions, an appraisal proceeding is the sole remedy available to a shareholder dissenting to a merger," the opinion stated, "courts generally agree that 'the appraisal remedy . . . may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.'" *Id.* at ¶ 30. In light of this well-recognized exception to the exclusivity provision in dissenter's rights statutes, the court held that "a claim of breach of fiduciary duty should be considered ***outside*** of the appraisal proceeding." *Id.*

Based on the limited facts of that case, however, the court found that the shareholders' breach of fiduciary duty claims could be consolidated with their appraisal proceeding because the core of the shareholders' claims was to recover "***only*** that increment of value lost due to [the majority shareholder's misconduct]." *Id.* at ¶ 33. The court explained that where the complaint "'boils down to nothing more than a complaint about stock price,'" appraisal is appropriate under such circumstances because "it awards essentially the same relief (lost value to shares) and avoids the danger of awarding duplicate damages that would otherwise result from a separate tort action for compensatory damages." *Id.* at ¶ 31. Moreover, the court reasoned that allowing the dissenting shareholders to maintain both an appraisal proceeding and an independent suit would similarly result in "duplicative damages." *Id.*

Thus, despite the limited circumstance where a shareholder's claims boil down to share price and would result in duplicative damages, *Groesbeck* clearly mandates that breach

of fiduciary duty claims should be considered "***outside*** of the appraisal proceeding." *Id.* at ¶ 30.

Unlike in *Groesbeck,* plaintiff here does not merely challenge the lost value of stock price; plaintiff challenges the entire merger process as unfair and invalid. (R.1-15, ¶¶1, 4, 19, 37.) Plaintiff alleges breach of fiduciary duties for failure to disclose material information to shareholders in connection with the merger. (R.1-15, ¶¶4, 19, 34.) Plaintiff also alleges self-dealing and conflicts of interest by the directors, including instances where defendants accepted bonuses not shared by NCEM's public shareholders. (R.1-15, ¶¶1, 4, 17, 19, 37, 40-43; R.949-971, ¶6.) Below, plaintiff sought an injunction, rescission of the merger, as well as costs and disbursements. (R.1-15, p.11.) For this reason, the danger of "duplicative recovery" discussed in *Groesbeck* is not present here. Moreover, while *Groesbeck* found consolidation was a convenient solution because shareholders there had initiated both an appraisal proceeding and a separate suit for damages, plaintiff here did not initiate an appraisal proceeding and consolidation is not an option. For all these reasons, plaintiff's breach of fiduciary duty claims should not be considered within an appraisal proceeding and plaintiff is not bound to the appraisal remedy under Utah Code Ann. § 16-10a-1302.

States with similar dissenter's rights statutes also hold that the statute's carve-out language entitles a shareholder to challenge a merger directly rather than be forced into appraisal. In *Cohen*, 62 P.3d 720, for example, plaintiff alleged the defendant directors usurped corporate opportunities and engaged in preferential transactions in connection with a merger, among other things. *Id.* at 725. Defendants alleged plaintiff was limited to an

appraisal remedy for his claims. In rejecting this argument, the Nevada Supreme Court considered a statute which is identical to Utah's:

> A stockholder who is entitled to dissent and obtain payment . . . may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to him or the domestic corporation.

Id. at 728 (citing Nev. Rev. Stat. Ann. § 92A.380).

The Nevada Supreme Court concluded that the statute's express language preserved shareholder actions that "attack the validity of the merger or seek monetary damages based upon improper actions during the merger process [and] allege wrongful conduct that goes to the approval of the merger." *Id.* at 728. The court further held that the term "fraudulent" in the statute referred not only to allegations of common law fraud, but included "a variety of acts involving breach of fiduciary duties imposed upon corporate officers, directors, or majority shareholders." *Id.* at 729. The *Cohen* court also rejected the defendants' argument that plaintiff should be bound to an appraisal proceeding because his claims amounted to nothing more than dissatisfaction with the stock price. *Id.* at 728-729. The court noted, "the mere fact that [plaintiff's] complaint alleges that his stock was worth more than the amount he received under the merger does not constitute grounds for dismissing under [the appraisal statute] so long as the complaint also contains allegations that the merger was approved through unlawful or fraudulent conduct." *Id.* at 729.

Similarly, in *McMinn*, 164 P.3d at 54-55, the New Mexico Supreme Court explained that appraisal statutes were developed in an era when the common law requirement of unanimous shareholder approval began to be replaced by statutes allowing for majority shareholder approval of corporate actions. *Id.* at 48. The appraisal remedy provided

minority shareholders with a "way out" of an involuntary situation – a cash payment for the fair value of their shares – in exchange for relinquishing their veto power over the corporate action. *Id.* It was thus intended to protect minority interests, not make them even more vulnerable to the majority. *Id.* at 48. Thus, enforcement of that provision in a case involving allegations of misconduct, breaches of fiduciary duty, self-dealing and conflicts of interest would run counter to the historical uses and purposes of the statute, by effectively allowing "exposure of non-controlling shareholders to oppressive conduct on the part of controlling stockholders." *Id.* at 49. Controlling shareholders, in other words, "could engage in oppressive tactics in breach of their fiduciary duties, and then escape liability for those actions simply by . . . relegat[ing] minority shareholders into an appraisal proceeding." *Id.* at 51. Accordingly, the *McMinn* court rejected defendants' contention that statutory appraisal was the exclusive remedy for a plaintiff alleging breach of fiduciary duties, oppressive conduct, and unjust enrichment in connection with a cash-out merger. *Id.* at 49.

Courts in more distant jurisdictions agree that claims alleging fraud or breach of fiduciary duty are not bound to an appraisal proceeding. As one decision summarized, "the prevailing view among state courts . . . is that the statutory appraisal proceeding is not the dissenters' exclusive remedy in cases of fraud, illegal purposes or other wrongful conduct by the majority or controlling shareholder." *Twenty Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028, 1036 (D. Md. 1982); *see also IRA for Benefit of Oppenheimer v. Brenner Cos.*, 419 S.E.2d 354, 357 (N.C. Ct. App. 1992) ("[A] statutory appraisal is not a dissenting shareholder's exclusive remedy when the shareholder has presented claims of breach of fiduciary duty, fraud, self-dealing, securities violations, or similar claims based on

allegations other than solely the inadequacy of the stock price.") (original emphasis omitted); *Sieg Co. v. Kelly*, 568 N.W. 2d 794, 802 (Iowa 1997) ("[T]he narrow remedy provided by an appraisal action does not encompass claims of fraud, self-dealing or breach of fiduciary duty . . . .").

B. Appraisal Does Not Provide an Adequate Remedy for Plaintiff's Claims

Appraisal cannot and should not be plaintiff's exclusive remedy for the additional reason that an appraisal proceeding cannot provide plaintiff with an adequate remedy at law. Plaintiff asserts he was not provided with full and fair information about the Company's prospects, so as to judge for himself the exact value of NCEM stock. (R.1-15, ¶¶3-4, 22, 34, 37-40; R.949-971, ¶6.) Defendants cannot withhold this information from shareholders and then assert that plaintiff was somehow given adequate data to initiate an appraisal proceeding focused solely on the stock's value. Indeed, nondisclosures or misrepresentations of material facts often warrant injunctive relief in the courts that would delay or even prevent the merger from taking place. Disclosure-based claims cannot be resolved in an appraisal proceeding because the appropriate remedies for disclosure violations – such as rescission or its monetary equivalent – are inconsistent with the purely monetary relief that is available in a statutory appraisal.

The Delaware Supreme Court in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), observed that because the appraisal remedy may not be adequate in cases involving self-dealing, corporate waste and director misconduct, the Chancellor was free to "fashion any form of equitable and monetary relief as may be appropriate." *Id.* at 714. Similarly, in

Joseph v. Shell Oil Co., 498 A.2d 1117 (Del. Ch. 1985), the plaintiffs attacked the disclosures in tender offer materials and the entire fairness of the tender process. Defendants moved to dismiss, arguing that appraisal was an adequate remedy. The court declined to dismiss the case on that ground, noting that it is very difficult at the preliminary stages of a case "to ascertain if an appraisal proceeding will ultimately provide an adequate remedy if the allegations of the plaintiff are proven to be correct." *Id.* at 1121. Yet another Delaware court has held that it is "nearly impossible for a judge . . . to dismiss a well-plead unfair dealing claim on the basis that appraisal is available as a remedy and is fully adequate." *Andra v. Blount*, 772 A.2d 183, 192 (Del. Ch. 2000).

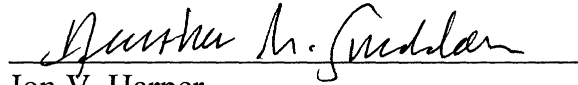
Thus, plaintiff is not limited to an appraisal remedy for his claims. As noted in *Groesbeck* and numerous other state court decisions, plaintiff's breach of fiduciary duty claims and allegations of conflict of interest and self-dealing are not appropriate for consideration in an appraisal proceeding. Nor would an appraisal provide an adequate remedy for plaintiff who alleges failure to disclose material information in connection with the merger. Accordingly, the trial court's ruling on this issue must be reversed.

III. CONCLUSION

For the foregoing reasons, dismissal was error. The trial court's rulings that plaintiff's claims are derivative, and that the exclusive remedy for his claims is appraisal under Utah Code Ann. § 16-10a-1302(5), should be reversed, and plaintiff should be allowed to proceed with his claims in a direct action.

DATED: October 21, 2009.

ANDERSON & KARRENBERG



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2009, I caused true and correct copies of the foregoing **APPELLANT'S OPENING BRIEF** to be served via first class U.S. Mail, postage prepaid, to the following:

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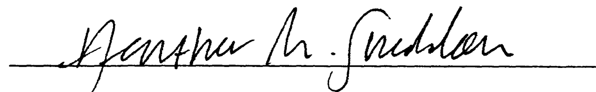

ADDENDUM EXHIBITS

1. Utah Code Ann. § 16-10a-1302.

Tab 1

PART 13

DISSENTERS' RIGHTS

16-10a-1301. Definitions.

For purposes of Part 13

(1) 'Beneficial shareholder" means the person who is a beneficial owner of shares held in a voting trust or by a nominee as the record shareholder

(2) 'Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer

(3) 'Dissenter" means a shareholder who is entitled to dissent from corporate action under Section 16-10a-1302 and who exercises that right when and in the manner required by Sections 16 10a 1320 through 16-10a-1328

(4) "Fair value" with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action

(5) "Interest" means interest from the effective date of the corporate action until the date of payment, at the statutory rate set forth in Section 15-1-1, compounded annually

(6) 'Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares that are registered in the name of a nominee to the extent the beneficial owner is recognized by the corporation as the shareholder as provided in Section 16-10a-723

(7) "Shareholder" means the record shareholder or the beneficial shareholder **1992**

16-10a-1302. Right to dissent.

(1) A shareholder, whether or not entitled to vote, is entitled to dissent from, and obtain payment of the fair value of shares held by him in the event of, any of the following corporate actions

(a) consummation of a plan of merger to which the corporation is a party if

(i) shareholder approval is required for the merger by Section 16-10a 1103 or the articles of incorporation, or

(ii) the corporation is a subsidiary that is merged with its parent under Section 16 10a-1104,

(b) consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired,

(c) consummation of a sale, lease, exchange, or other disposition of all or substantially all, of the property of the corporation for which a shareholder vote is required under Subsection 16-10a-1202(1), but not including a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale, and

(d) consummation of a sale, lease, exchange, or other disposition of all, or substantially all, of the property of an entity controlled by the corporation if the shareholders of the corporation were entitled to vote upon the consent of the corporation to the disposition pursuant to Subsection 16-10a 1202(2)

(2) A shareholder is entitled to dissent and obtain payment f the fair value of his shares in the event of any other)rporate action to the extent the articles of incorporation, ylaws, or a resolution of the board of directors so provides

(3) Notwithstanding the other provisions of this part, ex-›pt to the extent otherwise provided in the articles of incorporation, subject to the limitations set forth in Subsection (4), a share holder is not entitled to dissent and obtain payment under Subsection (1) of the fair value of the shares of any class or series of shares which either were listed on a national securities exchange registered under the federal Securities Exchange Act of 1934, as amended, or on the National Market System of the National Association of Securities Dealers Automated Quotation System, or were held of record by more than 2,000 shareholders, at the time of

(a) the record date fixed under Section 16-10a 707 to determine the shareholders entitled to receive notice of the shareholders' meeting at which the corporate action is submitted to a vote,

(b) the record date fixed under Section 16-10a-704 to determine shareholders entitled to sign writings consenting to the proposed corporate action, or

(c) the effective date of the corporate action if the corporate action is authorized other than by a vote of shareholders

(4) The limitation set forth in Subsection (3) does not apply if the shareholder will receive for his shares, pursuant to the corporate action, anything except

(a) shares of the corporation surviving the consummation of the plan of merger or share exchange,

(b) shares of a corporation which at the effective date of the plan of merger or share exchange either will be listed on a national securities exchange registered under the federal Securities Exchange Act of 1934, as amended, or on the National Market System of the National Association of Securities Dealers Automated Quotation System, or will be held of record by more than 2,000 shareholders,

(c) cash in lieu of fractional shares, or

(d) any combination of the shares described in Subsection (4), or cash in lieu of fractional shares

(5) A shareholder entitled to dissent and obtain payment for his shares under this part may not challenge the corporate action creating the entitlement unless the action is unlawful or fraudulent with respect to him or to the corporation **1992**

16-10a-1303. Dissent by nominees and beneficial owners.

(1) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in his name only if the shareholder dissents with respect to all shares beneficially owned by any one person and causes the corporation to receive written notice which states the dissent and the name and address of each person on whose behalf dissenters' rights are being asserted The rights of a partial dissenter under this subsection are determined as if the shares as to which the shareholder dissents and the other shares held of record by him were registered in the names of different shareholders

(2) A beneficial shareholder may assert dissenters' rights as to shares held on his behalf only if

(a) the beneficial shareholder causes the corporation to receive the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights and

(b) the beneficial shareholder dissents with respect to all shares of which he is the beneficial shareholder

(3) The corporation may require that, when a record share holder dissents with respect to the shares held by any one or more beneficial shareholders, each beneficial shareholder must certify to the corporation that both he and the record shareholders of all shares owned beneficially by him have asserted, or will timely assert, dissenters' rights as to all the shares unlimited on the ability to exercise dissenters' rights The certification requirement must be stated in the dissenters' notice given pursuant to Section 16-10a-1322 **1992**

16-10a-1320. Notice of dissenters' rights.

(1) If a proposed corporate action creating dissenters' rights