No. 07-16527

United States Court of Appeals
for the Ninth Circuit

REBECCA PROCTOR et al.

Plaintiff-Appellant,

v.

VISHAY INTERTECHNOLOGY, INC, a Delaware corporation, et al.

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF DISMISSAL AND SUMMARY JUDGMENT IN
THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JEREMY FOGEL U.S. DISTRICT JUDGE
CASE NO. 5:06-CV-04134 JF

BRIEF OF APPELLEES VISHAY INTERTECHNOLOGY, INC., VISHAY TEMIC SEMICONDUCTOR ACQUISITION HOLDINGS CORPORATION, AND FELIX D. ZANDMAN, DEFENDANTS

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Corporate Disclosure Statement

Vishay Intertechnology, Inc. is a Delaware corporation with no parent company and no company owning more than 10 percent of its stock.

Vishay Temic Semiconductor Acquisition Holdings Corporation is a wholly owned subsidiary of Vishay Intertechnology, Inc.

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Appellees Vishay Intertechnology, Inc., Vishay TEMIC Semiconductor Acquisition Holdings Corp., and Felix D. Zandman (together, "Vishay") respectfully submit this brief in response to the Opening Brief of Appellants.

I. STATEMENT OF ISSUES FOR REVIEW

1. Did the United States District Court for the Northern District of California properly deny plaintiffs' motion to remand this case to state court?
2. Did the District Court correctly conclude that plaintiffs' claims in this action were the subject of and fell within a settlement, release and Judgment in the Delaware Court of Chancery, and therefore plaintiffs were legally barred from pursuing their claims here?
3. Is plaintiffs' complaint legally deficient on other grounds not addressed by the Court below, because: (i) plaintiffs lack standing to pursue their derivative claim, (ii) to the extent plaintiffs have not suffered any direct injury, their claims are derivative, not direct, and (iii) plaintiffs have not met the legal requirements for a quasi appraisal claim?

II. STATEMENT OF THE CASE

The District Court properly dismissed plaintiffs' complaint on federal-state comity grounds, chiefly on the basis of res judicata. Plaintiffs now appeal that decision.[1]

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[1] The District Court also properly denied remand under 28 U.S.C. 1446(b) and

The class and derivative claims in this case have been disposed of by (i) a class action settlement and release approved by the Court of Chancery in Delaware, and (ii) a final judgment entered by the court in that case. In addition, prior to co-defendant Ernst & Young's ("E & Y") removal of the action to the District Court, the Court of Chancery issued a permanent injunction enjoining plaintiffs from prosecuting the claims in this action, holding that "this order is clearly justified and it is regrettable that a motion of this kind had to be presented." (ER 1534.) The Supreme Court of Delaware came to the same conclusion in dismissing an appeal of that injunction order, holding that the claims in this action "encompassed the same claims that had been released in the settlement of the Delaware Action." (ER 1539.) Indeed, plaintiffs themselves acknowledge on this appeal that "The Delaware Judgment resulting from [the class action] settlement, purported to release all claims of the Minority Shareholders, including their claims under California law, pending in this action . . . ." (Appellants' Br. 9.)

To reverse the decision below and allow this litigation to proceed in light of the holdings of the Delaware Court of Chancery, the Delaware Supreme Court, and the District Court below would (i) frustrate the class action settlement process,

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the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f) *et seq.* ("SLUSA"). Because Vishay joins the arguments on that point set forth by co-defendant Ernst & Young, Vishay will not address the remand issue in this Brief.

which gave plaintiffs ample opportunity to object if they wished before the settlement was approved, (ii) deprive Vishay of the benefit of its settlement with the shareholders, (iii) nullify the decision by the Court of Chancery interpreting its own order, and (iv) nullify the decision by the Supreme Court of Delaware holding that this action is encompassed by the Delaware settlement, release and Judgment. Such a result would also be unprecedented – and profoundly unfair to Vishay, which has already paid millions of dollars to settle these claims. The Court should therefore affirm the decision below.

III. STATEMENT OF FACTS

The record facts set forth below are undisputed.

A. Proctor Commences This Action

Vishay, a Delaware corporation headquartered in Pennsylvania, is one of the world's largest manufacturers of passive electronic components. (ER 0796 ¶ 2.) Siliconix, formerly a Delaware corporation headquartered in Santa Clara, California, designs, manufactures and markets active electronic components. (ER 0798 ¶¶ 6, 7.) From 1998 until a Vishay-Siliconix short-form merger in May 2005, Vishay owned 80.4 percent of Siliconix through a Delaware holding company. The remaining shares were held by approximately 600 stockholders. (ER 0806 ¶ 44.)

On August 12, 2002, Rebecca Proctor, then a Siliconix shareholder, filed a complaint in the Superior Court of California against Vishay, Siliconix, and officers and directors of both companies, and Siliconix's auditors, E & Y. (ER 0001-0009.) The complaint alleged direct and derivative causes of action for breach of fiduciary duty and waste predicated upon Vishay's alleged misappropriation in 1999 of two Siliconix sales subsidiaries for less than market value. (ER 0004 ¶¶ 17-19.) Proctor never served the 2002 complaint. (ER 0646 ¶¶ 4-7.)

More than two years later, in January 2005 Proctor filed an amended complaint. (ER 0060-00160.) The pleading focused on several purported Vishay-Siliconix self-dealing transactions. (ER 0095-98 ¶¶ 101-11.) As relief, plaintiffs sought among other things increased consideration for the value of their Siliconix holdings to compensate for the diminution purportedly caused by the challenged Vishay Siliconix transactions. (ER 0109 ¶ 157.)

B. Vishay's 2005 Tender Offer for Siliconix and Subsequent Short-Form Merger

On March 3, 2005, Vishay announced a proposed tender offer for the outstanding public shares of Siliconix. Under the terms of the proposal, Vishay planned to exchange 2.64 shares of Vishay common stock for each outstanding share of Siliconix stock, conditioned on the tender of a majority of the publicly held Siliconix shares. (ER 1508 ¶ 23.)

1. The Delaware Action is Filed Challenging Vishay's Domination of Siliconix and the Tender Offer

After Vishay announced its proposed tender offer, several Siliconix shareholders filed class action complaints in the Delaware Court of Chancery challenging the proposed transaction. Meanwhile, on April 12, 2005, Vishay launched the tender offer, offering to exchange 2.90 Vishay shares for each share of Siliconix. The plaintiffs in the Delaware actions in turn filed a consolidated amended complaint on April 18, 2005. (ER 1499-1518.)

In addition to challenging the fairness of the offer, the Delaware complaint cited Vishay's alleged "domination of the board and its intertwining of its business operations with those of Siliconix." (ER 1511 ¶ 32.) Alleging, as did plaintiffs in this case, that Vishay treated Siliconix "as a wholly-owned subsidiary" and "misappropriat[ed] Siliconix's cash and assets" (ER 1504 ¶ 18), over the course of 14 subparagraphs, the Delaware Siliconix plaintiffs recited virtually all the Vishay-Siliconix supposed self-dealing transactions cited in the amended *Proctor* complaint. (ER 1504-05 ¶¶ 18-19.)

On account of these and other allegations in Delaware which directly tracked the *Proctor* complaint, in the course of the proceedings the *Proctor* plaintiffs represented to the Superior Court of California that "the April 18, 2005 class action complaint in Delaware ***copied almost entirely*** allegations from plaintiffs' First Amended Complaint" in California. (ER 0654 ¶ 46.) In fact, the Delaware class

action complaint explicitly referenced this action, charging that "[a]s a result of the manner in which Vishay dominates and controls Siliconix, Vishay . . . [is] the subject of a derivative complaint by Siliconix's shareholders on behalf of Siliconix as the nominal defendant." (ER 1506-07 ¶ 19.)

2. The Delaware Action Is Settled and the Tender Offer and Merger Proceed

On April 20, 2005, Vishay reached an agreement in principle with representatives for the class in the Delaware action. (ER 1479-98.) Vishay agreed to increase the exchange ratio for its offer from 2.90 to 3.075 shares and to make certain additional disclosures in its tender offer materials, including additional disclosures concerning the California action. (ER 1483 ¶ V.) The exchange ratio increase equated to an increase of about $30 million for Siliconix shareholders.

Vishay successfully completed the tender offer on May 12, 2005. (ER 1485 ¶ BB.) The offer was conditioned on approval by a majority of Siliconix's public shareholders, and the shares ultimately tendered represented 77.1 percent of those shares. (*Id.*) Following the expiration of the offer, Vishay owned approximately 95.5 percent of the common stock of Siliconix. (*Id.*) As Vishay disclosed it would do in the tender offer documents, soon after completion of the tender offer Vishay effected a merger of one of its subsidiaries with and into Siliconix. (ER 0422.) As a result, Siliconix became a wholly owned subsidiary of Vishay with no public shareholders. (*Id.*)

On September 7, 2005, the parties submitted a Stipulation of Settlement to the Delaware Court of Chancery for approval. (ER 1479-1541.) On September 13, 2005, the Court of Chancery scheduled a settlement hearing for October 25, 2005. (ER 1519-1525.) The Scheduling Order provided that "Any person who fails to object . . . shall be deemed to have waived the right to object . . . and shall be forever barred from raising such objection in this or any other action or proceeding unless the Court orders otherwise." (ER 1523 ¶ 10.) The Court also stated that the notice provided to shareholders concerning the settlement and settlement terms "fully satisfies the requirements of due process, Rule 23 of the Rules of the Court of Chancery and applicable law." (ER 1521 ¶ 7.)

After a hearing on October 25, 2005, the Court of Chancery entered a Judgment certifying the class of Siliconix shareholders and approved the settlement of the class action as "fair, reasonable and adequate and in the best interests of the Class." (ER 1527-28 ¶¶ 4-5.) The Judgment incorporated by reference the Stipulation of Settlement and ordered a release and discharge running in favor of Vishay and its agents, employees, accountants, and others, of all claims:

> which have arisen, arise now or hereafter may arise out of or relate in any manner to the allegations, facts, events, transactions, acts, occurrences, statements, representations, omissions or any other matter whatsoever set forth in or otherwise related, directly or indirectly to (i) the allegations in the complaints in the Action, (ii) the Tender Offer (including all amendments and supplements), (iii) the Short-Form Merger, or (iv) the

> fiduciary obligations or disclosure duties of any of the Released Persons in connection with the Tender Offer or Short-Form Merger, but excluding any claims to enforce the Settlement or any claims by Siliconix stockholders for appraisal pursuant to 8 Del. C. § 262. . . .

(ER 1528 ¶ 8.) No shareholder appealed the October 2005 Judgment. (ER 1531.)

C. The Proceedings in California

In April 2005, Vishay demurred to the Amended Complaint in California. By order dated September 28, 2005, the Court granted Vishay's demurrer with leave to replead. (ER 0788-90.)

On November 21, 2005, a month after the Court of Chancery issued the October 2005 Judgment, plaintiffs in this action filed a Second Amended Complaint in Superior Court. (ER 0793-878.) The new complaint repleaded a pared-down list of challenged Vishay-Siliconix transactions previously set forth in both the prior complaint and in the Delaware complaint. (ER 0800-02 ¶¶ 15-20.) Plaintiffs also alleged a "scheme" by Vishay to "systematically misappropriate[]" assets from Siliconix so that the price of the stock would decrease, purportedly to allow Vishay to purchase the minority shareholders' interest in Siliconix at an unfair price – the very allegations recited in the class action settled in Delaware. (ER 0799 ¶ 13 ("Vishay had strong incentives to take the unlawful actions alleged below to drain assets from Siliconix in order to keep the price of the remaining 19.6% of Siliconix stock as low as possible, thus reducing the cost of any future acquisition of the remaining Siliconix shares by Vishay."); ER 802 ¶ 21 (noting

that Vishay effected self-interested transactions "to depress Siliconix stock to facilitate the purchase of the minority shareholders' interests").)

Based on these core allegations, plaintiffs purported to plead direct and derivative claims against Vishay. As damages, plaintiffs effectively sought additional consideration for the shares of Siliconix they previously held. In their class action claim, plaintiffs sought to recover the "diminution in the value of their respective shares of Siliconix stock." (ER 0808 ¶ 50; *see also* ER 0807 ¶ 48, ER 0812 ¶ 67.) With respect to their derivative claim, plaintiffs likewise alleged that "[b]ecause of the tender offer and short form merger . . . the only practical and equitable way to transmit compensatory damages to those who were harmed is to order that any damages from defendants to Siliconix flow through to Siliconix's minority shareholders pro rata in relation to the shares they held." (ER 0805 ¶ 38.) The new complaint also pleaded a cause of action for quasi-appraisal, alleging that the notice of appraisal rights was substantively inadequate because stockholders were not advised of "the extent to which the current market value of their Siliconix shares had been depressed, and the current market value of Vishay shares had been inflated" by Vishay's supposed misconduct. (ER 0810 ¶ 59.)

Vishay again demurred, principally on the ground that plaintiffs' claims were barred by the October 2005 Judgment in Delaware. On March 7, 2006, the California Superior Court heard argument on the demurrer. While observing that

Vishay's "contention that res judicata applies and collateral estoppel in terms of the Delaware action . . . may be a valid affirmative defense," the Court ruled that "on the face of the pleadings I cannot conclude that it absolutely bars the actions." (ER 1163.) However, the court noted that "[i]t may well be as we hear this case on a factual basis perhaps on summary judgment or some other basis the Court will be able to agree with you. But at this point on the mere face of the pleadings I am not going to foreclose this action." (ER 1169-70.)[2]

D. The Court of Chancery Enjoins the Prosecution of Proctor's Claims Because They Fall Within the Delaware Settlement, Release and Judgment

To avoid relitigating claims it had already paid substantial sums to resolve, Vishay then moved before the Court that issued the October 2005 Judgment, the Delaware Court of Chancery, for a permanent injunction enjoining class members from prosecuting any action in violation of the October 2005 Judgment, including Proctor's suit, at the time still pending in the California Superior Court. In two separate decisions, on June 13 and June 15, 2006, the Court of Chancery granted Vishay's motion. In the first decision (ER 1524), the Court stated that "[f]or the reasons stated in the moving papers, this order is clearly justified and it is regrettable that a motion of this kind had to be presented." (ER 1534.) The Court

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[2] Plaintiffs assert that in answering the California Superior Court complaint, Vishay did not raise the affirmative defense of res judicata or collateral estoppel. (Appellants' Br. 30.) That is incorrect. (ER 1183.)

also held that "the release in the previous judgment is clear" (*id.*), and noted that "none of the parties in the pending California litigation has bothered to appear, despite adequate notice of their opportunity to do so." (ER 1341.) The accompanying permanent injunction order entered by the Court of Chancery specifically stated that the October 25, 2005 "Order and Final Judgment encompasses, among other claims, all the claims asserted by the representative plaintiffs in *Proctor v. Vishay*" and "settled and released, among other claims, all the claims asserted in *Proctor v. Vishay.*" (ER 1532.) In the second decision, issued in response to opposition papers belatedly filed by a class member who had also submitted papers in support of plaintiffs on various motions in California, the Court adhered to its prior decision. (ER 1535-41.)

On the same day that the Court of Chancery issued its June 13, 2006 Order permanently enjoining the *Proctor* plaintiffs from prosecuting their claims, the parties to this action appeared before the Superior Court of California for a case management conference. (ER 1205-17.) In Appellants' Brief, plaintiffs incorrectly state that at the case management conference the California Superior Court "overruled demurrers of the Vishay Defendants and Defendant E & Y based on the alleged res judicata effect" of the Court of Chancery judgment. (Appellants' Br. 4, 29-30.) There were no such demurrer motions heard by the Court and no such decision by the California Superior Court on that date. Rather,

the Court merely conducted a case management conference. In an attempt to support their position that the Superior Court of California rejected the res judicata effect of the Delaware injunction on that day, plaintiffs quote out of context a portion of the June 13, 2006 transcript in which the California Superior Court merely rejected a request -- from E & Y, not Vishay -- to extend its time for filing an Answer. (Appellants' Br. 30; ER 1215-16.)

Instead, at the conference counsel for plaintiffs argued that despite its plain terms, the Court of Chancery injunction issued earlier that day should not impede plaintiffs' prosecution of this action in California Superior Court. (ER 1207-09.) The Court stated in response that "if you are in disagreement with [the injunction order] you need to appear there and seek to have it quashed or modified or to have a rehearing, but you don't just ignore it." (ER 1210.) The Court went on to state that "this Court is not going to be a party to a litigant violating a valid court order of another court." (ER 1213.) The Court "direct[ed] the plaintiff to go back to Delaware and deal with it" and gave plaintiffs' counsel until August 15, 2006 to "get your papers together and decide what you are going to do." (ER 1213-14.)

E. The Decision by the Delaware Supreme Court

Ignoring the Court's directive, the *Proctor* plaintiffs took no subsequent action in Delaware, nor did they appeal the Court of Chancery order. However, another former Siliconix shareholder who had aided plaintiffs in California by

submitting papers on their behalf, did prosecute an appeal of that order. On January 24, 2007, the Delaware Supreme Court dismissed the appeal. (ER 1537-41.) The highest Court in Delaware held among other things that "[d]espite the [October 25, 2005 Judgment], certain shareholders of Siliconix continued to prosecute an earlier-filed action in the Superior Court of California, County of Santa Clara, *which encompassed the same claims that had been released in the settlement of the Delaware action.*" (ER 1539 (emphasis added).) The Delaware Supreme Court further held that the claims in this action "*were released in a Delaware class action by the Court of Chancery's October 25, 2005 order and final judgment.*" (ER 1537-38 (emphasis added).) Inexplicably, plaintiffs in their Brief do not once reference the Delaware Supreme Court's decision.

F. The Decisions of the District Court

1. The District Court Denies Plaintiffs' Motion to Remand

On June 30, 2006, after the Court of Chancery issued its permanent injunction, E & Y removed the Superior Court action to the District Court on the basis of 28 U.S.C. § 1331 and 28 U S.C. § 1441(b). (ER 1218-52.) Plaintiffs moved to remand on July 31, 2006. (ER 1260-63.) The District Court denied plaintiffs' motion to remand on February 13, 2007. (ER 1431-1444.) The Court found that, contrary to plaintiffs' arguments, removal was proper as plaintiffs' class claim was preempted by SLUSA. (ER 1439-42.) The District Court

concluded that the action was a "covered class action" within the meaning of SLUSA, and that the suit did not fall within SLUSA's exception for "exclusively derivative" actions. (ER 1440.) Finally, the District Court held that the "Delaware carve-out" for false statements in connection with voting rights or tender offers did not apply because plaintiffs alleged, among other things, misconduct over a period of several years against E & Y. (ER 1442.)[3]

2. District Court Grants E & Y's Motion To Dismiss and Vishay's Motion for Summary Judgment

On March 23, 2007, E & Y moved to dismiss the District Court complaint and on March 27, 2007, Vishay moved for summary judgment. (ER 1445-71, 1542-65.) After hearing oral argument on both motions, on July 19, 2007 the District Court granted Vishay's and E & Y's motions, holding, as plaintiffs recognize (Appellants Br. 6), that the Delaware settlement, release and Judgment were entitled to res judicata effect. (ER 1714-19.)

In rendering its decision, the District Court noted that despite the settlement, release and Judgment in Delaware, "plaintiffs in the instant action nonetheless continued litigation in Santa Clara Superior Court by filing a Second Amended

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[3] As noted above, Vishay believes that the District Court properly denied remand under 28 U.S.C. § 1446(b) and SLUSA. For purposes of judicial economy, Vishay joins the arguments on that point set forth by co-defendant E & Y and will not address the issue separately here.

Complaint ("SAC") and then a subsequent SAC Amendment." (ER 1716.) The Court went on to hold:

> plaintiffs offer no evidence that they have attempted to address the Delaware injunction in Delaware. Instead, they have continued to litigate the instant case in California, arguing that they are entitled to a determination in California as to whether or not the Delaware settlement bars their claims and whether the Delaware Chancery Court had jurisdiction to issue the injunction. While plaintiffs correctly state the general rule that a state court may not enjoin proceedings in a federal court, the injunction at issue here 'encompasses, among other claims, all the claims asserted by the representative plaintiffs in *Procter v. Vishay Intertechnology Inc.*, Case No. 1-04-CV-18977' and 'plaintiffs settled and released, among other claims, all the claims asserted in [that action].'

(ER 1717-18.)

In dismissing the action, the District Court noted that "[a]s a matter of federal-state comity, this Court will not entertain arguments regarding the jurisdiction of the Delaware Chancery Court unless and until Plaintiffs have sought relief from the injunction in Delaware." (ER 1718.) The District Court made its dismissal of plaintiffs' claims "effective (90) days after the date of this order" to "permit Plaintiffs to initiate appropriate proceedings in Delaware." (*Id.*)

Despite ample opportunity after the Court's invitation, plaintiffs never sought any relief from the Court of Chancery in Delaware. Instead, they filed this appeal.

IV. SUMMARY OF ARGUMENT

Despite (i) the Delaware settlement, release and Judgment, (ii) the permanent injunction issued by the Court of Chancery, which held that "this order is clearly justified and it is regrettable that a motion of this kind had to be presented" (ER 1534), and (iii) the decision of the Delaware Supreme Court holding that the claims in plaintiffs' complaint "encompassed the same claims that had been released in the settlement of the Delaware Action" (ER 1539), plaintiffs continued to prosecute this case as if no legal impediment existed. The District Court properly put an end to plaintiffs' vexatious conduct. Under principles of full faith and credit, and based on *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 376 (1996), the Delaware settlement, release and Judgment are entitled to res judicata effect, definitively barring plaintiffs from prosecuting claims here that Vishay already paid substantial consideration to settle. To the extent plaintiffs argue that this action pleads claims that are different from the claims covered and released by the Delaware settlement, release and Judgment, the decisions by the Delaware Court of Chancery and Delaware Supreme Court – holding to the contrary that plaintiffs' claims in this action *are* encompassed within the Delaware settlement, release and Judgment – are entitled to collateral estoppel and res judicata effect.

In light of the foregoing, the judgment of the District Court granting Vishay summary judgment should be affirmed.

V. ARGUMENT

A. Standard of Review

A decision granting summary judgment on res judicata grounds is reviewed de novo. *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 761 (9th Cir. 2003); *Akootchook v. United States*, 271 F.3d 1160, 1164 (9th Cir. 2001).

Under Rule 56(c) of the Federal Rules of Civil Procedure, a court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If the moving party meets its initial burden of showing the absence of a genuine issue, then the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Based on the undisputed facts of this case, the District Court's decision granting summary judgment was correct because, as the Court of Chancery and Delaware Supreme Court have already held, plaintiffs' claims in this action have been disposed of by the Delaware settlement, release and Judgment, and it would

be inequitable – and a waste of judicial resources – to require Vishay to relitigate claims it has already paid substantial consideration to settle.

B. Plaintiffs' Claims Are Barred By the Delaware Settlement, Judgment and Release

As the District Court properly found, plaintiffs' claims are barred for the simple reason that, as already held by two courts – the Delaware Court of Chancery, which issued the Judgment in the first place, and the highest Court in Delaware – those claims are encompassed within the claims disposed of by the Delaware class action settlement, release and Judgment. Indeed, plaintiffs themselves acknowledge that "The Delaware Judgment, resulting from this settlement [of the Delaware class action], purported to release all claims of the Minority Shareholders, including their claims under California law, pending in this action . . . . " (Appellants' Br. 9.)

The District Court correctly noted that "a state court may not enjoin proceedings in a federal court." (ER 1718.) The District Court nevertheless held that it would defer to the Judgment and holdings of the Delaware courts unless plaintiffs obtained relief from those holdings. As plaintiffs acknowledged, this decision was predicated on principles res judicata. (Appellants' Br. 6.)

The preclusive effect of a state court judgment in a subsequent federal lawsuit is determined by the Full Faith and Credit Act, which provides that state judicial proceedings "shall have the same full faith and credit in every court within

the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. To determine the preclusive effect of a state court judgment, a federal court looks to the preclusion law of the state in which the judgment was rendered – here, Delaware. *See Marresse v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) ("It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken."); *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 478 (1982) ("Depriving state judgments of finality . . . would violate basic tenets of comity and federalism.").

The United States Supreme Court held in *Matsushita Electric Industrial Co.*, that when, as here, a Delaware settlement is already "'determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims. . . .'" 516 U.S. at 377-78 (citation omitted); *see also Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."). In *Matsushita*, the Court gave a class action settlement approved by the Court of

Chancery preclusive effect against a suit brought by a shareholder in federal court in California, holding that "a judgment entered in a class action, like any other judgment in a state judicial proceeding, is presumptively entitled to full faith and credit." 516 U.S. at 374.

Delaware courts have uniformly accorded broad preclusive effect to class action settlements. Under Delaware law, res judicata is "available if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action." *Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967); *see also Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989) (finding release bars claims based upon "same set of operative facts" and binds the class so long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object, even though the causes of action in subsequent suit might not have been the same as those settled).

Indeed, for res judicata purposes, the two complaints are not required to be "mirror image" complaints but may merely involve the same "subject matter or controversy." *See, e.g., In re Union Square Assocs. Sec. Litig.*, Civ. A. No. 11028, 1993 WL 220528, at *3 (Del. Ch. June 16, 1993) ("[A]bsolute parity of allegations . . . is not necessary to invoke the doctrine of res judicata."). This is so because,

whether or not the two actions concern precisely the same causes of action, "the same evil sought to be avoided is present: the possibility of conflicting rulings by this Court and by a foreign court." *Ivanhoe Partners v. Newmont Mining Corp.*, Civ. A. Nos. 9281, 9221, 1988 WL 34526, at *5 (Del Ch. Apr. 7, 1988). Nor is mutuality or exact identity of defendants required for res judicata to apply. *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991) ("Delaware, like many other jurisdictions, has abandoned the requirement of mutuality as a prerequisite to the assertion of collateral estoppel.").

In addition to the mandate of full faith and credit, "the public policy of [Delaware] seeks to avoid the unseemliness, unfairness, and inefficiency that results when different courts adjudicate identical claims." *In re Oracle Corp. Derivative Litig.*, 867 A.2d 904, 926 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005). Especially in the class action context, "considerations both of efficiency and fairness . . . require that a single adjudication be available in which charges of breach of a director's or controlling shareholder's duty to a corporation and its shareholders may be conclusively determined and all holders of stock bound." *Hynson v. Drummond Coal Co.*, 601 A.2d 570, 571-72 (Del. Ch. 1991); *see also Turner v. Bernstein*, 768 A.2d 24, 34 (Del. Ch. 2000) (following *Hynson* and noting that the "devotion of scarce judicial resources to repetitive exercises of this

sort on behalf of one identically situated class quite obviously would come at a large price to other litigants who need judicial attention").

In this case, there can be no dispute that the claims plaintiffs seek to prosecute here are encompassed within the Delaware settlement, release and Judgment. On this issue, the Court need look no further than the decisions by the Delaware Court of Chancery and Delaware Supreme Court. The Court of Chancery, which issued the October 25, 2005 Judgment in question, held that "the release in the previous judgment is clear." (ER 1534.) That Court also entered a permanent injunction order stating that its prior "Order and Final Judgment encompasses, among other claims, *all the claims asserted by the representative plaintiffs in Proctor v. Vishay*," and "settled and released, among other claims, *all the claims asserted in Proctor v. Vishay*." (ER 1532 (emphasis added).) In similar fashion, the Supreme Court of Delaware held that the claims here "were released in [the] Delaware class action by the Court of Chancery's October 25, 2005 order and final judgment," (ER 1537-38), and the claims plaintiffs are prosecuting here "encompassed the same claims that had been released in the settlement of the Delaware action." (ER 1539 (emphasis added).) Indeed, plaintiffs themselves do not dispute this point; they acknowledge that the Delaware Judgment "purported to release all claims . . . pending in this action." (Appellants' Br. 9.)

As the District Court effectively held, these decisions by the Court of Chancery – a court with considerable experience with respect to class actions and derivative suits – and the highest court in Delaware, are themselves entitled to collateral estoppel and res judicata effect. *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32 (1st Cir. 1991) (applying Delaware preclusion law; "[i]t is black letter law that collateral estoppel can apply to preclude the relitigation in federal court of issues previously determined in state court"). These decisions could not be more clear-cut; it is beyond dispute that the issue of whether the Delaware settlement, release and Judgment cover the claims prosecuted here was "'already decided in a prior suit in which [plaintiffs] had a full and fair opportunity to present [their] case.'" *Kohls v. Kenetech Corp.*, 791 A.2d 763, 768 (Del. Ch. 2000) (citation omitted), *aff'd*, 794 A.2d 1160 (Del. 2002).

Accordingly, principles of res judicata and collateral estoppel properly mandated dismissal of plaintiffs' Second Amended Complaint. *See In re Union Square Assocs. Sec. Litig.*, No. Civ. A. 11028, 1993 WL 513232, at *7 (Del. Ch. Nov. 29, 1993) ("Because plaintiff's individual complaint and the Class Action are based on the same factual predicate, plaintiff is barred from raising her claims by the doctrine of res judicata, if she was given sufficient notice to object to the [Class Action settlement]."); *Nottingham Partners v. Dana*, 564 A.2d at 1094 (finding release bars claims based upon "same set of operative facts" and binds the class so

long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object).[4]

C. Even If the Decisions of the Delaware Court of Chancery and Delaware Supreme Court Were Not Accorded Preclusive Effect, This Action is Still Legally Barred

Even were this Court to determine for some reason that plaintiffs were not precluded from relitigating whether the Delaware settlement, release and Judgment encompass the claims plaintiffs seek to prosecute here, the Court should nevertheless hold that the Delaware Judgment bars plaintiffs' claims.

To begin with, because it issued the original Judgment in question, the Court of Chancery was in the best position to interpret that order and, accordingly, the Court of Chancery's decision concerning the scope of its prior Judgment is entitled

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[4] It is well settled that a state court that has approved a class action settlement may enjoin shareholders from pursuing related claims in other state courts. *See, e.g., In re U.S. Robotics Corp. S'holders Litig.*, C.A. No. 15580, 1999 WL 160154, at *2 (Del. Ch. Mar. 15, 1999) (Delaware Court of Chancery enjoined shareholders from pursuing related claims in California filed three months after a Delaware class action was settled); *In re Union Square Assocs Sec. Litig.*, No. Civ. A. 11028, 1993 WL 220528, at *5 (Del. Ch. June 16, 1993) (Delaware Court of Chancery enjoined plaintiffs from litigating claims based on the "same factual predicate" as a class action settled and released by an earlier judgment). There is likewise no dispute that plaintiff shareholders are subject to personal jurisdiction in Delaware with respect to class action settlements involving Delaware corporations. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). Vishay did not ask the District Court to enforce the Delaware permanent injunction. Rather, and as set forth above, Vishay's position is that the findings of the Delaware Court of Chancery and Delaware Supreme Court that the claims here are encompassed within and released by the settlement, release and Judgment in Delaware are entitled to res judicata and collateral estoppel effect. This position is consistent with *Donovan v. City of Dallas*, 377 U.S. 408 (1964). *See* pages 29-31 below.

to substantial deference even if not entitled to res judicata effect. *See In re Merry-Go-Round Enters., Inc.*, 400 F.3d 219, 227 (4th Cir. 2005) ("'[A] court's interpretation of its own order must be given substantial deference.'" (citation omitted)); *Truskoski v. ESPN Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (lower court's interpretation of its own order is "'accorded great weight'" (citation omitted)); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 498 (3d Cir. 1982) ("[W]e must give particular deference to the district court's interpretation of its own order."); *Cf. Carr v. Runyan*, 89 F.3d 327, 331 (7th Cir. 1996) ("Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review.").

Beyond that, the decisions by the Court of Chancery and Delaware Supreme Court concerning the reach of the settlement, release and Judgment are undoubtedly correct. The October 25, 2005 Judgment granted a broad release running in favor of Vishay and its agents, employees and others, barring all claims "related in any manner to the allegations, facts, events, transactions, acts [or] occurrences . . . or any other matter whatsoever set forth in or otherwise related, directly or indirectly to . . . the allegations in the complaints in the Action." (ER 1529 ¶ 8.) This release clearly covers the claims brought by plaintiffs here, because, as set forth above, the complaint in this case and the complaint in

Delaware contain substantially overlapping allegations and seek the same relief. Specifically, both pleadings allege (i) misconduct with respect to Vishay borrowings (*compare* ER 0800 ¶ 15 *with* ER 1506 ¶ 18(l)); (ii) the transfer of Siliconix subsidiaries, equipment and information technology to Vishay (*compare* ER 0800 ¶ 17 *with* ER 1504-05 ¶ 18 a, f, & h); (iii) dealings in Israel (*compare* ER 0800-01 ¶ 17 *with* ER 1505 ¶ 18 g); (iv) the imposition of unwarranted charges on Siliconix (*compare* ER 0801-02 ¶ 20 *with* ER 1504-05, ¶ 18 b, g, i & j); and (v) misconduct and coercion with respect to Vishay's 2005 tender offer (*compare* ER 0809 ¶ 57 *with* ER 1515 ¶¶ 35-37). And both complaints cite the effect of Vishay's alleged abuse of Siliconix, purportedly depressing the company's cash flow and profits. (*Compare* ER 0801-02 ¶ 20 *with* ER 1508-09, ¶¶ 24, 27.)

Equally critical, the Delaware complaint explicitly referenced this suit. That pleading stated, "As a result of the manner in which Vishay dominates and controls Siliconix, Vishay . . . [is] the subject of a derivative complaint by Siliconix's shareholders on behalf of Siliconix as the nominal defendant." (ER 1506-07 ¶ 19.)

Additionally, the remedy sought by the plaintiffs here parallels that sought in Delaware: increased compensation for plaintiffs' shares on account of Vishay's alleged self-dealing transactions with Siliconix. In fact, both complaints assert that on account of Vishay's alleged self-dealing transactions, the value of the minority shareholders' Siliconix stock was reduced. (*Compare* ER 0802 ¶ 21 *with* ER 1515

¶ 35.) And just like the plaintiffs here, the Delaware plaintiffs sought to redress injuries sustained during the period preceding the tender offer by seeking increased consideration for their Siliconix shares on account of the allegedly improper Vishay-Siliconix transactions. And both complaints plead that Vishay effected these self-dealing transactions to facilitate its purchase of the minority shareholders' interests at a purportedly unfair price in a tender offer. (*Id.*)

Against this backdrop, it is not surprising that the *Proctor* plaintiffs represented to the Superior Court that the Delaware plaintiffs "***copied almost entirely***" the pleading filed by the plaintiffs here. (ER 0654 ¶ 46.) Appellants' Brief, moreover, admits that plaintiffs' complaint here as well as the Delaware complaint both focus on the purported inadequacy of the Vishay tender offer for Siliconix in light of Vishay's alleged misconduct. (*See* Appellants' Br. 13 ("Vishay, by the financial and legal machinations set out in Plaintiffs' SAC, was eventually able to buy the Siliconix Minority Shareholders' shares for 3.075 Vishay shares . . . ."); Appellants' Br. 14-17 (detailing the allegations in the Second Amended Complaint stating that Vishay improperly drained the assets of Siliconix to keep the remaining 19.6% of Siliconix stock as low as possible); Appellants' Br. 47 n.21 ("The Second Amended Complaint is replete with allegations directly implicating the stock of both Vishay and Siliconix, tender offers for Siliconix stock and the sale and purchase of such stock.").) And as noted

above, plaintiffs themselves concede that the Delaware Judgment encompass all claims pending in this action. (Appellants' Br. 9.)

These statements are judicial admissions by which plaintiffs are bound. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'" (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)); *Gradetech, Inc. v. Am. Employers Group*, No. C. 06 02991, 2006 WL 1806156, at *3 (N.D. Cal. June 29, 2006) ("Factual assertions in pleadings . . . are considered judicial admissions conclusively binding the party who made them.").

Significantly, "the hallmark of class action settlements, one reason they are made by defendants, is to secure very broad releases." *In re VMS Ltd. P'ship Sec. Litig.*, No. 90 C 2412, 1995 WL 76884, at *3 (N.D. Ill. Feb. 17, 1995), *aff'd*, 142 F.3d 441 (7th Cir. 1998); *see also Prezant v. DeAngelis*, 636 A.2d 915, 923 (Del. 1994) ("Judicial economy is served by a comprehensive settlement hearing rather than piecemeal litigation."). As noted above, allowing this suit to proceed would effectively (i) frustrate the class action settlement process, which gave plaintiffs here ample opportunity to make any objection they wished before the settlement

was approved, (ii) deprive Vishay of the benefit of its settlement with the shareholders, (iii) nullify the decision by the Court of Chancery interpreting its own prior order, and (iv) nullify the decision by the Supreme Court of Delaware holding that this action is encompassed within the Delaware settlement, release and Judgment. Against this backdrop, the decision below clearly merits affirmance.

D. Plaintiffs' Arguments That the District Court Decision Should Be Reversed Are Meritless

Appellants' Brief does not seriously contest the decisions of the Court of Chancery and Delaware Supreme Court that the claims in this action are encompassed within the Delaware settlement, release and Judgment. Indeed, as noted above, they concede the point. (Appellants' Br. 9.) Instead, plaintiffs assert a series of spurious arguments as to why their complaint is not barred on res judicata grounds. As set forth below, these arguments do not create triable issues.

1. The District Court Properly Determined the Res Judicata Effect of the Delaware, Settlement, Judgment and Release

According to plaintiffs, the District Court "refused to proceed to determine the *res judicata* effect of the Delaware Judgment" in contravention of the principles set out in *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964), and instead "enforc[ed] the Delaware State Court injunction." (Appellants' Br. 2.) This assertion is belied by the record as well as by plaintiffs' own admissions. Elsewhere in Appellants' Brief, plaintiffs admit that the District Court "accepted

the Delaware Judgment and Delaware Injunction as controlling over California law and as providing res judicata in this action." (Appellants' Br. 33.) Furthermore, an examination of the decision below clearly shows that the District Court complied with *Donovan* and principles of res judicata in granting Vishay's summary judgment motion.

As plaintiffs recognize (Appellants' Br. 35), the Supreme Court in *Donovan* held that "state courts are completely without power to restrain federal court proceedings." However, *Donovan* went on to hold that "whether or not a plea of res judicata would be good is a question for the federal court to decide." *Donovan*, 377 U.S. at 412-13. Consistent with *Donovan*, the District Court did not enforce the Delaware injunction. Rather, the Court below acknowledged "the general rule that a state court may not enjoin proceedings in a Federal Court." (ER 1717-18.) The Court went on to find that the Judgment issued by the Delaware Court of Chancery "'encompasses, among other claims, all the claims asserted by the representative plaintiffs in *Procter v. Vishay Intertechnology Inc.*, Case No. 1-04-CV-18977' and 'plaintiffs settled and released, among other claims, all the claims asserted in [that action].'" (ER 1718.) The District Court further stated that it would respect the Delaware Judgment "unless and until Plaintiffs first have sought relief from the injunction in Delaware." (ER 1718.)[5]

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[5] As noted above there is no dispute that the Court of Chancery had personal

In light of the foregoing, the District Court proceeded exactly as directed by *Donovan*. The Court below did not enforce the injunction, issued at a time when the case was pending in state court, but instead determined whether the Judgment issued in Delaware, as well as the decisions of the Court of Chancery and Delaware Supreme Court, were entitled to collateral estoppel and res judicata effect. The decision below thus fully accords with *Donovan*.

2. The Law of the Case Doctrine Has No Application Here

Plaintiffs next argue that because "the California Superior Court had previously declined to give res judicata effect to the settlement of the Delaware litigation, before defendants removed this action from state court to District Court . . . that prior ruling is the law of the case on the issue." (Appellants' Br. 54.) This argument fails based on plaintiffs' own characterization of the discretionary law of the case doctrine.

As plaintiffs observe, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (Appellants' Br. 54 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).) But the demurrer ruling by the California state court and cited by plaintiffs did not "decide[ ] upon a rule of law," as required for application of

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jurisdiction over the *Proctor* plaintiffs as members of the class certified in Delaware. *See Phillips Petroleum Co.*, 472 U.S. at 811.

law of the case. Rather, the Court held that as the record stood at that preliminary stage of the proceedings, it could not conclude that the Delaware settlement, release and Judgment encompassed the *Proctor* suit. (ER 1163.) Since that decision, however, the case assumed a dramatically different posture. As it was entitled to do, to obtain clarification concerning the scope of the Delaware settlement, release and Judgment, Vishay returned to the Court that supervised the settlement and issued the Judgment in question. *See* cases cited at page 24 n.4 above. The ruling then issued by the Court of Chancery could not have been clearer. The Court of Chancery held that the class action "Order and Final Judgment encompasses, among other claims, all the claims asserted by the representative plaintiffs in *Proctor v. Vishay* . . . ." (ER 1532.) The Delaware Supreme Court, in dismissing an appeal of that ruling, likewise held that the claims in this action "were released in a Delaware class action by the Court of Chancery's October 25, 2005 order and final judgment," and that this action "encompassed the same claims that had been released in the settlement of the Delaware action." (ER 1537-39.)

Even the Superior Court recognized that its preliminary ruling concerning the effect of the Delaware settlement, release and Judgment was not the law of the case and not binding in any subsequent stage, including on summary judgment. The Superior Court specifically stated in issuing its ruling that Vishay's

"contention that res judicata applies and collateral estoppel in terms of the Delaware action . . . may be a valid affirmative defense," but "on the face of the pleadings I cannot conclude that it absolutely bars the actions." (ER 1163.) The Court went on to note that "It may well be as we hear this case on a factual basis perhaps on summary judgment or some other basis the court will be able to agree with you" with respect to those defenses. (ER 1169-70.) *See Verizon Del., Inc. v. Covad Commc'ns Co.*, 232 F. Supp. 2d 1066, 1069-70 (N.D. Cal. 2002) (rejecting plaintiff's argument made in summary judgment motion that ruling on motion to dismiss was law of the case; "facts and arguments relevant to [the issue in question] had not been developed adequately in [defendant's] motion to dismiss"), *aff'd in part & rev'd in part on other grounds*, 377 F.3d 1081 (9th Cir. 2004).

In fact, once the Court of Chancery issued its permanent injunction, the Superior Court made clear that it would not permit plaintiffs to prosecute this action against Vishay unless plaintiffs obtained relief in Delaware from the June 2006 permanent injunction issued by the Court of Chancery. The Superior Court directed plaintiffs in response to their argument that the injunction should not prevent the Court from adjudicating the action that "if . . . you [are] in disagreement with [the injunction order] you need to appear there and seek to have it quashed or modified or to have a rehearing, but you don't just ignore it." (ER 1210.) The Court went on to state that "this Court is not going to be a party to a

litigant violating a valid order of another court." (ER 1213.) The Court "direct[ed] the plaintiff to go back to Delaware and deal with it" and gave plaintiffs' counsel until August 15, 2006 to "get your papers together" and "decide what you are going to do." (ER 1213-14.) Despite this directive, plaintiffs did not contest the Court of Chancery's order.

Plaintiffs' selective approach to the impact of prior rulings could not be more disingenuous. Plaintiffs contend that the District Court should have exercised its discretion and deferred to a preliminary ruling by a state court construing an order it did not issue. But plaintiffs in the same breath assert that the District Court should have ignored (i) a final ruling by the Court that issued the original order in the first place, enjoining prosecution of plaintiffs' claims because the claims in this case were encompassed by a final Judgment issued by that Court, and (ii) a ruling by the highest court in Delaware reaching the same conclusion. Plaintiffs offer no legal authority supporting that unprecedented result, nor does any exist.

3. The Proctor Complaint and the Delaware Tender Offer Complaint Contain Substantially Overlapping Allegations

Plaintiffs go on to argue that the claims in this action and those pleaded in Delaware are different because "the Delaware Tender Offer Litigation was filed in 2005, long after the instant case was filed in 2002 and was primarily concerned with the validity and amount of Vishay's tender offer for Siliconix shares."

(Appellants' Br. 57.) This argument has already been considered and rejected by both the Court of Chancery and Delaware Supreme Court and thus on collateral estoppel grounds should not be revisited. *Nottingham Partners v. Dana*, 564 A.2d at 1092. In any event, plaintiffs' allegations on this score are demonstrably false. Plaintiffs filed their second amended complaint – which was the subject of Vishay's summary judgment motion – in October 2005, *after* Vishay's April 2005 tender offer. That pleading specifically references the tender offer and complains of the inadequacy of the Vishay tender offer in light of Vishay's alleged misconduct with respect to Siliconix – the same allegations raised in Delaware. And both complaints seek the same relief, namely additional consideration for their Siliconix shares. *See* pages 25-27 above.

Given the substantial overlap of plaintiffs' complaint and the Delaware complaint, it is not surprising that plaintiffs' counsel represented to the California state court that the class action complaint in Delaware "***copied almost entirely***" the pleading filed by the plaintiffs here. (ER 0654 ¶ 46.) And as set forth at page 27 above, plaintiffs on this appeal admit that their complaint and the Delaware complaint both address the inadequacy of the Vishay tender offer in light of Vishay's alleged misconduct with respect to Siliconix. (*See, e.g.*, Appellants' Br. 47 n.21 ("The Second Amended Complaint is replete with allegations directly implicating the stock of both Vishay and Siliconix, tender offers for Siliconix stock

and the sale and purchase of such stock.").) Plaintiffs cannot escape these binding representations. *See Hamilton*, 270 F.3d at 782 (doctrine of judicial estoppel as designed to "protect against a litigant playing fast and loose with the courts").[6]

4. Plaintiffs' Due Process Rights Were Not Violated

According to plaintiffs, "granting res judicata effect to the Delaware judgment would violate the due process rights of Plaintiffs in the present case" because "the vast majority of Plaintiffs in this action received no notice of the pendency of the Delaware Tender Offer Litigation until long after it was quickly settled." (Appellants' Br. 59.) Plaintiffs offered no evidence below for this indisputably false assertion. The Court of Chancery specifically found that the "form and manner of the Notice to the Class is hereby determined to . . . have been given in full compliance with each of the requirements of Delaware Court of

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[6] The cases on which plaintiffs rely to argue that res judicata does not apply are not class action settlement cases, and are distinguishable on other grounds as well. In *Travelers Insurance Co. v. St. Jude Hospital*, 37 F.3d 193, 195-97 (5th Cir. 1994) (Appellants' Br. 58), the only reason the court held that a second action was not barred by res judicata was because of the vagaries of the Louisiana statute in question. In *Shamrock Assocs. v. Sloane*, 738 F. Supp. 109, 117 (S.D.N.Y. 1990) (Appellants' Br. 57) the second suit involved "different acts by defendants, different types of conduct by defendants and different effects of defendants' acts." In *NLRB v. United Techs. Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983) (Appellants' Br. 58), the court found that the second suit was not barred by res judicata because, unlike here, the second suit stemmed from a different transaction which took place a decade after the transaction at issue in the first suit. That court did find, however, that the second suit was barred by collateral estoppel because the same issue of law had been decided in the first proceeding. *NLRB.*, 706 F.2d at 1260-61.

Chancery Rule 23 and due process, and it is further determined that all members of the Class are bound by the Order and Final Judgment herein." (ER 1527 ¶ 2.) To the extent plaintiffs now contest notice, they were required to raise those objections in Delaware. Before approving the settlement, the Court of Chancery issued a Scheduling Order (incorporated by reference in the Judgment) providing that "Any person who fails to object . . . shall be deemed to have waived the right to object . . . and shall be forever barred from raising such objection in this or any other action or proceeding unless the Court [of Chancery] orders otherwise." (ER 1523 ¶ 10.) Significantly, the United States Supreme Court held in *Matsushita Electrical Industries Co.*, 516 U.S. at 377-78, that when, as here, a settlement is already "'determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims . . . .'" (citation omitted).

Moreover, it is undisputed that plaintiffs here knew full well about the settlement proceedings in Delaware, yet for tactical reasons deliberately chose to ignore those proceedings. In negotiating the timing of plaintiffs' filing of their second amended complaint, plaintiffs' counsel drafted and circulated to opposing counsel a stipulation on October 20, 2005 – five days before the settlement hearing which stated:

> On October 25, 2005 in the Court of Chancery of the State of Delaware, in and for New Castle County,

> Wilmington, Delaware, in the matter of *In re Siliconix, Inc. Shareholders Litigation*, Consolidated C.A. No. 1143-N, a hearing will be held pursuant to a "Notice of Pendency of Class Action, Proposed Class Action Determination, Proposed Settlement of Class Action, Settlement Hearing and Right to Appear" ("Chancery Hearing"). The Chancery Hearing and the Court of Chancery final order on the issues considered at the Chancery Hearing ("Chancery Order") may bear on issues in the case pending before this Court, on the Second Amended Complaint and on defendants' challenges to the Second Amended Complaint.
>
> The parties have agreed and hereby stipulate that, in order to take account of the Chancery Hearing and Orders plaintiffs shall have to and including thirty (30) days after the issuance of the Chancery Order to file and serve their Second Amended Complaint. This stipulation and the order sought from the Court will be in the best interests of judicial efficiency for the parties and the Court and for the resolution of the issues in this action.

(ER 1709.) There is likewise no dispute that plaintiffs had full notice of Vishay's application for a permanent injunction in the Court of Chancery. (ER 1341.)

5. Delaware Law Applies to Determine the Scope of Res Judicata

As an afterthought, plaintiffs contend that the District Court should have applied California law rather than Delaware law in determining the scope of res judicata and collateral estoppel. (Appellants' Br. 60.) However, as set forth at pages 18-19 above, the preclusive effect of a state court judgment in a subsequent federal lawsuit is determined by the Full Faith and Credit Act, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such

State . . . from which they are taken." 28 U.S.C. § 1738. To determine the preclusive effect of a state court judgment, a federal court looks to the preclusion law of the state in which the judgment was rendered – here, Delaware. *See Marresse v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 478 (1982).[7]

Plaintiffs do not make any effort to address the Delaware decisions applying collateral estoppel and res judicata in situations just like here, to prevent re-litigation of claims encompassed within a Delaware class action settlement. Nor do plaintiffs explain how California's preclusion law, even if it applied, would change the result reached by the District Court. Indeed, it would not.[8]

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[7] Plaintiffs' cases do not support the application of California law to preclusion issues. In the first case cited by plaintiffs, the court *did* follow the law of the state in which the judgment was issued to determine whether the action was barred by res judicata. *See R.J. Reynolds Tobacco Co. v. Newby*, 153 F.2d 819, 821 (9th Cir. 1946) (Appellants' Br. 60). The Court in *Ewing v. St. Louis-Clayton Orthopedic Group*, 790 F.2d 682, 685 (8th Cir. 1986) (Appellants' Br. 60) made a blanket statement that a federal district court is required to follow the res judicata law of the forum state. Commentators believe the case was incorrect in that respect. *See* 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Jurisdiction 2d* § 4472 (2007).

[8] Just as in Delaware, under California law res judicata and collateral estoppel require: (i) an identity of claims, (ii) a final judgment on the merits, and (iii) privity. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regulatory Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). As demonstrated above, these elements are clearly satisfied here: the suits arose from the "the same transactional nucleus of facts," *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir.2002), which is required for an identity of claims; the Delaware Court of Chancery and Delaware Supreme Court issued a final judgment; and the

6. Nullifying the Delaware Judgment Would Violate the Full Faith and Credit Clause of the Constitution and Frustrate the Principles Underlying Res Judicata

Equally meritless is plaintiffs' assertion that "manifest injustice" would result if their claims were barred on res judicata and collateral estoppel grounds. (Appellants' Br. 61.) In fact, the exact opposite is true: nullifying the Delaware Judgment violates the Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, the Full Faith and Credit Act, 28 U.S.C. § 1738, and *Matsushita*, 516 U.S. at 373-79. As noted above, the United States Supreme Court held in *Matsushita* that when, as here, a Delaware settlement is already "'determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion," and "Class members cannot subsequently relitigate the claims . . . .'" *Id.* at 377-78 (citation omitted); *see also Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."). In *Matsushita*, the Court gave a class action settlement approved by the Court of Chancery preclusive effect against a suit brought by a shareholder in federal court in California, holding that "a judgment entered in a class action, like

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Proctor plaintiffs were parties in both suits as members of the class certified in Delaware.

any other judgment in a state judicial proceeding, is presumptively entitled to full faith and credit." 516 U.S. at 374.

Equally egregious, plaintiffs' proposed approach, by requiring Vishay to relitigate settled claims, would frustrate the policies underlying res judicata – finality and judicial efficiency – and, further, reward plaintiffs for their procedural ploy of litigating here rather than objecting to the settlement in Delaware, as they were required to do. *See Estate of Hart*, 165 Cal. App. 3d 392, 397 (1984) ("As has been repeatedly stated, California must, regardless of policy objections, recognize the judgment of another state as *res judicata.*"). As the United States Supreme Court has recognized, *see Matsushita*, 516 U.S. at 377-78, these principles are particularly important in the context of a global settlement and release of shareholder class action claims. *See also Radfer Trust v. First Unum Life Ins. Co.*, No. C 04-2054, 2004 WL 2385000, at *4 (N.D. Cal. Oct. 25, 2004) ("Where a party has had a full and fair opportunity to litigate, res judicata, 'protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'" (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979))).

Finally, it is worthy of emphasis that two Courts – the Superior Court and the District Court – both gave plaintiffs ample opportunity to return to Delaware to

contest the Court of Chancery's ruling. Plaintiffs on both occasions declined to do so. This Court should not reward plaintiffs' gamesmanship.

E. Plaintiffs' Rule 56(f) Request Was Without Merit

Plaintiffs maintain that under Fed. R. Civ. P. 56(f) they should at minimum have been entitled to discovery to explore issues and questions concerning res judicata effect of the Delaware Judgment. (Appellants' Br. 63-66.) This argument fails at the threshold because plaintiffs did not satisfy their burden of showing: "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *State of Cal. ex. rel. Cal. Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

Plaintiffs were not only required to identify facts they "hope[] to discover to raise a material issue of fact," but also were required to show "that the evidence sought exists," and is not the product of "pure speculation." *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991) (citation and internal quotation marks omitted). The declarations plaintiffs submitted in support of their request for discovery failed to establish the existence of specific facts that were essential to proper determination of the merits of the motion, and instead merely identified categories of evidence that plaintiffs hope to find, *i.e.*, "evidence of a lack of incentive and

actions by plaintiffs' attorneys in the Delaware Tender Offer action to vindicate the rights of the class members in this action to prosecute this action fully and fairly." (ER 1664 ¶ 34(f).) Rule 56(f) does not permit fishing expeditions "to search for evidence [plaintiffs] think 'may exist.'" *Maljack Prod. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996).

Moreover, permitting plaintiffs to explore issues and questions concerning the Delaware settlement and to relitigate the issues disposed of in Delaware would defeat the very purpose of res judicata and deprive Vishay of the benefits of the Delaware settlement, pursuant to which Vishay paid substantial consideration to Siliconix shareholders. The appropriate time for plaintiffs to have raised these questions was during the settlement process, when plaintiffs could have objected to the settlement and taken discovery. And in any event, many of the questions plaintiffs belatedly sought to raise below, for example the nature of the notice provided to shareholders, the opportunity given to shareholders to opt out, and whether the class plaintiffs adequately considered alleged pre-tender offer misconduct, were specifically addressed in the Court of Chancery settlement materials. (*See* ER 1485, ¶¶ Z, AA; ER 1521-22, ¶¶ 7, 9–10; ER 1526-27, ¶ 2.) Plaintiffs offer no justification for sitting out the class action settlement process, and it is precisely the judicial inefficiency of plaintiffs' collateral attack on the

class action Judgment that the settlement procedure approved in *Matsushita* and followed by the Court of Chancery here is designed to prevent.

F. Plaintiffs' Claims Are Legally Defective on Other Grounds

The Court may also affirm the decision below on other, independent grounds as well: (i) plaintiffs lack standing to pursue their derivative claim, (ii) to the extent they do not allege a direct injury, plaintiffs cannot pursue their class action claim, and (iii) plaintiffs have failed to meet the legal requirements for their "quasi appraisal" claim.

1. Plaintiffs Lack Standing to Bring a Derivative Claim After the Vishay-Siliconix Merger

Regardless of whether Federal, California, or Delaware law applies, plaintiffs lack standing to pursue their derivative claims because they no longer own stock in Siliconix as a result of the Vishay-Siliconix merger.

Federal Rule of Civil Procedure 23.1 – which comports with both California and Delaware law – requires continuous ownership throughout the derivative suit for a plaintiff to maintain standing to sue. *See Lewis v. Chiles*, 719 F.2d 1044, 1047 n.1 (9th Cir. 1983) (the language in Federal Rule of Civil Procedure 23.1 stating that "a 'derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders . . . similarly situated in enforcing the right of the corporation' has served as an anchor for the concept that ownership must extend throughout the life

of the litigation" (citation omitted)); *Grosset v. Wenaas*, 42 Cal. 4th 1100, 1115 (2008) ("[W]hen the stockholder relationship is terminated, either voluntarily or involuntarily, a derivative plaintiff loses standing because he or she no longer has even an indirect interest in any recovery pursued for the corporation's benefit."); *Lewis v. Ward*, 852 A.2d 896, 901 (Del. 2004) (under "well established precepts of Delaware corporate law," when "a merger eliminates plaintiff's shareholder status in a company, it also eliminates her standing to pursue derivative claims on behalf of that company").

Plaintiffs rely on *Gaillard v Natomas Co.*, 173 Cal. App. 3d 410 (1985), for the proposition that "the completion of a merger after the transactions complained of does not preclude Plaintiffs from maintaining a derivative action on behalf of the merged company," (Appellants' Br. 71.) But *Gaillard* has been overruled by the California Supreme Court in *Grosset v. Wenaas*, 42 Cal. 4th 1100 (2008). In *Grosset*, the California Supreme Court rejected the reasoning in *Gaillard* and instead held that under both California and Delaware law a plaintiff must maintain continuous stock ownership throughout a derivative action to maintain standing. *Grosset*, 42 Cal. 4th at 1119. After analyzing the Delaware and California requirements for continuous ownership, the *Grosset* court explained that "when the stockholder relationship is terminated, either voluntarily or involuntarily, a derivative plaintiff loses standing because he or she no longer has even an indirect

interest in any recovery pursued for the corporation's benefit." *Grosset*, 42 Cal. 4th at 1115.

Plaintiffs acknowledged in their Second Amended Complaint that they are not presently Siliconix shareholders. (ER 0796, 0805 ¶¶ 1, 38.) That is because, as plaintiffs further pleaded, Vishay effected a short-form merger as of May 16, 2005, and thus Vishay is the sole shareholder of Siliconix. (ER 0796, 0809-10 ¶¶ 2, 58.) In light of the merger of Siliconix into Vishay approved as part of the Settlement, even if their claims were not barred on res judicata grounds plaintiffs have been stripped of any standing to pursue a derivative claim under well-established principles of Federal, California, and Delaware law.

Plaintiffs nonetheless maintain that they qualify for an exception to the continuous ownership rule, which applies when "plaintiffs contended they had lost their stock due to the same wrongful conduct that was the subject of the derivative suit they were trying to bring." (Appellants' Br. 69 (quoting *Kona Enters, Inc. v. Estate of Bishop*, 179 F.3d 767, 770 (9th Cir. 1999).) Plaintiffs' Second Amended Complaint, however, does not allege that the Vishay-Siliconix merger was effected as part of the "same wrongful" conduct alleged in their derivative claim. Nor does the SEC filing cited by Plaintiffs support their position. (Appellants' Br. 69.) Rather, Vishay merely reported, factually and accurately, what would likely happen to this lawsuit as a result of a merger.

2. Much of Plaintiffs' Claims Are Derivative, Not Direct

Plaintiffs purport to plead a direct class action claim against Vishay. Although plaintiffs seek additional consideration for their shares on account of the tender offer, they also seek other relief in this count that is properly characterized as derivative, not direct. Whether a suit is derivative or direct is determined by the law of the state of incorporation. *See, e.g., Lapidus v. Hecht*, 232 F.3d 679, 682 (9th Cir. 2000). Because Siliconix is a Delaware corporation, Delaware law -- not California law -- governs the issue of whether a suit is derivative or direct.[9]

Under Delaware law, "to have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege more than an

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[9] The cases cited by plaintiffs at pages 72-73 of their Brief to argue that California law should govern whether plaintiffs' claims are derivative or direct are inapposite. Setting aside that the cases cited by plaintiffs are all more than four decades old, they do not even address the issue of which law applies to determine whether a claim is direct or derivative. Two of the cases cited by plaintiffs address whether there was jurisdiction over a foreign corporation that maintained its principal place of business in California. *See Sharp v. Big Jim Mines*, 39 Cal. App. 2d 435, 441-42 (1940) (court assessed whether lower court had jurisdiction to enjoin defendants from levying an assessment on the stock of an Arizona corporation with its principal place of business in California); *W. Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 414 (1961) (court held that Commission of Corporations of the State of California had jurisdiction to act on a change of voting rights of shareholders of a Delaware corporation with its principal place of business in California). In *Hobbs v. Tom Reed Gold Mining Co.*, 164 Cal. 497 (1913), the court held that a writ of mandamus commanding defendant to allow a plaintiff stockholder to inspect a mine of an Arizona corporation could be issued in the state of California. In so ruling, the court did not determine whether California or Arizona law should govern because it presumed that Arizona law "was the same as the law of this state." *Id.* at 503.

injury resulting from a wrong to the corporation." *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988). Courts applying Delaware law distinguish between direct and derivative claims as follows: "Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). More specifically, "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.* at 1039.

Plaintiffs' Second Amended Complaint to a significant extent alleges an injury to Siliconix, which at most indirectly injured plaintiffs by supposedly reducing the value of their shares. (ER 0808 ¶ 50.) Thus, to the extent plaintiffs seek relief other than additional consideration for their shares, plaintiffs otherwise plead breaches of fiduciary duty that are clearly derivative under *Tooley*, 845 A.2d at 1039.

3. Plaintiffs' Quasi-Appraisal Claim is Contrary to the Parties' Settlement and Delaware Law

Finally, plaintiffs' claim for quasi-appraisal is inconsistent with the October 2005 Judgment and, further, offends Delaware law.

In permanently enjoining plaintiffs' prosecution of their claims, the Court of Chancery held that its October 2005 Order and Judgment "encompasses, among other claims, *all* the claims asserted by the representative plaintiffs in *Proctor v. Vishay*." (ER 1532 (emphasis added).) The recital paragraph of the Court of Chancery's permanent injunction order specifically noted that plaintiffs in this case "purported to assert a . . . cause of action for quasi appraisal." (*Id.*) Plaintiffs do not offer any reason why their quasi-appraisal claim should be exempted from the Court's ruling. Even were the Court to ignore the collateral estoppel and res judicata effect of the Delaware courts' rulings on this issue, summary judgment was still appropriate.

The parties' settlement approved by the October 2005 Judgment provides only one mechanism for Siliconix shareholders to obtain payment for their shares in excess of the agreed-upon tender offer price: a statutory appraisal proceeding under Section 262. Plaintiffs do not allege that they filed a Section 262 appraisal petition. (ER 0808-10 ¶¶ 54-59.) Accordingly, they failed to comply with either the terms of the settlement or Section 262(e) which requires, among other things, that a shareholder file an appraisal petition within 120 days of the merger. These "statutory formalities concerning appraisal rights 'furnish an orderly method for withdrawal from a corporation by shareholders who dissent from a merger.'" *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 479-80 (Del. Ch. 2000) (citation

omitted). Indeed, as plaintiffs themselves acknowledge (Appellants' Br. 79), "the deadlines of 8 Del C. § 262 are strictly construed" and "late demands are not excused." *Cede & Co. v. MedPointe Healthcare, Inc.*, No. Civ. A. 19354-NC, 2004 WL 2093967, at *22 (Del. Ch. Sept. 10, 2004).

Instead, plaintiffs contend they are entitled to quasi-appraisal. This remedy is available only in the narrowest of circumstances, when a plaintiff can establish a breach of fiduciary duty in connection with required disclosure concerning a merger, or a material violation of the notice requirements for statutory appraisal under 8 Del. Code § 262. *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 538-39 (Del. 1996) (quasi-appraisal not appropriate for "good faith disclosure violation").

In an attempt to meet this requirement, plaintiffs assert that the notice of appraisal rights they received was substantively inadequate because stockholders were not advised of "the extent to which the current market value of their Siliconix shares had been depressed, and the current market value of Vishay shares had been inflated" by Vishay's misconduct. (ER 0810 ¶ 59.) That circular claim collides squarely with the Court of Chancery's October 2005 Judgment, which released Vishay from all claims concerning "representations, omissions or any other matter whatsoever set forth in or otherwise related, directly or indirectly, to . . . fiduciary obligations or disclosure duties . . . in connection with the Tender Offer or Short

Form Merger." (ER 1529 ¶ 8.) The October 2005 Judgment thus specifically released all claims related to the disclosures that plaintiffs now contend were inadequate – the appraisal rights notice in connection with the short-form merger. (*Id.*) The October 2005 Judgment further incorporated by reference and approved the parties' Court-approved Stipulation of Settlement – not merely a Memorandum of Understanding, as plaintiff mistakenly call it (Appellants' Br. 78) – which stated that "[p]laintiffs reviewed the disclosures to Siliconix shareholders related to the Short-Form Merger and shareholder appraisal rights and are satisfied that those disclosures complied with all legal requirements, including fiduciary duties." (ER 1484 ¶ X.) Based on principles of *res judicata* and the parties' settlement, plaintiffs were accordingly barred from claiming otherwise.[10]

Nor have plaintiffs demonstrated that they did not receive the appraisal disclosure. Not a single plaintiff offered any evidence below supporting that allegation. Plaintiffs submitted only a declaration from one shareholder, Mr. Ray Fitzgerald. But he is not a plaintiff in this case. Furthermore, Mr. Fitzgerald

[10] Plaintiffs correctly note that the Delaware settlement preserves their appraisal rights under Section 262. (Appellants' Br. at 76.) But the settlement did not excuse plaintiffs' obligation to comply with the Delaware appraisal statute if they sought appraisal. (ER 0424-33.) Rather, the parties merely excluded the merits of any substantive claim for appraisal under 8 Del. Code § 262. These provisions do not allow plaintiffs to avoid the statutory filing requirements for appraisal, which they indisputably failed to meet, nor do these provisions exempt claims concerning the appraisal notice itself, which were specifically addressed and released.

actually filed a request for appraisal in a timely fashion, but then failed to perfect that request by commencing an appraisal action as required by 8 Del. Code § 262. (ER 1711-13.) In fact, as set forth in his declaration, Mr. Fitzgerald's broker apparently withdrew his request for appraisal, mistakenly according to Mr. Fitzgerald. (ER 1085.) Thus, non-party Fitzgerald's grievance is with his broker, not with Vishay.

VI. CONCLUSION

For these reasons, the Court should affirm the decision below.

Dated: April 8, 2008

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CERTIFICATE OF COMPLIANCE TO Fed. R. App. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 02-16172

In accordance with Circuit Rule 32-1, counsel certifies that this brief complies with the type-volume requirements of Rule 32(a)(7)(B) in that it uses a proportionally spaced typeface of 14 points, and contains 12,931 words.

Dated: April 8, 2008

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PROOF OF SERVICE

I, the undersigned, am a citizen of the United States and employed in the County of San Mateo, State of California, at the law firm of O'Melveny & Myers LLP, located at 2765 Sand Hill Road, Menlo Park, California 94025. I am over the age of eighteen years and not a party to the within action.

On April 8, 2008, I dispatched the foregoing BRIEF OF APPELLEES VISHAY INTERTECHNOLOGY, INC., VISHAY TEMIC SEMICONDUCTOR ACQUISITION HOLDINGS CORPORATION, AND FELIX D. ZANDMAN, DEFENDANTS by putting the original and fifteen (15) copies thereof in a sealed envelope, with delivery fees paid or provided for, for delivery the next business day to:

Clerk of the Court
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street
San Francisco, California 94103-1526
Telephone: (415) 568-9800

and by placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices.

Also on April 8, 2008, I served two (2) copies of the foregoing BRIEF OF APPELLEES VISHAY INTERTECHNOLOGY, INC., VISHAY TEMIC SEMICONDUCTOR ACQUISITION HOLDINGS CORPORATION, AND FELIX D. ZANDMAN, DEFENDANTS on each of the parties listed below, by

placing true and correct copies thereof in sealed envelopes, with delivery fees paid or provided for, for delivery the next business day to:

J. Andrew Heaton
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and by placing the envelopes for collection today by the overnight courier in accordance with the firm's ordinary business practices.

I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an overnight courier.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 8, 2008, at Menlo Park, California.

Bradley M. Redmond

Bradley M. Redmond