100

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE SILICONIX INCORPORATED SHAREHOLDERS LITIGATION	Consolidated C.A. No. 18700-NC

REDACTED

ANSWERING BRIEF OF DEFENDANT VISHAY INTERTECHNOLOGY, INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

MORRIS, NICHOLS, ARSHT & TUNNELL
A. Gilchrist Sparks, III
R. Judson Scaggs, Jr.
Jessica Zeldin
Patricia R. Uhlenbrock
1201 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347
(302) 658-9200
Attorneys for Defendant Vishay Intertechnology, Inc.

OF COUNSEL:

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Alan R. Friedman
Jonathan M. Wagner
Douglas Gray
Theresa A. Buckley
919 Third Avenue
New York, New York 10022
(212) 715-9100

June 13, 2001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Through his preliminary injunction motion, plaintiff Raymond Fitzgerald seeks to prevent Vishay Intertechnology, Inc. ("Vishay") from proceeding with its voluntary exchange offer for the shares of Siliconix incorporated ("Siliconix") that it does not already own and prevent Siliconix's shareholders from deciding for themselves whether to obtain the benefits of that offer. As set forth below, that would be a most unprecedented and inequitable result.

Siliconix designs, markets and manufactures semiconductors. Vishay, which owns 80.4% of the common of stock of Siliconix, manufactures electronic and semiconductor components. On February 22, Siliconix stock closed at $25.06 per share. After the close, Vishay announced that it was "proposing to purchase any and all outstanding [Siliconix] shares . . . not already owned at a price of $28.82 per share" in cash.

Three months later, on May 25, Vishay launched a formal tender offer, proposing to exchange 1.5 shares of Vishay common stock for each outstanding share of Siliconix stock. While the price of Vishay stock has fluctuated since that time, the close of trading value of the offer, which is scheduled to expire on June 22, 2001, has never dropped below $30; as of yesterday's close, the offer was worth $31.17 — a premium of 24% over the February 22 close, and a premium of 11.5% over the average Siliconix closing price over the prior 30 days. Vishay also announced that if its offer, which is conditioned on the approval of a "majority of the minority" of Siliconix shareholders, is successful so that it will own in excess of 90% of the outstanding Siliconix stock, it currently intends to effect a short-form merger on the same terms as that offered in its exchange offer.

Vishay believes that, for several reasons, its offer is an attractive one. The offer allows Siliconix shareholders to exchange relatively illiquid Siliconix stock for Vishay stock. It likewise enables Siliconix stockholders to share in the future upside of both Siliconix's and

Vishay's business. Of course, Vishay could be wrong about the merits of its offer. Nevertheless, Vishay has agreed to abide by the views of Siliconix's disinterested minority shareholders and proceed with its offer only if a "majority of the minority" tenders its shares.

Despite these undisputed facts, plaintiff Raymond Fitzgerald seeks to arrogate to himself the right to determine whether his fellow stockholders should be permitted to consider Vishay's offer. According to Mr. Fitzgerald, the Court should grant the extraordinary remedy of a preliminary injunction and deprive the shareholders of the ability to choose principally because (i) Vishay purportedly has not offered a fair price for the Siliconix shares, and (ii) Vishay's disclosures are supposedly inadequate. In fact, however, Mr. Fitzgerald is far from meeting the heavy burden required on this motion.

First: Mr. Fitzgerald has mischaracterized the governing legal standard. He claims that Vishay's offer can be enjoined merely because it is purportedly not fair to Siliconix shareholders. However, the Delaware Supreme Court has long held that shareholders have no right to receive any particular price in a tender offer. Equally dispositive, this Court has held several times, most notably in In re Life Technologies, Inc. Shareholders Litig., Del. Ch., Consol. C.A. No. 16513, Lamb, V.C. (Nov. 24, 1998) (transcript), and In re Ocean Drilling & Exploration Co. Shareholders Litig., Del. Ch., Consol. C.A. No. 11898, Chandler, V.C. (Apr. 30, 1991), that a majority stockholder has no duty to make a tender offer to the minority shareholders at a "fair" price. Those same cases have held that even when a Special Committee opines that the majority shareholder's offer is not fair, no injunction may issue absent a showing that the offer is economically coercive or that material information about the offer has been withheld or misrepresented.

Second: there is nothing coercive about Vishay's offer. Vishay has made an arms-length proposal to Siliconix's disinterested stockholders, who may accept or reject that offer on its merits. Far from depriving Siliconix minority stockholders of free choice, Vishay has empowered those disinterested stockholders by agreeing not to proceed with its offer without the approval of a "majority of the minority" — a key fact studiously ignored by Mr. Fitzgerald. Although Mr. Fitzgerald suggests that Vishay's offer is coercive because it was purportedly timed to take advantage of a drop in Siliconix's stock price, as a matter of law timing a tender offer at the bottom of the market is not coercive. As a matter of fact, on May 25 the price of Siliconix was virtually double its price on December 21, 2000, just five months earlier. Mr. Fitzgerald's other "coercion" arguments have also been rejected by this Court under virtually identical circumstances.

Third: contrary to Mr. Fitzgerald's nit-picky allegations, Vishay's extensive disclosures are in all respects fair and accurate. Vishay's Form S-4 Registration Statement properly details (i) the reasons for the offer, (ii) an assessment of the prospects for Vishay and Siliconix, (iii) relevant pros and cons, (iv) comparative historical share information, and (v) detailed financial information about Vishay and Siliconix including projections for future revenues and earnings. All of the information that Mr. Fitzgerald says was omitted or misrepresented in Vishay's S-4 either is not material or is fully and accurately disclosed.

Fourth: even if, defying settled precedent, the standard were entire fairness, the burden of proving unfairness would be on Mr. Fitzgerald in light of the "majority of the minority" provision, and Mr. Fitzgerald has not sustained that burden. The expert report offered by Mr. Fitzgerald on this issue was riddled with errors and speculative assumptions and certainly does not prove that Siliconix is worth less than what Vishay is offering. By contrast, Vishay's offer is well within the range of values placed on Siliconix stock by the investment advisor retained by the Special Committee, Lehman Brothers.

Finally, fifth: the balance of equities weighs heavily against the relief Mr. Fitzgerald seeks. Most critically, if the Court were to issue an injunction, Siliconix's shareholders would be unfairly deprived of the ability to decide whether to accept Vishay's offer. By contrast, and as Mr. Fitzgerald himself conceded, he and any other shareholder dissatisfied with Vishay's offer can refuse to tender and persuade others to do so as well. And if a majority nevertheless tender, Mr. Fitzgerald can avail himself of appraisal rights in the event Vishay proceeds with its intended short-form merger.

FACTS

Mr. Fitzgerald's brief presents a distorted and unreliable description of the actual events. Despite Mr. Fitzgerald's strident accusations, the conduct of the defendants and their advisors has been above-board and candid in every respect. While in the interests of space we do not correct all of Mr. Fitzgerald's misstatements, we attempt to set the record straight below.

A. Background: The Events Leading To Vishay's Offer.

Vishay was founded in 1956 by Dr. Felix Zandman, a widely acclaimed, highly respected inventor who has had a remarkable life and career. A native of Poland, Dr. Zandman during World War II was forced to hide in an underground hole for over a year, during which time the Nazis killed virtually his entire family. (Exhs. 1 and 2). After the war, Dr. Zandman obtained a Ph.D. in France at the Sorbonne and later emigrated to the United States, where he founded Vishay. (Zandman Tr. 6-7). Dr. Zandman has since become a leader in the industry. Just last month, President Bush honored Dr. Zandman when the Electronic Industries Alliance awarded Dr. Zandman its 2001 Medal of Honor. (Exh. 3).

Under Dr. Zandman's stewardship, Vishay has pioneered electronic components, many invented by Dr. Zandman himself, who holds dozens of patents. (Zandman Tr. 87; Eden Tr. 210). Vishay is now a Fortune 1000 company — the largest United States and European manufacturer of passive electronic components and a leading producer of discrete semiconductor components. With headquarters in Malvern, Pennsylvania, Vishay has over 20,000 employees in over 66 facilities in the United States and abroad. (S-4 (Exh. 4) at 7).

Siliconix designs, markets and manufactures power and analog semiconductor products. The company focuses principally on technologies and products for the communications, computer and automotive markets. During the last recession in 1990, the industry's downturn forced Siliconix to file for bankruptcy protection. (Fitzgerald Tr. 38-39). When the company emerged from bankruptcy in 1991, Daimler Benz AG owned 80% of the company's stock. (Id.). In 1998, Vishay through a subsidiary acquired Daimler-Benz's 80.4% share. (Id. at 31-33; Am. Complt. ¶ 1).

While Mr. Fitzgerald contends that, after the purchase of its Siliconix stock, Vishay "commence[d] a pattern of enriching itself at the expense of Siliconix" (OB at 4), Mr. Fitzgerald's own complaint concedes that Siliconix's business has thrived under Vishay's ownership. According to Mr. Fitzgerald, over the past two years the company "has experienced a fourteen thousand five hundred seventy-nine (14,579%) percent increase in net income." (Am. Complt. ¶ 1; see also Fitzgerald Tr. 33-34 (Siliconix has been "a very successful company" since Vishay's acquisition)). And while the price of Siliconix stock price over the last year has fluctuated from a high closing price of $144.50 on March 13, 2000 to a low of $19.69 on December 21, 2000, Siliconix's stock price since Vishay's acquisition has tripled from the $8 range in April 1998 (even lower later that year) to $25.06 on February 22, 2001. (14D-9 (Exh. 5) at 16; Exh. 13).

Since Vishay's acquisition of its interest in Siliconix, Siliconix's products have generally been marketed by Vishay's worldwide sales organization under the Siliconix brand name. The company itself is often referred to as "Vishay Siliconix." Vishay management's many years of experience in acquiring and consolidating companies have led it to believe that this combined branding benefits both companies. (Eden Tr. 211-13; Zandman Tr. 89-90). Pursuant to applicable accounting rules, Siliconix's results of operations and other financial information are completely consolidated in Vishay's financial statements. (Eden Tr. 27).[1]

From time to time, Vishay has considered increasing the size of its interest in Siliconix in a manner which would allow the company's public stockholders an equal opportunity to dispose of their shares. (S-4 at 25; Eden Tr. 20). Meanwhile, the semiconductor industry began experiencing a material downturn towards the end of 2000. (Am. Complt. ¶ 10; Zandman Tr. 18).

REDACTED

In the first quarter of 2001, Siliconix's net sales dropped dramatically to $88.1 million, compared to first quarter 2000 sales of $114.6 million, and profits during the period decreased by 65%. (Exh. 6; see also Eden Tr. 131).

With the recent downturn and the accompanying pressure on the stock price of Siliconix, Vishay felt that it was important to reduce costs and achieve synergies and thus looked towards an acquisition of the minority Siliconix shares.

REDACTED

Accordingly, on February 22, 2001 Vishay sent a letter to Siliconix's Board of Directors, proposing to purchase the outstanding public shares through a tender offer at a price of

---

1

REDACTED

$28.82 per share in cash.

REDACTED

Simultaneously with the February 22 letter, Vishay issued a press release disclosing the offer and its material terms to the public. (Exh. 7). The release stated:

> Vishay . . . announced today that it is proposing to purchase any and all outstanding shares of common stock of Siliconix Incorporated not already owned by Vishay at a price of $28.82 per share in cash. . . . Vishay also indicated that it might offer to exchange the Siliconix shares for shares of its common stock. Depending upon whether the exchange would be tax-free to Siliconix stockholders, Vishay would expect that the value per share of Siliconix in an exchange offer would be somewhat less than the cash price.
>
> . . . .
>
> Vishay is not asking Siliconix to enter into any agreement with respect to the offer or to pay a break-up fee in the event that the

---

2

REDACTED

> offer is not consummated or a higher offer from another bidder is received. Vishay's offer would not foreclose any other person from making a higher offer for the shares not already owned by Vishay.
>
> Vishay requested the opportunity to discuss its offer with a Special Committee of independent, non-management Siliconix directors who are unaffiliated with Vishay. . . .

In response, Siliconix's Board established a Special Committee consisting of the two non-Vishay directors on the Board: Mark Segall and Timothy Talbert. Mr. Fitzgerald's brief devotes much energy to attacks on the Special Committee. We refer to the brief of the Special Committee defendants for a full recitation of the true facts. We note here only that Vishay's Registration Statement and Siliconix's 14D-9 accurately describes Vishay's past connections with the Special Committee members.[3]

The Special Committee thereafter met on numerous occasions with its financial and legal advisors to discuss the proposal, the business and prospects of Siliconix, and trends in the industry. Lehman Brothers conducted various financial diligence investigations of Siliconix during this period and Heller Ehrman conducted legal investigations. On April 5, 2001, the members of the Special Committee and their advisors met in New York with representatives of

---

3

REDACTED

Vishay. (Eden Tr. 95-96). REDACTED

In the days following the announcement of Vishay's cash proposal, Siliconix stock jumped above the $28.82 offer price, REDACTED

REDACTED

On May 2, 2001, the members of the Special Committee and their advisors again met in New York with Vishay representatives. REDACTED

4 REDACTED

Following the May 2 meeting, counsel for Vishay and the Special Committee exchanged drafts of and comments upon a form of merger agreement between Vishay and Siliconix. (Exh. 9). Meanwhile, on May 9, 2001, Dr. Zandman made a presentation at a Merrill Lynch industry conference in New York City. During the conference Dr. Zandman made various statements about Siliconix's business. Although Mr. Fitzgerald credits him with saying at this conference that Siliconix stock was "bottoming up," Dr. Zandman made clear that "we believed that at that time it was a bottoming out and we hoped for this to go up. But at the same time I cautioned the people to whom I said it may go as well down. We don't know." (Zandman Tr. 69). Mr. Fitzgerald, who was present at the conference, acknowledged that Dr. Zandman opined that the outlook for Siliconix was still unsettled and that it would be much easier to understand the situation in a few months. (Fitzgerald Tr. 204).

B. Vishay's Offer.

REDACTED

Vishay decided to offer to acquire the publicly held stock of Siliconix in a stock-for-stock exchange offer without a merger agreement and without the advance approval of the Special Committee or favorable recommendation of the Siliconix board.

REDACTED

REDACTED

REDACTED

On May 25, 2001, Vishay issued a press release announcing the commencement of the offer to exchange 1.5 shares of common stock for each share of common stock of Siliconix. (Exh. 12). Valued at the close of business yesterday, the offer was worth $31.17. This represents (i) a premium of 24% over the $25.06 per share closing price on February 22, 2001, (ii) a premium of 11.5% over the $27.94 per share average closing price during the 30 days before that date, and (iii) a premium of 58% over the lowest per share price of $19.69 during the twelve months before that date. (See 14D-9 at 16). REDACTED

At the same time, Vishay filed with the Securities and Exchange Commission its S-4 Registration Statement and Schedule TO. Vishay filed amendments with certain updated information on June 1, 2001. The amended Registration Statement and Schedule TO included an offer to exchange/prospectus disseminated to Siliconix shareholders during the week of June 4. The documents disclosed, among other things, (i) the reasons for Vishay's offer, (ii) an assessment of the potential prospects for Vishay and Siliconix, (iii) a long list of relative risk factors, (iv) comparative historical share information, and (iv) detailed financial information about Vishay and Siliconix, including to the extent they existed, projections concerning future sales and growth.

5

REDACTED

The Registration Statement reported that Vishay's offer contained a non-waivable "majority of the minority" provision, providing that Vishay would not proceed with its offer unless a majority of shareholders unaffiliated with Vishay tendered their shares. Vishay's offering material also stated clearly that "[a]lthough we currently intend to effect a short-form merger following consummation of the offer, we are not required to do so and there are circumstances in which we may determine not to effect the merger." The Registration Statement likewise noted that if Vishay effected a short-form merger, it would be at the same per share consideration as in the exchange offer, and that objecting shareholders could avail themselves of appraisal rights under Delaware law.

As set forth in the Registration Statement and reiterating the testimony cited above of various witnesses, Vishay had many reasons for proceeding with its offer:

- the expectation that Siliconix's business could be further integrated with Vishay's, thereby enhancing prospects for both companies and reducing costs.
- The market for Siliconix stock is relatively illiquid compared to the market in Vishay stock.
- Because Vishay owns approximately 80.4% of the outstanding Siliconix stock, a sale of Siliconix in which stockholders would realize an acquisition premium is unlikely and could not occur without the consent of Vishay, and thus there is no "market check" on Siliconix stock.
- the recent softening of the market for electronic components, and the heightened need to focus on cost-cutting, operational efficiencies and product synergies, and Vishay's history of long-term growth through acquisitions; and
- stockholder allegations made from time to time, which Vishay believed were unfounded but which nonetheless diverted management attention.

(S-4 at 30; see also Eden Tr. 52-53, 94-95, 104).

The Registration Statement also discloses in considerable detail various pros and cons for Siliconix shareholders to consider. The Statement warns that (i) the price of Vishay common stock could depend upon factors different from those affecting the price of Siliconix common stock; (ii) the price of Vishay common stock could decline significantly following the offer; and (iii) anticipated synergistic benefits of the business combination may not be fully realized. (S-4 at 9, 11). The Registration Statement also calls upon the Siliconix shareholders to consider certain risks associated with Vishay's business, including (iv) the current softness in the electronic component industry; (v) the intensity of Vishay's competition; (vi) the sensitivity of Vishay's business to the availability, quality, and costs of certain raw materials; (vii) the extent to which Vishay's business is subject to customer cancellation; (viii) certain potential environmental liabilities faced by Vishay; (ix) uncertainties relating to Vishay's derivation of substantial revenues from overseas markets and production facilities; and (x) that Vishay's acquisition-focused growth strategy may not be feasible going forward. (Id. at 12-14).

In favor of the offer, the Registration Statement suggests that Siliconix shareholders may consider, among other things, (xi) the potential operational efficiencies and cost saving that Vishay believes can be realized by combining the companies; (xii) Vishay's greater size and its broader access to capital markets and greater borrowing capacity; (xiii) the greater breadth of Vishay's operations and product lines and the greater stability in revenue and earnings such breadth may provide; (xiv) the extensive analyst coverage given Vishay as compared with the absence of analyst coverage of Siliconix; (xv) the relative liquidity of Vishay shares; and (xvi) that Vishay's 80.4% ownership of Siliconix reduces the likelihood of the minority shareholders receiving an acquisition premium from a third party. (Id. at 31). The prospectus balances this information with disclosure reflecting (xvii) Siliconix's cost cutting in response to the economic downturn; (xviii) its "valuable and extensive portfolio of intellectual property" and its long history of innovative product development; (xix) that Siliconix's $107 million in earnings in 2000 were its best ever; (xx) the recovery of Siliconix's stock price from its 52-week low of $16.84 and its high of $88.06 during this same period; (xxi) the anticipation that Siliconix's stock price and operating performance "can be expected to rebound further with improvements in the United States and world economy"; (xxii) the historical tendency of Siliconix's stock to recover from economic downturns in advance of Vishay's stock; and (xxiii) the higher historic earnings multiples of Siliconix stock. (Id. at 31-32). Finally, the S-4 calls upon shareholders to consider (xxix) the various derivative allegations made by Mr. Fitzgerald herein. (Id.). Against this backdrop, the Registration Statement provides the Siliconix shareholders an extensive amount of accurate, relevant and well-balanced information.

C. The View Of Siliconix And Its Special Committee.

On June 8, 2001, Siliconix filed with the SEC its Schedule 14D-9, setting forth its recommendations concerning Vishay's offer. The 14D-9 reported that "the Special Committee has determined to remain neutral and make no recommendation with respect to the Offer and Merger." (14D-9 at 4). The 14D-9 went on to state that "[t]he Special Committee and the Siliconix Board of Directors believe that each holder of shares should make his, her or its own decision, based on all available information . . . whether to tender shares. . . ." (Id.).

The 14D-9 described the chronology of the Special Committee's work, including the absence of any third-party interest in Siliconix, the prior relationship between Special Committee members and Vishay, the Special Committee's view that $28.82 was inadequate and the Committee's efforts to convince Vishay to improve its offer. (Id. at 4-12). It then catalogued the many reasons why Siliconix and the Committee decided to remain neutral: (i) Siliconix's and Vishay's financial considerations and business prospects, (ii) that the offer represents a premium when measured against some closing Siliconix prices and a discount compared to other closing prices, depending on the date or range of dates selected for analysis, (iii) the lack of liquidity or analyst coverage of Siliconix, (iv) that tendering stockholders would have the opportunity to participate in future growth in Siliconix in proportion to their holdings of Vishay stock, (v) that the Vishay offer is expected to qualify as a tax-free exchange, (vi) the absence of any third-party proposals for Siliconix and Vishay's unwillingness to sell the company, (vii) the absence of certain protections for Siliconix shareholders as compared to the merger agreements that the Committee had been negotiating, (viii) the possible decline in Siliconix's stock price if Vishay withdraws its offer, and (ix) conflicts of interest of certain Siliconix directors and officers described in the 14D-9, as well as the overlap in functions between the two companies and their personnel. (Id. at 9-11).

After setting forth "upside case" and "base case" projections for Siliconix through 2005, as well Vishay's projections for 2001 and 2002, the 14D-9 described the extensive materials reviewed by and analyses prepared by the Special Committee's financial advisor, Lehman Brothers. (Id. at 13-19). The analyses reported the following valuations of Siliconix:

- a "comparable companies — Siliconix" analysis, indicating an equity value range of Siliconix stock of between $23.13 and $59.13 per share.
- a "comparable companies — Vishay" analysis, indicating an equity range for Siliconix stock of between $14.02 and $58.09 per share.
- a "historical stock price and exchange ratio" analysis, implying exchange ratios of between 1.1117 and 2.1094.
- a "transaction premium" analysis, which produced equity values ranging from either $23.39 to $53.93 per share (going private transactions), or $20.68 to $50.61 per share (full acquisitions in the technology sector).
- a discounted cash flow analysis, implying an equity value per share of between $29.68 and $38.81.

(Id. at 16-18).

D. Mr. Fitzgerald's Suit.

Mr. Fitzgerald, a practicing attorney in New York City, has been a Siliconix shareholder since 1990, when bonds he purchased at steep discounts during the Siliconix bankruptcy proceeding were converted to common stock upon the company's emergence from bankruptcy. (Fitzgerald Tr. 38). Notwithstanding his professed dissatisfaction with Vishay, Mr. Fitzgerald has benefited handsomely from Vishay's stewardship of Siliconix. REDACTED

Mr. Fitzgerald has from time to time questioned Vishay's actions with respect to Siliconix. (Am. Compl. ¶ 2). In response, Vishay's Vice Chairman asked Mr. Fitzgerald whether he would like to join the Board of Siliconix as an independent director. Mr. Fitzgerald declined. (Fitzgerald Tr. 57-58; Eden Tr. 37-39). After he filed his initial complaint, representatives of the Special Committee asked to and later did meet with Mr. Fitzgerald. The Special Committee's representatives solicited Mr. Fitzgerald's input into the process; Mr. Fitzgerald declined that offer, too. (Fitzgerald Tr. 216-220). Mr. Fitzgerald has likewise declined to contact Siliconix's large institutional shareholders to persuade them not to tender. (Id. at 23-25, 183-86).

ARGUMENT

The relief Fitzgerald seeks — a preliminary injunction — "is an extraordinary remedy and one not favored by this Court." In re Ocean Drilling & Exploration Co. S'holders Litig., Del. Ch., Consol. C.A. No. 11898, slip op. at 18, Chandler, V.C. (Apr. 30, 1991). The Court may grant a preliminary injunction only if Mr. Fitzgerald satisfies his heavy burden of demonstrating (i) a reasonable probability of success on the merits at trial, (ii) a reasonable probability of irreparable harm in the absence of an injunctive relief, and (iii) a balance of the equities and the public interest in favor of enjoining the offer. Mills Acquisition Co. v. MacMillan, Inc., Del. Supr., 559 A.2d 1261, 1278-79 (1989). Mr. Fitzgerald has not satisfied a single one of these elements.

I. MR. FITZGERALD HAS NO PROBABILITY OF SUCCESS ON THE MERITS.

A. Mr. Fitzgerald Has Misstated The Governing Standard: He Must Show Either That The Offer Is Coercive Or That Vishay's Disclosures Are Materially Misleading.

Mr. Fitzgerald bottoms much of his case on the proposition that Vishay's offer is not "fair" and that the 1:1.5 exchange ratio is a "completely inadequate" price. (OB at 36). By this argument, Mr. Fitzgerald ignores settled Delaware law. Under the governing standard, Vishay need not show that the offer is fair. Rather, Mr. Fitzgerald must prove that the offer is either economically coercive, or that Vishay's disclosures are materially misleading such that a reasonable shareholder would be more likely to tender his shares — a showing Mr. Fitzgerald cannot make.

The Supreme Court has long held that "in the absence of coercion or disclosure violations, the adequacy of the price in a tender offer cannot be an issue." Solomon v. Pathe Communications Corp., Del. Supr., 672 A.2d 35, 40 (1996). As the Court put it:

> In the case of totally voluntary tender offers, as here, courts do not impose any right of the shareholders to receive a particular price. . . . Delaware law recognizes that, as to allegedly voluntary tender offers (in contrast to cash-out mergers), the determinative factor as to voluntariness is whether coercion is present, or whether there is "materially false or misleading disclosures made to shareholders in connection with the offer. . . ."

Id.; see also Frank v. Arnelle, Del. Ch., C.A. No. 15642, slip op. at 4, Chandler, C. (Sept. 16, 1998) (Delaware law does not require that stockholders be offered "a fair price" if the tender offer is "not coercive").

Mr. Fitzgerald nevertheless maintains that the general rule should not apply here, because either (i) Vishay is the majority stockholder of Siliconix, or (ii) the Special Committee and Siliconix have purportedly breached or abdicated their supposed responsibilities to Siliconix's public shareholders. (OB at 37-46). But Mr. Fitzgerald's "entire fairness" argument could not be more mistaken. Simply put, he has overlooked iron-clad Delaware law concerning the appropriate standard of judicial review for a tender offer, as enunciated by the Delaware Supreme Court in Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971):

> A parent does indeed owe a fiduciary duty to its subsidiary when there are parent-subsidiary dealings. However, this alone will not evoke the intrinsic fairness standard. This standard will be applied only when the fiduciary is accompanied by self-dealing – the situation when a parent is on both sides of a transaction with its subsidiary. . . .

Obviously, with a tender offer, the majority shareholder is not on both sides of the transaction. See Solomon, 672 A.2d at 39.

More specifically, the cases hold that when, as here, a controlling stockholder commences a tender offer to purchase shares from the minority stockholders, because minority stockholders have the power to reject the offer, the majority shareholder has no duty to offer a fair price. This Court faced this very issue in In re Ocean Drilling & Exploration Co. Shareholders Litig., Del. Ch., Consol. C.A. No. 11898 Chandler, V.C. (Apr. 30, 1991). In that case, the majority shareholder of Ocean Drilling & Exploration Company launched an exchange offer for the 39% of the company it did not already own. A special committee of unaffiliated directors, the entire Ocean Drilling Board, as well as the special committee's investment advisor all opined that the majority shareholder's exchange offer was "not fair to the [Ocean Drilling] minority" and "advis[ed] the minority shareholders not to tender." Id. at 4. The shareholder plaintiffs argued that "regardless of any finding that [the Court] might make that the shareholders are not coerced and have adequate information with respect to the tender offer, [the majority shareholder] has a duty to offer the minority shareholders only a 'fair' price." Id. at 5. After citing a long series of cases, then Vice Chancellor Chandler firmly rejected that position:

> as a general principle our law holds that a controlling shareholder extending an offer for minority-held shares in the controlled corporation is under no obligation, absent evidence that material

> information about the offer has been withheld or misrepresented or that the offer is coercive in some significant way, to offer any particular price for the minority-held stock.

Slip op. at 6-7.

The same result was reached more recently in In re Life Technologies, Inc. Shareholders Litig., Del. Ch., Consol. C.A. No. 16513, slip op., Lamb, V.C. (Nov. 24, 1998) (transcript). Reiterating the standard set forth in Ocean Drilling and Solomon v. Pathe, the Court refused to enjoin an offer by a majority shareholder for the outstanding minority shares:

> Under our law, as I understand it, that standard of entire fairness does not apply to tender offers by parent corporations for shares of their subsidiaries unless some special circumstance exists. This rule is premised on the understanding that tender offers are voluntary transactions; that is, that stockholders each have a free choice to make to tender or not at a given price, and thus, that there is not duty to offer a fair price. . . .To say this differently, where a shareholder offers to purchase the shares of another, or even where a corporation offers to purchase its own shares from its stockholders, or a majority shareholder offers to purchase shares held by minority shareholders, no person or entity stands on both sides of the transaction.

Transcript at 3-4. That a special committee did not bless the majority shareholder's offer was of no moment:

> Further, even where a special committee is initially formed and after a period of time is disbanded because the parent is unable to, or unwilling to, meet the demands of the special committee — in my view, even in that circumstance, a subsequent tender offer made by the parent is still a transaction in which the parent does not have — under the law as I understand it, an obligation to offer a fair price, and thus, not one in which entire fairness is the governing standard.

Id. at 8-9; see also In re Marriott Hotel Props. II Ltd. P'ship Litig., Del. Ch., Consol. C.A. No. 14961, slip op. at 31, Lamb., V.C. (Jan. 24, 2000) ("the entire fairness standard does not apply" to tender offer for limited partnership interests made by entity that controlled the general partner;

transaction was not a merger, and "[i]t would be exceedingly paternalistic and intrusive to hold that the entire fairness test is required to protect the limited partners from themselves").

In the face of these settled authorities, Mr. Fitzgerald contends that, under McMullin v. Beran, Del. Supr., 765 A.2d 910 (2000), the Supreme Court imposed a fairness test when a party makes a tender offer for the minority public shares of a subsidiary, at least where the Board of the subsidiary has "breached its fiduciary duties in responding to the proposed transaction." (OB at 38). For several reasons, however, McMullin does not advance Mr. Fitzgerald's case.

First: in McMullin, a parent company negotiated a merger agreement between a subsidiary and a third party — an agreement which, after approval by the subsidiary's Board, would only later be submitted to the shareholders for approval. In sharp contrast, here the Siliconix Board was not asked to vote or pass on a merger agreement. There is no proposed corporate action by Siliconix. Rather, Vishay is making an offer directly to Siliconix's public shareholders, who must alone decide whether to tender their shares. These circumstances, ignored by Mr. Fitzgerald, make all the difference. Unlike McMullin, the Siliconix Board has no control over Vishay's offer; neither Siliconix nor its Board can stop Vishay's offer. Furthermore, and despite Mr. Fitzgerald's suggestions to the contrary, as set forth in the Special Committee's Brief the Board of a target is under no obligation to make a recommendation to shareholders concerning the offeror's offer.

Second: in McMullin, the Court held that "when the proposal to merge with a third party is negotiated by the majority shareholder, the board cannot abdicate that duty [to act properly in approving the merger] by leaving it to the shareholders alone to approve or disprove the merger agreement, because the majority shareholder's voting power makes the outcome a pre-ordained conclusion." 765 A.2d at 919. By contrast, here nothing is pre-ordained. To the contrary, Vishay's offer contains a non-voidable "majority of the minority" provision empowering rather than disenfranchising the minority Siliconix shareholders. Williams v. Geier, Del. Supr., 671 A.2d 1368, 1382 (1996).[6]

Finally, third: if the Supreme Court in McMullin somehow meant to upend the governing law and overrule in one full swoop Solomon v. Pathe, Life Technologies, Ocean Drilling, and the cases cited in the Special Committee's Brief, one would have expected the Supreme Court to have explicitly said so. To the contrary, the Court's silence speaks volumes — and confirms that McMullin is limited to its unique facts.

As did the plaintiffs in Life Technologies, Mr. Fitzgerald also cites Kahn v. Tremont, Del. Supr., 694 A.2d 422 (1997), and Kahn v. Lynch Communication Systems, Inc., Del. Supr., 638 A.2d 1110 (1994), for the proposition that "entire fairness applies because of the structure of the transaction." (OB at 42). This Court should reject the argument just as Vice Chancellor Lamb did in Life Technologies. Most notably, the decisions in Tremont and Lynch involved "self-dealing" transactions — the controlling stockholder exercised control over the corporation. Lynch, 638 A.2d at 1113, 1115 (parent-subsidiary merger); Tremont, 694 A.2d at 425-26, 428 (sale of interest in a corporation controlled by an individual stockholder to another corporation controlled by the same individual stockholder). Those cases stand for the entirely

6 The Court in McMullin also stressed that because Board of the subsidiary was "deciding to approve a proposed 'all shares' tender offer that is to be followed by a cash-out merger, the decision constitutes a final-stage transaction for all shareholders" and therefore "the time frame for the board's analysis is immediate value maximization for all shareholders." 765 A.2d at 919. That is not our case, for at least two reasons. To begin with, and as Mr. Fitzgerald himself contends, there is no assurance that Vishay's tender offer will lead to a "final stage" transaction, as in McMullin; Vishay's short-form merger is not a sure thing. (OB at 34 (alleging that "Vishay in fact may not take that action [short-form merger] at all")). And even if Vishay did effect a merger, that would not constitute a "final stage." Because they stand to receive 1.5 shares of Vishay stock for each Siliconix share they own, Siliconix shareholders, through their ownership of Vishay stock, will continue to share in the upside and have a say in matters bearing on Siliconix.

unremarkable proposition that the "entire fairness" standard is applicable only where "a controlling stockholder stands on both sides of the transaction. . . ." Tremont, 694 A.2d at 428; see also Lynch, 638 A.2d at 1115. That is not our case.

B. Vishay's Offer Is Not Coercive.

A determination of whether a tender offer by a majority stockholder constitutes a "voluntary" transaction turns two factors: (i) the adequacy of the disclosures made to the stockholders of the corporation, and (ii) whether the transaction is "coercive." See Solomon, 672 A.2d at 39 ("as to allegedly voluntary tender offers (in contrast to cash-out mergers), the determinative factor as to 'voluntariness' is whether coercion is present, or whether there are materially false or misleading disclosures made to shareholders in connection with the offer."). We address the disclosure issues at pages 30-43 below. We show here that there is nothing remotely coercive about Vishay's offer.

Under Delaware law, "inequitable coercion" exists in connection with a tender offer only when a fiduciary acts in a manner that operates "inequitably to induce the . . . shareholders to tender their shares for reasons unrelated to the economic merits of the offer." Eisenberg v. Chicago Milwaukee Corp., Del. Ch., 537 A.2d 1051, 1061 (1987). To be actionable, however, such "coercive" conduct directed at the tendering stockholders must be a "material" influence on the decision to tender. Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 533 A.2d 585, 605-606 (1987); Eisenberg, 537 A.2d at 1061-62. Even giving Mr. Fitzgerald more than his due, none of his coercion arguments passes muster.

1. The Supposed "Squeeze Out" Of The Minority.

When asked at his deposition how the transaction is coercive, Mr. Fitzgerald said only that he might be "frozen out" of Siliconix: "The problem that I face as a shareholder is that I could end up an even more minority person with Vishay continuing to . . . rip off the company. . . . Even if we end up getting frozen out in the freeze-out merger because of what my understanding is of appraisal proceedings and the time value of money, it's all very unattractive to me." (Fitzgerald Tr. 112-113; see also OB 33).

By these allegations, Mr. Fitzgerald mistakenly grounds his grievance on the fundamental facts that (i) he is a public shareholder in a company 80% owned by Vishay, and which has had a majority owner for at least the last ten years, (ii) if Vishay's offer is successful, the minority's stockholdings will be reduced, and (iii) Vishay could then effect a short-form merger, as it is entitled to do under Delaware law. But these facts — all fully disclosed — would be true in connection with any tender offer followed by a short-form merger. To adopt Mr. Fitzgerald's position under these circumstances would mean that all tender offers are inequitably coercive. That obviously is not the law. Simply put, that the minority stockholders may feel financial pressure to tender their stock does not render the offer inequitably coercive.

> Of course the minority shareholders may have felt financial pressure to tender their shares in light of the likelihood that their shares would have little value after the foreclosure. This type of financial pressure, however, does not render the tender offer actionably coercive. Indeed, financial downfall of a company is one of the risks assumed by the minority shareholders when they invested in the common stock of Pathe . . . .

Solomon v. Pathe Communications Corp., Del. Ch., C.A. No. 12563, slip op. at 6, Allen, C. (Apr. 21, 1995), aff'd, Solomon v. Pathe Communications Corp., Del. Supr., 672 A.2d 35 (1995); see also Eisenberg, 537 A.2d at 1061-62 (that self-tender offer may result in decrease in outstanding shares and decline in market value of those shares "without more has been held not to be wrongfully coercive").

2. Timing Issues.

Despite disavowing any other claims of coercion at his deposition, Mr. Fitzgerald now maintains that Vishay's offer is coercive because Vishay purportedly improperly timed its

February announcement "to take advantage of the Company's depressed stock price," at the supposed bottom of the market. (OB at 5). This argument is wrong as a matter of fact and law.

Vishay's offer did not come at the bottom. Vishay made its initial offer when the market price of Siliconix was $25.06 — nearly 28% above the low of $19.69 on December 21. When Vishay launched its tender offer the price of Siliconix stock was at $32.85 — 67% over the December 2000 low, and several times its low in 1999. As Mr. Fitzgerald agreed, over the past two years Siliconix's stock price has "bounced around" quite a bit (Fitzgerald Tr. 136) — from a high of $144.50 in March 2000 to a low of $11.04 in June 1999. (See Exhs. 13 and 14). And even Mr. Fitzgerald was constrained to concede that "I could be wrong" as to what direction Siliconix's stock price was headed. Neither he nor Vishay has a crystal ball: "To say that I know where the price of Siliconix or Vishay or any other stock will be tomorrow, I wouldn't be sitting here, I'd be talking to my broker." (Fitzgerald Tr. 137-38).

Nor is Mr. Fitzgerald correct in asserting that Vishay deliberately timed its offer at a time when the stock price was low. Rather, and as demonstrated at pages 6-12 above, it was depressed industry conditions that led Vishay to consider ways to save money, synergize the company, and allow Siliconix shareholders to take advantage of those potential benefits.

In any event, and as a matter of law, even had Vishay timed the offer at the bottom of the market that would not amount to coercion. In Eisenberg, plaintiffs alleged that a self-tender offer by the corporation seeking to purchase the preferred stock of the corporation was inequitably coercive for these reasons: (i) it was "purposefully timed to coincide with the lowest market price for the Preferred since 1983," (ii) the Board decided not to pay dividends, despite its ability to do so, and (iii) the corporation announced that it intended to seek the delisting of the shares at issue. 537 A.2d at 1061. In addressing the "timing" and "dividend" allegations, the Court stated:

> If these were the only relevant circumstances (and if proper disclosure was made of all material facts), the Court would have difficulty concluding, at least on this preliminary record, that the Offer is inequitably coercive. In what sense do corporate directors behave inequitably if they cause the corporation to offer to purchase its own publicly-held shares at a premium above market, even if the market price is at an historic low? So long as all material facts are candidly disclosed, the transaction would appear to be voluntary.[7]

As a related argument, Mr. Fitzgerald now contends that the offer is coercive because Vishay purportedly intentionally manipulated and "capped" Siliconix stock price through its February 22 announcement. (OB at 36). That shrill claim likewise cannot be squared with either the facts or the law. On the facts, and as Mr. Fitzgerald was constrained to concede, Siliconix's price exceeded the supposed "cap" between February 22 and May 24. (Fitzgerald Tr. 120-21). Indeed, on May 23 Siliconix's stock price closed at $32.67 — fully 13% above the supposed cap. On the law, there is nothing about Vishay's announcement that was untruthful, let alone coercive. Vishay was under an obligation to disclose to the market its intentions as to Siliconix on February 22; it might have been a violation of the securities laws had it failed to do so. Any company announcement may have an effect on stock prices. But that does not amount to coercion in any sense.

The same argument raised by Mr. Fitzgerald here failed in Ocean Drilling. There, as here, the plaintiff alleged that the majority stockholder's "timed announcement of its

---

7 The delisting allegation asserted by plaintiffs in Eisenberg tipped "the balance and impel[led] the Court to find that the Offer, even if benignly motivated, operate[d] in an inequitably coercive manner." Specifically, in holding that the disclosure concerning "delisting" made the Offer inequitably coercive, the Court of Chancery recognized that the directors failed to demonstrate that they were "obliged to seek delisting in order to protect a paramount interest of the corporation or an overriding interest of the common stockholders." Id. at 1062 (emphasis added). For this reason, Mr. Fitzgerald's assertions that Vishay's offer is "just as coercive as the more blatant threats in Eisenberg," misses the mark. Unlike in Eisenberg, Vishay has not made any threats to harm Siliconix or its prospects in the event the offer either succeeds or fails.

[exchange] offer at a point when the ratio of the market price of Murphy and [Ocean Drilling] stock was unusually favorable to Murphy, effectively 'capping' that ratio during the pendency of the offer." Plaintiffs argued that "[b]ecause Murphy has effectively frozen the unfavorable ratio which existed at the time of the announcement of the exchange offer, a stockholder acting in his own self interest is effectively precluded from a third alternative." In language exactly applicable here, this Court rejected this argument:

> I . . . note that the announcement of the offer three months before its commencement was apparently necessitated by SEC rules, and that the reality of the marketplace dictates that a "capping" effect will occur in all two-step merger transactions. In addition, no evidence has been presented to indicate that, absent capping, the market price ratio currently would be more favorable to minority shareholder. . . .

Slip op at 7.

3. The Supposed Uncertainty With Respect To The Short-Form Merger And Supposed Inability To Exit Siliconix For Fair Value.

Next, Mr. Fitzgerald now contends that the offer is coercive because Vishay has "refus[ed] to commit to a second-step cash-out merger," thereby effectively "imprison[ing] indefinitely" Siliconix shareholders. (OB at 36). Again, this exact same argument was rejected in both Life Technologies and Ocean Drilling. In Ocean Drilling, the majority shareholder did not include an assurance of a follow-up merger at the same exchange ratio, "thus leaving non-trading shareholders in the dark as to [the majority shareholder's] future intention." The Court held that "I am not persuaded that this structural feature of the exchange offer is actionably coercive." Slip op. at 5. And in Life Technologies, Vice Chancellor Lamb held that the same supposed uncertainty is "not an argument that leads me to believe that the offer is coercive." Transcript at 11.

It is also significant that, even if by some inconceivable stretch Vishay's offer was actionably coercive, any such coercion would be mitigated by the "majority of the minority" aspect of Vishay's offer. Although Mr. Fitzgerald conveniently neglects to raise this feature of Vishay's offer until page 45 of his brief, this non-waivable condition vests the right to approve Vishay's offer with disinterested minority shareholders. In Life Technologies, Vice Chancellor Lamb noted that because the majority shareholder conditioned its offer on reaching 80% ownership of the subsidiary, that "makes the offer less powerful." Transcript at 11. According to the Court, that condition, "creates less of an incentive for people to tender than they would if there were no minimum condition, because it creates greater uncertainty about the ultimate success of the offer." Id.; see also Ocean Drilling, slip op. at 5. (in light of majority stockholder's non-waivable "majority of the minority" condition to its tender offer, target subsidiary's "minority shareholders would appear able to determine for themselves whether or not to accept the offer.").

C. Mr. Fitzgerald Has Not Sustained His Burden Of Proving That Vishay's Disclosures Are Materially Misleading.

Under Delaware law, a fiduciary "is not required to disclose all available information" just because that information "might be helpful." Skeen v. Jo-Ann Stores, Inc., Del. Supr., 750 A.2d 1170, 1174 (2000); Stroud v. Grace, Del. Supr., 606 A.2d 75, 85 (1992). Rather, only those facts that are material and within the control of the fiduciary must be disclosed. Id. at 84. A fact is material if there is a "substantial likelihood" that its disclosure "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Skeen, 750 A.2d 1174. In the tender offer context, a plaintiff must show "a reasonable probability that [the offeror] has made a material omission" or misstatement "that would make a reasonable shareholder more likely to tender his shares." Ocean Drilling, slip op. at 3 (emphasis added). The burden of establishing materiality rests squarely on the plaintiff. Loudon v. Archer-Daniels-Midland Co., Del. Supr., 700 A.2d 135, 143 (1997). Mr. Fitzgerald fails to carry his burden. Each fact he says is omitted from or misrepresented in the Registration Statement either is not material or is fully and accurately disclosed.

1. Vishay's Voluminous Disclosure Supplemented By Siliconix's 14D-9 Provides The Public With All The Material Information Required.

Even before reaching the specifics of Mr. Fitzgerald's disclosure allegations, it is worthy of emphasis that the depth and breadth of Vishay's securities filings bespeak an intent to disclose — and actual disclosure of — as much information as reasonably possible to the Siliconix shareholders so that they can make an informed decision whether to tender their shares. The Registration Statement (i) detailed the chronology of the transaction, including the dealings with the Special Committee, (ii) disclosed the connections between the Special Committee members and Vishay, (iii) explained the reasons why Vishay was proceeding with its offer, (iv) described potential pros and cons of the offer for shareholders, (v) provided detailed historical information about the two companies, (vi) provided Vishay and Siliconix projections of future sales and profits, and (vii) attached numerous exhibits, including Mr. Fitzgerald's own amended complaint, so that shareholders could see his point of view. Cf. Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1210 (D.C. Cir. 1989) ("even if it is proved ultimately to be correct in maintaining that appellees' Schedule 13D is false and misleading, the annexation of [the target's] complaint would appear to offset most if not all possible adverse consequences of the misrepresentation"). Vishay's disclosures have been supplemented by those of Siliconix in its Schedule 14D-9, which explains the Special Committee's and Siliconix's neutral view and provides detailed information and analyses from Lehman concerning the value of Siliconix.

Moreover, Mr. Fitzgerald's own conduct belies his claim that Vishay's disclosures are untruthful. At his deposition, Mr. Fitzgerald said he was able to place a value in his Siliconix shares — "well in excess of three times" $28.82 — based on "public sources" and "discussions with other investors" — none of whom had inside information about Siliconix. (Fitzgerald Tr. 71-76). Further underscoring the point, Mr. Fitzgerald's financial expert, Mr. Matthews, likewise was able to value Siliconix relying almost exclusively on public information. (Exh. 15).

Finally, and to eliminate all doubt, Vishay offered to file as an exhibit to an amended Registration Statement, Mr. Matthews' report setting forth Mr. Fitzgerald's view in this litigation of the supposed value of Siliconix for every shareholder to see. (Exh. 16). Mr. Fitzgerald's refusal to date to provide permission suggests that he is more interested in litigation posturing than getting Siliconix shareholders the information he says they need.

2. The Registration Statement Discloses All Material Information Regarding The Value And Prospects Of <u>Siliconix, Vishay And The Combined Companies.</u>

Turning to Mr. Fitzgerald's specific disclosure allegations, he claims first, that Vishay's Registration Statement fails to disclose sufficient financial data about Siliconix, Vishay and the combined companies. (OB at 21-26). This argument is spurious. The Registration Statement included (i) Vishay audited and unaudited historical information for the last five years and quarter ended March 31, 2000 (S-4 at 17-18), (ii) Siliconix audited and unaudited historical information for the last five years and quarter ended March 31, 2000 (<u>id.</u> at 17, 19), (iii) Vishay historical data on a per share basis (<u>id.</u> at 21), (iv) Siliconix historical data on a per share basis (<u>id.</u> at 21), (v) Vishay and Siliconix unaudited pro forma combined data on a per share basis (<u>id.</u> at 21), (vi) Siliconix unaudited pro forma per share data (<u>id.</u> at 21), (vii) comparative market value data for both companies (<u>id.</u> at 22), (viii) Vishay historical trading price data (<u>id.</u> at 23),

(ix) Siliconix historical-trading price data (id. at 24), (x) Vishay internal forecasts (id. at 33), (xi) Siliconix internal forecasts (id. at 33), (xii) information on recent developments, including certain pending litigation (id. at 20, 32) and, (xiii) a narrative description of risk factors relating to Vishay's business (id. at 10, 31, 32).

Additionally, the Registration Statement incorporates by reference, as permitted by SEC regulations, (i) Vishay's 2000 Annual Report, (ii) Vishay's March 31, 2001 Quarterly Report, (iii) the description of Vishay's common stock as set forth in its Registration Statement on Form S-3 dated April 6, 2000, (iv) Siliconix's 2000 Annual Report, and (v) Siliconix's March 31, 2000 Quarterly Report. (Id. at 1). Finally, shareholders are informed repeatedly that additional information can be obtained by calling Vishay's information agent at a toll free number, through the SEC's website, by visiting Vishay's headquarters or through the SEC directly. (Id. at 1-2). And to the extent shareholders might somehow need additional information, they can review the Lehman analyses in Siliconix's 14D-9.[8]

a. Siliconix Information.

Mr. Fitzgerald goes on to assert that the Registration Statement created the misimpression that Siliconix's business and prospects are deteriorating. (OB at 22). In support of this allegation, he points to Vishay's statement that it "perceived . . . a continuing deterioration in the electronic component market generally and in the space in which Siliconix operates in particular." (S-4 at 28). As set forth at pages 4-6 above, and notwithstanding Mr. Fitzgerald's mischaracterization of Dr. Zandman's public statements, this is a true and accurate representation

8 Mr. Fitzgerald points to Nagy v. Bistricer, Del. Ch., 770 A.2d 43 (2000) and Turner v. Bernstein, Del. Ch., C.A. No. 16190, Strine, V.C. (June 6, 2000) to suggest that all information regarding value is per se material. (OB at 24). This is of course a gross exaggeration of the case law. Liability attached in both Nagy and Turner because the disclosure documents at issue contained absolutely no financial information whatsoever, with regard to a privately held security. Neither of these factors is present here.

of Vishay's view. (Zandman Tr. 60-61, 65, 70-71; Eden Tr. 131; see also n. 11 below). Vishay is under no obligation to adopt Mr. Fitzgerald's erroneous characterization of the facts. See Seibert v. Harper & Row, Pub'g, Inc., Del. Ch., C.A. No. 6639, slip op. at 15, Berger, V.C. (Dec. 5, 1984).

Equally weak, Fitzgerald claims that the above disclosure obligated Vishay to inform shareholders that Siliconix was poised for recovery once the economy improved. (OB at 22). However, he elsewhere recognized that Vishay disclosed this exact information: "Vishay further admitted in the Registration Statement that: (i) Siliconix's stock price and operating performance can be expected to rebound further with improvements in the U.S. and world economies; and (ii) Siliconix historically has recovered from adverse economic conditions ahead of corresponding improvements in Vishay's business." (OB at 16; see also S-4 at 31).[9]

Mr. Fitzgerald next argues that although Vishay disclosed projections for Siliconix, Vishay breached its duty of disclosure because these projections lacked detail and were not accompanied by their underlying assumptions. (OB at 23, 25-28).[10] Again, this claim is utterly without merit. The Delaware Supreme Court recently held that disclosure of basic financial data in far less detail than included in Vishay's Registration Statement, is sufficient.

---

9 Nor does this disclosure create any internal inconsistency in the Registration Statement. The "rebound further" statement speaks as of a longer-term view than Vishay's immediate concerns. (S-4 at 31).

10 Citing R.S.M. v. Alliance Capital Mgmt. Corp., Del. Ch., C.A. No. 17449, slip op. at 48-49, Strine V.C. (Apr. 10, 2001) and McMullin, Mr. Fitzgerald again tries to establish a per se rule of materiality with respect to projections. (OB at 26). Neither of these decisions supports such a rule. The projections at issue in R.S.M. were found potentially material because they could have been necessary to evaluate an assertion made in the proxy statement that unitholders would receive a specific level of incremental value as a result of contractual arrangements on a going-forward basis in a reorganization. No such claim is made here. Fitzgerald's citation to McMullin is even more misplaced. The Court there did not "find a disclosure violation based on failure to disclose methodologies," as his brief contends (OB at 23), but rather held that the issues presented involved mixed questions of fact and law that would have to await discovery and trial. McMullin, 710 A.2d at 926.

Skeen, 750 A.2d at 1174. In Skeen, the disclosure documents included a copy of the company's (i) audited and unaudited financial statement, and (ii) quarterly market prices and dividends, both for the period immediately proceeding the transaction. Id. at 1173. Plaintiffs asserted that this information was insufficient to evaluate whether shareholders should demand appraisal. Id. at 1174. Specifically, plaintiffs argued that defendants should have disclosed all the financial data that shareholders would need if they were making an independent determination of value, including (i) a summary of methodologies used and ranges generated by defendant's financial advisor in reaching it fairness opinion, (ii) management's five-year projections, and (iii) more current financial information. Id. at 1173. The Supreme Court rejected plaintiffs' contentions, stating that "[o]mitted facts are not material simply because they might be helpful." Id. at 1174. Here, shareholders have much more information than the shareholders in Skeen and Fitzgerald has failed to demonstrate the materiality of any of the "details" of the projections.

Moreover, the Registration Statement makes clear that the projections are contingent and uncertain. (S-4 at 33). Under Delaware law, this type of speculative information need not be disclosed. McMillan v. Intercargo Corp., Del. Ch., C.A. No. 16963, slip op. at 15-16, Jacobs, V.C. (May 3, 1999) ("In cases where the inherent unreliability of the projections is disclosed to stockholders in the proxy statement or is otherwise established the projections have been found not material."); Repairman's Serv. Corp. v. National Intergroup, Inc., Del. Ch., C.A. No. 7811, slip op. at 20, Walsh, V.C. (Mar. 15, 1985) ("[g]enerally, 'soft' information, such as projections . . . need not be disclosed . . . ."). Because projections generally need not be disclosed, failure to provide shareholder details and assumptions concerning projections that are disclosed clearly cannot constitute a breach of fiduciary duty.

Equally unavailing is Fitzgerald's allegation that the Registration Statement is deficient because it erroneously states that the Siliconix forecasts contained therein were "prepared by Siliconix's management." (OB at 23-24). The total mix of information — including Siliconix's 14D-9 — informs the public that "Siliconix and Vishay share certain administrative and management staff, including individuals who were involved in furnishing some of the financial information provided by Siliconix to the Special Committee and Lehman Brothers, and the fact that Vishay participates in Siliconix's budgeting and forecasting processes." (14D-9 at 11).[11]

---

[11] Despite Mr. Fitzgerald's suggestions to the contrary, there is no evidence in the record that Vishay exercised any improper dominion over Siliconix's forecasting process. president, Dr. King Owyang, explained the process through which Siliconix **REDACTED**

And finally, even if the old projections had been more accurate than the revised figures (which the relevant sales data has proved in the interim is not the case), both the new and old numbers were fully disclosed in Siliconix's 14D-9 under the headings "Base Case" and "Upside Case," respectively.

According to Mr. Fitzgerald, Vishay should also have disclosed information concerning Siliconix's new patents, products and product pipeline so to allow minority shareholder to value their holdings. (OB at 24). Mr. Fitzgerald does not specify what information should have been disclosed, why it was reliable, how it was material or that Vishay even knew of its existence. See In re Genentech Corp. S'holders Litig., Del. Ch., Consol. C.A. No. 11377, Chandler, V.C. (June 6, 1990) (speculative information regarding products in development need not be disclosed); see also Stroud, 606 A.2d at 84.[12] Moreover, Siliconix's 1999 and 2000 10-K's report in substantial detail the company's new products, research and development expenditures and commitment to new products and innovation.

Although recognizing that the Registration Statement discloses the existence of a patent infringement lawsuit and acknowledging that Siliconix only recently filed this lawsuit, Mr. Fitzgerald goes on to fault Vishay for not disclosing any details concerning the recovery expected from this litigation. (OB at 24-25). This claim fails for two reasons. **REDACTED**

Hopes do not constitute material information.

In any event, and given that the litigation was filed just recently, any attempt to value and disclose the expected recovery would be purely speculative. Delaware law does not

12 This is in sharp contrast to Joseph v. Shell Oil Co., Del. Ch., 482 A.2d 335 (1984), upon which Fitzgerald mistakenly relies. There, not only did plaintiff claim that information regarding recent oil discoveries was material, but also submitted evidence from defendants' expert quantifying the value of this undisclosed discovery to be almost $4 per share.

require disclosure of this sort of guesswork. See, e.g., In re Western Nat'l Corp. S'holders Litig., Del. Ch., Consol. C.A. No. 15927, slip op. at 74, Chandler, C. (May 22, 2000) (claim that potential losses that might result from litigation should be disclosed "ignore[s] the long line of Delaware cases holding that there is no duty to speculate in a proxy statement"); TCG Secs., Inc. v. Southern Union Co., Del. Ch., C.A. No. 11282, slip op. at 13, Chandler, V.C. (Jan. 31, 1990) (stating "'the proposition that in relation to unresolved litigation, no disclosure of specific estimates of probable recovery made by management and the directors, nor past negotiations concerning settlement, are required'") (citation omitted).[13]

Mr. Fitzgerald's final disclosure claim relating to valuation information is that Vishay should have disclosed the details concerning Vishay's position with respect to Mr. Fitzgerald's derivative allegations against Vishay and certain Siliconix directors. (OB at 25). Because the outcome of this litigation is every bit as speculative as the outcome of the patent litigation, no disclosure was required. Nevertheless, the Registration Statement includes Vishay's assessment that these claims are completely without merit (S-4 at 32 ("Vishay denies these claims and allegations"); id. at 30 (Vishay believes that stockholder allegations made from time-to-time are "unfounded")). This clearly states Vishay's belief that the claims have no value. To disclose that these claims have value would be tantamount to an admission of liability, something which Delaware law does not require fiduciaries to do. See Wolf v. Assaf, Del. Ch., C.A. No. 15339, slip op. at 14, Steele, V.C. (June 16, 1998) ("Delaware corporate fiduciary duty

---

[13] Fitzgerald's reliance on Sealy Mattress Co. of N.J. v. Sealy, Inc., 532 A.2d 1324 (1987) is misplaced. That case involved a damages judgment after trial as opposed to a mere unliquidated claim.

principles do not require [that] directors predict the outcome of litigation in which it is engaged or admit wrongdoing that it attempts to disprove").[14]

b. Vishay Information.

Continuing through his laundry list, Mr. Fitzgerald next asserts that Vishay failed to disclose its projections. Again, Fitzgerald has made no credible showing that this information is material. First, he argues that this information should have been disclosed because this is a stock-for-stock transaction in which shareholders will receive their consideration in the form of Vishay stock. (OB at 25). Yet based solely on Siliconix data, Mr. Fitzgerald's own expert Mr. Matthews was able opine, albeit erroneously, as to the supposed inadequacy of Vishay's offer. Mr. Fitzgerald is wrong on the law, too. He principally cites Nagy v. Bistricer, a case involving privately held securities. Our case involves a publicly traded stock and Nagy v. Bistricer is inapplicable. Rather, the concept embedded in Delaware law that the market price is a reliable indicator of value should govern. See Thomas & Betts Corp. v. Leviton Mfg. Co., Del. Ch., 685 A.2d 702, 713 & 713 n.10 (1995) (noting that the absence of a publicly traded market gives rise to a legitimate, and presumably "unique," need by minority shareholders for access corporate

---

14 The contention that Vishay failed to adequately disclose its response to plaintiffs' derivative claims is particularly galling given that there is not a shred of evidence that Vishay tried to unjustly enriched itself at Siliconix's expense. Both Dr. Zandman and Dr. Owyang testified emphatically that the patents that Mr. Fitzgerald contends Vishay is improperly benefited from were in fact invented by Dr. Zandman, a man with dozens of inventions to his name. (Zandman Tr. 84, 86; Owyang Tr. 155-56). Likewise, the use of the name "Vishay Siliconix" in selling Siliconix products is a result of the company's many years of experience in acquiring and consolidating companies and adding the Vishay cache to the acquired company's trade name and so making available to it Vishay's far more extensive markets and distribution network. It is a technique that benefits both Vishay and Siliconix. (Eden Tr. 211-12; Zandman Tr. 89). ' **REDACTED**
something Mr. Fitzgerald :

financial information in valuing their shares). And as set forth above, projections are classic soft information that need not be disclosed.

Beyond that, Vishay has disclosed its projections. (See S-4 at 33). That Vishay's projections are only for a two-year period does not amount to a disclosure violation; Vishay cannot disclose information that it does not have. Cf. Stroud, 606 A.2d at 84 (disclosure obligation does not extend to information beyond the fiduciary's control). Nor does Vishay have a duty to create any particular set of projections — and Mr. Fitzgerald does not allege the existence of any such duty. See In re Dataproducts Corp. S'holders Litig., Del. Ch., Consol. C.A. No. 11164, slip op. at 8, Jacobs, V.C. (Aug. 22, 1991) (noting that defendants were not "affirmatively obligated to create (and then disclose) such valuations").

c. Combined Companies Information.

Mr. Fitzgerald next contends that Vishay is required to disclose pro forma projections for the proposed, combined entity. (OB at 26-28). But once again, Vishay has disclosed all that exists. And as the Registration Statement recognizes, any synergies that may result from the Transaction may not be realized (S-4 at 11 ("We may not be able to fully integrate the operations of Siliconix with our operations without encountering difficulties. The integration may not be completed as rapidly as we expect or achieve anticipated benefits.")). Any combined projections would likewise be as speculative — and Vishay was not required to disclose any combined projections for the same reasons it was not required to disclose the stand-alone projections. See pages 32-33, 37-38 above.[15]

---

15 Fitzgerald's reliance on In re Arkla Exploration Co. S'holder Litig., Del. Ch., Consol. C.A. No. 12288, Hartnett, V.C. (Jan. 9, 1992), for this point is misplaced. The "synergies" that the Arkla Court addressed were the ability to cancel certain contractual arrangements with specific price terms. Slip op. at 11. Such information can hardly be considered soft. Nor can Fitzgerald find any support in Wacht v. Continental Host, Ltd., Del. Ch., C.A. No. 7954, Berger, V.C. (Apr. 11, 1986), which was decided on a motion to dismiss, and which specifically distinguished itself from those cases decided on a preliminary record.

Moreover, plaintiffs have made no credible showing as to why such data would be material to Siliconix's shareholders. As Chancellor Allen explained in Roberts v. General Instruments Corp., Del. Ch., C.A. No. 11639, Allen, C. (Aug. 13, 1990):

> Projections that are of interest to an acquiror seeking control of a company are not necessarily material to the decision of a minority shareholder to sell or hold stock. A potential acquiror typically seeks great detail about the operations of a company. If it succeeds in its bid, it will have power over the organization and structure of the company assets ... By contrast, ... [t]he decision of a shareholder in a tender offer is more limited than the decision of a would-be acquiror (or lender) and the information material to her decision is different and not as extensive.

Slip op. at 23-24.

3. Information Concerning Vishay's Opinion As To The Fairness Of Its Offering Price Is Not Material.

Mr. Fitzgerald goes on to assert that Vishay should have disclosed certain facts from which Siliconix's shareholders could determine whether Vishay believed the offer was fair. (OB at 28-30). Specifically, Mr. Fitzgerald alleges that the Registration Statement should have included a description of (i) Vishay's basis for the Exchange Ratio, including what valuation methodologies it employed and what investment advisors it engaged, and (ii) the basis for its decision to abandon a cash tender. (Id. at 29, 30). This claim is wrong both in its assumptions and application.

As discussed at pages 18-23 above, under Life Technologies Vishay has no obligation to offer a fair price to Siliconix's minority shareholders in making its unilateral tender offer. To require that Vishay nonetheless disclose its beliefs as to the fairness of the offering price stands this law on its head. The Court in Life Technologies specifically held that requiring a unilateral bidder who is under no duty to offer any certain price to provide information that would reveal the top price it was willing to pay (or whether the price could be considered "fair" from some perspective) would plainly be illogical. Transcript at 16-17.[16]

Even if it were the law that a bidder in a unilateral tender offer would have to disclose facts sufficient to allow selling shareholders to make inferences regarding the buyer's beliefs as to whether the offering price was objectively fair, none of the specific items that Fitzgerald claims should have been disclosed here would be of any moment. First, a bidder need not reveal its internal pricing policy. O'Reilly v. Transworld Healthcare, Inc., Del. Ch., 745 A.2d 902, 929 (1999) ("I cannot see how disclosure of [the majority shareholder's] internal appraisal of the [target's] financial report or its internal estimate of what [the target] was worth to [the majority shareholder] would materially benefit a stockholder deciding whether to approve or disapprove [of a] merger."). Second, the basis for Vishay's decision to abandon a cash tender offer is actually disclosed. (See S-4 at 28 (noting that Vishay was motivated by "movements in the stock market and Vishay's perception of a continuing deterioration in the electronic components market generally and in the space in which Siliconix operates in particular.")).

Hemmed in by this disclosure, Mr. Fitzgerald further contends that Vishay's explanation is materially incomplete because it fails to reveal that the real impetus for the exchange offer was Siliconix's rapidly improving prospects and increasing stock price. (OB at 28). Again, this argument is without merit. First, Mr. Fitzgerald's allegation is simply wrong on

---

16 None of Nagy, Zirn v. VLI Corp., Del. Supr., 621 A.2d 773 (1993), Matador Capital Mgmt. Corp. v. BRC Holdings, Inc., Del. Ch., 729 A.2d 280 (1988), Kahn v. United States Sugar Corp., Del. Ch., C.A. No. 7313, slip op. at 14-15, Hartnett, V.C. (Dec. 10, 1985), or In re Staples Inc. S'holders Litig., Del. Ch., C.A. No. 18784, Strine, V.C. (June 5, 2001) (see OB at 27-28), involved a unilateral tender offer without a fairness obligation. They are thus distinguishable. Furthermore, to the extent that Mr. Fitzgerald seeks to categorize Arkla as a motivation case, he is wrong. The Court in Arkla stated that information regarding supply contracts between the bidder and the target was material because it was important to value, and not because it related solely to the tender offeror's motivations.

the facts. (Zandman Tr. 60-61, 65, 70-71; Eden Tr. 131; see also pages 6-12 above). Second, even if Vishay timed the offer to take advantage of what it believed to be advantageous market conditions, Vishay was under no duty to disclose this self-flagellating inference. See Louden, 700 A.2d at 144; Margolies v. Pope & Talbot, Inc., Del. Ch., C.A. No. 8244, slip op. at 16-17, Hartnett, V.C. (Dec. 23, 1986) (holding that directors were not required to disclose their hidden and malevolent motives in initiating a recapitalization plan).

Mr. Fitzgerald's claim that the Registration Statement falsely represents Vishay's intention regarding effectuation of the follow-up short form merger (OB at 29), is likewise pure fancy. The Registration Statement reveals that Vishay "currently intend[s], as soon as practical after consummation of the offer, to effect such a short-form merger. . . ." (S-4 at 40). It then continues that despite this present intention, Vishay is "not required to do so and there are circumstances in which [Vishay] may determine not to effect the merger." (S-4 at 40; see also id. (explaining certain consequences of "consummat[ing] the offer but not the short-form merger")). Thus, shareholders were informed of Vishay's intention to consummate the follow-up merger, but that it could decide later not to effect the follow-up merger. Neither the cited deposition testimony (OB at 29) or any other evidence in the record contradicts these statements.

Also without merit is Mr. Fitzgerald's last claim, that Vishay should have disclosed the likelihood of attaining the 90% ownership level. (OB at 29-30). There is no evidence that the outcome of the offer is anything other than unknown and speculative. Vishay is not responsible for predicting the future in its Registration Statement.

4. Information Concerning The Special Committee Is Either Immaterial Or Has Been Disclosed.

Finally, Mr. Fitzgerald maintains that Vishay should have disclosed a potpourri of items regarding the Special Committee and its financial advisor, Lehman Brothers. (OB at 30-34). Mr. Fitzgerald nowhere alleges or proves that Lehman Brothers' analyses were ever provided to Vishay. Accordingly, Vishay could not have described the information Mr. Fitzgerald sought to have disclosed because this data was not in Vishay's control at the time it commenced its offer. Stroud, 606 A.2d at 84. In any event, the Special Committee has now disclosed this information in its Schedule 14D-9.[17]

To the extent that Mr. Fitzgerald faults Vishay for not adequately disclosing certain supposed conflicts of interest affecting members of the Special Committee (OB at 31-32), the Court need look no further than Mr. Fitzgerald's own Amended Complaint. In paragraph 1, Mr. Fitzgerald pleads that "Vishay has now admitted that the two members of the Special Committee are fatally conflicted." (Am. Complt. ¶ 1). He was no doubt referring to Vishay's Registration Statement, which notes the existence of "material relationships" in the past between Messrs. Talbert and Segall. (S-4 at 27). Moreover, given that the Special Committee has failed to recommend in favor of the transaction, it is hard to see why these conflicts would even be material.

Last, Mr. Fitzgerald claims that although the Registration Statement and 14D-9 summarize the negotiations, Vishay failed to disclose discussions with the Special Committee and Lehman Brothers concerning the draft merger agreement. (OB at 32-33). That too is information not required to be disclosed. Arnold v. Society for Savs. Bancorp, Inc., Del. Ch., C.A. No. 12883, slip op. at 17, Chandler, C. (Dec. 17, 1993) (fiduciaries are not required to

---

17

REDACTED

disclose a "play-by-play" description of their negotiations), aff'd in part, rev'd in part, Del. Supr., 650 A.2d 1270 (1994); TCG Secs., Inc., slip op. at 17. This is especially true here, since Vishay had no obligation to deal with the Special Committee and was entitled to go directly to the shareholders.

D. Even If The Applicable Standard Is "Entire Fairness" Mr. Fitzgerald Has Not Sustained His Burden Of Proving That The Transaction Is Unfair.

Even if, defying settled precedent, "entire fairness" were the applicable standard, Mr. Fitzgerald's motion should still be denied: he has not proven that Vishay's offer is unfair.

When a self-dealing transaction is contingent upon approval by a majority of the minority, Delaware law is clear: the burden of proving unfairness shifts to the plaintiff. See Williams, 671 A.2d at 1382 ("In those parent-subsidiary situations where the circumstances call for an entire fairness analysis, the burden is normally on the defendants to show entire fairness, but if a majority of the minority votes in favor under certain circumstances, the burden shifts to the plaintiff to show unfairness"); Schlossberg v. The First Artists Production Co., Del. Ch., C.A. No. 6670, slip op. at 10, Berger, V.C. (Dec. 17, 1986) ("[E]ven if Weinberger applies, the burden would shift to plaintiffs to establish that the merger was unfair inasmuch as the merger was conditioned upon a favorable vote of a majority of the minority stockholders"). The reason is obvious: such a provision underscores the importance of shareholder franchise and its exercise, and permits the disinterested shareholders to determine the fate of a transaction.

To sustain his burden, Mr. Fitzgerald offered an expert report from Gil Matthews. (Exh. 15). But that opinion was so riddled with holes that is does not prove anything. Of the three valuation methodologies cited by Mr. Matthews, at deposition he effectively conceded the invalidity of two. With respect to a "comparable acquisitions" analysis, Mr. Matthews admitted that, for a variety of reasons, the one recent acquisition he identified in his report is "of very little value in this case" and entitled to "miniscule" weight, since that company is not comparable to Siliconix. (Matthews Tr. 134-136). As for his "discounted cash flow" analysis, Mr. Matthews conceded that any such analysis based only on projections "is of limited value because this is not a business that is highly predictable" with respect to future earnings. (Id. 69-70). He instead relies primarily on his comparison of the Vishay offer to the price/earnings ratios of a list of twelve companies purportedly comparable to Siliconix. On this basis Mr. Matthews claims that the multiple of Siliconix earnings offered by Vishay is much below the fair value of Siliconix.

Even accepting the twelve companies as comparable, Mr. Matthews' analysis does not advance Mr. Fitzgerald's case. Mr. Matthews compared the twelve companies' price earnings multiples — the ratio of their earnings per share ("EPS") to their stock price — with that of Siliconix for three time periods: the "current year," the "next year," and the last twelve months. (Exh. 15 at 3). The current year's multiples come out the wrong way from Mr. Fitzgerald's perspective: they suggest that the Vishay offer represents a higher multiple of Siliconix's current earnings (33.7x) than the multiples of current earnings at which the "comparable" companies are trading on the stock market. Not surprisingly, perhaps, Mr. Matthews urges that his current year analysis be put to the side, terming that analysis an aberration because "it results from Siliconix's temporarily depressed EPS in 2001." (Id. at 4). But the entire industry, including the twelve comparables, suffers from the same adverse market conditions as does Siliconix. (Matthews Tr. 113-14). Thus, a comparison of their multiples to Siliconix's is no less valid for the current year than for any other time period.

Mr. Matthews' analysis of the EPS multiples for "next year," i.e., 2002, suggests that the Vishay offer is at a lower multiple of Siliconix's projected 2002 earnings than the ratio of the current stock prices of the comparables to their predicted 2002 earnings. But he essentially conceded that his "next year" analysis is dubious. Mr. Matthews compared

Siliconix's internal projections for 2002 with the mean of disparate projections made by various outside analysts with respect to the various comparables. The analysts making the projections likely vary from one company to another, and so do the dates at which they made their projections. (Matthews Tr. at 49-55).

Mr. Matthews' "last twelve months" analysis of earnings of Siliconix and the twelve comparables necessarily relies on a very atypical twelve month period, which has featured not only the dramatic collapse of NASDAQ prices for nearly all technology companies, but also a wild swing up and down in the fortunes of the industry. (Matthews Tr. 41, 125-27, 137). To challenge the fairness of the Vishay offer solely on the results of this unusual year is imprudent, if not irrational. This is particularly so since Mr. Matthews' current year analysis affirmatively support the fairness of the offer.

As a final error, Mr. Matthews did not perform the same analysis for Vishay. (Matthews Tr. 109-12, 142-43). Yet, as Mr. Fitzgerald's brief itself declares, "Because the consideration in the proposed transaction is Vishay common stock, Vishay's business, prospects and financial condition are highly material to the Siliconix minority stockholders." (OB at 25).

In contrast to Mr. Matthews' flimsy report, and even putting aside that Vishay's offer represents a premium over the February 22 closing prices, there is substantial evidence bolstering the fairness of Vishay's offer. Lehman Brothers valued the offer and Siliconix using multiple approaches. Joe Stone of Lehman Brothers testified, without contradiction, that based on "the values that were calculated from our analysis as set forth in the 14D-9, the [Vishay] exchange offer as indicated would fall within those ranges" of value. (Stone Tr. at 136). Thus, under no circumstances could the Court conclude on this record that Mr. Fitzgerald has proven that the offer is unfair — particularly in light of the heavy burden he bears on this motion.

II. MR. FITZGERALD HAS NOT DEMONSTRATED IRREPARABLE HARM ABSENT AN INJUNCTION.

There is a second, independent reason why Mr. Fitzgerald's motion should be denied: he cannot show irreparable harm absent an injunction. In the context of a tender offer, a plaintiff must demonstrate that, absent preliminary injunctive relief, (i) the alleged injury could not easily be undone, and (ii) damages would not be a meaningful or adequate remedy. See, e.g., Kingsbridge Capital Group v. Dunkin' Donuts Inc., Del. Ch., C.A. No. 10907, slip op. at 14, Chandler, V.C. (Aug. 7, 1989) (in case of self-tender, a preliminary injunction would issue only where plaintiffs prove that such transaction "was imminent, and which, if allowed to take place, would effectively and permanently" deprive the stockholders of a potential opportunity). Mr. Fitzgerald maintains that an injunction is necessary because (i) inadequacy of disclosure is recognized as irreparable injury, and (ii) damages would be difficult to access. Mr. Fitzgerald is incorrect on all counts.

To begin with, and contrary to Fitzgerald's assertions, Vishay did not violate its duty of disclosure. See pages 29-43 above. Second, damages will not necessarily be difficult to assess. If stockholders do not tender their shares and Vishay thus cannot forward with its offer, there would be no damages. If a majority of the public stockholders tender their shares and it is ultimately determined that Vishay breached its fiduciary duties, damages likely could be assessed. See United States Sugar, slip op. at 2, 34-35 (concluding, after the Court denied an application for a preliminary injunction enjoining the consummation of an offer and held a trial on the merits, that defendants breached their fiduciary duties and awarding damages of $4 per share).

Equally critical, any dissatisfied shareholder who did not tender could avail himself of the appraisal remedy in the event Vishay completes the intended short form merger. In In re Ocean Drilling, this Court denied a preliminary injunction addressed to majority shareholder's tender offer for shares held by minority, where Special Committee said the offer was unfair; the Court noted that "if the plaintiffs are correct with respect to their non-disclosure or coercion claims a remedy will be available to them should I not order the injunction . . . the irreparability of any harm caused by the defendants' conduct is limited to a large extent by the availability of the quasi-appraisal remedy." Slip op. at 7. Indeed, Mr. Fitzgerald has already retained a valuation expert who has opined as to the purported value of his shares (Fitzgerald Tr. 78-80), and is fully prepared to go the appraisal route. (Id. at 197-98).

III. THE BALANCE OF THE EQUITIES WEIGHS HEAVILY IN FAVOR OF ALLOWING THE SILICONIX SHAREHOLDERS, RATHER THAN MR. FITZGERALD, TO DETERMINE THE FATE OF VISHAY'S OFFER.

Finally, Mr. Fitzgerald's motion should denied because the harm resulting from a preliminary injunction would far outweigh any supposed benefit that relief might confer. Not only would an injunction thwart Vishay's carefully constructed offer, but it would also hurt Siliconix's public shareholders. Those stockholders would effectively be denied the opportunity to (i) obtain a premium for their shares, (ii) trade in illiquid Siliconix stock for liquid shares of Vishay, and (iii) participate in Siliconix's upside on a going forward basis. Beyond that, and as Mr. Fitzgerald himself acknowledged, Siliconix's stock price could very well drop if Vishay is barred from proceeding with its offer. (Fitzgerald Tr. 20; see also Eden Tr. 94-95). That would harm, not benefit the public stockholders. See Life Technologies, transcript at 18 (denying preliminary injunction; "I believe, also, that the stockholders are entitled to receive this $37 offer; they are entitled to make their own judgment as to whether or not if offers them enough money for their stock; and that it would be wrong for me in this situation to deprive them of the ability to take the $37, which represents a premium offer to market"); In re Ocean Drilling, slip op. at 7 (denying injunction; "an injunction will cause the destruction of the considerable structure now in place to accomplish the tender offer, and some irreparable loss will result. I also note that an injunction will cause delay in the shareholders and [the offeror's] ability to achieve a deal which [the offeror], and perhaps the shareholders, are willing to consummate at the present time").

By contrast, and as Mr. Fitzgerald himself recognized, those Siliconix shareholders who are dissatisfied with Vishay's offer have at least two remedies. They can, for one, express their displeasure by declining to tender their shares. (Fitzgerald Tr. 114-15). Indeed, Mr. Fitzgerald claims to have had extensive discussions with like-minded stockholders who apparently do not intend to tender their shares. (Id. at 26-27). If Mr. Fitzgerald convinces a majority not to tender, Vishay will abide by the wishes of the majority and drop its offer. Mr. Fitzgerald already knows the identity of Siliconix's largest institutional stockholders (Fitzgerald Tr. 23-25, 183-186) — although, for reasons he refused to disclose and having to do with advice of his counsel, Mr. Fitzgerald has declined to contact those institutions. (Id. at 23-25, 186).

Siliconix's non-tendering public shareholders can also avail themselves of their appraisal rights in the event Vishay obtains a "majority of the minority" in the tender offer and Vishay proceeds with a second step merger. Mr. Fitzgerald has already announced that "I'll spend the money and I'll spend the time" on appraisal. (Fitzgerald Tr. 197-98).

In sum, there is no reason why Mr. Fitzgerald's personal views as to the supposed unfairness of Vishay's offer should be foisted on Siliconix's public shareholders — and doubly so, in light of the "majority of the minority" provision empowering those stockholders to determine the future course of the company. In fairness to the public shareholders of Siliconix, and if principles of corporate democracy are to have any effect, those disinterested shareholders — and not Mr. Fitzgerald alone — should determine the future of Siliconix.

CONCLUSION

For these reasons, the Court should deny Fitzgerald's motion and allow Siliconix shareholders to consider Vishay's offer.

MORRIS, NICHOLS, ARSHT & TUNNELL

A. Gilchrist Sparks, III
R. Judson Scaggs, Jr.
Jessica Zeldin
Patricia R. Uhlenbrock
1201 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347
(302) 658-9200
Attorneys for Defendant Vishay Intertechnology, Inc.

OF COUNSEL:

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Alan R. Friedman
Jonathan M. Wagner
Douglas Gray
Theresa A. Buckley
919 Third Avenue
New York, New York 10022
(212) 715-9100

June 13, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2001, copies of the ANSWERING BRIEF OF DEFENDANT VISHAY INTERTECHNOLOGY, INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION were served, by hand, on the following attorneys of record:

Kevin G. Abrams, Esquire
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899

Lawrence C. Ashby, Esquire
Ashby & Geddes
222 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899

Robert K. Payson, Esquire
Potter Anderson & Corroon
Hercules Plaza
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

Norman M. Monhait, Esquire
Rosenthal, Monhait, Gross & Goddess
Mellon Bank Center, Suite 1401
P.O. Box 1070
Wilmington, DE 19899

Lewis H. Lazarus, Esquire
Morris, James, Hitchens & Williams
222 Delaware Avenue
P.O. Box 2306
Wilmington, DE 19899

Jessica Zeldin

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2001, copies of the REDACTED VERSION OF ANSWERING BRIEF OF DEFENDANT VISHAY INTERTECHNOLOGY, INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION were served, by hand, on the following attorneys of record:

Kevin G. Abrams, Esquire
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899

Lawrence C. Ashby, Esquire
Ashby & Geddes
222 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899

Robert K. Payson, Esquire
Potter Anderson & Corroon
Hercules Plaza
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

Norman M. Monhait, Esquire
Rosenthal, Monhait, Gross & Goddess
Mellon Bank Center, Suite 1401
P.O. Box 1070
Wilmington, DE 19899

Lewis H. Lazarus, Esquire
Morris, James, Hitchens & Williams
222 Delaware Avenue
P.O. Box 2306
Wilmington, DE 19899

Jessica Zeldin