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Supreme Court of Texas.
In re: Harold R. SCHMITZ, Norborne P. Cole, Jr., Brian C. Flynn, Jr., James F.
Gallivan, Jr., Olivia F. Kirtley, Richard C. Osborne, Alfred A. Schroeder and
George F. Schroeder, Defendants, and LANCER CORPORATION, nominal Defendant,
Relators.
No. 07-0581.

April 2, 2008

Appearances:
Debra Janece McComas, Haynes and Boone, LLP, Dallas, TX, for the relators.
Kevin K. Green, Coughlin Stoia GellerRudman & Robbins LLP, San Diego, CA, for the Real Party in Interest.

Before:

Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Texas Supreme Court Justices, en banc.

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JUSTICE HECHT: Be seated. The Court is ready to hear argument in 07-0581 In re Schmitz [In re: Harold R. SCHMITZ, Norborne P. Cole, Jr., Brian C. Flynn, Jr., 2007 WL 2464115, Supreme Court of Texas]. The Chief Justice is not sitting.
SPEAKER: May it please the Court. Ms. McComas will present argument for the relators. The relators have reserved five minutes for rebuttal.

ORAL ARGUMENT OF DEBRA JANECE MCCOMAS ON BEHALF OF THE PETITIONER

MS. MCCOMAS: May it please the Court. This --there's essentially one issue before the Court and that's whether a two-sentence letter from a law firm related to a merger satisfies the demand requirement under Article 5.14 of the Texas Business Corporation Act. There are three independent reasons for this Court to hold that it does not. First, the letter doesn't identify a shareholder. The letter doesn't describe with particularity the actor mission complained of, and the letter does not satisfy the 90-day advance notice requirement.

JUSTICE BRISTER: How could they have described it more particularly?

MS. MCCOMAS: How could they have? Well, they certainly at a minimum, every jurisdiction that's written on this, and there aren't a lot, that this -- that most of the law comes from Delaware says that ata minimum, there should be--the identity of a wrongdoer. They should identify the injury and give a factual basis to explain what's the injury and the claim of the corporation that the shareholder is trying to take over, and then tell the board what they need to do. You remember, this is a shareholder derivative action. The shareholder --

JUSTICE BRISTER: As they said, they're selling for 22 per share rather than 23 per share.

MS. MCCOMAS: Right. I mean --

JUSTICE BRISTER: And one might imply from that as a shareholder, I'd rather have 23 than 22.

MS. MCCOMAS: [inaudible] for a board trying to decide what the lawsuit is about, what's the -- what's the wrong with that? It's not the fact that there's a dollar difference in share alone, it's nothing that's an actionable legal action. You've got to tell me what the board did wrong.

JUSTICE BRISTER: Maybe I read too many John Grisham thrillers, but the answer is because the reason they were taking the lower price is always because the board gets more money personally that way.

MS. MCCOMAS: If that was the accusation, they needed to put it in letter.

JUSTICE BRISTER: But how would they know that if you all wouldn't, I mean, they didn't even know who this was -- who the other bidder was.

MS. MCCOMAS: Actually, they filed a lawsuit three days later that certainly had that information in it so I think they did know who it was.

JUSTICE BRISTER: But did they -- did they know why, I mean, are they incorrect that you -- the board failed to disclose their analysis. Is that just a lie or is that true?

MS. MCCOMAS: No. Actually, one day before --well, let's say timing wise, there was a proxy statement in November and then there was a subsequent proxy statement and an additional proxy statement in December that disclosed the board's analysis entirely as to what they intended to do and what they were doing, so they had that information. The letter just simply didn't explain. And if -- if you wanna know what particularity means, that's obviously what we're here to decide today because we don't have guidance at least in this Court as to what that means. And I wanna back up a little bit and put that in the context of the Texas statute compared to other statutes and particularly Delaware.

In 1997, our Texas legislature adopted the Model Code in an effort to what they said closed the gap on the Delaware advantage. So they enacted the code that wrote in some restrictions that didn't exist even under Delaware Law as to a derivative action. And in that statute, one of the things they wrote in that even under the Model Code doesn't exist as a requirement that the letter be -- the demand letter be made with particularity. And that's language we don't have elsewhere so even in cases we cited to you where there was substantial more information in the letter than what we have and our letter wasn't enough. I would argue under the Texas statute, particularity means something very specific. And if you want an example to apply in this case, if you look at pages five and six, at Real Parties Brief on the Merits, they do a nice two-page summary of who they think did what that was wrong and why, and they had all that information in their petition that they

filed three days after they sent this letter.

So you have to ask yourself why they sent a letter that only had two sentences in it that was as vague as it was if they had that information available to them. Because remember again the point of this statute is to give the board the information they need to decide where they need to go whether -- this is asking for permission to take away from the board and the company the right to manage litigation and step into the shoes of the company to pursue a lawsuit. And the statute very carefully lays out what steps the board has to take to decide whether or not that's appropriate. And one of the things the board has to do is it has to decide whether there are independent directors that can make this consideration or whether a special committee needs to make that consideration. They have to decide whether it's in the best interest of the corporation. And that jumps us back to the question of whether the shareholder should have been identified in the letter, because our letter not only doesn't tell the board what's legally wrong with this one dollar per share. It doesn't tell us who plans on bringing the lawsuit.

JUSTICE: Is that -- is that fact alone enough?

MS. MCCOMAS: Yes. I think both of those are independent grounds. You could hold definitely and quite narrowly, quite frankly if you wanted to, that the absence of a shareholder named on this letter alone is enough, because that information has to be available for the board to act under the statute. The statute contemplates the board interacting with the shareholder. And if that shareholder is not named on the face the letter -- of the letter, we would argue that that alone is sufficient to prohibit the lawsuit from being filed.

JUSTICE WAINWRIGHT: The -- the plaintiffs made no assertions that such demand would be futile?

MS. MCCOMAS: No. And futility is not relevant under the Texas statute that takes us back to one of the other things about Texas' code compared to the Delaware statute. The Delaware statute allows for futility which is essentially an excuse for not making demand in the first place. Texas took that out and said, 'You have to make demand.' There's no excuse for not making demand in the first place with the corporation.

I wanna go -- there's a third reason why this letter is insufficient and that's because Article 5.14 which is the statute we're talking about, also says, 'Once you send the demand letter to the corporation you have to give the board 90 days to consider it, and there are specific things the board is doing during those 90 days.' In this case, the letter was sent to the board sometime on December 20th. By its terms, the board was given less than a day to respond. The lawsuit was filed on December 23rd, and just to put it in context, that was the Friday before Christmas. So, they get the demand letter on a Wednesday, the Friday before Christmas they get a lawsuit filed. On its face, this obviously doesn't meet the 90-day requirement. So, unless there's some exception, that's also a very easy way to determine that this letter didn't satisfy the minimum requirement.

JUSTICE BRISTER: Then lots of noticed statutes we said well -- but if the statute didn't say what happens, then we have to look at the purpose of statute, etc. This statute doesn't say what happens, does it?

MS. MCCOMAS: What happens when you don't [inaudible] --

JUSTICE BRISTER: If you do it in 87 days rather than 90.

MS. MCCOMAS: No, because that contemplates you do it in 90 days.

JUSTICE BRISTER: So like, but unlike Hines v.Hash [Hines v. Hash,

843 S.W.2d 464, Tex.,1992], we said 60-day notice under the DTPA. If you filed less than 60 days, we're gonna abate the case until the 60 days is over. So, could you cure this problem here or what is there about the purpose of the statute that would be subverted if the ruling was, okay, well,this case is abated for 87 more days until the 90 days runs.

MS. MCCOMAS: Well, let me go back both to plain language and purpose I think to answer your question. I think under the plain language, the way our statute is written is it's an absolute prohibition from ever bringing the lawsuit and because there are other steps --

JUSTICE BRISTER: That's what people said about Hines v. Hash in the 60- day notice, but they actually didn't say absolute prohibition. It just says you have to send 60 days before trial.

MS. MCCOMAS: Right, right. Whereas ours is an absolute prohibition the lawsuit never commenced, it's as if it never happened and I think that's the difference in the statutory language. But I think there's also a difference on the purpose. The purpose under the DTPA of that 60-day requirement is to allow people to consider settling it before it goes to trial. Here the purpose is to -- if the shareholder derivative suit itself as an exception to the general rule that the board is the one that controls the --controls all claims of the corporation. Here you have an -- not an outsider --but a shareholder trying to come in and take advantage of an exception to do that. It's -- it never gets off the ground under this statute. You never have a right to get to step one until this --

JUSTICE GREEN: It's hard -- hard to have an abated lawsuit pending when the board decides that yes, it is going to take on this litigation and file a separate suit. Is that what you're saying?

MS. MCCOMAS: What --

JUSTICE GREEN: In other words, if they don't comply with the 90 days and so if the rule is that you abate the proceeding, okay, so the Board then is -- is considering whether or not to take the case on its own and then -- then what does it do? File its own lawsuit? Is that the --the discrepancy here?

MS. MCCOMAS: If it decides it's appropriate, yeah. The statute there -- there are a lot of things, it's not just consider whether to settle. The board has a lot of considerations that it can take into during this process and during the period of the 90-day waiting period. And that is it can -- it can put together -- it -- it needs to investigate the claim. And it's either they're gonna do that through just interested shareholders or a special committee that they're going to look into this issue and -- let me get back to one more purpose of the statute that I think is a little bit different, is that that's very cumbersome and time consuming. And if you put it in the context of the facts of this case, what that would have done is that it would have created a burden on this corporation and directors in the midst of putting together a merger having to put together, the disinterested shareholders to also investigate that merger at the same time. I'm not saying that's always inappropriate. There are times when of course that's appropriate, but to invoke that and to put them through the cost expense, the question on their business judgment and the -- the -- the problems for the corporation of doing that, you have to at least make this threshold requirement. So, I think it's more than just abating to give them time to do that. I think this is a threshold requirement that this statute in the legislature intended. This is step one, if you don't get it, the lawsuit never occurs.

JUSTICE JOHNSON: Is there something unusual about publicity or something that goes beyond the apparent harm or cause of defending a case? Because it seems like if you -- you -- you hire a lawyer, you have lawyers on staff they're gonna -- or on-staff or you hire independent lawyers depending, and they simply file an answer and a plea in abatement. It doesn't seem like that's gonna be -- when you're talking about mergers and corporate actions -- that might not be such as significant detriment. But if there's something else -- publicity is gonna put sand in the gears of whatever you're doing and something like that. Is there something beyond that?

MS. MCCOMAS: Of course, I do think that the statute, if you look at the legislative intent, and again it was to make Texas a place more attractive than other jurisdictions perhaps to incorporate, that the burden is part of what they're thinking about. And it's not just the cost of filing the lawsuit. It's also the cost of investigating it. Putting together a special committee and the time burden on the board at the time that they're moving forward on significant ventures, but also you're right -- I'm sorry I think I have to get a little water -- that there would be a publicity factor there, that there's accusal of wrongdoing at the time that they're putting the corporation up for sale could have a very significant negative impact on the company.

JUSTICE HECHT: But I -- I don't understand your argument in that respect. If the letter had been more specific, there would bean even more suggestion of wrongdoing.

MS. MCCOMAS: Well, but the letter is not public. What the letter does is it's sent to the board and it gives the board the right in the first instance to investigate and decide what to do with that information, whether to file a lawsuit, whether to take action separate or independent from filing a lawsuit, whether to wait. And like I said, I'm not saying that there aren't instances. The statute was written for an obvious reason, that there are instances where a shareholder should be allowed to come in and question the board's activity but they have to do it by following the statutory prerequisites.

We didn't get to talk much about the 90 days, so I wanna just talk about it briefly that the only exception there is irreparable injury. At least the only exception, the real parties have tried to invoke is irreparable injury. That's irreparable injury to the corporation, not to the shareholders and here what they're complaining about is a dollar difference in the share price for a company that's about to merge and cease to exist. If there's any injury there, it's to the shareholder's share value and not to the corporation itself, but in any event it would be monetary. The Court has no further questions? Thank you.

JUSTICE HECHT: Thank you Counsel. The Court is ready to hear argument from the real party in interest.

SPEAKER: May it please the Court. Mr. Green will present argument for the real party in interest.

ORAL ARGUMENT OF KEVIN K. GREEN ON BEHALF OF THE RESPONDENT

MR. GREEN: May it please the Court. First on the-- the issue of naming the shareholder. I think every lawyer has had the experience of writing something that you might have written differently. If you could go back and just to be clear from the outset and we would have avoided this whole issue if the client's name apparently had been in there

according to the defendants. But the issue that we're here on is, what does the statute require and there was a nice debate in the first argument about the infidelity to--

JUSTICE MEDINA: Since we require more -- since we require more that would -- than a two-sentence letters and we're gonna sue you, it seem -- the letter seems to fall very short in my view.

MR. GREEN: Well, on naming the shareholder, the -- the statute says a written demand is filed. And the -- the -- there's no mystery that the corporation knew what the demand was. The proxy statement that was issued two days after the demand letter refers to the demand letter. This is at volume 2 of the record page 341. They knew exactly what the demand was. There wasn't any mystery to it. And the question arise, I think there was a question about the degree of particularity that's required and the statute does say what particularity and -- and what does that mean. And the -- the case we had guidingus -- what we got here was Pace v. Jordan [Pace v. Jordan, 999 S.W.2d 615,Tex.App.-Houston [1 Dist.],1999], from the First District. And that -- that case says, 'The particularity just means a fair opportunity for the board to consider the claim and the nature of the claim.' And so, the question is, 'How much detail do you need to get to satisfy that?' That's what we were working against.

JUSTICE HECHT: Yeah, but the one problem is it --if you got the letter, you wouldn't know what standing Mr. Robbins had to complain if he's not a shareholder.

MR. GREEN: I understand that -- that question.

JUSTICE HECHT: You look on the list, he's not a shareholder. He just came out of the blue. And so, how does the company know that this is -- a complaint is being made by somebody who can actually sue and has standing to make the complaint.

MR. GREEN: In the Smachlo [Smachlo v. Birkelo, 576 F. Supp. 1439 (D. Del. 1983)] case, the defendants have cited, I think the board saw the clarification of the letter, says that a part of it was unclear, I think they contacted the lawyer and that's how they found out. There is no reason that couldn't have been done here.

JUSTICE WAINWRIGHT: But the question is are they obliged to or are you obliged to identify the shareholder. Their -- the standing question Justice Hecht just raised is an important one, the corporation needs to see if the person who is attempting to bring the derivative action is actually a shareholder. We need to take a look and see if there's some statutes, Delaware and others, if they've been a shareholder long enough. And some -- some cases, courts are skeptical of persons who buy one share and then attempt to pursue a derivative action and bought it recently versus someone who's been a longstanding significant shareholder in the company. All of those are issues that have come up under Delaware law and we're gonna be apparently reaching, not now, in the future here in Texas. And as you know, I presumed those are things that are important for courts and companies in the first instance to consider --which is one reason why there's an identification of shareholder requirement. But particularity, you're right. We're gonna define here hopefully.

MR. GREEN: I understand that, and I -- I can only go back to the statute that says the demand is filed. And I think there is a difference between the phrasing of the statute in the passive tense and the active tense. And we cited cases like that. The courts look at it differently. And there just isn't a requirement in the statutory language.

JUSTICE WAINWRIGHT: So you think in Texas you can file a

shareholder derivative action without identifying the shareholder, period?

MR. GREEN: I think that this sort of thing is not common in my experience --

JUSTICE WAINWRIGHT: Well, that sounded like what you were just trying to say, so --

MR. GREEN: I'm not trying to suggest that it should be a precedent for that, and as I say if we can go back and do this letter differently and avoid this issue, we would.

JUSTICE GREEN: What would be a [inaudible]

JUSTICE WAINWRIGHT: Let me re-ask my question. Do you believe that in Texas you can file a shareholder derivative action without identifying the shareholder?

MR. GREEN: That's what the statute allows as I read it. The other issues that they have raised --

JUSTICE BRISTER: Can you file a shareholder derivative suit without sending a notice letter at all.

MR. GREEN: No. No, it's a universal demand statute so that the demand is required --

JUSTICE GREEN: How about a phone call?

MR. GREEN: It has to be in writing according to the statute -- a written demand.

JUSTICE GREEN: Okay.

MR. GREEN: They've also argued that particular-

JUSTICE JOHNSON: The question arises, is that jurisdictional to filing the lawsuit?

MR. GREEN: Complying with the statute is jurisdictional. We don't dispute that? No. The question then what's thestatute--

JUSTICE JOHNSON: So then the question is should it be abated or should it be dismissed? You have the letter, as Justice Brister asked awhile ago, what -- should this lawsuit be abated or dismissed if the letter is insufficient?

MR. GREEN: We don't dispute that it needs to be dismissed if the letter is insufficient. That's the threshold analysis under the statute. So the question is, what does the statute require when on the particularity the standard that we were working against before we got here wasPace v. Jordan and those elements in the Pace decision, maybe the wrongdoer, the board of directors -- the factual basis for the claim that there is a superior offer and the shareholder generally would want more. The injury was following the initial offer, the Hoshizaki offer at a lower price and to quote the demand letter, the board was asked to fully and fairly consider all potential offers.

JUSTICE GREEN: So some non-shareholder out there hears about this and thinks, well, that's just not right. It should have taken a higher offer, so sends the letter in, just like the one that you have and done. And then so -- so then somebody else, another lawyer, who does represent shareholders but that's all we need. Somebody sent a letter so that's notice enough. I don't need to send one now, so I can just go ahead and file suit.

MR. GREEN: I don't think that's what we have here.

JUSTICE GREEN: Oh, no. No, but you have a letter that doesn't identify a shareholder which wouldn't report to stimulate the corporation to do anything without any evidence of -- anybody who sent this letter has an actual standing as a shareholder.

MR. GREEN: I understand that there is no reason under the circumstances especially when there is no dispute that the board received the letter. And the proxy again acknowledged his receipt of

the letter and then the nature of the demand. And then the proxy also says that the letter doesn't identify the shareholder. And there's a phone number on the letter,there was no effort to contact our firm to seek clarification.

JUSTICE O'NEILL: The claim --

MR. GREEN: And that simply means -- I'm sorry?

JUSTICE: [inaudible].

JUSTICE O'NEILL: The claim that you made ultimately was that they had sold it for an unfair price.

MR. GREEN: That's one of the issues. Yes.

JUSTICE O'NEILL: And doesn't the statute require that you state with particularity that complaint? That you're selling it for an unfair price?

MR. GREEN: It requires pleading the act of omission or other matters which is subject of the claim and that was certainly the essence of it. But Pace tells us that you don't essentially have to send your petition to the board with your letter --

JUSTICE O'NEILL: No.

MR. GREEN: -- or have that be your letter.

JUSTICE O'NEILL: But your letter has to state the claim.

MR. GREEN: Yes.

JUSTICE O'NEILL: You're selling it for an unfair price.

MR. GREEN: Correct.

JUSTICE O'NEILL: And I don't see that in the letter. Maybe I'm missing something. I understand that you can perhaps imply that from the letter, but the statute requires that you set forth the particularity and this just says that you've gotten a superior offer and don't take any further steps until you give information. It doesn't say you're selling it for an unfair price. And I think this one, the complaints they're making is the statute requires you actually state what your complaint is and I don't get that from the letter.

MR. GREEN: I would take it from the word superior, that this is a superior offer, that if the shareholder has one in hand, it's higher than the other --

JUSTICE O'NEILL: But your claim is that it was an unfair price.

MR. GREEN: That is part of it. I'm just going to get to that that the essence of it is the process is being followed. Is the fair process that's going to maximize shareholder value for the sale of the company? And that's why the letter says fully and fairly consider all potential offers. And it wasn't a mystery that this strategic buyer number one was out there, and had been out there since October and had made a higher offer, that much have been disclosed.

JUSTICE O'NEILL: Well, I guess what I'm struggling with here is the degree of particularity as to the cause of action that's required. Because could you just write a letter and say, be sure to be fair in what you do, and that would be enough to support any cause of action that you claimed?

MR. GREEN: I don't think that it would be because it's not tethered in the facts or circumstances like we have here. In -- in this case, we have the other offer that's out there and I suggest --

JUSTICE O'NEILL: Well, okay. You have two offers A and B, be fair in what you do. I mean, it seems to me there's got to be something more than just consider everything that's before you and you have an obligation to get the best price.

MR. GREEN: I understand that, but I think in the circumstances here where there isn't any mystery what we're talking about, that they know they got this other offer. It's for a higher price and part of the

flow of events in October involved how to respond to that offer and deal that it was an ongoing issue up until December.

JUSTICE O'NEILL: But it doesn't say that $22 dollars a share is an unfair price.

MR. GREEN: I'm looking at the text of the letter. I don't disagree with you, but I think it's sufficient to say the factual basis of the claim --

JUSTICE BRISTER: But it's clearly lower than 23, at least the last time I looked at it at the number line -- number line.

MR. GREEN: I'm not a math expert, but I tend to agree.

JUSTICE BRISTER: What the other side says, this isn't it -- puts a huge burden on us. We've got to go -- get all these committees and all this other stuff. That's why the bar needs to be real high. You agree with that or felt to agree with that?

MR. GREEN: The description we've heard is that Texas needs to be an attractive place to incorporate. That's the argument that's been made and they say that's reflected in the statute and the policies. I think there's another side of that coin. That is, that the shareholders are the owners of these public companies and Texas also has to be an attractive place to invest not just to incorporate. The point I want to get out now is maybe a good time, but I think there needs to be some balance in the standards ultimately that takes into account the other side of the coin.

JUSTICE JOHNSON: Who does that, us or the legislature?

MR. GREEN: I think that the legislature does that, but in giving some gloss to the statute which is pretty terse, the statute itself is only one sentence and the Pace court tried to elaborate it and give it some meaning, and I think that's a consideration that weighs in the balance here. Unless the Court has any further questions --

JUSTICE WILLETT: What about the irreparable injury--kind of escaping the 90-day advance notice requirement?

MR. GREEN: Yeah. The -- it's not a universal demand statute although you can never bring a derivative case. The exception is for irreparable injury and --

JUSTICE WILLETT: He agrees injury to the corporation.

MR. GREEN: To the corporation that you don't need to wait the 90 days. And the injury here is the process that's being followed. That it's not possible to go back and recreate that process that will maximize the price for the shareholders and that's it in a nutshell.

JUSTICE HECHT: Any further questions?

MR. GREEN: Thank you.

JUSTICE HECHT: Thank you, Counsel.

REBUTTAL ARGUMENT OF DEBRA JANECE MCCOMAS ON BEHALF OF THE PETITIONER

MS. MCCOMAS: I just wanna clean up a few things particularly with reference to the proxy statement and saying that that meant that the board understood the demand and what the issue was. All the proxy statement says is, and the proxy statement came out two days after the demand letter was sent to the board. It says, 'On December 20th the company received a one-paragraph letter by telecopy from a lawyer demanding that the company terminate its efforts to consummate the merger with Hoshizaki and pursue the offer proposed by strategic buyer one as disclosed above on page 19.' The demand letter does not state

the demand is on behalf of any shareholder of Lancer. The letter says, I mean, that's all the board could gleam from that letter and that's not enough to determine that there is a lawsuit out there. In fact, the proxy statement says there are no existing lawsuits. One more point on Pace-- sorry guys, the cold --

JUSTICE BRISTER: All the investigation you were doing, you were doing that already.

MS. MCCOMAS: As far as whether the merger was investigated --

JUSTICE BRISTER: Whether you should take 23 from one guy or 22 from the other with all the other conditions attached. They all already had been doing that for a long time.

MS. MCCOMAS: That's right.

JUSTICE BRISTER: So that wouldn't take in any expert to investigate?

MS. MCCOMAS: Well, the issue -- the question for the board is what's wrong with the dollar difference? That's the problem you're having in --

JUSTICE BRISTER: That's -- but that's what you have to decide when you're picking between those two offers.

MS. MCCOMAS: Right, but what's the lawsuit about? What's the -- I don't wanna say criminal act -- what's the breach of fiduciary duty associated with this if the board is supposed to go investigate?

JUSTICE HECHT: But you --

MS. MCCOMAS: That's the problem.

JUSTICE HECHT: -- but you're taking an inferior offer?

MS. MCCOMAS: But that in and of itself is not a breach of fiduciary duty if there are reasons not to take the inferior offer. It's not just the dollar amount that makes the difference.

JUSTICE HECHT: Well, but if it's -- that there are reasons that is not inferior.

MS. MCCOMAS: What -- then tell me why -- why that's a superior offer? What about that is superior that makes it a breach of fiduciary duty not to pursue it?

JUSTICE BRISTER: Well, I mean that's just what you said in your proxy statement. If I have a thousand shares, I'd rather have a dollar more than a dollar less. All other things being equal. All other things may not be equal, but you knew what other things were or were not equal. You weren't confused about that. You wouldn't have to do any investigation about that at all.

MS. MCCOMAS: Yeah. I wanna capitalize on that statement that I get a dollar more, I get a dollar less. That's kind of the crux of the problem here. The only harm we're talking about is harm to the individual shareholders. And that's the issue is that this letter said --

JUSTICE BRISTER: This wasn't done, so this shouldn't have been brought as a shareholder derivative suit at all?

MS. MCCOMAS: Not if that was our complaint. If their complaint was for corporate raise or mismanagement that affected to the value coming into the corporation, then it's the shareholder derivative suit because it's a corporate claim. If all you're complaining about is, 'I don't like this deal because I'm not getting enough as an individual shareholder,'that's an individual shareholder complaint, and there are remedies available for that. But those remedies are appraisal rights. There are statutory steps which by the way this real party chose not to take and let the merger go through without taking any action.

If I can clean up one more thing real quick, the Pace case, we do cite that as the standards for wrongdoing. I do wanna make clear that

case does not apply the particularity requirements in the current statute. It's riding on the old statute.

And the demand is filed in the passive tense on whether there has to be a shareholder. I actually take issue. I think the statute clearly contemplates that the board is communicating with the shareholder. If you look at 5.14 C- 2 which is the 90-day requirement, it says you must wait 90 days and one of the exceptions to that is unless rejection has been made to the shareholder. The board can't be communicating with this shareholder unless the shareholder has been identified in the demand letter.

JUSTICE WAINWRIGHT: There's an affidavit in the brief that says that Virginia Dillingham is a shareholder. Does the record reflect when she became a shareholder or how many shares she owns?

MS. MCCOMAS: It does not. One more thing that's worth noting is several times my opponent said, 'They never made an effort to contact us. They had our phone number. They had the law firm's phone number. Why didn't they inquire?' The statute certainly doesn't put a burden on the corporation to get the demand right in the first place. But I think there's probably a pretty easy explanation for that too is that there wasn't a lot of time between the time the suit was filed and time demand was made. So, you know, if it were 90 days into it and they had convened the committee and we're working into it that might be a little less errouneous of statement. But I think given the timing that that's not quite fair. Does the Court have any further questions?

JUSTICE HECHT: Thank you, Counsel.

MS. MCCOMAS: Thank you.

JUSTICE HECHT: That concludes the argument of the second case. The Court will take another brief recess.

SPEAKER: All rise.