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## Notes

### NO CLEAR WINNER: APPRAISING THE IMBALANCES OF DELAWARE'S QUASI-APPRAISAL REMEDY AFTER *BERGER v. PUBCO CORP.*

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#### I. INTRODUCTION

In the recent and highly-publicized \$24.9 billion buyout of Dell, Inc., activist investor Carl Icahn—believing the buyout offer to be undervalued—urged fellow Dell shareholders to prepare to exercise appraisal rights for their shares should the buyout be approved.<sup>1</sup> Appraisal statutes generally allow dissenting minority shareholders in a corporate merger or buyout situation to bring suit to obtain the judicially determined fair value for their shares.<sup>2</sup> In traditional long-form merger or buyout transactions, such as the Dell deal, the exercise of appraisal rights is one of several alternatives available to minority shareholders interested in challenging the merits of the transaction.<sup>3</sup>

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1. See Michael J. De La Merced, *Ichan's Latest Gamble at Dell: Appraisal Rights*, N.Y. TIMES DEALBOOK (July 10, 2013, 10:33 AM), [http://dealbook.nytimes.com/2013/07/10/ichans-latest-gamble-at-dell-appraisal-rights/?\\_r=1](http://dealbook.nytimes.com/2013/07/10/ichans-latest-gamble-at-dell-appraisal-rights/?_r=1) (explaining that Mr. Ichan's uncommon request could yield higher payout for minority shareholders). The buyout was ultimately approved by a majority vote of the Dell shareholders. See Brett Molina, *Dell Shareholders Approve \$25 Billion Buyout*, USA TODAY (Sept. 12, 2013, 4:19 PM), <http://www.usatoday.com/story/tech/2013/09/12/dell-buy-out-vote/2803907/> (reporting result of Dell vote).

2. See, e.g., George S. Geis, *An Appraisal Puzzle*, 105 Nw. U. L. REV. 1635, 1642 (2011) (discussing general purpose of appraisal statutes).

3. See, e.g., Gretchen Morgenson, *For Dell Investors, a Safety Valve*, N.Y. TIMES (June 22, 2013), [http://www.nytimes.com/2013/06/23/business/for-dell-investors-a-safety-valve.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/23/business/for-dell-investors-a-safety-valve.html?pagewanted=all&_r=0) (explaining exercising appraisal rights as interesting alternative for dissenting shareholders compared with traditional shareholder suits based on breach of fiduciary duties); see also Robert B. Schumer et al., *Quasi-appraisal: The Unexplored Frontier of Stockholder Litigation?*, 12 M&A JOURNAL 1, 2 (2012), available at <http://www.paulweiss.com/media/103314/>

In short-form merger situations, however, after the seminal Delaware Supreme Court opinions in *Weinberger v. UOP, Inc.*<sup>4</sup> and *Glassman v. Unocal Exploration Corp.*,<sup>5</sup> judicial appraisal became the sole remedy available to minority shareholders wishing to challenge the merits of the short-form transaction, absent fraud or illegality.<sup>6</sup> The exclusivity of the appraisal remedy for minority shareholders in short-form merger situations was decided, in part, based on the Delaware Supreme Court's interpretation of the purpose of the Delaware short-form merger statute.<sup>7</sup> That purpose was to provide a parent corporation, owning at least ninety percent of the outstanding shares of each class of stock of another corporation, with a mechanism to effectuate a merger unilaterally.<sup>8</sup>

Delaware courts have held, however, that even when unilaterally effectuating a short-form merger, the majority shareholder corporation still owes certain fiduciary duties to the minority shareholders.<sup>9</sup> These duties

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7719347\_1.pdf (acknowledging various types of litigation remedies available to minority shareholders in long-form mergers). Generally, under Section 251 of Delaware General Corporation Law (the long-form merger statute), in the event of a proposed arms-length merger transaction, approval from a majority of shareholders is required for the transaction to proceed. See DEL. CODE ANN. tit. 8, § 251 (West 2013) (codifying requirements of shareholder approval in long-form merger transactions); see also Richard T. Hossfeld, *Short-Form Mergers After Glassman v. Unocal Exploration Corp.: Time to Reform Appraisal*, 53 DUKE L.J. 1337, 1338 (2004) (explaining shareholder approval in long-form merger transactions ensures shareholders receive adequate value for their shares).

4. 457 A.2d 701 (Del. 1983).

5. 777 A.2d 242 (Del. 2001).

6. See *Weinberger*, 457 A.2d at 714 (holding plaintiff's monetary remedy in cash-out merger situation should ordinarily be confined to appraisal proceeding); see also *Glassman*, 777 A.2d at 248 (“[A]bsent fraud or illegality, appraisal is the exclusive remedy available to a minority stockholder who objects to a short-form merger.”). Under Section 253 of Delaware General Corporation Law, a short-form merger may be effectuated when a parent corporation owns at least ninety percent of the outstanding shares of each class of stock of a subsidiary. Compare DEL. CODE ANN. tit. 8, § 253 (codifying requirements of short-form merger transactions), and Hossfeld, *supra* note 3, at 1338 (explaining summary procedure for short-form merger as compared to traditional long-form merger), with DEL. CODE ANN. tit. 8, § 251 (codifying requirements of shareholder approval in long-form merger transactions), and Hossfeld, *supra* note 3, at 1338 (explaining shareholder approval in long-form merger transactions ensures shareholders receive adequate value for their shares). For a further discussion of the Delaware long-form merger statute requirements, see *supra* note 3 and accompanying text.

7. See generally Bradley R. Aronstam et al., *Delaware's Going-Private Dilemma: Fostering Protections for Minority Shareholders in the Wake of Siliconix and Unocal Exploration*, 58 BUS. LAW. 519, 525 (2003) (noting short-form merger statute “provides parent corporations with the means for unilaterally effectuating mergers with their subsidiaries”).

8. See *Glassman*, 777 A.2d at 245 (“[T]he very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise.”); see also Hossfeld, *supra* note 3, at 1365 (explaining benefits of short-form mergers for parent corporations).

9. See *Glassman*, 777 A.2d at 248 (“Although fiduciaries are not required to establish entire fairness in a short-form merger, the duty of full disclosure remains . . . .”); see also *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 307 (Del. Ch. 2005)

include the duty of full disclosure.<sup>10</sup> In the event parent corporations violate their fiduciary duties in short-form merger transactions, Delaware courts have provided minority shareholders with a quasi-appraisal remedy.<sup>11</sup> The Delaware Supreme Court, however, in *Weinberger* and *Glassman*, had left open the question of what the appropriate procedural application of this quasi-appraisal remedy would be.<sup>12</sup> This is an important question because it greatly impacts both majority and minority shareholders.<sup>13</sup>

The appropriate quasi-appraisal remedy should balance the majority shareholders' interest in effectuating a merger unilaterally with the minority shareholders' right to make an informed appraisal decision.<sup>14</sup> Should Delaware courts loosely regulate fiduciary duties in short-form merger situations, minority shareholders may lack the necessary information to make an informed appraisal decision.<sup>15</sup> Without adequate information, minority shareholders would be vulnerable to the parent corporation's interest

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(describing majority shareholder's duty of disclosure in short-form merger transactions); *Nebel v. Sw. Bancorp, Inc.*, Civ. A. No. 13618, 1995 WL 405750, at \*5 (Del. Ch. July 5, 1995) (same).

10. See *Glassman*, 777 A.2d at 248 (discussing majority shareholder's duty of disclosure in short-form merger transactions).

11. See *Geis*, *supra* note 2, at 1642 (noting quasi-appraisal has been judicial response to short-form merger transactions effectuated with violations of fiduciary duties); see also *Schumer et al.*, *supra* note 3, at 1 ("Generally, quasi-appraisal has been recognized in cases in which a corporation fails to make disclosures that directly affect the stockholders' decision whether or not to seek appraisal.").

12. See *Berger v. Pubco Corp.*, 976 A.2d 132, 138 (Del. 2009) (stating issue of what remedy should be available to minority shareholders in case of violation of fiduciary duty is one of first impression for Delaware Supreme Court).

13. See *Hossfeld*, *supra* note 3, at 1359 (noting generally appraisal remedies should seek to balance risks of oppression by majority against harassment by minority); see also Joseph M. Coleman, *The Appraisal Remedy in Corporate Freeze-Outs: Questions of Valuation and Exclusivity*, 38 Sw. L.J. 775, 776 (1984) (noting appraisal proceedings "prevent majority shareholders from abusing their favorable position" in merger transactions). The importance of the quasi-appraisal remedy is also supported by the Delaware courts' increased use of the remedy outside of short-form merger transactions. See, e.g., *Schumer et al.*, *supra* note 3, at 2 (describing Delaware courts' consideration of quasi-appraisal as protection for minority shareholders in sign and consent transactions). These cases are also notable as they suggest Delaware courts are willing to forgo pre-closing remedies of disclosure issues and defer to the protection provided to minority shareholders through the quasi-appraisal proceeding. See *id.* at 4 (discussing evolution of quasi-appraisal remedy).

14. See *Hossfeld*, *supra* note 3, at 1360 (discussing need for more balanced appraisal remedy).

15. See *McMullin v. Beran*, 765 A.2d 910, 920 (Del. 2000) (finding minority shareholders must be able to make informed decision whether to accept buyout price or seek appraisal of their shares); see also *Nebel v. Sw. Bancorp, Inc.*, Civ. A. No. 13618, 1995 WL 405750, at \*5 (Del. Ch. July 5, 1995) (noting parent corporation has "duty . . . to disclose all facts material to minority stockholders' decision whether to accept the short form merger consideration or seek an appraisal" (citing *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992))).

in cashing out the minority at the lowest possible price.<sup>16</sup> Conversely, should Delaware courts establish a jurisprudence that enforces fiduciary duties too strictly, majority shareholders effectuating short-form mergers would be continuously exposed to harassment in the form of quasi-appraisal claims.<sup>17</sup> The issue of determining the appropriate procedural application of the quasi-appraisal remedy was one of first impression for the Delaware Supreme Court and was addressed in *Berger v. Pubco Corp.*<sup>18</sup>

The Delaware Supreme Court's opinion in *Berger* seems, on its face, to benefit minority shareholders in short-form merger transactions.<sup>19</sup> This

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16. See Aronstam et al., *supra* note 7, at 521 (explaining imposition of fiduciary duties guards against risk that majority shareholders could unilaterally implement transactions to detriment of minority shareholders).

17. See Hossfeld, *supra* note 3, at 1359 (noting generally appraisal remedies seek to balance risks of oppression by majority against harassment by minority); see also Schumer et al., *supra* note 3, at 2 (advocating quasi-appraisal remedy should be limited "to avoid the tipping of the balance of the law" in favor of post-merger litigation). Vice Chancellor Laster recently addressed the issue of disclosure claim harassment by minority shareholders and the importance of a balanced equitable remedy:

As we know from scholarly studies, the past decade has witnessed a dramatic transformation in the nature of public company M&A litigation. In 2010, 84.2 percent of announced deals attracted lawsuits. In 2010 and 2011, according to Cornerstone Research, 91 percent attracted lawsuits. According to the data for 2011, in the same study, 96 percent of deals valued at \$500 million or more attracted lawsuits. That's compared to 53 percent in 2007.

As these volumes have increased, merits-related outcomes have decreased. So of the 447 transactions involving public companies valued at a \$100 million plus, between 2005 and 2010 for which data is available, 69.8 percent resulted in a settlement. The remaining 135 were dismissed by the Court. So all of those were either settled or dismissed. Of the cases that settled, 74.7 percent were supplemental disclosures only . . . . That was a sharp increase over 1999 through 2000 when . . . the rate of disclosure-only settlements was only 10 percent.

As I have observed, viewed against the background of these statistics, the increase in disclosure-only settlements is troubling. Disclosure claims can be settled cheaply and easily, creating a cycle of supplementation that confers minimal, if any, benefits on the class. I don't think for a moment that 90 percent—or based on recent numbers, 95 percent of deals are the result of a breach of fiduciary duty. I think that there are market imbalances here and externalities that are being exploited.

What this means is that this Court needs to think carefully about balancing.

Transcript of Oral Argument at 10–12, *Stourbridge Inv. LLC v. Bersoff*, C.A. No. 7300-VCL (Del. Ch. Mar. 13, 2012) (discussing appropriate quasi-appraisal remedy).

18. 976 A.2d 132, 133 (Del. 2009) ("The issue on this appeal is what remedy is appropriate in a 'short form' merger . . . where the corporation's minority stockholders are involuntarily cashed out without being furnished the factual information material to an informed shareholder decision whether or not to seek appraisal.").

19. See Geis, *supra* note 2, at 1642 (noting that after *Berger* quasi-appraisal became more convenient than traditional appraisal for dissenting minority shareholders); see also Andrew J. Nussbaum, *Delaware Supreme Court Establishes Equitable*

Note, however, analyzes the imbalances of the quasi-appraisal remedy established in *Berger* and the detrimental effects that remedy will have on both the interest of parent corporations and the rights of minority shareholders in short-form merger transactions.<sup>20</sup> Part II of this Note provides a brief background of Delaware's quasi-appraisal jurisprudence with a focus on short-form mergers and the emergence of diverging procedural applications of the quasi-appraisal remedy.<sup>21</sup> Part III details the facts and procedural posture of *Berger* and analyzes the Delaware Supreme Court's holding.<sup>22</sup> Part IV addresses the imbalances of the Delaware Supreme Court's approach in *Berger* in regards to protecting minority shareholder rights while also preserving the interest of majority shareholders in short-form merger transactions.<sup>23</sup> Finally, Part V concludes by suggesting that the Delaware Supreme Court revisit the holding of *Berger* to establish a more balanced quasi-appraisal remedy.<sup>24</sup>

## II. AN OVERVIEW OF QUASI-APPRAISAL JURISPRUDENCE LEADING UP TO *BERGER V. PUBCO CORP.*

Quasi-appraisal is a judicially created remedy available to minority shareholders who are deprived of the full right to statutory appraisal.<sup>25</sup> As Delaware courts have held that statutory appraisal is the sole remedy available to minority shareholders in a short-form merger situation, quasi-appraisal has become an important protection of minority shareholders' rights when the majority inequitably prevents the minority from making a fully informed statutory appraisal decision.<sup>26</sup> Delaware courts, however, have struggled to balance the statutorily protected interests of the majority

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*Relief in Short Form Mergers*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE & FIN. REG. (July 26, 2009, 1:38 PM), <http://blogs.law.harvard.edu/corpgov/tag/berger-v-pubco-corp/> (reasoning benefits provided to minority shareholders from *Berger* decision "may encourage increased litigation following short-form mergers").

20. For a discussion of the detrimental effects of the quasi-appraisal remedy handed down in *Berger*, see *infra* notes 105–21 and accompanying text.

21. For a discussion of Delaware's quasi-appraisal jurisprudence and the emerging diversion in application of the quasi-appraisal remedy, see *infra* notes 43–68 and accompanying text.

22. For a discussion of the facts, procedural posture, and the Delaware Supreme Court's analysis in *Berger*, see *infra* notes 72–104 and accompanying text.

23. For a discussion of the effects of *Berger* on minority shareholder rights and the interest of majority shareholders in short-form merger transactions, see *infra* notes 105–21 and accompanying text.

24. For a discussion of the conclusion of this Note, see *infra* notes 142–47 and accompanying text.

25. See *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005) (discussing appropriate remedy available to minority shareholders in case of "technical non-compliance with the appraisal statute" by majority shareholder); see also *Geis*, *supra* note 2, at 1648 (explaining rationale for creation of quasi-appraisal remedy by Delaware courts).

26. See *Berger v. Pubco Corp.*, 976 A.2d 132, 145 (Del. 2009) (recognizing quasi-appraisal and its enforcement of statutory and fiduciary duties related to short-form mergers as important protection for minority shareholders); see also

with the rights of minority shareholders in the application of the quasi-appraisal remedy.<sup>27</sup>

A. *Majority Shareholder Interest and the Purpose of the Delaware Short-Form Merger Statute*

The Delaware Supreme Court initially addressed the purpose of the Delaware short-form merger statute in *Stauffer v. Standard Brands, Inc.*<sup>28</sup> The court in *Stauffer* held the purpose of the short-form merger statute was to provide parent corporations with a means of unilaterally eliminating minority shareholders' interest in an enterprise.<sup>29</sup> Giving weight to the legislative intent of the Delaware short-form merger statute, the court in *Stauffer* further held that the exclusive remedy for minority shareholders in a short-form merger would be judicial appraisal.<sup>30</sup> The exclusivity of

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Nussbaum, *supra* note 19 (discussing benefits provided to minority shareholders from *Berger* decision).

27. See Hossfeld, *supra* note 3, at 1359 (noting generally appraisal remedies seek to balance risks of oppression by majority against harassment by minority); see also Gilliland, 873 A.2d at 315 (holding minority shareholders must opt in and escrow a portion of merger proceeds to secure quasi-appraisal proceeding); Geis, *supra* note 2, at 1648 (acknowledging Delaware Supreme Court in *Berger* wrestled with open questions related to quasi-appraisal procedure). *But see* Nebel v. Sw. Bancorp, Inc., Civ. A. No. 13618, 1995 WL 405750, at \*5 (Del. Ch. July 5, 1995) (holding quasi-appraisal is opt-out proceeding and minority shareholders are not required to escrow any merger proceeds).

28. 187 A.2d 78 (Del. 1962), *overruled by* Roland Int'l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979) ("As to *Stauffer*, we agree that the purpose of § 253 is to provide the parent with a means of eliminating minority shareholders in the subsidiary . . ."); see *id.* at 80 (discussing purpose of Delaware short-form merger statute).

29. See *id.* (determining purpose of Delaware short-form merger statute "is to provide the parent corporation with means of eliminating the minority shareholder's interest" unilaterally).

30. See *id.* (holding in disputes related to value arising from effectuation of short-form merger, appraisal is exclusive remedy available to dissenting minority shareholders). The Delaware Supreme Court in *Stauffer* established that the court will protect majority shareholder parent corporations' legitimate interest in being able to unilaterally effectuate short-form mergers against breach of duty challenges from minority shareholders. See *id.* (indicating that "power of the parent corporation to eliminate the minority [interest] is a complete answer to . . . breach of trust" claims). Later, the Delaware Supreme Court diverged from the premise established in *Stauffer* that the purpose of the Delaware short-form merger statute was to allow controlling shareholders to unilaterally eliminate minority interests. See *Singer v. Magnavox Co.*, 380 A.2d 969, 980 (Del. 1977) ("[T]he fiduciary obligation of the majority to the minority stockholders remains and proof of a purpose, other than such freeze-out, without more, will not necessarily discharge it."), *overruled by* *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). In *Singer*, the supreme court established a business purpose test applicable to appraisal actions and found that a controlling shareholder breaches its fiduciary duty to minority shareholders if it effects a merger for the sole purpose of eliminating the minority shareholders. See *id.* (holding short-form merger made solely for purpose of freezing out minority shareholders is violation of fiduciary duty). However, any precedent established by the *Singer* decision was short-lived as the Delaware Supreme Court in *Weinberger* overruled *Singer* and re-established the principles of *Stauffer* by eliminating the business purpose test and again limiting the minority stockholders re-

the appraisal remedy protects the interest of the majority shareholder in unilaterally effectuating the transaction.<sup>31</sup>

The Delaware courts have uniformly interpreted the purpose of the short-form merger statute over time.<sup>32</sup> With this purpose in mind, Delaware courts have consistently protected a majority shareholder's ability to unilaterally eliminate the minority interest through a short-form merger by making statutory appraisal the exclusive remedy available to objecting minority shareholders.<sup>33</sup> Delaware courts have, however, carved out some exceptions to the exclusivity of the statutory appraisal remedy in short-form merger situations.<sup>34</sup> The most notable exceptions are cases of fraud, illegality, or breach of fiduciary duty.<sup>35</sup> The rationale behind allowing these exceptions is that, in cases of fraud, illegality, and breach of fiduciary duties, minority shareholders are unable to make an informed appraisal decision.<sup>36</sup>

#### B. *Minority Shareholders' Rights to Informed Decisions and the Fiduciary Duty of Disclosure*

Delaware courts have also consistently protected the right of minority shareholders to make an informed appraisal decision in short-form

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course in short-form mergers to a remedy known as quasi-appraisal. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (noting plaintiff's monetary remedy in short-form merger situation should be confined to quasi-appraisal proceeding); see also *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 245–47 (Del. 2001) (describing history of Delaware jurisprudence related to exclusivity of appraisal in context of short-form mergers).

31. See *Glassman*, 777 A.2d at 248 (finding that in order to give effect to purpose of short-form merger statute, appraisal must be “exclusive remedy available to a minority stockholder who objects to a short-form merger”).

32. See *id.* at 245–48 (citing *Stauffer*, 187 A.2d at 80) (recognizing purpose of short-form merger statute as announced in *Stauffer*); *Stauffer*, 187 A.2d at 80 (“[T]he very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder’s interest in the enterprise.”); *Nebel*, 1995 WL 405750, at \*5 (discussing purpose of short-form merger statute).

33. See, e.g., *Glassman*, 777 A.2d at 245 (noting exclusivity of appraisal remedy protects legislative intent of short-form merger statute); *Stauffer*, 187 A.2d at 80 (same).

34. See, e.g., *Glassman*, 777 A.2d at 247 (indicating equitable remedies other than statutory appraisal would be available in cases involving fraud or illegality); *Weinberger*, 457 A.2d at 714 (same); *Stauffer*, 187 A.2d at 80 (same).

35. See, e.g., *Glassman*, 777 A.2d at 247 (finding statutory appraisal is exclusive remedy for minority shareholders objecting to short-form mergers except in cases of fraud or illegality); *Stauffer*, 187 A.2d at 80 (same); see also *Glassman*, 777 A.2d at 248 (determining duty of disclosure remains in short-form merger transactions).

36. See *Glassman*, 777 A.2d at 248 (“Where the only choice for the minority stockholders is whether to accept the merger consideration or seek appraisal, they must be given all the factual information that is material to that decision.”); see also *Nussbaum*, *supra* note 19 (noting only obligation of parent company in short-form merger is to provide minority shareholders with sufficient information to make informed appraisal decision); *Schumer et al.*, *supra* note 3, at 2 (discussing requirement for corporations to make disclosures that directly affect stockholder’s ability to make informed decision about appraisal).



merger situations.<sup>37</sup> To ensure that minority shareholders are provided with the requisite information to make an informed decision, Delaware courts impose a fiduciary duty of loyalty on majority shareholders.<sup>38</sup> As part of this duty of loyalty, majority shareholders effectuating a short-form merger must disclose any information material to the minority shareholders' appraisal decision.<sup>39</sup> Information is material if there is a substantial likelihood that a reasonable shareholder would consider the information important in making the appraisal decision.<sup>40</sup> In the context of a short-form merger, the statutory appraisal remedy cannot adequately address situations in which the minority is left uninformed due to a breach of the majority's duty of full disclosure.<sup>41</sup> To address the inadequacies of the statutory appraisal remedy in these situations, the Delaware courts have fashioned an equitable quasi-appraisal remedy.<sup>42</sup>

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37. For a further discussion of the need for minority shareholders to make an informed decision whether to seek appraisal, see *supra* note 36 and accompanying text.

38. See *Weinberger*, 457 A.2d at 710 (discussing duty of loyalty owed by directors of Delaware corporations to their shareholders).

39. See *id.* at 703 (holding majority shareholders withholding information material to transaction is breach of fiduciary duty owed to minority shareholders); see also *Glassman*, 777 A.2d at 248 (finding fiduciaries owe duty of full disclosure to minority stockholders in short-form merger); Hossfeld, *supra* note 3, at 1348 (explaining parent corporation must satisfy duty of full disclosure in short-form merger).

40. See *McMullin v. Beran*, 765 A.2d 910, 925 (Del. 2000) (discussing materiality standard in context of breach of fiduciary duties arising from merger transaction); see also *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))). The Delaware Chancery Court has also found omission of certain information can be per se material if that information is required to be provided by statute. See *Nebel v. Sw. Bancorp. Inc.*, Civ. A. No. 13618, 1995 WL 405750, at \*6 (Del. Ch. July 5, 1995) (holding statutory requirement that corporation include current appraisal statute in its short-form merger notice makes that information per se material).

41. See *Weinberger*, 457 A.2d at 714 (explaining appraisal remedy may not be adequate in certain cases and equitable remedy may be fashioned); see also *Nebel*, 1995 WL 405750, at \*2 (discussing limitations of appraisal remedy in short-form merger situations). In these situations the claim is that the breach of duty has left minority shareholders unable to make an informed appraisal decision. See *id.* at \*5 (discussing plaintiff's claims related to breach of fiduciary duty). Therefore, the appraisal remedy, without the requirement of additional disclosures, cannot be an adequate remedy for that claim. See *id.* The exclusiveness of the appraisal remedy leaves minority shareholders especially vulnerable in short-form merger situations as, technically, the merger has taken place before the majority is required to disclose any information. See *Geis*, *supra* note 2, at 1648 (explaining short-form mergers become effective before any disclosures are made to minority shareholders); see also DEL. CODE ANN. tit. 8, § 253 (codifying requirements of short-form merger). For a further discussion of the minority shareholders' right to make an informed appraisal decision in short-form merger situations, see *supra* note 15 and accompanying text.

42. See *Geis*, *supra* note 2, at 1648 (explaining judicial response to inadequacies of statutory appraisal has been to craft quasi-appraisal remedy); see also *Schu-*

### C. *The Quasi-appraisal Remedy*

The Delaware judiciary developed the quasi-appraisal remedy to address situations in which minority shareholders had been deprived of the full right to statutory appraisal.<sup>43</sup> Unfortunately, the Delaware courts have inconsistently applied the procedural aspects of the quasi-appraisal remedy.<sup>44</sup> This inconsistency stems in part from the struggle of Delaware courts to fashion an equitable remedy that balances the rights of minority shareholders with the interests of parent corporations in short-form mergers.<sup>45</sup>

#### 1. *Origins of Quasi-appraisal*

The Delaware Supreme Court first recognized quasi-appraisal as an equitable remedy available to cashed-out minority shareholders in *Weinberger*.<sup>46</sup> The Delaware Supreme Court in *Weinberger* found that as minority shareholders had tendered their shares on a materially uninformed basis, they were deprived of their right to statutory appraisal.<sup>47</sup> The court in *Weinberger* also established the ability of Delaware courts to fashion equitable remedies in cases where appraisal would be an inadequate remedy due to fraud or violations of fiduciary duties.<sup>48</sup>

The Delaware Supreme Court in *Weinberger* did not intend for quasi-appraisal to become the alternative remedy in all cases of corporate transactions involving fraud or breaches of fiduciary duties.<sup>49</sup> Nevertheless, in

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mer et al., *supra* note 3, at 1 (noting quasi-appraisal remedy has been implemented in short-form merger cases where fiduciary breaches duty of disclosure).

43. See *Weinberger*, 457 A.2d at 714–15 (discussing quasi-appraisal remedy now available to minority shareholders); see also *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005) (discussing purpose of quasi-appraisal remedy).

44. For a discussion of the inconsistent application of the quasi-appraisal remedy, see *infra* notes 53–68 and accompanying text.

45. For a discussion of the importance of balancing the rights of minority shareholders with the interests of majority shareholders in short-form mergers, see *supra* notes 14–17 and accompanying text.

46. See *Weinberger*, 457 A.2d at 714–15 (discussing quasi-appraisal remedy now available to minority shareholders); see also *Schumer et al.*, *supra* note 3, at 2 (acknowledging quasi-appraisal remedy was first recognized in *Weinberger*).

47. See *Weinberger*, 457 A.2d at 712 (concluding shareholder vote on tender offer was uninformed and therefore meaningless); see also *Gilliland*, 873 A.2d at 311 (discussing *Weinberger* holding).

48. See *Weinberger*, 457 A.2d at 714 (discussing other situations in which statutory appraisal remedy may not be appropriate); see also *Coleman*, *supra* note 13, at 789 (discussing *Weinberger*'s enablement of Delaware courts to fashion equitable remedies). Shortly after *Weinberger*, the Delaware Supreme Court again supported the discretion of Delaware courts in these matters when it held that there are certain situations in which, even absent fraud or illegality, the court may establish equitable remedies other than judicial appraisal. See *Rabkin v. Phillip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1100 (Del. 1985) (concluding appraisal is exclusive remedy only if minority stockholders' complaints are limited to judgmental factors of valuation).

49. See *Weinberger*, 457 A.2d at 714 (enumerating limited types of cases to which quasi-appraisal remedy would apply). The court in *Weinberger* initially only

a number of post-*Weinberger* cases, the Delaware Chancery Court has used its *Weinberger*-supported discretion to extend the application of the quasi-appraisal remedy beyond the scope envisioned by the Delaware Supreme Court in *Weinberger*.<sup>50</sup> Despite its increased application of the quasi-appraisal remedy, the Chancery Court had difficulty consistently fashioning a quasi-appraisal proceeding that balanced the majority shareholders' interests with the minority shareholders' rights.<sup>51</sup>

## 2. *Inconsistent Application of Quasi-appraisal Remedy in the Context of Short-Form Mergers*

In two Delaware Chancery Court cases, *Nebel v. Southwest Bancorp. Inc.*<sup>52</sup> and *Gilliland v. Motorola, Inc.*,<sup>53</sup> the court found that parent corporations executing short-form merger transactions had breached their duty of disclosure to minority shareholders.<sup>54</sup> In both cases, the court also found that the statutory appraisal remedy was inappropriate and chose to offer minority shareholders a quasi-appraisal remedy.<sup>55</sup> The courts differed, however, in what they held to be the appropriate procedural application of the quasi-appraisal remedy.<sup>56</sup>

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intended the quasi-appraisal remedy to apply to similarly situated cases currently being litigated so those courts may apply the more liberalized valuation procedures established in *Weinberger*. See *id.* (noting limitations on application of quasi-appraisal remedy); see also Schumer et al., *supra* note 3, at 2 (“The *Weinberger* court did not attempt to create a new remedy apart from statutory appraisal . . .”). In fact, the Delaware Supreme Court in *Weinberger* and in subsequent decisions stressed the exclusivity of the statutory appraisal remedy except in limited circumstances. See *Weinberger*, 457 A.2d at 714 (noting remedy available to minority shareholders should ordinarily be confined to statutory appraisal proceeding albeit with more liberalized valuation approach); see also *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001) (reaffirming *Weinberger*'s statements about scope of appraisal).

50. See, e.g., *Gilliland*, 873 A.2d at 312 (applying quasi-appraisal remedy to short-form merger situation involving breach of fiduciary duty although statutory appraisal proceeding including *Weinberger*'s liberalized valuation approach was available); see also *Nebel v. Sw. Bancorp, Inc.*, Civ. A. No. 13618, WL 405750, at \*7 (Del. Ch. July 5, 1995) (same); Schumer et al., *supra* note 3, at 3 (discussing variety of cases in which quasi-appraisal remedy was applied or was considered).

51. For a full discussion of the inconsistent application of the quasi-appraisal remedy, see *infra* notes 52–68 and accompanying text.

52. Civ. A. No. 13618, 1995 WL 405750 (Del. Ch. July 5, 1995).

53. 873 A.2d 305 (Del. Ch. 2005).

54. See *Nebel*, 1995 WL 405750, at \*6 (finding parent corporation violated its fiduciary duty of disclosure); see also *Gilliland*, 873 A.2d at 307 (finding majority stockholder breached its fiduciary duty).

55. See *Nebel*, 1995 WL 405750, at \*7 (holding appropriate remedy for disclosure violation in question was quasi-appraisal); see also *Gilliland*, 873 A.2d at 307 (“The court must look beyond the [general appraisal] statute to fashion a proper remedy.”).

56. See *Berger v. Pubco Corp.*, 976 A.2d 132, 137 (Del. 2009) (discussing differences between *Nebel* and *Gilliland*); see also *Gilliland*, 873 A.2d at 313 (discussing procedural aspects of quasi-appraisal remedy absent in *Nebel*).

a. The *Nebel* Approach to Quasi-appraisal

The Chancery Court in *Nebel* granted minority shareholders a quasi-appraisal remedy in which shareholders were neither required to opt in to the quasi-appraisal proceeding, nor were minority shareholders required to escrow any of the proceeds they had received from the merger.<sup>57</sup> The opt-out proceeding established by the court in *Nebel* essentially created a class action proceeding in which the entire class of minority shareholders would be included in the quasi-appraisal proceeding brought by any individual minority shareholder.<sup>58</sup> Although the *Nebel* court neglected to provide sufficient rationale for its decision to establish an opt-out proceeding, later opinions have suggested that this approach properly balances procedural burdens on majority and minority shareholders.<sup>59</sup>

b. The *Gilliland* Approach to Quasi-appraisal

In *Gilliland*, the Delaware Court of Chancery again addressed the issue of what the appropriate remedy should be in the case of a short-form merger effectuated with violations of the majority shareholder's duty of disclosure.<sup>60</sup> The parties in *Gilliland* agreed that the transaction was effectuated with a breach of the duty of full disclosure.<sup>61</sup> The parties also agreed that quasi-appraisal would be the appropriate remedy.<sup>62</sup> The parties disagreed, however, on the proper procedural application of the quasi-appraisal remedy; specifically, they disagreed as to whether minority shareholders would be required to opt in and to escrow a portion of their

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57. See Schumer et al., *supra* note 3, at 3 (discussing Chancery Court's holding in *Nebel*); see also *Berger*, 976 A.2d at 137 (detailing quasi-appraisal proceeding resulting from *Nebel* decision). But see *Gilliland*, 873 A.2d at 312 (claiming *Nebel* assumed, without deciding, that quasi-appraisal would be opt-out proceeding).

58. See Schumer et al., *supra* note 3, at 3 (describing *Nebel* remedy as "class-wide quasi-appraisal").

59. See *Nebel*, 1995 WL 405750, at \*7 (granting quasi-appraisal remedy but not discussing procedural aspects). But see *Berger*, 976 A.2d at 143 (noting opt-out proceeding does not burden majority shareholder but relieves procedural burden on minority shareholders).

60. See *Gilliland*, 873 A.2d at 307 (describing issue to be resolved).

61. See *id.* (noting question of breach was addressed in previous opinion). The breach of the fiduciary duty stemmed from the fact that the majority shareholder in *Gilliland* had not provided any disclosures related to the company's financial condition prior to the execution of the short-form merger transaction. See *id.* at 308 (discussing basis for prior court's finding of breach of fiduciary duty of disclosure). Although in *Gilliland* most minority shareholders had been provided with adequate financial disclosures pursuant to a recent tender offer, some of which were publicly available, the court held that all minority shareholders involved in the short-form merger transaction must be provided with *at least* summary financial information, trading data of the shares, and a reference to publicly available sources from which additional data could be obtained. See *id.* (discussing minimum requirements for adequate financial disclosure).

62. See *id.* at 307 (noting disagreement was focused solely on procedural issues related to quasi-appraisal remedy).

merger proceeds.<sup>63</sup> Ultimately, the Court of Chancery in *Gilliland* held that the appropriate quasi-appraisal remedy required minority shareholders to both opt in and to escrow a portion of the merger proceeds.<sup>64</sup>

The court's rationale for the opt-in and escrow requirements was that this remedy properly reflects the legislative intent of the short-form merger statute and the modicum of risk inherent in a statutory appraisal proceeding.<sup>65</sup> The court noted that, like in a statutory appraisal proceeding, the opt-in proceeding requires that the minority shareholders make a choice to participate in the action.<sup>66</sup> Further, the court reasoned that the escrow requirement reflects the risk of the statutory appraisal proceeding in that minority shareholders may actually lose value should the judicially determined valuation be less than the proposed merger consideration.<sup>67</sup>

### III. *BERGER V. PUBCO CORP.*

In *Nebel* and *Gilliland*, the Delaware Court of Chancery handed down conflicting opinions regarding the appropriate procedural remedy to address violations of fiduciary duties in the context of a short-form merger.<sup>68</sup> The Delaware Supreme Court, ruling on a matter of first impression, attempted to address this conflict in *Berger v. Pubco Corp.*<sup>69</sup> In finding for the

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63. *See id.* at 308–10 (explaining disagreement in regards to quasi-appraisal procedure). The plaintiffs in *Gilliland* called for a class-wide quasi-appraisal action where all minority shareholders eliminated in the short-form merger would be automatically joined in the appraisal proceeding. *See id.* at 308–09 (detailing plaintiffs' argument). The defendant, on the other hand, called for a more limited quasi-appraisal remedy wherein plaintiffs must opt in to the action individually and must escrow any proceeds received from the merger. *See id.* at 309 (detailing defendant's argument).

64. *See id.* at 313 (deciding quasi-appraisal should be opt-in remedy in which minority shareholders involved are required to escrow portion of merger proceeds).

65. *See id.* at 313–14 (accepting defendant's arguments); *see also* *Berger v. Pubco Corp.*, 976 A.2d 132, 138 (Del. 2009) (discussing rationale behind court's remedy in *Gilliland*).

66. *See Gilliland*, 873 A.2d at 313 (explaining rationale for opt-in requirement).

67. *See id.* (explaining rationale for escrow requirement); *see also* Schumer, *supra* note 3, at 1 (noting in statutory appraisal proceeding plaintiffs "bear the risk that the court will appraise the stockholder's shares at a lower value than the merger consideration"). The *Gilliland* court also noted the escrow requirement will incentivize minority shareholders to make a more reasoned appraisal decision and would avoid a windfall to minority shareholders who would have chosen to accept the merger consideration if given the choice. *See Gilliland*, 873 A.2d at 313 (discussing benefits of escrow requirement).

68. For a discussion of the conflicting applications of the quasi-appraisal remedy, *see supra* notes 51–68 and accompanying text.

69. *See Berger*, 976 A.2d at 139–40 (detailing conflicting holdings of *Nebel* and *Gilliland*). The Chancery Court's holding in *Nebel* favors plaintiff dissenting minority shareholders as it reduces the procedural burdens of having to opt in to the quasi-appraisal action and having to escrow cash that has already been received. *See id.* at 143 (explaining *Nebel*'s quasi-appraisal remedy is potentially less burdensome than *Gilliland* approach). Conversely, the Court of Chancery's holding in

plaintiff, the Delaware Supreme Court held that in a short-form merger where the controlling shareholder failed to disclose material facts, the appropriate remedy would be an opt-out quasi-appraisal proceeding with no requirement that minority shareholders escrow any portion of the merger proceeds.<sup>70</sup>

#### A. Facts

Pubco Corporation (Pubco) was a Delaware corporation whose common shares were not publicly traded.<sup>71</sup> The Pubco majority shareholder, owning over ninety percent of outstanding shares, bought out the interest of the minority shareholders via a short-form merger.<sup>72</sup> Under Delaware's short-form merger statute, the board of directors must adopt a resolution approving the merger and supply minority shareholders with a notice informing them the merger has occurred and instructing them that they should seek appraisal.<sup>73</sup> The short-form merger statute also requires that the minority shareholders receive a copy of the current Delaware appraisal statute.<sup>74</sup> Additionally, Delaware common law requires the majority share-

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*Gilliland* favors defendant majority shareholders in that it would limit their potential liability in a quasi-appraisal action to only those shareholders that choose to opt in. *See id.* (discussing benefits of opt-in proceeding to defendant corporations).

70. *See id.* at 143–44 (discussing appropriate quasi-appraisal procedure).

71. *See id.* at 134 (noting Pubco's status as Delaware corporate entity). That Pubco was not a publicly-traded company is important as most publicly-traded companies are subject to enhanced periodic public disclosure requirements which would generally satisfy the substantive disclosure requirements of the fiduciary duty of disclosure. *See, e.g.,* Bradley R. Aronstam & David E. Ross, *Retracting Delaware's Corporate Roots Through Recent Decisions: Corporate Foundations Remain Stable While Judicial Standards of Review Continue to Evolve*, 12 DEL. L. REV. 1, 23 (2010) (discussing Pubco's lack of public disclosures factoring in to *Berger* court's decision).

72. *See Berger*, 976 A.2d at 134 (“Under the short form merger statute, the only relevant corporate action required to effect a short term merger is for the board of directors of the parent corporation to adopt a resolution approving a certificate of merger, and to furnish the minority shareholders a notice advising that the merger has occurred and that they are entitled to seek an appraisal under [Title 8, Section 262]. Section 253 requires that the notice include a copy of the appraisal statute, and Delaware case law requires the parent company to disclose in the notice of merger all information material to shareholders deciding whether or not to seek appraisal.” (citations omitted)).

73. *See* DEL. CODE ANN. tit. 8, § 253 (West 2013) (describing required procedures to effectuate short-form merger). In *Berger*, the majority shareholder, Robert H. Kanner, was also the sole director of the corporation. *See Berger*, 976 A.2d at 134 (describing role of Robert H. Kanner).

74. *See* tit. 8, § 253 (describing required procedures to effectuate short-form merger); *see also Berger*, 976 A.2d at 135 (noting that Delaware law requires controlling shareholder to attach copy of appraisal statute to short-form merger notice).

holder disclose to the minority shareholders all information material to shareholders deciding whether to seek appraisal.<sup>75</sup>

In *Berger*, the plaintiff minority shareholder received a notice from the parent corporation that Pubco's controlling shareholder had effectuated a short-form merger.<sup>76</sup> This notice disclosed information about Pubco's business, the names of its officers and directors, the number of shares and classes of stock outstanding, a description of related business transactions, and copies of Pubco's most recent interim and annual unaudited financial statements.<sup>77</sup> Notably missing from the notice were disclosures regarding the company's plans or prospects for the future, any meaningful discussion of Pubco's operations, or disclosures of finances by division or line of business.<sup>78</sup> Additionally, the copy of the Delaware appraisal statute provided to the minority shareholders was outdated.<sup>79</sup>

### B. Procedural Posture

The Court of Chancery found, and the Delaware Supreme Court agreed, that the disclosures provided to the minority shareholders provided no significant financial information with which an informed decision regarding appraisal could be made.<sup>80</sup> Additionally, the disclosures provided no information as to how the majority shareholder had determined the buyout price.<sup>81</sup> Ultimately, the Chancery Court found, and the

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75. See *Berger*, 976 A.2d at 134 (noting additional requirements for appropriate effectuation of short-form merger). For a further discussion of the materiality standard applied by Delaware courts, see *supra* note 40 and accompanying text.

76. See *id.* (describing information provided to minority shareholders pursuant to short-form merger). The short-form merger procedure is only available when at least ninety percent of each class of the outstanding shares is owned by another corporation. See tit. 8, § 253 (codifying required procedures to effectuate short-form merger); see also *Berger*, 976 A.2d at 134 (noting short-form merger can only be effectuated by parent corporation). Therefore, Robert H. Kanner formed a wholly-owned subsidiary, Pubco Acquisitions, Inc., and transferred his Pubco shares to that entity. See *Berger*, 976 A.2d at 134 (describing procedures performed by controlling shareholder to effectuate short-form merger).

77. See *Berger*, 976 A.2d at 134 (describing information provided to minority shareholders pursuant to short-form merger).

78. See *id.* at 135 (identifying information not provided to minority shareholders). Specifically, the unaudited financial statements indicated Pubco held a "sizeable amount of cash" but provided no information as to the prospective uses of that cash. See *id.* (identifying information not provided to minority shareholders). Further, the description of the company provided to shareholders contained only five sentences and included vague statements such as "[t]he company owns other income producing assets." See *id.* (alteration in original) (internal quotation marks omitted) (describing vagueness of information provided).

79. See *id.* (noting appraisal statute had been updated with changes that became effective two months prior, but notice provided to minority shareholders did not reflect those changes).

80. See *id.* at 138 (explaining disclosure violations were not at issue on appeal).

81. See *id.* at 136 (determining that given mix of available information valuation method was substantially likely to alter total mix of available information).

Delaware Supreme Court affirmed, that there were two distinct disclosure violations: first, the failure to disclose the valuation methodology used in calculating the merger price, and second, the outdated copy of the appraisal rights statute provided to minority shareholders.<sup>82</sup> It is important to note that the Chancery Court found that the requirement to disclose the methodology used to value the shares was limited to the specific facts of the case at hand.<sup>83</sup> Further, the Chancery Court made clear that only the valuation methodology need be disclosed, and no disclosure of valuation inputs or assumptions was required.<sup>84</sup>

The Court of Chancery held that because the notice did not disclose material facts, the minority shareholders were entitled to a quasi-appraisal remedy. The Chancery Court held further that shareholders who elected to pursue appraisal must “opt in” to the proceeding and escrow a portion of the merger proceeds they received.<sup>85</sup> The plaintiff appealed to the supreme court, arguing that the Chancery Court erred as a matter of law by

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82. *See id.* (discussing Chancery Court’s findings of two distinct disclosure violations); *see also* Evangelos Kostoulas, *Case Law Developments: Terms of Equity Capital Raised in Unfair Transaction Reformed by Court*, DEL. TRANSACTIONAL & CORP. L. UPDATE (Young Conaway Stargatt & Taylor, LLP), Winter 2009, at 3, available at <http://www.youngconaway.com/files/Publication/fb241fe0-9aff-46eb-a169-324a449816c9/Presentation/PublicationAttachment/dd7dcf9c-a816-4c64-8e5e-0248657325be/DECorpUpdateWinter2009.pdf> (noting Court of Chancery in *Berger* found violation in that short-form merger notice failed to disclose process for determining price of shares).

83. *See Berger*, 976 A.2d at 136 (citing *Berger v. Pubco Corp.*, Civil Action No. 3414-CC, 2008 WL 2224107, at \*3 (Del. Ch. May 30, 2008)) (discussing disclosure violations). The valuation methodology was material in this case because the merger notice provided inadequate financial disclosures and no other financial or company information was publicly available. *See id.* (citing *Berger*, 2008 WL 2224107, at \*3) (explaining disclosure of valuation methodology would substantially alter total mix of available information). For a further discussion of the standard of materiality, *see supra* note 40 and accompanying text.

84. *See Berger*, 976 A.2d at 136 (“This does not mean that Kanner should have provided picayune details about the process he used to set the price; it simply means he should have disclosed in a broad sense what the process was . . . .” (quoting *Berger*, 2008 WL 2224107, at \*3)). Although the Delaware Supreme Court did not directly address disclosure requirements, it did support the Chancery Court’s findings as evidenced by its quotation of the portion of the Chancery Court’s opinion relevant to the inadequacy of the disclosure. *See id.* (discussing materiality of valuation methodology).

85. *See id.* at 138 (explaining quasi-appraisal remedy handed down by Chancery Court). Specifically, the Chancery Court’s quasi-appraisal remedy called for the dissenting shareholders to be furnished with all material information necessary to make an informed appraisal decision. *See id.* (same). Further, the Chancery Court’s quasi-appraisal remedy closely reflected the approach applied by the *Gilliland* court in that the remedy required that minority shareholders who wish to participate in the quasi-appraisal action opt in to the proceeding and escrow a portion of the merger proceeds they had received. *See id.* (same). The Delaware Supreme Court noted that the Chancery Court’s purpose for the opt-in and escrow requirements was to “replicate [the] modicum of risk” inherent in a general appraisal proceeding. *See id.* (discussing Chancery Court’s holding).



requiring the minority shareholders to opt in to the appraisal action and to escrow a portion of the merger proceeds.<sup>86</sup>

### C. *Delaware Supreme Court Analysis and Holding*

Ultimately, the Delaware Supreme Court in *Berger* held that the appropriate quasi-appraisal remedy was an opt-out remedy in which minority shareholders were not required to escrow any portion of their merger proceeds.<sup>87</sup> In arriving at this conclusion, the court analyzed a number of different procedural alternatives.<sup>88</sup> The court addressed the *Nebel* and *Gilliland* approaches, as well as two other procedural alternatives not previously addressed by the Chancery Court.<sup>89</sup>

#### 1. *Newly Developed Quasi-appraisal Alternatives*

Although only two alternatives to the quasi-appraisal remedy had been previously presented in Delaware jurisprudence, the Delaware Supreme Court in *Berger* analyzed four possible remedies.<sup>90</sup> The supreme court raised and dismissed two alternative remedies that had not previously been discussed in the Court of Chancery.<sup>91</sup> The first was a replicated appraisal remedy in which the quasi-appraisal remedy accurately matched the general statutory appraisal proceeding.<sup>92</sup> The court rejected

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86. *See id.* (explaining basis of plaintiff's appeal). Although the issue of what constitutes a disclosure violation was not on appeal, the supreme court did not take issue with the Chancery Court's statements that the addition of the valuation methodology to the total mix of available information may have constituted an adequate disclosure. *See generally* Kevin Miller, *More on Berger v. Pubco: Disclosure in Notices of Appraisal Rights and Merger Proxies*, DEALLAWYERS.COM (July 20, 2009, 7:37 AM), <http://www.deallawyers.com/Blog/2009/07/most-commentators-on-berger-v.html> (noting Delaware Supreme Court took no issue with Chancery Court's findings in regards to disclosure requirement).

87. For a further discussion of the holding of the Delaware Supreme Court in *Berger*, see *infra* notes 101–04 and accompanying text.

88. For a further discussion of the procedural alternatives discussed by the Delaware Supreme Court in *Berger*, see *infra* notes 91–104 and accompanying text.

89. For a further discussion of the procedural alternatives discussed by the Delaware Supreme Court in *Berger*, see *infra* notes 91–104 and accompanying text.

90. *See Berger*, 976 A.2d at 139 (“[F]our possible alternatives present themselves, of which only two are advocated by either side. The remaining two alternatives are advocated by no party. We nonetheless identify and consider them, because to do otherwise would render our analysis incomplete.”).

91. *See id.* (noting two alternatives discussed which were advocated by neither side and not previously discussed in Chancery Court).

92. *See id.* at 139–40 (discussing replicated appraisal approach). The replicated appraisal remedy would duplicate precisely the procedure of the general appraisal statute. *See id.* at 141 (discussing replicated appraisal). Under the replicated appraisal approach, the minority shareholders would receive all information determined to be material to making an informed appraisal decision. *See id.* (same). The shareholder would then make a formal demand for appraisal, which would include remission of stock certificates to the corporation and the entire merger proceeds received in the short-form merger. *See id.* (same). The corporation would then have the option of settling with dissenting shareholders or com-

this replicated appraisal approach due to the unacceptable burden placed on the minority shareholders.<sup>93</sup>

The second alternative the court addressed was to dismiss the quasi-appraisal proceeding altogether and find that the breach of duty rendered the short-form merger statute inapplicable.<sup>94</sup> Under this approach an equity remedy would be determined using an entire fairness review.<sup>95</sup> The court rejected this alternative, noting that to proceed with an entire fairness review would disregard the legislative intent of the short-form merger statute as interpreted by the Delaware Supreme Court in *Stauffer* and *Glassman*.<sup>96</sup>

## 2. *Quasi-appraisal Alternatives Developed by the Chancery Court*

The court then shifted its focus to the two quasi-appraisal remedies previously discussed by the Court of Chancery in *Nebel* and *Gilliland*.<sup>97</sup> The supreme court in *Berger* explained that the duty of disclosure and the quasi-appraisal remedy that arises from a breach of that duty provide important protections for minority shareholders.<sup>98</sup> Therefore, the court

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mencing a formal appraisal proceeding. *See id.* (same). The benefit of this approach is that it “would give maximum effect to the legislative intent” of the drafters of the Delaware short-form merger statute as recognized in *Stauffer* and *Glassman*. *See id.* (noting strongest argument favoring replicated appraisal).

93. *See id.* at 141 (discussing flaws of replicated appraisal which led to its rejection). The court also discussed the Chancery Court’s acknowledgement in *Gilliland* that requiring shareholders to return all merger proceeds would be unfair as it would expose the minority shareholders to the corporation’s credit risk for the duration of the appraisal proceeding. *See id.* (discussing flaws of requirement for minority shareholders to escrow all merger proceeds).

94. *See id.* at 140 (discussing alternative to rendering short-form merger statute inapplicable).

95. *See id.* (explaining implications of entire fairness proceeding). The argument for the application of the more liberal entire fairness review is that the fiduciary’s failure to make adequate disclosures would result in a remedy wherein the legality of the merger itself would be called into question. *See id.* (noting this remedy is applied in long-form merger cases where there is violation of fiduciary duty).

96. *See id.* at 141 (noting entire fairness is least favored alternative). The basis of the disclosure requirement is to enable minority shareholders to make an informed decision about seeking appraisal, and providing a non-appraisal remedy would be inconsistent with the purpose of the imposition of the duty. *See id.* (discussing purpose of fiduciary duty of full disclosure). For a further discussion of the Delaware Supreme Court’s interpretation of the legislative intent of the short-form merger statute, see *supra* notes 7–8 and accompanying text.

97. *See Berger*, 976 A.2d at 142 (discussing quasi-appraisal alternatives). The court noted both the *Nebel* and *Gilliland* quasi-appraisal alternatives would entitle minority shareholders to receive supplemental disclosures allowing them to make an informed appraisal decision. *See id.* (noting similarities of two quasi-appraisal alternatives). Further, the court noted both quasi-appraisal alternatives would allow minority shareholders to recover the difference between the merger proceeds and the fair value of their shares “without having to establish the controlling shareholders’ personal liability for breach of fiduciary duty.” *Id.*

98. *See id.* at 145 (explaining protections afforded by duty of disclosure and quasi-appraisal remedy).

held that access by minority shareholders to the quasi-appraisal remedy should not be restricted by requirements that minority shareholders opt in or escrow a portion of their merger proceeds.<sup>99</sup>

The supreme court in *Berger* found that the opt-in requirement handed down in *Gilliland* potentially burdened minority shareholders desiring to seek an appraisal recovery, as it poses a risk of forfeiture.<sup>100</sup> Additionally, the supreme court did not support the requirement from *Gilliland* that minority shareholders escrow a portion of the merger proceeds.<sup>101</sup> The supreme court explained that fairness requires that majority shareholders forfeit their statutory right to retain the merger proceeds if they deprive the minority of material information.<sup>102</sup> Therefore, the Delaware Supreme Court in *Berger* established a class action quasi-appraisal remedy with no requirement that minority shareholders escrow any portion of the merger proceeds.<sup>103</sup>

#### IV. APPRAISING THE IMBALANCES OF THE QUASI-APPRAISAL REMEDY AFTER *BERGER V. PUBCO CORP.*

Although the outcome of *Berger* benefited the minority shareholder plaintiffs in that case, *Berger* also suggests a limitation on minority shareholder rights in future short-form merger situations.<sup>104</sup> Specifically, the supreme court limited the disclosure requirements imposed on majority shareholder corporations wishing to execute a short-form merger.<sup>105</sup> Additionally, the gratuitous quasi-appraisal remedy granted to minority shareholders will make it difficult for Delaware courts in the future to require additional disclosures without tipping the balance of fairness too far

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99. *See id.* (finding quasi-appraisal remedy ordered by Chancery Court was legally erroneous). Ultimately, the court found that the opt-in requirement created a significant burden on the minority shareholders. *See id.* at 143 (discussing burdens imposed by opt-in and escrow requirements). Conversely, an opt-out structure would avoid the increased burden to minority shareholders while creating no additional procedural burden for the parent corporation. *See id.* (noting under either alternative parent corporation would be able to quickly identify class of dissenting shareholders). Further, although the defendants argued that the escrow requirement best mimics the risks associated with a general appraisal proceeding, the court found that the quasi-appraisal proceeding that operated in the fairest way does not require minority shareholders to escrow a portion of the merger proceeds. *See id.* at 143–44 (analyzing fairness of escrow requirement).

100. *See id.* at 143 (arguing if minority shareholder fails to appropriately opt in they forfeit opportunity to seek appraisal); *see also* Aronstam & Ross, *supra* note 71, at 24 (discussing holding of *Berger*).

101. *See Berger*, 976 A.2d at 144 (rejecting escrow requirement).

102. *See id.* (providing rationale for rejection of escrow requirement).

103. *See id.* at 143–44 (discussing appropriate quasi-appraisal procedure).

104. *See id.* at 136 (explaining majority does not have to provide valuation details but only broad sense of valuation process); Miller, *supra* note 86 (noting *Berger* opinion suggests level of required disclosure is not as detailed as required by previous Chancery Court opinions).

105. *See* Miller, *supra* note 86 (explaining increased disclosure requirements suggested by Chancery Court decisions).

in favor of minority shareholders.<sup>106</sup> Ultimately, Delaware courts must impose increased disclosure requirements to ensure that minority shareholders are provided with sufficient information to make an informed appraisal decision.<sup>107</sup> However, if these increased disclosure requirements are imposed, Delaware courts must also revisit the quasi-appraisal remedy established in *Berger* to ensure the quasi-appraisal remedy does not expose parent corporations in short-form merger situations to overly burdensome litigation.<sup>108</sup>

#### A. *Increasing Disclosure Requirements*

Commentators have highlighted a number of benefits to minority shareholders resulting from the supreme court's decision in *Berger*.<sup>109</sup> Ultimately, however, the disclosure threshold established in *Berger* does not ensure that minority shareholders will be provided with sufficient information to make an informed decision whether to seek appraisal.<sup>110</sup> The only substantive disclosure violation noted in *Berger* was the parent corporation's failure to disclose the valuation methodology used to establish the merger price.<sup>111</sup> Therefore, the court suggests that although the minority shareholders had access to only limited unaudited financial data, an inadequate description of company operations, and no future projections, if the minority shareholders had knowledge of the valuation methodology, they could have made an informed decision as to whether to seek appraisal.<sup>112</sup>

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106. See Nussbaum, *supra* note 19 (discussing increased litigation risk associated with quasi-appraisal remedy handed down in *Berger*).

107. See Miller, *supra* note 86 (noting *Berger* opinion suggests level of required disclosure is not as detailed as required by previous Chancery Court opinions).

108. See Schumer et al., *supra* note 3, at 6 (explaining if quasi-appraisal becomes widely available to address post-closing disclosure claims, litigation costs could increase dramatically for parent corporations).

109. See Geis, *supra* note 2, at 1649 (highlighting benefits to minority shareholders of quasi-appraisal as class-action and rejection of requirement that minority shareholders escrow any portion or proceeds); see also Nussbaum, *supra* note 19 (discussing how benefits provided to minority shareholders from *Berger* decision will encourage increased litigation following short-form mergers).

110. See Miller, *supra* note 86 (explaining disclosures required by *Berger* are not as detailed as requirements in previous Chancery Court decisions).

111. For a further discussion of the disclosure violations found in *Berger*, see *supra* notes 80–84 and accompanying text. The court characterized the second disclosure violation as a technical disclosure violation. See *Berger v. Pubco Corp.*, 976 A.2d 132, 145 (Del. 2009) (“If only a technical and non-prejudicial violation of [Title 8, Section 253] had occurred, the result might be different. In some circumstances, for example, where stockholders receive an incomplete copy of the appraisal statute with their notice of merger, the *Gilliland* remedy might arguably be supportable.”).

112. See Miller, *supra* note 86 (discussing financial disclosures made by parent company in *Berger* and additional financial disclosures required by court). For a further discussion of the financial and operating disclosures provided to the minority shareholders in *Berger*, see *supra* notes 78–79 and accompanying text. For a further discussion of the additional disclosure requirements addressed by the court in *Berger*, see *supra* notes 80–84 and accompanying text. For further discus-

### 1. *Trust or Verification*

The court justifies the limited disclosure requirement by noting that the minority shareholders' decision to seek appraisal turns, at least partially, on a question of trust.<sup>113</sup> However, shareholders also chose to verify the adequacy of the merger consideration by performing independent valuations.<sup>114</sup> The inadequacy of the disclosure requirement in *Berger* results from the minority shareholders' inability to independently calculate an accurate valuation of their shares.<sup>115</sup> The inability of minority sharehold-

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sion of the purpose of the fiduciary duty of disclosure, see *supra* note 38 and accompanying text.

113. See *Berger*, 976 A.2d at 136 ("Where, as here, a minority shareholder needs to decide only whether to accept the merger consideration or to seek appraisal, the question is partially one of trust . . .").

114. See Aronstam et al., *supra* note 7, at 552 (explaining subsidiaries often retain independent financial and legal experts to achieve best merger price for minority shareholders). Also, given the high cost of the appraisal proceeding, it is important for minority shareholders to form independent valuations to weigh their chances of success. See *id.* at 547 ("[I]t has been argued that smaller shareholders are economically unable to justify seeking the appraised value of their shares because the costs associated with pursuing an appraisal action will often times exceed the potential for recovered gains . . ."). The need for minority shareholders to rely on independent valuations instead of trust is further highlighted by incentives, inherent in the appraisal process, for parent corporations to discount the merger consideration. See, e.g., *id.* at 548 (describing negative incentives inherent in appraisal process).

115. See *Stauffer v. Standard Brands, Inc.*, 187 A.2d 78, 80 (Del. 1962) (noting appraisal remedy is applicable to disputes over value), *overruled by* *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1983); *In re Netsmart Tech., Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007) (discussing material information to shareholders independently valuing shares); Miller, *supra* note 86 (noting disclosure requirements established by *Berger* were more limited than disclosure requirements established by previous Chancery Court decisions). In two notable Chancery Court cases, the Chancery Court discussed the fiduciary duty of disclosure in merger situations and seemed to suggest more robust disclosure requirements. See Miller, *supra* note 86 (discussing Chancery Court decisions in regard to disclosure requirements); see also *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) (holding that summary of methodologies used and ranges of values generated by financial analyses performed by client's financial advisor were material information to minority shareholders making informed appraisal decision); Miller, *supra* note 86 (citing *In re Netsmart*, 924 A.2d at 203) (suggesting more robust disclosures are required for shareholders to make informed decision whether to accept proposed merger).

Further, the court in *Berger* limited the situations in which the valuation methodology disclosure requirement would apply. See *Berger*, 976 A.2d at 136 (suggesting in other short-form situations majority shareholder would not be required to disclose valuation methodology). For example, had Pubco been a registered company or had Pubco's disclosures not been so grossly inadequate, there may have been no requirement to disclose the method of valuation. See Miller, *supra* note 86 (noting Delaware Supreme Court took no issue with Chancery Court's findings in regards to disclosure requirement); Nussbaum, *supra* note 19 (explaining *Berger's* holding is limited to short-form mergers accompanied by material disclosure violations).

Additionally, the court suggests that technical as opposed to substantive disclosure violations may not be subject to the same, opt-out, no escrow, quasi-ap-

ers to independently value shares would make it difficult for them to make an informed decision as to whether to seek appraisal.<sup>116</sup>

## 2. *The Need for Appropriate Disclosures*

More appropriate disclosure requirements are necessary to ensure that minority shareholders can make informed appraisal decisions in short-form merger situations.<sup>117</sup> This is not to suggest that the *Berger* court was wrong in not requiring more detailed valuation disclosures.<sup>118</sup> In fact, even the required disclosure of the valuation methodology itself may be unnecessary.<sup>119</sup> Instead, minority shareholders need more detailed financial and operating disclosures relating to the company itself so that they may perform independent valuations.<sup>120</sup>

### B. *Revisiting the Quasi-appraisal Procedure*

Although Delaware courts need to require more appropriate disclosures to ensure that minority shareholders can make more informed appraisal decisions, doing so may overburden majority shareholders due to the quasi-appraisal remedy applied in *Berger*.<sup>121</sup> Given the current opt-out

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praisal remedy. See *Berger*, 976 A.2d at 145 (“If only a technical and non-prejudicial violation of [Title 8, Section 253] had occurred, the result might be different.”); see also Aronstam & Ross, *supra* note 71, at 24 (“Importantly, however, the Supreme Court suggested that less expansive quasi-appraisal relief may be appropriate for technical disclosure violations, such as where stockholders receive an incomplete copy of the appraisal statute with their notice of merger.”). *Contra Berger*, 976 A.2d at 144 (“[F]airness requires that the corporation be held to the same strict standard of compliance with the appraisal statute as the minority shareholders.”).

116. For a further discussion of the purpose of the duty of disclosure and material information, see *supra* notes 37–40 and accompanying text.

117. For a further discussion of the inadequacy of the disclosure requirements in *Berger*, see *supra* notes 110–16 and accompanying text.

118. See *Berger*, 976 A.2d at 136 (“This does not mean that Kanner should have provided picayune details about the process he used to set the price; it simply means he should have disclosed in a broad sense what the process was . . . .” (quoting *Berger v. Pubco Corp.*, Civil Action No. 3414-CC, 2008 WL 2224107, at \*3 (Del. Ch. 2008))).

119. See *In re Netsmart*, 924 A.2d at 203 (suggesting company information is more important to investors than valuation inputs). Even without knowledge of the valuation methodology used by the parent corporation, if given sufficient financial and operating information, minority shareholders can come up with an accurate valuation of the company using any number of valuation modeling techniques. See *id.* (“Investors can come up with their own estimates of discount rates or . . . market multiples. What they cannot hope to do is replicate management’s inside view of the company’s prospects.”). Notably, as the defendant in *Berger* correctly argued, the short-form merger statute does not require the use of any sophisticated valuation methodology; therefore, it is possible valuation details cannot be provided because they do not exist. See *Berger*, 976 A.2d at 136 (accepting defendant’s assertion that any valuation method can be used no matter how absurd).

120. See *In re Netsmart*, 924 A.2d at 203 (discussing information necessary for minority shareholders to perform independent valuation).

121. See Hossfeld, *supra* note 3, at 1359 (noting generally appraisal remedies should seek to balance risks of oppression by majority against harassment by mi-

quasi-appraisal procedure, increasing disclosure requirements would subject parent corporations to increased litigation risk.<sup>122</sup> Therefore, to allow the judiciary to consider imposing more appropriate disclosure requirements in short-form merger situations, Delaware courts must first revisit the quasi-appraisal remedy established in *Berger*.<sup>123</sup>

### 1. *The Opt-out Requirement*

The opt-out requirement is too burdensome to parent corporations in short-form merger situations, given the need for more robust disclosure requirements.<sup>124</sup> The supreme court in *Berger* found that the alternative opt-in requirement is potentially burdensome to minority shareholders desiring to seek an appraisal recovery because it poses a risk of forfeiture.<sup>125</sup> However, this risk of forfeiture is no different from the forfeiture experienced by a minority shareholder in a statutory appraisal situation who chooses to vote for the merger or not to elect appraisal.<sup>126</sup>

In an appraisal proceeding, minority stockholders who seek appraisal must demand it, and only those minority stockholders that demand appraisal are entitled to receive the judicially determined fair value of their shares.<sup>127</sup> Consequently, in a statutory appraisal proceeding, minority stockholders who take no action receive the merger price, regardless of the outcome of the judicial appraisal.<sup>128</sup> The opt-in approach in *Gilliland*, however, applied less stringent opt-in requirements than statutory ap-

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nority); see also Schumer et al., *supra* note 3, at 6 (explaining litigation costs could increase dramatically for parent corporations if quasi-appraisal becomes widely available to address post-closing disclosure claims).

122. See Schumer et al., *supra* note 3, at 2 (noting quasi-appraisal should be limited to “avoid tipping the balance of law too heavily in favor of post-transaction price litigation”). The Delaware Supreme Court’s holding in *Berger* removed risks to minority shareholders previously associated with appraisal and therefore will encourage increased litigation. See Nussbaum, *supra* note 19 (theorizing quasi-appraisal remedy established by *Berger* could result in increased post-merger litigation).

123. For a further discussion of the need for more appropriate disclosure requirements, see *supra* notes 113–18 and accompanying text. For a further discussion of the need to revisit the quasi-appraisal remedy, see *infra* notes 125–41 and accompanying text.

124. For a further discussion of the increased burdens of quasi-appraisal on parent corporations, see *supra* notes 122–24 and accompanying text.

125. See *Berger v. Pubco Corp.*, 976 A.2d 132, 143 (Del. 2009) (indicating if minority shareholders fail to appropriately opt in, they forfeit opportunity to seek appraisal).

126. See DEL. CODE ANN. tit. 8, § 251 (West 2013) (codifying requirements of shareholder approval in long-form merger transactions); see also Hossfeld, *supra* note 3, at 1338 (explaining required procedures for perfection of statutory appraisal rights).

127. See *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 313 (Del. Ch. 2005) (describing statutory appraisal procedure).

128. See *id.* (describing statutory appraisal procedure to be reflected by quasi-appraisal); see also Schumer et al., *supra* note 3, at 6 (discussing rationale of *Gilliland* approach).

praisal.<sup>129</sup> These less stringent requirements would alleviate some of the perceived risks of forfeiture as compared to statutory appraisal.<sup>130</sup> Ultimately, the imposition of the opt-out proceeding is a greater burden to the parent corporation than an opt-in requirement would be to a minority shareholder interested in pursuing appraisal.<sup>131</sup> Therefore, an opt-in requirement similar to statutory appraisal or under *Gilliland*'s less stringent standard would better balance the majority shareholders' interest with the minority shareholders' rights than the opt-out applied in *Berger*.<sup>132</sup>

## 2. *The Escrow Requirement*

The escrow requirement is not necessary to protect the rights of minority shareholders, and is also not essential to support the majority's interest in unilaterally effectuating a short-form merger.<sup>133</sup> The escrow requirement operates to expose the minority to the same risk inherent in statutory appraisal and to ensure the parent corporation can reclaim a portion of the merger proceeds should the judicially determined value of the shares be less than the merger price.<sup>134</sup> As this requirement does not serve the rights of the minority shareholders or the interest of the majority, the supreme court in *Berger* decided this issue on the basis of fairness.<sup>135</sup> As the court notes, fairness requires that the minority and majority shareholders be held to the same strict standards of compliance with the appraisal and short-form merger statute, respectively.<sup>136</sup> Minority shareholders who fail to properly perfect their statutory appraisal rights as required by the technical procedures mandated in the appraisal statute

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129. See *Gilliland*, 873 A.2d at 313 (discussing opt-in requirements of quasi-appraisal). For example, in *Gilliland*, as in *Berger*, the court did not require beneficial owners to request quasi-appraisal through their record holder as is required in statutory appraisal. See *id.* (expressing concern that shareholders would have difficulty ensuring cooperation of former record holders); see also Geis, *supra* note 2, at 1642 (discussing benefits of *Berger* court not requiring minority shareholders to act through record holders).

130. See tit. 8, § 262(d) (discussing procedure to perfect statutory appraisal rights). For a further discussion of the less stringent opt-in requirements discussed in *Gilliland*, see *supra* notes 128–30 and accompanying text.

131. See Schumer et al., *supra* note 3, at 5 (noting burden of exposure to unforeseen class-wide litigation would disincentivize parent corporations from pursuing short-form mergers).

132. See *id.* (describing burdens of opt-out quasi-appraisal proceeding on majority shareholder).

133. See *Gilliland*, 873 A.2d at 313 (discussing purpose of escrow requirement is to “replicate a modicum of risk” inherent in statutory appraisal proceeding).

134. See *id.* (discussing rationale for escrow requirement).

135. See *Berger v. Pubco Corp.*, 976 A.2d 132, 144 (Del. 2009) (discussing rationale for rejection of escrow requirement).

136. See *id.* (“[F]airness requires that the corporation be held to the same strict standard of compliance with the appraisal statute as the minority shareholders.”).



lose their right to appraisal.<sup>137</sup> Therefore, as the supreme court held in *Berger*, majority shareholders should also suffer a forfeiture should they fail to comply with the technical requirements of the short-form merger statute.<sup>138</sup>

The protection of minority shareholders' rights to make an informed appraisal decision is best addressed by requiring more adequate financial and operating disclosures.<sup>139</sup> Further, the interest of majority shareholders in unilaterally removing the minority interest is most burdened by creating a class-wide remedy for the entire minority.<sup>140</sup> Therefore, the court in *Berger* properly rejected the escrow requirement because it is unnecessary to protect the minority's rights and inessential to the majority's interest.<sup>141</sup>

## V. CONCLUSION

The Chancery Court has been troubled by the increasing trend of post-merger disclosure-based litigation.<sup>142</sup> Vice Chancellor Laster has

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137. See DEL. CODE ANN. tit. 8, § 251 (West 2013) (codifying requirements of shareholder approval in long-form merger transactions); see also *Berger*, 976 A.2d at 144 (discussing forfeiture by minority for failing to strictly comply with appraisal statute).

138. See *Berger*, 976 A.2d at 144 (applying fairness reasoning in rationale for rejecting escrow requirement). The Delaware Supreme Court noted that minority shareholders would receive a dual benefit from not having to escrow the merger proceeds because they were permitted to use the proceeds received, which they could possibly owe back to the parent corporation in the future, while simultaneously litigating for additional merger consideration. See *id.* 143–44 (noting dual benefit of shareholders retaining merger proceeds). However, the court found the dual benefit neither unfair nor inequitable. See *id.* (“[D]oes that make [the dual benefit] inequitable from the fiduciary’s standpoint? We think not.”); Aronstam & Ross, *supra* note 71, at 23 (discussing court’s analysis of dual benefit to minority shareholders).

139. For a further discussion of the need for more appropriate disclosure requirements, see *supra* notes 113–18 and accompanying text.

140. For a further discussion of the burdens of an opt-out appraisal procedure on parent corporations, see *supra* notes 123–24 and accompanying text.

141. See *Berger*, 976 A.2d at 144 (holding quasi-appraisal remedy would not require minority shareholders to escrow any portion of merger proceeds). The rationale for the escrow requirement in *Gilliland* was that the quasi-appraisal remedy should replicate the risk inherent to minority shareholders in statutory appraisal. See *Gilliland*, 873 A.2d at 313 (“[T]his quasi-appraisal action should be structured to replicate a modicum of the risk that would inhere if this were an actual appraisal action . . .”). The Delaware Supreme Court in *Berger* made a more compelling argument, however, that just as minority shareholders who fail to observe the technical requirements of the appraisal statute forfeit their right to recover the fair value of their shares, parent corporations who fail to observe the technical requirements of the short-form merger statute should forfeit their right to the protections afforded to them under that statute. See *Berger*, 976 A.2d at 144 (discussing rationale for rejection of escrow requirement).

142. See, e.g., Transcript of Oral Argument at 10–12, *Stourbridge Inv. LLC v. Bersoff*, C.A. No. 7300-VCL (Del. Ch. Mar. 13, 2012) (discussing troubling trend in disclosure litigation).

noted the possibility of exploitation of parent corporations by minority shareholders through the use of disclosure claims.<sup>143</sup> Conversely, commentators have highlighted the importance of the use of appraisal jurisprudence to protect minority shareholders from overreaching by the majority.<sup>144</sup>

The legitimate concerns for protecting both minority and majority shareholders in short-form merger situations call for a balanced equitable remedy when a breach of fiduciary duty is found.<sup>145</sup> The current Delaware jurisprudence does not provide the necessary, balanced, quasi-appraisal remedy.<sup>146</sup> As the imposition of fiduciary duties and the construction of equitable remedies are responsibilities of the judiciary, Delaware courts should revisit the holding of *Berger* and attempt to develop a more balanced remedy.<sup>147</sup>

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143. *See id.* (noting externalities of disclosure jurisprudence that are being exploited).

144. *See* Coleman, *supra* note 13, at 777 (explaining appraisal proceedings prevent majority shareholders from abusing their favorable position in merger transactions); *see also* Geis, *supra* note 2, at 1642 (“[T]he appraisal remedy has been rehabilitated as a defense against abusive freezeout mergers by majority shareholders.”).

145. For a further discussion of the need to protect majority shareholders from disclosure claims, see *supra* notes 122–23 and accompanying text. For a further discussion of the need to protect minority shareholders in freeze-out situations, see *supra* notes 113–18 and accompanying text. For further discussion of the need for a balanced quasi-appraisal remedy, see *supra* note 14 and accompanying text.

146. For a further discussion of the inadequacies of the current quasi-appraisal remedy, see *supra* notes 113–38 and accompanying text.

147. For a further discussion of the need for more appropriate disclosure requirements and a change in the current quasi-appraisal procedure, see *supra* notes 113–38 and accompanying text.

