

INSIGHTS

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A Critique of *Pure Reasoning*

The Delaware Chancery Court's decision in Pure Resources attempted to overrule the Delaware Supreme Court's decision in Skeen with respect to the adequacy of disclosures regarding the financial analyses performed by a company's financial advisor. M&A practitioners thus are placed in the awkward position of having to choose between the law as stated by the Chancery Court or the Supreme Court.

by Kevin Miller

In its 2002 decision *In re Pure Resources, Inc. Shareholders Litigation*,¹ the Delaware Chancery Court attempted to overrule the Delaware Supreme Court's 2000 decision in *Skeen v. Jo-Ann Stores, Inc.*² with respect to the adequacy of disclosures regarding the financial analyses performed by a company's financial advisor. Unfortunately, several recent Delaware Chancery Court decisions approvingly have cited the expansive disclosure requirements set forth in *Pure Resources*, rather than follow *Skeen*.³ M&A practitioners thus have been placed in the awkward position of having to choose between the law of the State of Delaware as stated by the Delaware Supreme Court in *Skeen* or the view advocated by the Chancery Court in *Pure Resources*.

The *Pure Resources* decision also is subject to a number of other criticisms that reduce its utility as a precedent, including criticisms that it (1) created a new disclosure obligation that appears unwarranted in the absence of a transaction requiring corporate action under Delaware law; (2) inappropriately criticized the special committee of the board of directors of Pure Resources for not insisting on obtaining the authority to implement a shareholder rights plan; and (3) imprudently granted an injunction prohibiting the consummation of an exchange offer by the

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controlling stockholder of Pure Resources at a time when the special committee of the target's board was adamantly opposed to the offer.

Background

In May 2000, Unocal Corporation spun off its oil and gas exploration and production business in the Permian Basin and combined it with Titan Exploration, Inc., an oil and gas company that also operated in the Permian Basin. The resulting entity, Pure Resources, Inc. was owned 65.4 percent by Unocal and 34.6 percent by Titan's former stockholders, including members of its management.

In August 2002, Unocal notified the Pure Resources Board of Directors that it intended to commence an offer to acquire all of the outstanding shares of Pure Resources common stock not owned by Unocal at an exchange ratio of 0.6257 shares of Unocal common stock per share of Pure Resources common stock. The offer was conditioned on a majority of the outstanding shares of Pure Resources common stock not owned by Unocal being tendered into the offer. The Pure Resources Board of Directors promptly formed a special committee authorized to retain independent advisors, take a position on behalf of Pure Resources with respect to the offer's advisability and to negotiate with Unocal to obtain an increase in its offer. Minority stockholders of Pure Resources brought motions to enjoin the offer alleging that (1) the offer was inadequate and subject to an entire fairness review and (2) Unocal and the Pure Resources Board of Directors had made inadequate and misleading disclosures regarding material facts necessary for stockholders of Pure Resources to make an informed decision as to whether or not to tender shares of Pure Resources common stock into the offer.

The Entire Fairness/Majority of the Minority Issue

The *Pure Resources* decision is perhaps best known for its holding that a tender offer by a

controlling stockholder is non-coercive and will not be subject to the entire fairness test espoused by *Kahn v. Lynch Communication Systems, Inc.*⁴ if “(1) it is subject to a non-waivable majority of the minority tender condition; (2) the controlling stockholder promises to consummate a prompt § 253 merger at the same price if it obtains more than 90 percent of the shares; and (3) the controlling stockholder has made no retributive threats”. . . and the majority stockholder permits “the independent directors on the target board both free rein and adequate time to react to the tender offer, by (at the very least) hiring their own advisors, providing the minority with a recommendation as to the advisability of the offer, and disclosing adequate information for the minority to make an informed judgment.”⁵ As more fully discussed below, this significant holding relied on prior case law that distinguished tender offers from mergers on the basis that tender offers did not involve corporate action. To these conditions, the Chancery Court later suggested in *Cox Communications* another condition (albeit in dicta) that “the tender offer [be] recommended by an independent special committee.”⁶

With respect to Unocal’s initial exchange offer, the *Pure Resources* court granted a limited injunction easily cured by Unocal amending the offer to exclude stockholders affiliated with Unocal as directors and officers and the management of Pure Resources from the definition of the minority.⁷

The Disclosure Issue

The *Pure Resources* court also enjoined consummation of Unocal’s offer because Pure Resources had failed to include a summary of the substantive work underlying the valuation analyses performed by the special committee’s financial advisors in the Solicitation and Recommendation Statement on Schedule 14D-9 filed by Pure Resources in response to Unocal’s exchange offer.

Criticism 1—The *Pure Resources* Court’s Disclosure Holding Attempted to Overrule the Delaware Supreme Court

In its 2000 decision, *Skeen v. Jo-Ann Stores, Inc.*,⁸ the Delaware Supreme Court considered a claim

that House of Fabrics, Inc. wrongfully failed to disclose a summary of the methodologies used and the ranges of values generated by the financial analyses performed by its financial advisor in a notice of appraisal rights sent to its stockholders pursuant to Section 262 of the Delaware General Corporation Law.

In February 1998, House of Fabrics, Inc. agreed to be acquired by Fabri-Centers of America, Inc. in a two-step transaction—a tender offer for at least a majority of the outstanding shares of House of Fabrics common stock followed by a cash out merger at the same price. Fabri-Centers acquired approximately 77 percent of the outstanding shares of House of Fabrics common stock in the tender offer and announced the second step merger three weeks later. A copy of the written opinion of Donaldson, Lufkin & Jenrette Securities Corporation (DLJ), dated February 1, 1998, rendered to the House of Fabrics Board of Directors in connection with its evaluation of the transaction was attached to the House of Fabrics Schedule 14D-9 filed with the Securities and Exchange Commission and sent to House of Fabrics stockholders in connection with the first step tender offer and also was attached to the Notice of Appraisal Rights sent to House of Fabrics stockholders two months later in connection with the second-step merger. DLJ’s fairness opinion described DLJ’s approach and valuation methodologies as follows:

In arriving at our opinion, we have reviewed the Agreement as well as financial and other information that was publicly available or furnished to us by the Company including information provided during discussions with management. Included in the information provided during discussions with management were certain financial projections of the Company for the period beginning fiscal year 1998 and ending fiscal year 2003 provided by the management of the Company and certain information concerning the Company’s near-term liquidity concerns. In addition, we have compared certain financial and securities data of the Company with various other companies whose securities are traded in public markets, reviewed the historical stock prices and

trading volumes of the common stock of the Company, reviewed prices and premiums paid in certain other business combinations and conducted such other financial studies, analyses and investigations as we deemed appropriate for purposes of this opinion.⁹

While the foregoing excerpt from DLJ's opinion briefly summarized the methodologies employed by DLJ in reaching its fairness conclusion, neither the opinion nor any accompanying disclosure provided the detailed level of disclosures that would have been required by the *Pure Resources* court, as approvingly cited by the Chancery Court in *Netsmart* or *CheckFree*. In contrast to the level of disclosure those decisions claim is required, neither DLJ's opinion nor the House of Fabrics Notice of Appraisal Rights identified the companies used in conducting the "selected companies" analysis, the transactions used in the "selected transactions" analysis, the mean or median multiples derived from the selected companies and selected transaction analyses, the discount rates or terminal value multiples used in the discounted cash flow analysis or the reference valuation ranges indicated by any of those analyses.¹⁰

Stockholders are not entitled to a summary of the methodologies used and ranges of values generated by the target company's financial advisor.

That view is contrary to the holding in *Skeen* in which, after considering the adequacy of the disclosures to minority stockholders in the Notice of Appraisal Rights regarding DLJ's fairness opinion, the Delaware Supreme Court upheld the Chancery Court's dismissal of a claim that House of Fabrics had wrongfully failed to disclose a summary of the methodologies used and ranges of values generated by DLJ in reaching its fairness opinion, stating:

Appellants are advocating a new disclosure standard in cases where appraisal is an option.

They suggest that stockholders should be given all the financial data they would need if they were making an independent determination of fair value. Appellants offer no authority for their position and we see no reason to depart from our traditional standards.¹¹

Furthermore, the Delaware Supreme Court confirmed that the disclosure standard it was applying to the House of Fabrics Notice of Appraisal Rights was the same as the settled law of Delaware regarding the disclosure required in connection with mergers.

In this appeal, we consider the adequacy of corporate disclosures to minority stockholders who were "cashed out" in a merger approved by the majority stockholder. The minority stockholders complain that they were not given enough financial information to decide whether to accept the merger consideration or seek appraisal. *They say, in essence, that the settled law governing disclosure requirements for mergers does not apply, and that far more valuation data must be disclosed where, as here, the merger decision has been made and the only decision for the minority is whether to seek appraisal. We hold that there is no different standard for appraisal decisions.*¹²

The *Pure Resources* court attempted to distinguish the Delaware Supreme Court's holding in *Skeen* by referencing *Sealy Mattress Co. v. Sealy, Inc.*,¹³ a Chancery Court decision that predated *Skeen*, and *McMullin v. Beran*,¹⁴ an allegedly conflicting decision of the Delaware Supreme Court several months after *Skeen*. According to the Chancery Court:

These conflicting impulses were manifested recently in two Supreme Court opinions. In one, *Skeen v. Jo-Ann Stores, Inc.*, the Court was inclined towards the view that a summary of the bankers' analyses and conclusions was not material to a stockholders' decision whether to seek appraisal. In the other, *McMullin v. Beran*, the Court implied that information about the analytical work of the board's banker could well be material in analogous circumstances.¹⁵

Describing *Skeen* as merely being “inclined towards a view” ignores the clear and unequivocal holding of the Delaware Supreme Court that stockholders are not entitled to a summary of the methodologies used and ranges of values generated by the target company’s financial advisor in reaching its fairness opinion. Similarly, suggesting that *McMullin* advocates a contrary view disregards the equally clear holding of the Delaware Supreme Court in that case supporting *Skeen*. While, in *McMullin*, the Delaware Supreme Court refused to dismiss a plethora of disclosure claims that included an alleged failure to disclose the valuation methodologies used by the target company’s financial advisor, the Delaware Supreme Court did not analyze the materiality of any individual disclosure claim, much less conclude that any such disclosures were material. Rather, *McMullin* actually supports a conclusion that a summary of a financial advisor’s methodologies and valuation conclusions is not required:

In *Skeen*, it was argued that the minority shareholders should have been given all of the financial data they would need if they were making an independent determination of fair value. We declined to establish “a new disclosure standard where appraisal is an option.” We adhere to our holding in *Skeen*.¹⁶

Criticism 2—The *Pure Resources* Court Created Unwarranted Disclosure Obligations with Respect to Tender Offers

Even if the Delaware Supreme Court were to reverse itself and conclude that the disclosure of a financial advisor’s methodologies and valuation conclusions were required in a merger proxy or notice of appraisal rights under Delaware law, it still would be inappropriate for a Delaware court to impose such expansive disclosure requirements on a disclosure document that is mandated by the Federal securities laws in connection with tender offers; a form of transaction that does not require corporate action under Delaware law.

As noted, the *Pure Resources* decision is perhaps best known for its holding that a non-coercive tender offer by controlling stockholder that satisfies certain criteria will not be subject to the entire fairness test.

That holding was based in substantial part on earlier cases such as *In re Siliconix Inc. Shareholders Litigation*, in which the Chancery Court acknowledged that “the scrutiny given to tender offer transactions is less than the scrutiny that may be given to, for example, a merger transaction.”¹⁷ As the *Siliconix* court explained:

The difference in judicial approach can be traced to two simple concepts. The first is that accepting or rejecting a tender is a decision to be made by the individual shareholder, and at least as to the tender itself, he will, if he rejects the tender, still own the stock of the target company following the tender. The second concept is that the acquired company in the merger context enters into a merger agreement, but the target company in the tender context does not confront a comparable corporate decision because the actual target of a tender is not the corporation (or its directors), but, instead, is its shareholders. . . . [T]ender offers essentially represent the sale of shareholders’ separate property and such sales—even when aggregated into a single change in control transaction—require no “corporate” action and do not involve distinctively “corporate” interests.¹⁸

It is inconsistent to hold that a tender offer is not subject to the entire fairness test because there is no corporate action, but nevertheless mandate a disclosure standard for tender offers as if there were corporate action. Nevertheless, the *Pure Resources* court justifies its attempt to regulate disclosures in a Schedule 14D-9 by arguing that the mere disclosure of a fairness opinion, without extensive disclosure of the underlying valuation methodologies and other substantive portions of the fairness opinion provider’s work is misleading:

The [registration statement filed with the SEC in connection Unocal’s exchange offer] and 14D-9 are also required “to provide a balanced, truthful account of all matters” they disclose. Related to this obligation is the requirement to avoid misleading partial disclosures. When a document ventures into certain subjects, it must do so in a manner that is materially complete and unbiased by the omission of material facts.¹⁹

The Chancery Court's view that the disclosure of a fairness opinion without disclosure of the underlying analysis is misleading is significantly broader than its holding in *Netsmart* and at odds with its holding in *CheckFree*. In *Netsmart*, the Chancery Court required the disclosure of certain management projections used in the discounted cash flow analysis performed by Netsmart's financial advisor because they were different from those disclosed in the proxy statement mailed to Netsmart's stockholders.²⁰ As the Chancery Court stated in *CheckFree*:

Plaintiffs' reliance on [*Netsmart*] is misplaced. As this Court has previously noted, "[a] disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per se* misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis." Moreover, the Supreme Court in *Skeen* rejected an argument similar to the one plaintiffs make here.²¹

The Federal securities laws themselves impose, and implicitly support, different disclosure obligations on issuers of registered equity securities depending on whether they are filing a merger proxy statement on Schedule 14A or a Solicitation/Recommendation Statement on Schedule 14D-9 in response to a tender or exchange offer.

Schedule 14A and Item 1015 of Regulation M-A under the Securities Exchange Act of 1934 require that, with respect to any report, opinion, or appraisal materially relating to a merger that is referenced in the merger proxy statement, the issuer must provide a summary of the report, opinion, or appraisal including "the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the subject company or affiliate; and any limitation imposed by the subject company or affiliate on the scope of the investigation."²² Although initially, the fairness opinion itself, in the forms developed and used by most large investment banks, was deemed to satisfy these requirements, the staff of the SEC has, over time, through the comment process, required more

and more expansive disclosure pursuant to Item 1015, including extensive disclosure regarding each material financial methodology used, the data to which each such methodology is applied and the results of each analyses.

In contrast, Item 1015 does not apply to, and issuers of publicly registered equity securities are not required to provide the information it requires in, a Schedule 14D-9 filed in response to a tender or exchange offer. Instead, the only information typically disclosed in a Schedule 14D-9 besides the opinion itself, is the name of the opinion provider and the material terms of its compensation arrangements.²³ The fact that the Federal securities laws do not require extensive disclosure of a financial advisor's valuation methodologies and conclusions in a Schedule 14D-9 suggests that such information is not *per se* material and that the failure to provide such information is not *per se* misleading.

The Federal securities laws impose different disclosure obligations on issuers of registered equity securities depending on whether they are filing a merger proxy statement or a tender or exchange offer.

Finally, one clearly surprising implication of the *Pure Resources* decision is that if a Delaware company whose securities were not registered pursuant to the Federal securities laws became the subject of a tender offer, *Pure Resources* implies that it would be required to disseminate a document such as a Schedule 14D-9 to its stockholders containing a summary of the substantive work underlying the valuation analyses performed by the company's financial advisor, despite the absence of any requirement to disseminate a Schedule 14D-9 under the Federal securities laws.

The *Pure Resources* court presumably believed that requiring expansive disclosure in merger proxies, notices of appraisal rights and Schedule 14D-9s of the substantive work underlying the valuation

analyses performed by a company's financial advisor is in the best interests of the company's stockholders. However, the *Pure Resources* court advances those interests at a cost—increased legal risk to the financial advisor whose contract with the company carefully restricts the uses, disclosure and beneficiaries of its advice. Boards and special committees obtain fairness opinions to help demonstrate that they have fulfilled their fiduciary duty of care, not to provide investment advice to their stockholders. Far from permitting fairness opinions to be touted to stockholders, a financial advisor's engagement letter prohibits disclosure of the financial advisor's advice and opinion, except to the extent required by law (*i.e.*, Item 1015), confirms that the financial advisor's advice and opinions are solely for the use and benefit of the company's board of directors, disclaims any recommendation to the board and disclaims any advice or recommendation to the company's stockholders. A board of directors, not its financial advisor, retains ultimately responsibility for determining whether a transaction is appropriate and in the best interests of stockholder. Abrogating the terms of those carefully negotiated engagement letters, without considering the additional risk to financial advisors or giving them an opportunity to be heard is not equitable and undermines the parties' freedom to contract.²⁴

Criticism 3—The *Pure Resources* Court Unfairly Criticized the *Pure Resources* Special Committee

Following the commencement of litigation relating to Unocal's exchange offer, the *Pure Resources* special committee requested that it be delegated expanded powers, *i.e.*, the full authority of the Board of Directors of *Pure Resources* under Delaware law including, among other things, the power to search for alternative transactions and adopt a shareholder rights plan, a so-called poison pill. Unocal and its representatives on the *Pure Resources* Board of Directors objected to this request for additional powers and authority, and it was not pursued by the special committee. Nevertheless, the *Pure Resources* court questioned why the special committee did not make this "their Alamo" and implicitly criticized the special committee for not insisting on "the power to deploy a poison pill—the by-now *de rigeur* tool of a board responding to a third-party tender

offer."²⁵ Given Unocal's ownership of a majority of *Pure Resources* common stock, its ability to elect a majority of *Pure Resources* Board of Directors, its clear statement that it was not interested in selling its shares, the lack of precedent for such expansive authority in other going private transactions by controlling stockholders, and the experience of Unocal's legal counsel, the *Pure Resources* court's statements appear to amount to a criticism of the special committee for not obtaining the unobtainable.

Later, the *Pure Resources* court conceded that: there appears to have been at least a rational basis to believe that a pill was not necessary to protect the *Pure* minority against coercion, largely, because *Pure*'s management had expressed adamant opposition to the Offer. Moreover, the board allowed the Special Committee a free hand to recommend against the Offer—as it did; to negotiate for a higher price—as it attempted to do; and to prepare the company's 14D-9—as it did.²⁶

Yet, the *Pure Resources* court failed to acknowledge that, absent a holding that it is a breach of a board's fiduciary duty to refuse to grant a special committee the authority to implement a poison pill in response to a tender or exchange offer by its controlling stockholder, it is hard to imagine any well-advised board, a majority of whose members are affiliated with the controlling stockholder, granting such authority to a special committee. Instead, the *Pure Resources* court criticized the special committee for invoking privilege to avoid disclosure of advice rendered by its counsel and drew the negative inference that "the Special Committee was unwilling to confront Unocal as aggressively as it would have confronted a third-party bidder."²⁷

Criticism 4—The *Pure Resources* Court Created the Ultimate Defensive Device

The *Pure Resources* court relied on the special committee's inability to adopt a shareholder rights plan as justification for advocating disclosure of the valuation analyses provided to the special committee by its financial advisor. However, rather than mandate disclosure of a summary of the substantive

work underlying the valuation analyses performed by the special committee's financial advisors, the *Pure Resources* court granted an injunction prohibiting consummation of Unocal's offer pending such disclosure. By granting an injunction prohibiting Unocal from consummating its offer at a time when the special committee had expressed adamant opposition to Unocal's offer, the *Pure Resources* court handed every special committee opposing an offer by a controlling stockholder the ultimate defensive weapon—even better than a poison pill. Under the *Pure Resources* decision, a special committee can give any stockholder—including the ubiquitous strike suit plaintiff in going private transactions—the power to obtain an injunction prohibiting consummation of an offer merely by refusing to include a summary of the financial analysis performed by its financial advisor in the Schedule 14D-9 filed in response to the offer. The alternative, mandating such disclosure at a time that the special committee was adamantly opposed to the offer and attempting to negotiate a higher price, would have been equally imprudent as it would have significantly weakened the special committee's negotiating position by potentially disclosing its reserve price, the lowest price Unocal must offer in order to obtain the special committee's recommendation. Rather, the Chancery Court needed to find a way to improve the special committee's negotiating leverage, something that it was ultimately able to do in *Cox Communications* by adding a requirement that an offer by a controlling stockholder be recommended by a special committee in order to avoid being subject to the entire fairness test.

Conclusion

While the Chancery Court's *Pure Resources* decision has been praised widely for its holding that a carefully structured non-coercive tender offer by a controlling stockholder will not be subject to the entire fairness test under Delaware law, other aspects of the *Pure Resources* decision should be reevaluated as precedent, particularly its attempt to overrule the Delaware Supreme Court's decision in *Skeen*. Unfortunately, unless or until the Delaware Chancery Court is willing to acknowledge this error or the Delaware Supreme Court is given an opportunity to address this issue, practitioners must choose

between the law of the State of Delaware as stated by the Delaware Supreme Court in *Skeen* or the views advocated by the Chancery Court in *Pure Resources* and its progeny.

In addition, the *Pure Resources* decision is subject to criticism because it:

- Created unwarranted disclosure requirements for a company's response to a tender offer, a form of transaction that does not require corporate action under Delaware law;
- Inappropriately criticized the *Pure Resources* special committee for not obtaining the authority to implement a shareholder rights plan;
- Imprudently sought to require the special committee to disclose a summary of the substantive work underlying the valuation analyses performed by its financial advisors at a time that the special committee was adamantly opposed to Unocal's offer and attempting to negotiate a higher exchange ratio; and
- Imprudently gave special committees the ability to empower stockholders to obtain a judicial injunction prohibiting consummation of an offer merely by refusing to make certain disclosures.

The fundamental issue that the *Pure Resources* court was attempting to address in granting the injunction prohibiting consummation of Unocal's offer was the special committee's lack of negotiating leverage in a two-step acquisition that permitted a controlling stockholder to take a company private without having to satisfy the entire fairness test. Ultimately, the Chancery Court solved this conundrum in *Cox Communications* by adding (in dicta) a requirement that the controlling stockholder's offer must be recommended by the special committee. However, the Chancery Court never admitted that it had been wrong: (1) to criticize the *Pure Resources* special committee for failing to obtain the authority to implement a poison pill; or (2) for granting an injunction in an attempt to force the special committee to disclose the valuation conclusions of its financial advisors at a time when the special committee was adamantly opposed to the offer and attempting to negotiate a higher exchange ratio.

NOTES

1. *In re Pure Res. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002).
2. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170 (Del. 2000).
3. See e.g., *Globis Partners, L.P. v. Plumtree Software, Inc.*, No. 1577-VCP, 2007 Del. Ch. LEXIS 169, at *45, n. 104 (Del. Ch. Nov. 30, 2007); *In re CheckFree Corp. S'holders Litig.*, No. 3193-CC 2007 Del. Ch. LEXIS 148 at *8 (Del. Ch. Nov. 1, 2007) (Alston & Bird LLP acted as counsel to Check-Free); and *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171 (Del. Ch. 2007); but see *Transcript of Motion For Temporary Restraining Order, City of Monroe Employees Retirement Sys. v. CTI Molecular Imaging, Inc.*, No. 3:05-CV-204 at 67-68 (E.D. Tenn. Apr. 26, 2005) (Alston & Bird LLP acted as counsel to CTI Molecular).
4. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).
5. *Pure Res.*, at 808 A.2d at 445.
6. *In re Cox Commc'ns, Inc., S'holders Litig.*, 879 A.2d 604, 646 (Del. Ch. 2005).
7. *Pure Res.*, 808 A.2d at 446-447.
8. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170 (Del. 2000).
9. See Annex E to the Information Statement and Notice of Appraisal Rights available at <http://sec.gov/Archives/edgar/data/31512510000950152-98-002907.txt> and Annex E to the Solicitation/Recommendation Statement on Schedule 14D-9 filed by House of Fabrics with the SEC and distributed to its stockholders in response to the Fabri-Centers of America tender offer available at <http://sec.gov/Archives/edgar/data/31512510000950152-98-000765.txt>.
10. See the Information Statement and Notice of Appraisal Rights available at <http://sec.gov/Archives/edgar/data/31512510000950152-98-002907.txt> filed by House of Fabrics with the SEC and distributed to its stockholders in response to the Fabri-Centers of America tender offer.
11. *Skeen*, 750 A.2d at 1174.
12. *Id.* at 1171 (emphasis added).
13. *Sealy Mattress Co. v. Sealy, Inc.*, 532 A.2d 1324, 1339-1340 (Del. Ch. 1987).
14. *McMullin v. Beran*, 765 A.2d 910 (Del. 2000).
15. *Pure Res.*, 808 A.2d at 449.
16. *McMullin*, 765 A.2d at 925.
17. *In re Siliconix Inc. S'holders Litig.*, No. 18700, 2001 Del. Ch. LEXIS 83, at *25. (Del. Ch. June 19, 2001).
18. *Siliconix*, 2001 Del. Ch. LEXIS, at *25-28.
19. *Pure Res.*, 808 A.2d at 448.
20. *Netsmart*, 924 A.2d at 201-202.
21. *CheckFree*, 2007 Del. Ch. LEXIS 148, at *7-8.
22. See Item 14(b)(6) of Schedule 14(A) and Item 1015(b)(6) of Regulation M-A available at <http://www.law.uc.edu/CCL/regS-KISK1015.html>.
23. See Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A.
24. See Kevin Miller, *The Obligations of Financial Advisors—New Decision Upholds Contractual and Other Limitations*, *Deal Lawyers*, Mar.-Apr. 2008, at 10.
25. *Pure Res.*, 808 A.2d at 431.
26. *Id.* at 447.
27. *Id.* at 431.