No. 07-16527

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REBECCA PROCTOR, REX BROOKS, ET AL. ., et al.,
Plaintiffs-Appellants,
v.

VISHAY INTERTECHNOLOGY, INC. ET AL., et al.,

Defendants-Appellees

District Court No. 5:06-CV-4134 JF
(N.D. Calif. San Jose Division)

On Appeal from the United States District Court
For the Northern District of California
Honorable Jeremy Fogel

OPENING BRIEF OF APPELLANTS

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I. STATEMENT OF JURISDICTION

The District Court, in denying Plaintiffs' motion to remand the case after removal from state court, ruled that this case arises under the laws of the United States: *viz.*, that Plaintiff's class claim is completely preempted by the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78bb. (ER 1438-42) The District Court thereby posited jurisdiction pursuant to 28 U.S.C.§ 1331 (federal question).

The District Court granted the motion of Defendant Ernst & Young ("E&Y") to dismiss pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 12(b)(6) ("Rule 12(b)(6)") and the motion of the Vishay Defendants[1] for summary judgment under Fed.R.Civ.P. 56 ("Rule 56") by an order filed July 19, 2007. The order was "effective October 15, 2007" unless "Plaintiffs secure[d] relief prior to October 15, from the Delaware Chancery Court as to the injunction issued [by that court] on June 13, 2006." ("Dismissal Order") (ER 1714-19) A notice of appeal was filed timely from the Dismissal Order on August 17, 2007. (ER 1741-44) (Fed. R. App. Proc. 4(a)(1)) The

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[1] Defendants Vishay Intertechnology, Inc., Vishay Temic Semiconductor Acquisition Holdings Corporation and Felix D. Zandman, the chairman, CEO and controlling shareholder of Vishay are referred to herein as the "Vishay Defendants".

Dismissal Order further provided that "the dismissal shall be effective ninety (90) days after the date of this order [July 19, 2007]." Plaintiffs did not secure relief from the Delaware Chancery Court prior to October 15, 2007, and filed timely an amended notice of appeal on October 19, 2007. (ER 1745-48) This Court has jurisdiction under 28 U.S.C. § 1291.

II. ISSUES PRESENTED

1. Whether the District Court erred in enforcing the Delaware state court injunction enjoining plaintiffs from proceeding in the District Court and in refusing to allow Plaintiffs to proceed in the District Court to determine the *res judicata* effect of the Delaware judgment?

2. Whether the District Court erred in failing to remand this case to the Santa Clara Superior Court, after untimely and procedurally improper removal by Defendant E&Y to the District Court?

3. Whether the District Court erred in dismissing, under, Rules 12(b)(6) and 56, all of Plaintiffs' claims without allowing Plaintiffs any opportunity to conduct discovery to determine the *res judicata* effect of the Delaware settlement and judgment on this action?

4. Whether Plaintiffs' derivative claims on behalf of Siliconix under

California law survived the Delaware judgment?

5. Whether Plaintiffs' fiduciary breach claims under California law survived the Delaware judgment?

6. Whether Plaintiffs' claims for "quasi appraisal rights" under Delaware law survived the Delaware judgment?

III. STATEMENT OF THE CASE

This action was filed in California Superior Court August 12, 2002 (ER 0001-09) and remained there until it was removed to the District Court on June 30, 2006 (ER 1218-52) ("State Action"). The State Action was filed in California Superior Court, which had *in personam* jurisdiction over the matter because: (a) Siliconix has been based in California since its inception in 1964; (b) the alleged unlawful acts took place in California and damaged Siliconix there; and (c) California statutory and case law clearly established the claims alleged: (1) that majority shareholders owe a fiduciary duty to minority shareholders not to self-deal with corporate assets;[2] (2) that minority

[2] *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969)(minority shareholders have standing to prosecute direct actions against majority shareholders when there was some transaction or business relationship other than the simple status as majority shareholder, by which the majority obtained a benefit to itself, rather than to the company as a whole, even if the transaction also resulted in diminishing the

shareholders have standing to sue derivatively for the corporation to recover the benefits of the self-dealing, even after a merger divests them of their shares;[3] and (3) that California law governs actions involving damages like those to Siliconix and its Minority Shareholders in suits in California courts.[4]

On June 13, 2006 the California Superior Court overruled demurrers of the Vishay Defendants and Defendant E & Y based on the alleged *res judicata* effect of a Delaware judgment resulting from class actions filed in Delaware on March 4, 2005 in order to challenge the Tender Offer by Vishay for Siliconix shares and the resulting Freeze-Out Merger ("Delaware Judgment"). (ER 1205-16) The Superior Court also rejected the Defendants' use of an injunction Defendants procured enjoining Plaintiffs and their attorneys from prosecuting their claims in the State Action based on the alleged *res judicata* effect of the Delaware Judgment ("Delaware Injunction"). (ER 1215-16) In doing so, the Superior Court Judge

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value of all the shares in the corporation.)

[3] *Gaillard v. Natomas Co.*, 173 Cal. App. 3d 410, 420 (1985) (if completion of a tender offer defeated shareholder standing in derivative cases, corporate management would be given an incentive to pilfer the corporation). California Corporations Code § 800(b) (an action may be maintained in right of a foreign corporation [derivatively] by any holder of shares if the complaint alleges that plaintiff was a shareholder, of record or beneficially at the time of the transaction complained of).

[4] California Corporations Code § 800 (providing for application of California law as the procedural law of the forum).

stated that it was "rather extraordinary for a court in one state to tell the parties in litigation in this state how the court basically ought to be ruling on the issue of whether or not settlement in that other state affects this litigation" and that he "expect[ed] that to be litigated appropriately and with due deliberation [in the California Superior Court]." (ER 1215-16)

The Superior Court was on solid legal ground in doing so, since California law clearly supported findings that: (1) derivative claims survived the Delaware Tender Offer, Freeze-Out Merger and Judgment (*see*, Section VII.E., below); (2) direct claims for fiduciary breach and appraisal rights survived the Delaware Tender Offer, Freeze-Out Merger and Judgment (*see*, Sections VII.F. and VII.G., below)

On June 30, 2006, after unsuccessfully arguing to the Superior Court in the State Action that *res judicata* from the Delaware Judgment barred this action and that the Delaware Injunction prevented its prosecution, Defendant E&Y immediately filed a notice of removal of the action to the District Court, engaging in blatant forum and judge shopping because it did not like the Superior Court's position. (ER 1218-52)

The District Court, after removal, denied Plaintiffs' motion to remand this action back to California Superior Court, despite the facts that: (1) the removal

notice was not properly joined in by all defendants as required by 28 U.S.C. § 1441(b); (2) nearly eighteen (18) months had passed since Defendant E&Y had been served with the First Amended Complaint ("FAC") – the "initial pleading setting forth the claim for relief on which the action or proceeding is based" under 28 U.S.C. § 1446(b) (which limits removal to thirty (30) days after service of such pleading); and (3) both the Vishay Defendants and Defendant E&Y had litigated substantive issues in the California Superior Court, before removing it to District Court, waiving their removal rights. (ER 1431-44)

The District Court, after denying remand to state court, summarily dismissed this action on Rule 12(b)(6) and 56 motions by Defendant E&Y and the Vishay Defendants. The District Court based its dismissal on the alleged *res judicata* effect of the Delaware Judgment and the on Delaware Injunction. In doing so, the District Court Dismissal Order: (1) did not address the California State Court's rejection of the *res judicata* defense; (2) did not address the conflict between established California law and the Delaware law on which the Delaware Judgment was based – law which has been heavily criticized by legal scholars,[5] which would not be applied in California courts and which leading scholars have characterized

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[5] Guhan Subramanian, *Fixing Freezeouts*, 115 Yale L.J. 2, 31 (2005); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785 (2003).

as "in disarray;" [6] and (3) did not afford Plaintiffs the opportunity for any discovery of the facts required to prove or disprove the *res judicata* effect of the Delaware Judgment. The District Court, instead, ordered Plaintiffs to have all these issues decided by the Delaware Chancery Court – a Court which had already decided these issues and enjoined Plaintiffs from proceeding in California state or federal court. (ER 1714-19)

More importantly, in doing so, the District Court directly contravened the rule set out by the United States Supreme Court in *Donovan v. City of Dallas*, 377 U.S. 408, 412-413 (1964) that: (1) "state courts are completely without power to restrain federal-court proceedings, in *in personam* actions;" (2) "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;" and (3) where defendants claim *res judicata* in a prior state court judgment "whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide." On this authority alone, the District Court's dismissal must be reversed.

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[6] 'Delaware's fiduciary doctrine governing going private transactions by controlling shareholders is presently in disarray. Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, ABA Business Lawyer, May 2007, abstract.

IV. STATEMENT OF FACTS

A. Basic Facts Underlying Plaintiffs' Claims[7]

The facts of this action involve the extensive and well-documented looting of Siliconix, Inc., by the Vishay Defendants, who controlled 80.4% of Siliconix stock, for their own benefit and to the detriment of the Siliconix 19.6% minority shareholders ("Minority Shareholders"). (ER 0080-81) The looting was accomplished through a wide-ranging scheme, employing a variety of mechanisms, which drained cash and other assets from Siliconix in breach fiduciary duties owed by the Vishay Defendants. (ER 0084-102)

In order to escape responsibility to Siliconix and the Minority Shareholders for this looting, the Vishay Defendants used Delaware law to make a tender offer to the Siliconix minority shareholders ("Tender Offer"), and, as to those shareholders who did not accept the tender offer, to implement a "short form" or "freeze out merger" forcing the sale of the Siliconix Minority Shareholders' shares to the Vishay Defendants ("Freeze-Out Merger"). Neither the Tender Offer nor the Freeze-Out Merger purchase of shares from the Minority Shareholders accorded adequate notice, full disclosure and independent appraisal rights to these shareholders. Both resulted in gross underpayment by the Vishay Defendants for

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[7] An extensive recitation of these facts and references to supporting public materials is set out in the Frist Amended Complaint, ER 0060-0160.

the Minority Shareholders' Siliconix shares.

In order the bless the Tender Offer and Freeze-Out Merger, the Vishay Defendants entered into a settlement on April 28, 2005with class action plaintiffs and their attorneys who had just filed their *pro forma* class actions on March 4, 2005 in the Delaware Chancery Court. The Delaware Judgment, resulting from this settlement, purported to release all claims of the Minority Shareholders, including their claims under California law, pending in this action since August 12, 2002.

The allegations of looting, and, the allegations of inadequate disclosures and notice to Siliconix Minority Shareholders with regard to the Tender Offer and Freeze-Out Merger contained in the Second Amended Complaint ("SAC") are deemed true for purposes of a Rule 12(b)(6) motion, and, were supported in the District Court by declarations and requests for judicial notice, creating material issues of fact preventing summary judgment, under Rule 56 with respect to the *res judicata* issue, derivative claims, direct fiduciary claims and quasi appraisal rights. (ER 0793-878, ER 1658-69)

Nonetheless, the District Court here, based on the Delaware Judgment, the Delaware Chancery Court's determination of *res judicata* and issuance of the Delaware Injunction enjoining Plaintiffs from proceeding on these issues

(including discovery or inquiry of any kind on them) issued the Dismissal Order, giving full effect to the Delaware Injunction, unless Plaintiffs obtained relief from that injunction from the Delaware courts. (ER 1714-19)

B. Background of Siliconix and Vishay

Siliconix is an old-line, well-respected Silicon Valley firm. It was one of the first group of semi-conductor chip makers in the Silicon Valley. It specialized in active semiconductor components, primarily MOSFETs (metal-oxide semiconductor field-effect transistors). Siliconix is, today, the world's number one supplier of low-voltage power MOSFETs . MOSFETs are the solid-state switches that are used to manage and convert power in computers, cell phones and communications infrastructure, and to control motion in computer disk drives and automotive systems. (ER 0067)

Siliconix grew internally, using technology innovation and profits to expand its sales and profits. From 1964 through 1988 Siliconix was profitable in 96 straight quarters. It has had profits for 11 straight years from 1992 - 2002. Because of its unique products and their profitability, Siliconix had strong finances and considerable cash. (ER 0067)

Siliconix business model and liquidity contrasted starkly with that of Vishay. Vishay designed, manufactured and marketed passive electronic components used

in other companies' products and technologies. Vishay's components primarily consisted of fixed resistors and of tantalum, multi-layer ceramic chip ("MLCC") and film capacitors. The company offered most of its product types in the traditional leaded device form. The company did not produce active components such as semiconductors. Its products were "commodities" with low technology, low margins and many competitors. (ER 0067-68)

Vishay grew through leveraged buyouts. Vishay arranged for lines of credit using a number of banks to purchase companies with the cash proceeds of its loans. When an offer was accepted and the transaction completed, Vishay began to sell off assets of the acquisition to pay off lines of credit. The target company's manufacturing facilities were either sold or moved offshore to low-labor-cost countries. This method of sales growth worked well as long as the underlying assets were valued correctly and the liquidation process and integration was done quickly so that the interest costs of the acquisition did not exceed the profits. Low profit margins, high interest costs and market slow-downs severely impacted this acquisition of Vishay in the period 1998 - 2005, creating huge demands by Vishay for credit and cash, which it often satisfied through Siliconix. (ER 0066-72)

C. Vishay Acquires A Majority Stake in Siliconix – Attempts to Buy Siliconix Minority Shareholders Out

On March 2, 1998, Vishay bought 80.4% of the outstanding Siliconix stock from Daimler-Benz, the parent of Mercedes Benz. If Vishay had made a formal tender offer for the remaining 19.6% of the Siliconix shares in public hands (Siliconix Minority Shareholders' shares) in March 1998, it would have cost Vishay $85,000,000, because Siliconix stock was trading at about $42.50 per share. In 2000 Siliconix shares traded above $125.00 per share. However, Vishay had purchased Daimler-Benz's Siliconix stock for only $27.65 per share. On February 22, 2001 Vishay made a cash tender offer for all of the remaining outstanding shares of Siliconix at a price of $28.82 a share. (ER 0080-81) An application for a preliminary injunction by a Siliconix minority shareholder to prevent this tender offer was denied.[8] However, the offer was rejected on its own terms when less than 50% of Siliconix minority shareholders accepted. This, like the subsequent Vishay Tender Offer and Freeze-Out Merger in 2005, was fraught with fiduciary breaches

[8] *In re Siliconix, Inc. Shareholders' Litigation,* C.A. No. 18700, 2001 WL 716787 (holding that "a controlling shareholder extending an offer for minority-held shares in the controlled corporation is under no obligation, absent evidence that material information about the offer has been withheld or misrepresented or that the offer is coercive in some significant way, to offer any particular price for the minority-held stock" and finding no such showing.)

by the Vishay Defendants, which the Delaware courts declined to act on.[9]

Vishay thereby 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, reducing Vishay's cost of any future acquisition of the remaining Siliconix shares. Vishay and its controlling shareholder, Defendant Felix Zandman, also had strong incentives to bolster the stock price of Vishay so that an exchange of Vishay stock for Silcionix stock in a tender offer or freeze-out merger would dilute Vishay stock as little as possible. Finally, Vishay had strong incentives to have its actions judged under Delaware law and avoid scrutiny by any other courts.

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 (the equivalent of $38.44 per share for each Siliconix share at the closing of the Tender Offer on May 12, 2005).

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[9] These are examined in detail in Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, ABA Business Lawyer, May 2007, at pages 824-830. This article concluded that "*Siliconix* provides a provcative illustration of how far a controller [controlling shareholder] could go in exerting a dominating influence over the controlled company's board and minority shareholders, while successfully avoiding judicial intervention on grounds that it had committed [fiduciary] fraud and coercion."

D. Vishay Defendants' Unlawful Conduct

Taking advantage of its 80.6% majority ownership of Siliconix, the Vishay Defendants committed the following acts to satisfy their credit and cash needs, to hold the price of Siliconix stock down, and to benefit themselves, to the detriment of the Siliconix Minority Shareholders.

(1) Vishay borrowed Siliconix money and pledged Siliconix assets solely for Vishay's benefit. Vishay forced Siliconix to extend it lines of credit: $75 million effective December 1999, and $100 million effective December 26, 2002, running until 2005. Vishay borrowed from Siliconix on numerous occasions: $37 million from Siliconix against Vishay' credit line in 1999 and 2000, $75 million against its credit line in 2002, $70 million against its credit line in March 2003, and $70 million against its credit line in June 2003. Loan documents were amended so that Siliconix could not borrow on a $825 Million Vishay Line of Credit but was still liable for all of Vishay's debt on that credit line. Further, a $400 Million Vishay Line of Credit dated July 31, 2003 was written to tie Siliconix up so that, if Siliconix had borrowed anything, it would have had to borrow from the $400 Million Vishay Line and Siliconix would have become liable for not

only its own borrowings but for all of Vishay's borrowings as well. (SAC ¶ 15, ER 0800)

(2) Vishay transfered Siliconix subsidiaries, equipment, software systems, personnel and other assets to Vishay, solely for Vishay's benefit. Vishay took over Siliconix's sales subsidiaries Temic North America and Temic Asia Pacific, which also acted as the sales agents for other companies, at book value, a small fraction of the fair market, arms length value for those subsidiaries. Vishay then imposed exorbitant commissions on Siliconix for using those sales subsidiaries. Resulting in a loss of tens of millions of dollars to Siliconix. Vishay absorbed and used Siliconix's SAP software system in Vishay's own operations, a system worth over $30 million dollars, without payment. Vishay also transferred Siliconix's testing equipment from low-cost facilities in East Asia to a high-cost Vishay facility in Israel for Vishay's benefit in meeting certain obligations it had to maintain government credits in Israel. (SAC, ¶ 17, ER 0800, 1144-45)

(3) Vishay forced Siliconix to sue General Semiconductor for patent infringement while Vishay was attempting to acquire General Semiconductor at a favorable discount to Vishay. Siliconix bore the

attorneys' fees and costs of the infringement action. Vishay compelled Siliconix to settle with General Semiconductor in return for concessions of some $25 million to Vishay on its acquisition of General Semiconductor, an acquisition which provided no benefit to Siliconix. (SAC ¶ 18, ER 0801)

(4) Vishay diverted Siliconix intellectual property to Zandman, the chairman, CEO and controlling shareholder of Vishay. Three patents were issued to Vishay, listing Zandman as co-inventor along with two Siliconix employees. (Patent Nos. 6,316,287,6,441,475 and 6,562,647). The two Siliconix employees had extensive expertise and prior art in the areas where the patents were issued, Zandman had none. The inventions were made by Siliconix employees as part of their work at Siliconix, for which they were compensated by Siliconix. Further, Zandman's employment contract with Vishay provided that, as a retirement benefit, he received five percent (5%) of the gross revenues received by Vishay derived from the sale of any products that incorporate Zandman's patents. Neither this arrangement nor any similar arrangement was afforded to nor enjoyed by any employee at Siliconix. (SAC ¶ 19, ER 0801)

(5) Vishay, by imposing unwarranted charges on Siliconix, and by allocating Vishay's overhead to Siliconix, inflated Vishay's cash flow and profits and depressed Siliconix's cash flow and profits. From Vishay' acquisition of a majority stake in Siliconix through December 31, 2004, Siliconix has reported related party transactions with its majority shareholder, Vishay, totaling $193 million in value.[10] The value of unreported, unvalued or undervalued related party transactions forced upon Siliconix by Vishay and the damage to Siliconix from Vishay's self-dealing is many times this amount. (SAC ¶ 19, ER 0801)

E. Defendant E & Y's Unlawful Conduct

In 1998, after Vishay acquired an 80.4% of the stock in Siliconix, Vishay forced Siliconix to fire its long time auditor, KPMG, and to retain E&Y as the auditor for Siliconix. The retaining of E&Y was not done by anyone at Silconix, but by an officer and director of Vishay. (ER 1142, 1148-49) Vishay and E&Y, when the CFO of Siliconix objected to the book value purchase of Siliconix's sales subsidiaries Temic North America and Temic Asia Pacific, fired that CFO. With its own auditor and CFO installed at Siliconix, Vishay did not report in SEC

[10]Siliconix Audited Financial Statements for 1998-2004, S.E.C. Forms 10-K.

statements all of the related party transactions between Siliconix and Vishay and in those reported, did not assure arms-length, fair market transactions. (ER 1143-50)

F. The Inception of This Action

Against this backdrop, the Siliconix Minority Shareholders filed this action in California Superior Court on August 12, 2002 ("Original Complaint"). The Original Complaint contained two (2 claims for relief: (1) a derivative claim by Siliconix against Vishay for breach of its fiduciary duty, as a majority shareholder, and for corporate waste of Siliconix assets, to recover the amounts taken by Vishay solely for its own benefit without fair market compensation; and (2) a derivative class action by the Siliconix Minority Shareholders to recover the amounts they were injured by the Vishay Defendants, as majority shareholders. (ER 0001-09)

The Siliconix Minority Shareholder made repeated attempts to force disclosure of the details of Vishay's transactions with Siliconix and to obtain for Siliconix officers, directors and auditors who acted independently of Vishay and in the best interests of all Siliconix Shareholders (ER 0017-57).[11]

When such extra-judicial attempts by Siliconix Minority Shareholders to rein

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[11] The minority shareholders of Siliconix submitted to Siliconix a "Shareholder Proposal for Siliconix, Inc., Pursuant to S.E.C. Rule 14a-9." The Shareholder Proposal was rejected by the board of directors of Siliconix, who sought and received a no action letter from the S.E.C. on certain limited aspects of the shareholder proposal on March 1, 2004.

in Vishay's misappropriations from Siliconix were unsuccessful, Plaintiffs filed a First Amended Complaint ("FAC") on January 10, 2005. (ER 0060-0160) This FAC spelled out in great detail the information Plaintiffs had acquired about Vishay's unlawful actions with references to SEC public documents filed by Vishay and Siliconix.

G. Vishay's Tender Offer

On March 3, 2005, Vishay issued a press release announcing its intent to commence a tender offer to acquire the 19.6% minority interest (5.849 million shares) of Siliconix common stock that it did not already own by means of exchanging 2.64 shares of Vishay common stock for each share of Siliconix stock ("Tender Offer"). Vishay's Tender Offer envisioned a "short-form merger," whereby the merger would be completed if, among other things, more than 50% of the outstanding shares accepted the Tender Offer and the Siliconix Minority Shareholders having to sell their shares at a 2.64 to 1 ratio with Vishay shares, or accept "appraisal rights" "Freeze-Out Merger" to set the ratio. Commencement of the Tender Offer was not conditioned on prior approval of the terms of the Tender Offer by Siliconix or a special committee of Siliconix directors. The Tender Offer expired on May 12, 2005. (ER 0436-0545)

H. 2005 Delaware Class Actions

One day following the announcement of the Tender Offer on March 4, 2005, five (5) *pro forma* class action complaints were filed in the Delaware Chancery Court on behalf of Siliconix's public shareholders. The complaints named as defendants Siliconix, Vishay, and Siliconix's board of directors. The complaints alleged that the Tender Offer was unfair to Siliconix's Minority Shareholders, and that Siliconix directors had breached their fiduciary duties to Siliconix Minority Shareholders. Plaintiffs in these actions alleged the exchange ratio was unfair and inadequate for several reasons, including Vishay's domination and control of Siliconix and ability to time the offer to take advantage of Siliconix's pre-announcement depressed stock price. The complaints sought to enjoin the Tender Offer or, in the alternative, to rescind the transaction and/or recover damages. (ER 1479-1480)

The five (5) class actions were consolidated in the Delaware Chancery Court in an action entitled *In re Siliconix, Inc. Shareholders Litigation*, C.A. No. 1143-N and a Consolidated Amended Class Action Complaint ("Consolidated Complaint') was filed on April 18, 2005. (ER 1499-1518)

The Consolidated Complaint in Delaware did not name the same defendants as this action, omitting Vishay Temic Semiconductor Acquisition Holdings

Corporation, Siliconix, Inc., E&Y, and Felix D. Zandman. It contained two (2) counts of breach of fiduciary duty under Delaware law: (1) Count I claiming that "neither the process nor the price [was] fair" in the Tender Offer; and (2) Count II claiming that "defendants [had] breached their fiduciary duty through materially inadequate disclosures and material omissions." There was no derivative claim on behalf of Siliconix, and no claims against Felix D. Zandman or E&Y. (ER 1499-1518)

I. Settlement of the Delaware Class Actions

On April 28, 2005, defendants and plaintiffs' class counsel entered into a Memorandum of Understanding ("MOU") to settle the Delaware action for: (1) an increase in the exchange ratio of Vishay shares for Siliconix shares in the Tender Offer from 2.64 to 3.075; and (2) certain supplemental disclosures to be made by Vishay in an amended SEC Form S-4 (Tender Offer and Disclosure) and certain disclosures by Siliconix in its SEC Schedule 14D-9 (Solicitation/Recommendation Statement) filed in response to the Tender Offer.

J. Vishay and Siliconix Fail To Make Adequate SEC Disclosures

In the SEC Form S-4 for the Tender Offer and amendments filed by Vishay the only mention of this action was as one of sixteen (16) exhibits 99.7.1-99.7.16 to the S-4 which were described as "complaints and decisions relating to the 2001

tender offer of Vishay . . . for Siliconix" (emphasis supplied).[12] In the S-4's, under the category of "complaints relating to the 2005 tender offer of Vishay . . . for Siliconix," this action was not mentioned — although this action potentially both lowered the value of Vishay shares and raised the value of Siliconix shares significantly.

On April 21, 2005 Vishay issued a press release which stated that it had "reached an agreement in principal with the plaintiffs in pending litigation regarding the offer to settle these suits" without specifying what suits were involved. On April 22, 2005 Siliconix filed its Amendment No. 1 to SEC Schedule 14d Solicitation/Recommendation Statement for the Tender Offer (although the Schedule 14d-9 would not be filed until April 25, 2005) which attached Vishay's ambiguous statement.

On April 26, 2005, Vishay issued a news release which stated that "Vishay . . . announced that the California Superior Court today granted Vishay's motion to stay the purported class action filed in California challenging Vishay's pending exchange offer for the shares of Siliconix." On April 27, 2005, Siliconix filed Amendment No. 3 to its Schedule 14d, attaching Vishay's news release and stating that: "[o]n April 26, 2005, Vishay issued a press release announcing that the

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[12] Vishay, SEC Form S-4, filed April 12, 2005, Part II-1, Item 21; Exhibit 99.8, Part II-4.

California Superior Court granted Vishay's motion to stay the purported class action filed in California challenging the offer"[13] – not mentioning the name of the California action (which was not this action).

On May 2, 2005, Siliconix filed Amendment No. 4 to its Schedule 14d announcing the Memorandum of Understanding settling the Delaware class actions, stating: "The plaintiff in the California action challenging the exchange offer is not a party to the MOU. The California Superior court issued a stay of that action on April 26, 2005."[14] Again the name of the California action referred to was not mentioned.

As set out in the SAC these SEC filings were inadequate in a number of respects. (1) The Siliconix Minority Shareholders were confused about the status of the State Action, thinking that it had been "stayed." (2) The information in the SEC filings was totally inadequate to evaluate the value of Siliconix shares in light of the claims in ths action. (3) Vishay failed to comply with its legal obligations to provide timely and adequate notice to the holders of Siliconix's shares of their right of their right to an "appraisal" of the fair value of their shares ("Appraisal Rights").

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[13] Siliconix, Amendment No. 3 to Schedule to Rule 14d-100 Tender offer, filed April 27, 2005, page 2.

[14] Siliconix, Amendment No. 4 to Schedule to Rule 14d-100 Tender offer, filed April 25, 2005, page 2.

Many Siliconix shareholders received no notice of their appraisal rights. (ER 1081-84) (4) Those who did eventually receive notices were nonetheless harmed because those notices did not contain adequate financial or other information to allow the shareholder determine the fair value of their Siliconix shares, and, 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 Defendants' misconduct. More specifically, the financial data provided in the notices that were sent merely referenced historical financial performance of Siliconix and Vishay as altered by the misconduct alleged above and thus gave those shareholders who received it no basis for determining either the degree to which the misconduct affected that performance or the value of the derivative action based on that misconduct. (SAC, ¶¶ 55-59, ER 0808-10)

K. Tender Offer Closes

Based on the foregoing, on May 12, 2005, the Tender Offer closed with the tendering of approximately 77.1 % of Siliconix's publicly held shares in exchange for Vishay shares at a ratio of 3.075 Vishay shares for every Siliconix share. At that point, Vishay held a total of 95.5 % of Siliconix shares. (ER 0422)

L. Freeze-Out Merger

On May 16, 2005, Vishay announced that it had effected the Freeze-Out

Merger and claimed that each remaining Siliconix share was converted into the right to receive 3.075 Vishay shares. (ER 0424-35)

M. Settlement of the Delaware Class Actions ("Delware Settlement")

The parties to the consolidated class actions in *In re Siliconix, Inc. Shareholder Litigation*, filed in Delaware on March 4, 2005, entered into a Stipulation and Agreement of Compromise, Settlement and Release. This was filed with the Delaware Chancery Court on September 7, 2005 ("Settlement Agreement"). In addition to the consideration for the settlement recited in the April 28, 2005, MOU, the Settlement Agreement provided for, *inter alia*: (1) notice of the settlement to be given by Vishay to the Siliconix Minority Shareholders; and (2) a broad release of all claims, including all state and federal claims, excluding "any claims by Siliconix shareholders for appraisal pursuant to 8 Del.C. § 262" ("Delaware Settlement"). (ER 1479-99)

The settlement was concluded in an "Order and Final Judgment' by the Delaware Chancery Court filed on October 25, 2005, reciting that adequate notice of at least ten (10) days had been given; certifying the class; finding the settlement to be "fair, reasonable and adequate and in the best interests of the class;" dismissing the action "with prejudice as to all defendants." It releasing all claims "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 of 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." ("Delaware Judgment") (ER 1526-1530)

N. Proceedings in the California State Action

While Vishay and Siliconix were concluding the settlement of the Delaware class actions, and for some time beyond, the Vishay Defendants and Defendant E&Y continued to litigate in the California State Court Action.

1. E&Y's Demurrer and Motion to Compel Arbitration

In response to Plaintiffs' FAC, on April 1, 2005, E&Y filed: (1) a demurrer; and (2) a motion to compel arbitration. On September 28, 2005, E&Y's demurrer was sustained in part and overruled in part. It was sustained as to the futility of a demand on the Siliconix Board of Directors, with leave to amend. It was overruled as to E&Y's claim of lack of standing based on the Freeze-Out Merger. (ER 0788-790)

2. SAC: November 21, 2005

On November 21, 2005, plaintiffs filed their SAC and served it on E&Y. It

contained the same two (2) California state law causes of action as the Original Complaint and the FAC: (1) "Shareholder's Derivative Action, Breach of Fiduciary Duty; Waste of Corporate Assets;" and (2) "Class Action, Breach of Fiduciary Duty." The SAC added a third cause of action: (3) "Quasi-Appraisal of Shares" based on Vishay's Tender Offer for Siliconix shares. (ER 0793-0878)

3. E&Y and Vishay Demurrers Based on Delaware Judgment

On January 6, 2006[15] E&Y and the Vishay Defendants filed demurrers in the State Action. These demurrers were both based, in part, on the claim that "[p]laintiffs' claims against E&Y were released as part of a class action settlement in *In re Siliconix, Inc. Shareholders Litigation*, C.A. No. 1143-N (Del. Ch. Oct. 10, 2005)." Both defendants made exactly the same argument – that all of plaintiffs' claims in the SAC were barred by the Delaware Settlement and Delaware Judgment. (ER 0879-81, 1015-1018, 1299) Both were rejected by the Judge. (ER 1279-80)

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[15] Amended demurrers were filed on January 27, 2006, omitting E&Y's and the Vishay Defendants' argument relying on *Grosset v. Wenaas*, 133 Cal. App. 4th 710 (2005) because the California Supreme Court had granted a petition for review in *Grosset* on January 4, 2006, before the demurrers, thereby depublishing the case. The amended demurrers did not change the argument based on the Delaware Settlement.

4. Demurrer Based on Delaware Judgment Overruled in State Action

On May 8, 2006, Judge Jack Komar of the Santa Clara Superior Court ruled in the State Action that "[t]he Vishay Defendants' demurrer to all causes of action in plaintiffs' SAC, based on an alleged release of claims in the class action settlement in *In re Siliconix, Inc. Shareholders Litigation*, C.A. No. 1143-N (Del. Ch. Oct. 10, 2005), is overruled." (Emphasis supplied.) (ER 1279-80) As to E&Y's demurrer, Judge Komar sustained the demurrers as to the First and Second Causes of Action in the SAC (shareholder derivative claims and breach of fiduciary duty claims) with leave to amend to state facts sufficient to show as to these causes of action: (1) that E&Y owed a fiduciary duty and breached that fiduciary duty; (2) that a conspiracy existed and E&Y participated in such conspiracy; and (3) that plaintiffs made a demand on Siliconix's Board of Directors or that a demand would have been futile. (ER 1156-58)

5. Amendment to SAC as to E&Y

Pursuant to Judge Komar's order of May 8, 2006, granting plaintiffs leave to amend as to the First and Second Causes of Action (the same claims as in the Original Complaint, the FAC and the SAC) plaintiffs filed their "Amendment to Second Amended Complaint re E&Y" on May 31, 2006 ("E&Y Amendment").

The E&Y Amendment did not change any of the charging allegations in the SAC's First Cause of Action (Shareholder's Derivative Action, Breach of Fiduciary Duty, Waste of Corporate Assets), nor its Second Cause of Action (Class Action, Breach of Fiduciary Duty). It merely stated detailed factual allegations supporting plaintiffs' claims against E&Y based on these same state law causes of action. (ER 1141-55)

6. Delaware Court Issues Injunction Based on Delaware Settlement ("Delaware Injunction")

The Vishay Defendants, unsuccessful before Judge Komar in their demurrer to the SAC based on the Delaware Judgment, sought and obtained an order on June 13, 2006, from Vice Chancellor Leo E. Strine of the Delaware Chancery Court, which order purported to permanently enjoin Plaintiffs and their counsel from prosecuting this action ("Delaware Injunction"). (ER 1531-33)

7. State Court Declines to Dismiss Based on Delaware Injunction.

On June 13, 2006, counsel for defendants, including E&Y, presented Judge Komar in the State Action with Delaware Injunction. Defendants requested that Plaintiffs dismiss the State Action based on the Delaware Injunction. Defendants then argued, to Judge Komar that they should have the opportunity to plead the Delaware Judgment again, as a complete *res judicata* bar to the State Action,

notwithstanding the earlier overruling of demurrers by Judge Komar based on the Delaware Judgment. E&Y's counsel requested that Judge Komar consider its claim that the Delaware Order precluded it from having to respond to the E&Y Amendment. (ER 1214-15) Judge Komar, after initially being favorably inclined, denied this request, stating:

> "I will tell you this. I think it is rather extraordinary for a court in one state to tell the parties in litigation in this state how the court basically ought to be ruling on the issue of whether or not settlement in that other state affects this litigation. I think that is extraordinary. That's the implication from the order directed to these plaintiffs.
>
> Be that as it may I expect that to be litigated appropriately and with due deliberation. I'm not going to extend the time for filing an answer. I think you need to demur or answer, file your response, or if you think your company might benefit from this injunction ordering the plaintiff not to do something then you may do so at your own risk."

The Vishay Defendants filed an answer to the SAC on May 26, 2006. This Answer did not raise as an affirmative defense the *res judicata* effect of the Delaware Judgment.

E&Y chose not to file a response to the E&Y Amendment to the SAC, but to change the forum and judge by removing the action to the District Court. (ER 1218-1259)

O. "Notice of Removal" Filed by E&Y Only – Vishay Defendants Belatedly Join

On June 30, 2006, defendant E&Y filed in the District Court its "Notice of Removal" of the State Court Action. (ER) None of the other defendants[16] joined in the Notice of Removal. The Notice of Removal states, at paragraph 22, that "[a]ll defendants consent to the removal of this action." The only other document filed in connection with the removal, the "Declaration of Patrick E. Gibbs in Support of Defendant E&Y LLP's Notice of Removal," does not even address other defendants joining in the Notice of Removal. On September 15, 2006, forty five (45) days after Plaintiffs filed a Motion to Remand in the District Court, the Vishay Defendants filed a Joinder in Defendant Ernst and Young's notice of removal (ER 1406-08)

P. District Court Denies Plaintiff's Motion to Remand and Finds Complete Preemption of State Court Claims by SLUSA

On February 13, 2007, the District Court issued an unpublished "(1) Order Denying Motion to Remand and (2) Denying Plaintiff's Request for Costs and

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[16] There are three (3) other corporate defendants in this action, Vishay Intertechnology, Inc., Vishay Temic Semiconductor Acquisition Holdings and Siliconix, Inc. There is one (1) individual defendant in this action, Felix D. Zandman.

Attorney's Fees." In this Order, the District Court held as follows: (1) that the Vishay Defendants' failure to join in the removal notice of E&Y could be cured at any time prior to the entry of judgment and was so cured; (2) that E&Y filed the removal notice within thirty (30) days of receipt of a pleading setting forth the claim upon which the removal action was based – the E&YAmendment to the SAC filed and served on May 31, 2006; (3) that Defendants' did not waive their right of removal by the repeated demurrers which were overruled and failed attempts to assert the *res judicata* effect of the Delaware Judgment; and (4) that the Securities Uniform Standards Act, 15.U.S.C. § 78bb, ("SLUSA") completely preempted the state law bases for the SAC. (ER 1431-1444)

Q. The District Court Grants the Vishay Defendants' Rule 12(b)(6) Motion to Dismiss and E&Y's Rule 56 Motion for Summary Judgment Based on the *Res Judicata* Effect of the Delaware Judgment

On March 23, 2007 Defendant E&Y filed a Rule 12(b)(6) motion to dismiss based on the *res judicata* effect of the Delaware Judgment and the Delaware Injunction issued in aid of that judgment. On March 27, 2007 the Vishay Defendants, who had already answered the SAC, filed a Rule 56 motion for summary judgment on the same basis.

On July 19, 2007 the District Court issued its unpublished "Order Granting Defendants' Motion to Dismiss and Motion for Summary Judgment." The District Court, without legal analysis or legal authority excepting the Delaware Courts' own rulings in the *In re Silionix Shareholder Litigation*, accepted the Delaware Judgment and Delaware Injunction as controlling over California law and as providing *res judicata* in this action and granted Defendants' motion for summary judgment and motion to dismiss. (ER 1714-19) The District Court refused to proceed at all "unless and until Plaintiffs first have sought relief from the injunction in Delaware" and "secure[d] relief prior to October 15, 2007 from the Delaware chancery Court as to the injunction issued on June 13, 2006." (ER 1718)

The District Court, while acknowledging "the general rule that a state court may not enjoin proceedings in a federal court" (*see, Donovan v. City of Dallas*, 377 U.S. 408, 412-413 (1964)) refused to follow this rule and dismissed the action, effective ninety (90) from its Order unless Plaintiffs obtained relief from the Delaware Injunction. (ER 1718) Plaintiffs declined to do so, instead appealing the District Court's rulings in this appeal.

R. Plaintiffs Appeal the District Court's Failure to Remand and Dismissal

On August 17, 2007 Plaintiffs appealed to this Court "the district court's 'Order Granting Defendants' Motion to Dismiss and Motion for Summary Judgment' entered on July 19, 2007 and "the district court's 'Order (1) Denying Motion to Remand and (2) Denying plaintiff's request for Costs and Attorney's Fees,' entered in this action on February 13, 2007 and merged into the order granting Defendants' motion for summary judgment and motion to dismiss." (ER 1741-42)

On October 19, 2007, after the October 15, 2007 effective date of the District Court's 'Order Granting Defendants' Motion to Dismiss and Motion for Summary Judgment' Plaintiffs filed an additional notice of appeal, appealing to this Court "the district court's 'Order Granting Defendants' Motion to Dismiss and Motion for Summary Judgment' entered on July 19, 2007 and "the district court's 'Order (1) Denying Motion to Remand and (2) Denying plaintiff's request for Costs and Attorney's Fees,' entered in this action on February 13, 2007 and merged into the order granting Defendants' motion for summary judgment and motion to dismiss." (ER 1745-46)

V. SUMMARY OF ARGUMENT

A. The District Court Erred in Enforcing the "Delaware Injunction" Enjoining Proceedings in the District Court and Not Allowing Plaintiffs to Proceed To Determine the *Res Judicata* Effect of the Delaware Judgment

District Court, in dismissing this action based on the Delaware Injunction, directly contravened the rule set out by the United States Supreme Court in *Donovan v. City of Dallas*, 377 U.S. 408, 412-413 (1964) that: (1) "state courts are completely without power to restrain federal-court proceedings, in *in personam* actions;" (2) "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;" and (3) where defendants claim *res judicata* applies as a result of a prior state court judgment "whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide." On this basis alone, the District Court's dismissal must be reversed and the case remanded.

B. The District Court Erred in Failing to Remand to the Santa Clara Superior Court, after Untimely and Procedurally Improper Removal by Defendant E&Y to the District Court

Defendant E&Y did not file its notice of removal from California State Court until nearly eighteen (18) months after it was served with the FAC and nearly seven (7) months after it was served with the SAC, both of which complaints clearly put E &Y on notice that federal jurisdiction could be asserted. The removal statute 28 U.S.C. § 1446(b) and case law require that "(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . ." E&Y's failure to do this requires remand to State Court.

Before its E&Y's notice of removal, both E&Y engaged in repeated waivers of the right to remove this action to federal court by litigating issues in the State Action. (1) E&Y and the Vishay Defendants filed two demurrers each in the State Action, trying to get the action dismissed. (2) E&Y made a motion to compel arbitration in the State Action. (3) E&Y and the Vishay Defendants tried twice to get the claims against them dismissed as a matter of law based on the class action settlement in *In re Siliconix, Inc. Shareholders Litigation*. (4) The Vishay

Defendants argued and lost this issue in the State Court's Order of May 8, 2006 which overruled the Vishay Defendants' demurrer (in which E&Y had joined)based on the Delaware Judgment. (5) The Vishay Defendants sought and obtained the Delaware Injunction. (6) Both the Vishay Defendants and E&Y raised this issue again, unsuccessfully, at the June 13, 2006 hearing in the State Action.

Finally, Defendant E&Y and the Vishay Defendants violated and ignored for 2 ½ months, until 1 ½ months after the remand motion was made, the requirement under 28 U.S.C. § 1441(b), that where the state action has multiple defendants, all defendants in the state action must join in the notice of removal. The Vishay Defendants only joined in the notice of removal forty-five (45) days after Plaintiffs' motion for removal was served and filed.

This action should have been remanded by the District Court on each of these grounds.

C. The District Court Erred in Dismissing, under Fed.R.Civ.P. Rules 12(b)(6) and 56, All of Plaintiffs' Claims Without Allowing Plaintiffs Any Opportunity to Conduct Discovery to Determine the *Res Judicata* Effect of the Delaware Judgment on this Action

Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427-28, 69 L.Ed.2d 103 (1981); *Western Radio Services Co., Inc. v. Glickman,* 123 F.3d 1189, 1192 (9th Cir. 1997); *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir.1982). In order for *res judicata* to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties. *Blonder-Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313, 323-24, 91 S.Ct. 1434, 1439-40, (1971). It is clear from a review of the SAC that there was not an identity of claims nor of parties between this action and *In re Siliconix Shareholder Litigation* in the Delaware Chancery court. The alleged nucleus of facts in the SAC involves the looting of Siliconix from 1999 through 2005, whereas the Delaware Tender Offer Litigation involves a challenge to the Delaware announcement and Tender Offer in March and April of 2005. Moreover, the appraisal rights were explicitly exempted from the Delaware Judgment and were brought as the Third Claim for Relief in the SAC.

D. Plaintiffs' Derivative Claims on Behalf of Siliconix under California Law Survived the Delaware Judgment

The "continuous ownership requirement" for derivative claims is established by Fed. R. Civ. P., Rule 23.1. Binding Ninth Circuit precedent holds that application of that requirement is thus a matter of federal interpretation of Rule

23.1, not state law. *Kona Enterprises, Inc. v. Estate of Bishop*, 179 F.3d 767, 769 (9th Cir. 1999). *Kona Enterprises* establishes that federal courts have long granted an equitable exception to the continuous ownership requirement in Rule 23.1 when a merger has taken place, as with the Delaware Freeze-Out Merger. Applying this law, Plaintiffs had viable derivative claims in the District Court.

E. Plaintiffs' Fiduciary Breach Claims Under California Law Survived the Delaware Judgment

"Standing" in the District Court is established by the "continuous [stock] ownership requirement" under Rule 23.1 and the equitable exception for mergers, discussed at Section.V.E.2, above. *Kona Enterprises, Inc. v. Estate of Bishop,* 179 F.3d 767, 769 (9th Cir. 1999). The applicable choice of law standard requires a District Court in California to apply California choice of law for the substantive law of fiduciary breaches. *Klaxon Co. v. Stentor Electric, Mfg. Co.* 313 U.S. 487, 496, 61 S. Ct. 1020,, 121-22 (1941). The California substantive law that applies is set out in the seminal California case *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969). *Jones* allows a minority shareholder to bring a personal action alleging 'a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the

corporation's ongoing value. This cause of action is not precluded by Delaware law or the Delaware Judgment.

F. Plaintiffs' Claims for "Quasi Appraisal Rights" under Delaware Law Deriving from 8 *Del. C.* § 262 Survived the Delaware Judgment

The Settlement Agreement in the Delaware Tender Offer Litigation excluded "any claims by Siliconix stockholders for appraisal pursuant to 8 *Del. C.* § 262." The SAC, in the Third Claim for Relief clearly pleads the facts necessary to establish "quasi appraisal" rights deriving from 8 *Del. C.* § 262 through judicial interpretation.

VII. ARGUMENT

A. Standards of Review

1. Standard of Review for Dismissal Based on *Res Judicata* is *De Novo*

A district court's dismissal based on *res judicata* is reviewed *de novo*. *Western Radio Services Co., Inc. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997) *United Parcel Serv., Inc. v. California Pub. Util. Comm'n*, 77 F.3d 1178, 1182 (9th Cir.1996).

2. Standard of Review for Denial of Motion to Remand is *De Novo*

Removal of a case from state to federal court raises a question of federal subject matter jurisdiction. Accordingly, an order denying remand on jurisdictional grounds is reviewed *de novo*. *Emrich v. Touche Ross & Co.*, 846 F. 2d, 1190, 1194 (9th Cir. 1988). *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 771 (9th Cir. 1986) "The burden of establishing federal jurisdiction falls on the party invoking removal." *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 931 (9th Cir.1986)(citing *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir.1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 476 (1985)

3. Standard of Review for Dismissal Under Fed.R.Civ.P. 12(b)(6) is *De Novo*

A district court's order granting a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is reviewed *de novo*. *Everest & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F. 3d 226, 228 (9th Cir. 1994).

In conducting a *de novo* review, the reviewing court does not defer to the lower court's ruling, but *independently* considers the matter anew, as if no decision had been rendered on the matter below. *United States v. Silverman*, 861 F. 2d 571, 576 (9th Cir. 1988). The reviewing court must accept the allegations of the

complaint as true and construe them in a light most favorable to plaintiff. *Terracon v. Valley Nat'l Bank*, 49 F. 3d 555, 558 (9th Cir. 1995).

A motion to dismiss for legal insufficiency under Fed. R. Civ. P. 12(b)(6) is a disfavored motion that is rarely granted and then only in extreme circumstances. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853 (1976).

4. Standard of Review for Summary Judgment is *De Novo*

An order granting summary judgment is reviewed *de novo*. *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1047 (9th Cir 1995) The reviewing court must determine whether, viewing the evidence in the light most favorable to the nonmoving party there are any genuine issue of material fact and whether the district court correctly applied the substantive law. *City of Vernon v. Southern Calif. Edison*, 955 F.2d 1361, 1365 (9th Cir. 1992). The party seeking summary judgment has the burden to identify those parts of the record that indicate the *absence* of a genuine issue of material fact. *Brinson v. Linda Rose Joint Venture, supra,* 53 Fed. 3d at 1047.

B. The District Court Erred in Failing to Remand to the Santa Clara Superior Court, after Untimely and Procedurally Improper Removal by Defendant E&Y to the District Court

The removal of the State Action to the District Court by E&Y suffered from three (3) significant infirmities.l

1. The District Court Erred In Not Remanding to State Court For Failure of All Defendants to Join in the Notice of Removal

On June 30, 2006, defendant E&Y filed in the District Court its "Notice of Removal" of the Superior Court Action. (ER 1753-59) None of the other defendants[17] joined in the Notice of Removal. The Notice of Removal stated, at paragraph 22, that "[a]ll defendants consent to the removal of this action." The only other document filed in connection with the removal, the "Declaration of Patrick E. Gibbs in Support of Defendant E&Y LLP's Notice of Removal"(ER 228-30), putting aside that it is incompetent on its face, does not even address other defendants joining in the Notice of Removal.[18] Not until September 15, 2006, long

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[17] There are three (3) other corporate defendants in this action, Vishay Intertechnology, Inc., Vishay Temic Semiconductor Acquisition Holdings and Siliconix, Inc. There is one (1) individual defendant in this action, Felix D. Zandman.

[18] The "Declaration of Patrick E. Gibbs in Support of Defendant Ernst & Young LLP's Notice of Removal" (ER 1228-1230) has as its declarant "Karli E. Sager" (Page 1, line 1 " I, Karli E. Sager declare as follows:)" but is not sworn to

after Plaintiffs had moved for remand on July 31, 2006, did the Vishay Defendants file a formal joinder in the E&Y removal.

A notice of removal to federal court from state court, under 28 U.S.C. § 1441(b), where the state action has multiple defendants, requires that all defendants in the state action join in the notice of removal. *Parrino v. FHP, Inc.* 146 F.3d 699, 703 (9th Cir. 1998); *Doe v. Kerwood*, 969 F.2d 165, 168 (5th Cir. 1992). "If there are several defendants in the action, the right to remove belongs to them ***jointly***. Therefore, all defendants who may properly join in the removal notice ***must*** join. [*Hewitt v. City of Stanton* (9th Cir. 1986) 798 F2d 1230, 1232; *Doe v. Kerwood* (5th Cir. 1992) 969 F2d 165, 167; and see 28 USC § 1446(a)." *Cal. Prac. Guide Fed. Civ. Pro. Before Trial,* Schwarzer, Tashima and Wagstaffe, ¶ 2:611 (2006). This rule requiring joinder of all parties is subject only to narrow statutory exceptions, not applicable here. [19]

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or signed by Ms. Sager rather by Patrick E. Gibbs. Mr. Gibbs, contrary to the declaration to which he has sworn, is not "an associate with the law firm of Latham & Watkins LLP and did not participate in some of the events described." Neither the declaration nor its Exhibits A-G address the issue of whether the other defendants join in the notice of removal.

[19] The exceptions to this rule, are limited to: (1) where the nonjoining defendant has not been served with process in the state action at the time the notice of removal is filed; (2) the nonjoining defendant is merely a nominal or formal party, or is aligned in interest with plaintiff; or (3) the removed claim is 'separate and independent' one or more nonremovable claims against the nonjoining defendant; i.e., only the defendants to the removable claim need join in

"It is not required that all defendants actually sign the notice of removal. But those who do not sign should submit a written form of joinder by which they agree to the action taken on their behalf. [*Roe v. O'Donohue* (7th Cir. 1994) 38 F.3d 298, 301--insufficient merely to say codefendants do not object to removal; *Ogletree v. Barnes* (ED PA 1994) 851 F.Supp. 184, 188– ***mere statement by removing defendant that others consent to removal*** [is] ***not sufficient***]" *Cal. Prac. Guide. Fed. Civ. Pro. Before Trial,* Schwarzer, Tashima and Wagstaffe, ¶ 2:611 (2006)

The District Court held, based on *Parrino,* that remand on procedural requirements for removal here would be an "empty formality." This is not so for two reasons: (1) *Parrino* specifically disavowed this, stating "[w]e do not, as the dissent suggests, read *Caterpillar* to authorize district courts to ignore the procedural requirements for removal: to the contrary, we agree with *Caterpillar* that '[t]he procedural requirements for removal remain enforceable by the federal trial court judges to whom those requirements are directly addressed,'" and (2) since the remand in *Caterpillar,* on which *Parrino* relied, was sought post-judgment, and "[t]o wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and

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the notice of removal.

unprotracted administration of justice." It is hardly good precedent to allow skilled and competent counsel to flagrantly ignore procedural requirements for long periods, without consequence.

2. The District Court Erred in Allowing Defendant E&Y to Remove Untimely, The Notice of Removal Not Being Filed Within Thirty (30) Days From Notice of the Purported Bases of Federal Question Jurisdiction

The removal statute, 28 U.S.C. § 1446, provides for a mandatory limitation of thirty (30) days for filing a notice of removal:

> "(b) The notice of removal of a civil action or proceeding **shall be filed within thirty days** after the receipt by the defendant, through service or otherwise, of a copy of the **initial pleading** setting forth the **claim for relief** upon which such action or proceeding is based . . ." (Emphasis supplied.)

The "initial pleading" received by E&Y "setting forth [in detail] the claims for relief upon which [the State Action] was based" was the FAC, served on E&Y on January 13, 2005, nearly eighteen (18) months before E&Y's notice of removal. The causes of action in the FAC were: (1) the First Cause of Action: Shareholder's Derivative Action, Breach of Fiduciary Duty, Waste of Corporate Assets; and (2) the Second Cause of Action: Class Action, Breach of Fiduciary Duty. The FAC made it abundantly clear that the Siliconix SEC filings, subscribed to by E&Y,

were part of the fiduciary breaches. These same causes of action were repeated in the SAC, with updating of the facts to include the Vishay/Siliconix Tender Offer and Freeze-Out Merger which occurred in early 2005. The SAC was served on E&Y on November 21, 2005, nearly seven (7) months before E&Y's notice of removal. Both the FAC and the SAC gave E&Y enough information to know that their auditing and subscribing to SEC filing of Siliconix were at issue. E&Y's assertion that "they were not aware of the basis of Plaintiffs first and second claims for relief until the [SAC] Amendment was filed on May 31, 2006" is disingenuous. The District Court's adopting of this assertion is not warranted by a simple review of the FAC and SAC. It cannot be said in good faith by E&Y that the allegations in both the FAC and the SAC did not put it on notice that the State Action was a class action,[20] involved the stock of Siliconix and Vishay[21] and involved misleading the

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[20] The face of the Second Amended Complaint is labeled "CLASS ACTION." The class is defined at paragraphs 40-41 as "all individuals or legal entities who held a legal interest in Siliconix's stock at any point in time from March 2, 1998, through May 12, 2005. . ." and "the minority shareholders of Siliconix." (ER 0806)

[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. See, Second Amended Complaint, (¶¶ 11–13, 55-59, ER 0799, 0808-10)

minority shareholders of Siliconix.[22] These allegations are plain from the face of both the FAC and the SAC.

3. The District Court Erred in Ruling That Defendants Did Not Waive Their Right to Removal by Repeated Actions in State Court Indicating a Willingness to Litigate in State Court

E&Y again and again waived the right to remove the State Action from Santa Clara Superior Court by indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court. E&Y: (1) twice demurred in the State Action to the First and Second Causes of Action, which are the same causes of action they removed to the District Court: (2) made a motion in the State Action to force arbitration of their case: and, (3) twice requested Judge Komar to dismiss the action based on the Delaware Settlement – in their January 6, 2006 demurrer and again based on the Delaware Vice Chancellor's order of June 13, 2006, in open court on June 13, 2006.

"A state court defendant may lose or waive the right to remove a case to federal court 'by taking some substantial offensive or defensive action in the state

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[22] The Second Amended Complaint is also replete with allegations of fraud – both active misrepresentation and concealment – and stock manipulation. See, Second Amended Complaint, (¶¶ 13-14, 20-21, 36, 47, 59; ER 0799-0800, 0801-0802, 0804, 0807, 0810)

court action indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court.' [*Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP* (11th Cir. 2004) 365 F3d 1244, 1246 (emphasis added; internal quotes omitted)]" *Cal. Prac. Guide Fed. Civ. Pro. Before Trial,* Schwarzer, Tashima and Wagstaffe, ¶ 2:874 (2006)

Not one, but several acts of E&Y taken over a period of two years constituted a waiver of its right to remove the State Action to this Court. Filing a motion to dismiss a state court complaint is an affirmative use of the state court process and waives defendant's right to remove. *Schotz v. RDV Sports, Inc.*, 821 F.Supp. 1469 (M.D. Fl. 1993) ; *Heafitz v. Interfirst Bank of Dallas*, 711 F.Supp. 92, 96 (S.D.N.Y. 1989). Making a motion in state court to compel arbitration is an affirmative use of the state court process, also waiving defendant's right to remove. *McKinnon v. Doctor's Associates, Inc.*, 769 F.Supp. 216, 220 (E.D. Mich. 1991) . Having argued and lost an issue in state court, a defendant may not remove the action to federal court for what is in effect an appeal of the adverse decision. See, *Kiddie Rides USA, Inc. v. Elektro-Mobiltechnik*, 579 F.Supp. 1476, 1479-1480 (C.D. Ill. 1984) ; *Rosenthal v. Coates* 148 U.S. 142, 147, 13 S.Ct. 576, 577 (1893) (defendant simply cannot "experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court"). Where a defendant

participated in state court proceedings including seeking an injunction and moving for summary judgment such defendant has "actively invoked the state court's jurisdiction," and removal is waived. *Zbranek v. Hofheinz*, 727 F.Supp. 324, 325 (E.D. Texas 1989)

Moreover, because all defendants must join in removal (see, Section VII.B.1 above), valid waivers of the right to remove of one defendant, such as those of the Vishay Defendants, cuts off the removal rights of the others, like E&Y, as well. *Russell Corp. v. American Home Assur. Co.*, 264 F3d 1040, 1047 (11th Cir. 2001).

Clearly, E&Y's and the Vishay Defendants' actions together constitute repeated waivers of the right to remove this action to federal court. (1) E&Y and the Vishay Defendants filed two demurrers each in the State Action, trying to get this action dismissed. (2) E&Y made a motion to compel arbitration in the State Action. (3) E&Y and the Vishay Defendants tried twice to get the claims against them dismissed as a matter of law based on the class action settlement in *In re Siliconix, Inc. Shareholders Litigation*, C.A. No. 1143-N (Del. Ch. October 25, 2006). (4) The Vishay Defendants argued and lost this issue in the State Court's Order of May 8, 2006 which overruled the Vishay Defendants' demurrer based on the Delaware Settlement. (5) The Vishay Defendants sought and obtained a state court injunction in Delaware purporting to permanently enjoining plaintiffs from

prosecuting the State Action. (6) Both the Vishay Defendants and E&Y raised this issue again, unsuccessfully, at the June 13, 2006 hearing in the State Action. Defendants have clearly waived their right to remove the State Action to the District Court.

The District Court's denial of the motion to remand was based on its incorrect concludions: (1) that E&Y and the Vishay Defendants had no knowledge, actual or inquiry of potential federal securities claims; and (2) that (based on a 5th Circuit case) Defendants did not seek "an adjudication on the merits by asking for dismissal from Judge Komar at the June 13, 2005 hearing because of the Delaware Judgment and Injunction. (ER 1437)

C. The District Court Erred in Enforcing the "Delaware Injunction" Enjoining Proceedings in the District Court

The District Court, in its Dismissal Order enforced the Delaware Injunction, refusing to allow Plaintiffs to proceed in District Court and to adjudicate the *res judicata* claim based on Delaware law. This was in error for several reasons.

1. State Courts May Not Enjoin Proceedings in Federal Court and the Federal Court Must Allow Plaintiffs to Prosecute Their Suit in Federal Court

The United States Supreme Court in the case of *Donovan v. City of Dallas,*[23] with Justice Black speaking for the Court, said:

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time... While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that: '* * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'

Donovan is directly on point. In that case, the Texas Supreme Court issued an injunction prohibiting plaintiffs from prosecuting their case in federal district court, because a prior Texas judgment was alleged to be *res judicata* as to the parties and issues in the federal case. The Court, in determining that a state court

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[23] 377 U.S. 408, 412-413, 84S.Ct. 1579, 1582 (1964).

cannot validly "enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter" stated:

> It may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, a question as to which we express no opinion. But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And ***whether or not a plea of res judicata in the second suit would be good is a question for the federal court to decide*** [footnotes and citations omitted]. (Emphasis supplied.)

Donovan has been followed recently in the Ninth Circuit. *Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Illinois*, 421 F.3d 835, 851 (9th Cir. 2005)("even assuming that the anti-suit injunction in the liquidation order is a 'judgment' entitled to full faith and credit, a point we do not decide, state courts may never enjoin *in personam* proceedings in the federal courts. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 11.2.1, at 717 n.10 (4th ed. 2003)")

Although the District Court recognized in its Dismissal Order that the general rule is that "a state court may not enjoin proceedings in a federal court" it gave this rule only lip-service. (ER 1718) The result of the District Court's refusal to proceed to determine the *res judicata* effect of the Delaware Judgment and deferring

to the Delaware Injunction is in direct violation of the rule in *Donovan.*

2. The Law of the Case Requires that the State Court Ruling that *Res Judicata* Does Not Prevent the Case from Proceeding Be Applied

As defendants acknowledged at the District Court, 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 the District Court. That prior ruling is the law of the case on the issue. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 2177 (1988) ("'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'" to promote the "finality and efficiency of the judicial process by 'protecting against the agitation of settled issues'" (citations omitted)). Application of law of the case is discretionary where, as here, the previous ruling was made not by a higher court but by a coordinate court in a parallel system. See *United States v. Dunbar,* 357 F.3d 582, 592-93 (6th Cir. 2004) *vacated on other grounds*, 125 S.Ct. 1029 (2005); see generally *City of Los Angeles v. Santa Monica BayKeeper*, 254 F.3d 882, 888-89 (9th Cir. 2001) (law of the case doctrine is discretionary when the ruling in question was not made by a higher court). That discretion should be exercised to apply law of the case where, as here, defendants obviously removed the action to federal court

in a naked attempt to evade the effect of Judge Komar's ruling. Such blatant forum-shopping should not be rewarded. See generally *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74-78, 58 S. Ct. 817, 820-22 (1938) (federal courts should endeavor to avoid encouraging forum-shopping between state and federal courts because forum-shopping discriminates irrationally among litigants, undermines the authority of the courts, and poses Constitutional problems).

D. The District Court Erred in Dismissing , Under Rules 12(b)(6) and 56, All of Plaintiffs' Claims Without Allowing Plaintiffs Any Opportunity to Conduct Discovery to Determine the *Res Judicata* Effect of the Delaware Judgment on this Action

Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2427-28, 69 L.Ed.2d 103 (1981); *Western Radio Services Co., Inc. v. Glickman,* 123 F.3d 1189, 1192 (9th Cir. 1997); *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir.1982).

In order for *res judicata* to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties. *Blonder-Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313, 323-24, 91 S.Ct.

1434, 1439-40, (1971); *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n. 3 (9th Cir. 2002).

A party asserting the defense of *res judicata* and collateral estoppel bears the burden of establishing the various elements of those defenses. *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 627 n.4 (9th Cir. 1988). Defendants did not attempt to lay out those elements and set forth the proof of each in their motion and the District Court did not address any of these issues. Plaintiffs cannot be expected to refute each point necessary to a demonstration defendants have failed to make.

1. The State Action and the Delaware Tender Offer Litigation Do Not have an "Identity of Claims" or "Identity or Privity Between Parties"

"Identity of claims exists when two suits arise from 'the same transactional nucleus of facts.' " *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n. 3 (9th Cir. 2002) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir.2001)).; *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003).

While Defendants asserted at the District Court that the parties and issues in the two cases are identical, this is clearly not the case. They did not meet their

burden of so demonstrating, because they could not. 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. The present action, however, is primarily concerned with Defendants, including defendants other than Vishay, who were not parties to the Delaware Tender Offer Litigation, and who conspired to loot Siliconix of its assets long before the Tender Offer. There is a different nucleus of facts in the California State Action.

Defendants themselves in their SEC Form S-4 and Schedule 14d-100 did not classify the State Action as being in the same category with the Tender Offer Litigation, – suits filed in direct response to Vishay's announcement of the Tender Offer in March 2005.

In fact, the separation between this case, primarily concerned with misconduct long before the tender offer and short-form merger and the Delaware Tender Offer Litigation, primarily challenging the tender offer, is wider than that in other cases holding that *res judicata* does not apply. For example, in *Shamrock Associates v. Sloane*, 738 F. Supp. 109, 116-17 (S.D.N.Y. 1990), the defendant accounting firm argued that a judgment in a prior case concerning disclosures in a Schedule 13D precluded a second case concerning disclosures in 10K and 10Q

forms because the two cases grew out of the same claim involving purchases of the very same stock certificates. The court ruled to the contrary, on the grounds that the two sets of disclosures were distinct enough to constitute separate claims.

Similarly, in *NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1259-60 (2d Cir. 1983), the defendant employer argued that a judgment in a prior case against a union concerning enforcement of certain work rules precluded a second case arising from enforcement of those same rules set forth in the same collective bargaining agreement. The court ruled to the contrary, on the grounds that the two acts of enforcement were distinct enough in time to constitute separate claims. *Id.* ("But the circumstance that several operative facts may be common to successive actions between the same parties does not mean that the claim asserted in the second is the same claim that was litigated in the first, and that litigation of the second is therefore precluded by the judgment in the first.").

Lastly, in *Travelers Insurance Co. v. St. Jude Hospital of Kenner, Louisiana, Inc.*, 37 F.3d 193, 195-97 (5th Cir. 1994), the defendant general partner argued that a claim against it by a creditor was precluded by a prior action against the partnership where the creditor should have asserted its claim against the general partner as well. The court ruled to the contrary, on the grounds that the two suits involved distinct facts because one concerned the liability of the partnership and

one concerned the liability of the general partner, even though the liability facts were largely the same and the general partner was a defendant in the prior action.

The instant case and the Delaware Tender Offer Litigation are much more distinct than the situations present in those authorities.

2. Applying *Res Judicata* to the Delaware Judgment Against Plaintiffs Would Violate Plaintiffs' Due Process Rights

Further, granting *res judicata* effect to the Delaware Judgment would violate the due process rights of Plaintiffs in the present case. 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. The Delaware Tender Offer Litigation began on March 4, 2005 and was settled, without notice to any plaintiffs, in the Memorandum of Understanding on April 28, 2005. Notice to the class did not go out until October 2005, with ten (10) days notice for the final approval hearing and simultaneous entry of the Order and Final Judgment on October 25, 2005. As the United States Supreme Court has stated: "[B]efore an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation,' and we said that 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.'" *Ortiz v. Fibreboard Corp.*, 527 U.S.

815, 848, 119 S. Ct. 2295, 2315 (1999) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974 (1985)) (brackets in original and added); see *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S. Ct. 1761 (1996) (overturning the trial court's decision to use *res judicata* to bar a subsequent class action because application violated due process rights of absent class members).

3. California Law Substantive, Not Delaware Law, Should Have Been Applied to Determine the Scope of *Res Judicata*

It is clear that the District Court should have applied California law, not Delaware law, in determining the scope of *res judicata* here. See, e.g., *Ewing v. St. Louis-Clayton Orthopedic Group, Inc.*, 790 F.2d 682, 685 (8th Cir. 1986) ("'Where the first action was brought in state court and involved non-federal matters, the overwhelming view is that the federal district court is required under *Erie* to follow the res judicata law of the forum state'" *(citation omitted))*; *accord R. J. Reynolds Tobacco Co. v. Newby*, 153 F.2d 819, 820 (9th Cir. 1946) (applying law of forum state to determine preclusive effect of judgment in other state).

Consequently, defendants' citation in the District Court to Delaware authorities on *res judicata* and the District Court's reliance on Delaware law are inapposite. Similarly, the Delaware court's own interpretation of its rulings are not controlling here, where California law applies and the District Court had the

opportunity to review its own case, not merely accept the characterizations of this case proffered by defendants or by the Delaware courts in issuing the Delaware Injunction.

4. Application of *Res Judicata* Here Should Have Been Declined to Prevent a Manifest Injustice

To avoid a manifest injustice, California courts have declined to apply preclusion doctrines, like *res judicata*, to foreclose a second case. See *Greenfield v. Mather*, 32 Cal. 2d 23, 35 (1948), criticized but not overruled in *Slater v. Blackwood*, 15 Cal. 3d 791, 796 (1975); *Jackson v. Jackson*, 253 Cal. App. 2d 1026, 1037 (1967); *Hight v. Hight*, 67 Cal. App. 3d 498, 503 (1977). In this case, it would be manifestly unjust to allow defendants to manipulate a settlement of a later-filed action to try and foreclose this action from proceeding. It would be all the more unjust to do so after a California Superior Court judge declined to give the Delaware settlement *res judicata* effect, and defendants removed this case to the present forum to evade the effect of that ruling.

At the very least, the District Court could not have determined whether manifest injustice was present without a more developed factual record upon which to base its determination, which it prevented by its Dismissal Order.

In short, whether defendants can successfully assert the doctrine of *res judicata* here depends upon a host of factual issues that defendants and the District Court did not even attempted to establish. The following factual issues, properly raised by Plaintiffs in the District Court, are implicated:

– Did the Delaware Tender Offer Litigation consider adequately the pre-tender offer misconduct which is the focus of the instant litigation?

– What sort of notice, if any, was provided to those absent class members in the Delaware Tender Offer Litigation who are also members in the present class?

– What opportunity was given to absent class members in the Delaware Tender Offer Litigation to opt out?

– What was the intent of the drafters of the Settlement Agreement in the Delaware Tender Offer Litigation with respect to the present action?

– Did the defendants in the Delaware Tender Offer Litigation attempt to manipulate the settlement of that case to attempt to foreclose this case?

– What incentive did the plaintiffs' attorneys in the Delaware Tender Offer Litigation have to vindicate the rights of the class members here to prosecute this action fully and fairly? (ER 1664-65)

The resolution of such factual issues could not and should not have been *de facto* determined by the District Court in issuing the Dismissal Order. They simply

cannot, in accordance with the requirements of due process, be resolved in defendants' favor as a matter of law based on a Rule 56 motion for summary judgment that provides no probative evidence on any of these vital issues or on a Rule 12(b)(6) motion to dismiss that provides even less.

5. The District Court Should have Allowed Plaintiffs Discovery Under Rule 56(f) to Address the *Res Judicata* Issues Presented by Settlement of the Delaware Litigation

The Supreme Court has made it clear that a grant of summary judgment is inappropriate unless a district court permits the parties adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S. Ct. 2548, 2554 (1986); see also *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 486, 112 S. Ct. 2072, 2092 (1992); *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). Indeed, summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511 n.5 (1986). Moreover, the grant of summary judgment in a complex case "before the plaintiff has had a full opportunity for discovery . . . may constitute reversible error." *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986) (antitrust action).

There is no dispute that: (1) Plaintiffs here were afforded no discovery whatsoever on the factual issues they spelled out to the District Court as being essential to determine the *res judicata* effect of the Delaware Judgment; and (2) Plaintiffs properly raised this issue at the District Court and delineating issues on which discovery should have been granted. (ER 1664-65) Unlike Judge Komar in the State Action, who declined to precipitously proceed to judgment based on the Delaware Judgment and Delaware Injunction (stating that he "expect[ed] that to be litigated appropriately and with due deliberation [in the California Superior Court]") the District Court proceeded to enter an order of dismissal with no discovery and no legal analysis of: (a) the conflicts of law issues; (b) substantive California law or Delaware law; or (c) the elements of *res judicata* on which Defendants had the burden of proof.

"Because summary judgment is a drastic remedy and deprives a party of the right to a jury trial, strict standards apply." William W. Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 14:31, at 14-10 (2007); see also *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513-14. This rationale is particularly apposite here, because securities cases are notoriously complex factually. See, e.g., *Helwig v. Vencor, Inc.*, 251 F.3d 540, 555 (6th Cir. 2001) (materiality element in securities cases alone is inherently factually intensive).

The Supreme Court has articulated that "[a]ny potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex*, 477 U.S. at 326, 106 S. Ct. at 2554. The decision whether to grant a Fed. R. Civ. P. 56(f) application for a continuance and additional discovery is committed to the sound discretion of the district court. *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987).

In *VISA International Service Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986), the Ninth Circuit found that the district court had abused its discretion in denying plaintiff's Rule 56(f) application and granting the defendant's summary judgment motion. *Id.* at 1476. The Ninth Circuit reversed and permitted additional discovery to allow plaintiff to properly oppose the summary judgment motion. *Id.*; see also *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980) ("Generally where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, discovery should be allowed before the trial court rules on a motion for summary judgment."); *Zell v. InterCapital Income Securities, Inc.*, 675

F.2d 1041, 1045-46 (9th Cir. 1982); *Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan*, 662 F.2d 641, 646 (9th Cir. 1981).

As shown above, Plaintiffs believe that Defendants' motion for summary judgment was infirm and should have been denied on the merits by the District Court. If not, the District Court still should have denied or continued the motion so that Plaintiffs received an opportunity to conduct the discovery they had properly applied for, in order to obtain evidence relating to the settlement of the Delaware Tender Offer Litigation and whether it should be given *res judicata* effect. (ER 1664-65) It is particularly inappropriate to grant summary judgment where, as here, information crucial to Plaintiff's opposition on the *res judicata*, collateral estoppel, due process, securities claims and quasi-appraisal issues is almost exclusively in the possession of the Vishay Defendants and its representatives and where access to that information has been foreclosed by reason of the fact that there had been no discovery allowed yet in the action. "'[A] party's access to . . . material is of crucial importance . . . where the information is likely to be in the sole possession of the opposing party.'" *Garrett*, 818 F.2d at 1519 (quoting *Patty Precision v. Brown & Sharpe Manufacturing Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984)); see also *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of*

Philadelphia, 945 F.2d 1260, 1263 (3d Cir. 1991); 10B Charles A. Wright et al., *Federal Practice and Procedure* § 2741, at 419 (3d ed. 1998).

Plaintiffs had not had the opportunity in the District Court to obtain the disclosures from the Vishay defendants under Rule 26, nor to pursue the discovery necessary to develop a comprehensive factual record that would enable Plaintiffs to respond adequately to the Vishay defendants' premature motion for summary judgment. (ER 1663-65) The admissible evidence which could have been elicited with depositions and discovery to justify plaintiffs' opposition to the Vishay Defendants' summary judgment motion was set out with particularity by declaration at the District Court. (ER 1664-65)

E. Plaintiffs' Derivative Claims on Behalf of Siliconix Survived the Delaware Judgment

1. Federal Law Governs the Question Whether Plaintiffs Have Standing to Pursue Their Derivative Claim in Federal Court

Whether plaintiffs have standing to assert their derivative claim depends on application of what is known as the "continuous ownership requirement," the requirement that plaintiffs in a derivative action generally own stock in the company on whose behalf they assert a claim. Defendants in the District Court asserted that, under Delaware law, a post-complaint merger of that company by an acquiring

company defeats the continuous ownership requirement and thus deprives plaintiffs of standing. That assertion is off base, however, because Delaware law does not control this point.

Rather, federal law governs the issue in a District Court. It is well established that procedural questions are governed by the law of the forum, whereas conflicts of law principles apply to determine which state's law sets forth the substance of a cause of action. See generally *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1155 (5th Cir. 1987) (*en banc*) ("It is often said that the 'general rule' is that federal diversity courts 'apply state substantive law and federal procedural law'; and indeed the statement is roughly accurate."), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S. Ct. 1928 (1989). In particular, federal courts apply the Federal Rule of Civil Procedure to questions covered by those rules so long as the rule in question is both authorized by the Rules Enabling Act and constitutional. *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136 (1965).

The continuous ownership requirement for derivative actions is established by Fed. R. Civ. P. 23.1. Binding Ninth Circuit precedent holds that application of that requirement is thus a matter of federal interpretation of Rule 23.1, not state law. *Kona Enterprises, Inc. v. Estate of Bishop*, 179 F.3d 767, 769 (9th Cir. 1999).

2. This Case Falls Within the Merger Exception to the Continuous Ownership Requirement

As the controlling *Kona Enterprises* case states, federal courts have long granted an equitable exception to the continuous ownership requirement in Rule 23.1 when a merger has taken place:

> The second situation in which equitable standing has been granted is the 'merger cases.' In these cases, equitable standing has been granted where the 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. The courts have focused on the fact that, because a merger had occurred, the company on whose behalf the plaintiffs were suing had disappeared. An exception to the continuous share ownership requirement of Rule 23.1 was thus deemed appropriate.

179 F.3d at 770.

The SAC alleges at many places that defendants were engaged in misconduct that culminated in the merger. Further, defendants admitted as much in Vishay's amended S-4 statement regarding the tender offer, filed with the Securities and Exchange Commission (SEC):

> If the offer and merger are successfully consummated, Vishay will own 100% of the outstanding equity of Siliconix. In that circumstance, any derivative claims asserted in the pending litigation on behalf of Siliconix, even if successful, may inure solely to the benefit of Vishay. Recovery on the purported class action claims might also be denied to Siliconix stockholders, either because Vishay is successful in having those claims dismissed or they are otherwise mooted as a result of the merger. Thus, the offer and merger may deprive stockholders of any value in the pending litigation.

(ER 0603-12) In other words, Vishay made the Tender Offer in order to moot the present litigation. The Tender Offer was completed on May 12, 2005, likely because many Siliconix shareholders abandoned hope of ever preventing Vishay from continuing to help itself to Siliconix assets. (ER 0422) Consequently, there is no serious doubt that plaintiffs have standing to assert their derivative claim because this case falls within the merger exception to the continuous ownership requirement.

3. This Issue Was Correctly Decided in the State Court Action As Well Under California Corporations Code § 800 and the *Gaillard* Case

Defendants demurred on this very issue in the State Action and their demurrer was overruled. The State Court decision was based on California Corporations Code § 800 which specifies the procedural prerequisites for maintaining a shareholder's derivative action. It states, in pertinent part:

> (b) No action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares . . . unless . .
>
> > (1) The plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially . . . at the time of the transaction or any part thereof of which plaintiff complains . . .

This requirement is referred to in California to as the "contemporaneous ownership requirement" as well. *Gaillard*, 173 Cal. App. 3d at 414. In *Gaillard*, as here, the defendant argued that the plaintiff could not prosecute a derivative action

because a merger had taken place after the case was filed, and the trial court agreed, relying upon the Delaware authority of *Lewis v. Anderson*, 453 A.2d 474 (Del. Ch. 1982), aff'd, 477 A.2d 1040 (Del. 1984). The *Gaillard* court reversed, noting that Corporations Code § 800 required only that the plaintiff had been a shareholder at the time of the transactions complained of, not at later points. Most importantly, the court reasoned:

> To hold that a merger has the effect of destroying such causes of action would be tantamount to giving free reign to deliberate corporate pilfering by management and then immunizing those responsible from liability by virtue of the merger which they arranged. This would be a grossly inequitable result.

Id. at 420.

Gaillard not Delaware law controlled this issue in the State Acton. Under *Gaillard*, 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. Further, it should be noted that a successful derivative claim would benefit the nominal plaintiff, Siliconix, because there are parties other than Vishay among the defendants who would help defray the losses suffered by Siliconix.

4. California Law, Not Delaware Law, Applied to the State Action

As noted above, Corporations Code § 800 states that it is applicable to any action "instituted or maintained in right of any domestic or *foreign corporation*."

(Emphasis added.) Consequently, any general choice of law rules are besides the point on this question. The California Legislature has directed that Corporations Code § 800 shall apply to derivative actions regardless whether the company concerned was incorporated in California or elsewhere.

F. Plaintiffs' Direct Fiduciary Breach Claims Under California Law Survived the Delaware Judgment

In the District Court two question govern whether Plaintiff Minority Shareholders could proceed with a direct claim against Defendants for fiduciary breaches. The first is a question of standing, the "continuous ownership requirement" which is satisfied as as to Plaintiffs in the District Court by Rule 23.1 and the equitable exception for mergers, discussed at E.2, above. *Kona Enterprises, Inc. v. Estate of Bishop,* 179 F.3d 767, 769 (9th Cir. 1999). The second is a choice of law issue, which requires a District Court in California to apply California choice of law for the substantive law of fiduciary breaches. *Klaxon Co. v. Stentor Electric, Mfg. Co.* 313 U.S. 487, 496, 61 S. Ct. 1020, 121-22 (1941)

California substantive law applies here under the applicable choice of law standard. Siliconix's principal place of business was located in California and many members of the plaintiff class are located here. See, *Sharp v. Big Jim Mines*, 39 Cal. App. 2d 435, 438 (1940) (applying California law to enjoin levy of assessment

because corporation incorporated in Arizona had principal place of business in California); *Hobbs v. Tom Reed Gold Mining Co.*, 164 Cal. 497, 502-03 (1913) (applying California law to mandate inspection of assets because corporation incorporated in Arizona had principal place of business in California); see, also *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 411-14 (1961) (Commissioner of Corporations could mandate corporation incorporated in Delaware to comply with California law because, among other reasons, the principal place of business was located in California).

Defendants erred in asking the District Court to apply Delaware law to that question and the District Court erred in deferring to the Delaware Judgment as determining whether the fiduciary breach claims could have been brought in the Delaware Tender Offer Litigation and whether *res judicata* applied.

Accordingly, whether the Plaintiff Minority Shareholders have standing to assert a direct claim against Defendants must be analyzed under California law, not under Delaware law.

The seminal California case on point is *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969). In *Jones*, a minority shareholder alleged that the majority shareholders had breached their fiduciary duty to her by forming a holding company and selling shares in the holding company rather than shares in the original concern.

The trial court granted a demurrer on the grounds that her only viable cause of action was derivative for reduction in value to the shares of the original concern and her proportionate share therein. The California Supreme Court reversed, granting her standing to prosecute a direct claim even though "she does allege that the value of her stock has been diminished by defendants' actions." Id. at 107.

As the court summarized in *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238 (2004):

> [W]e read *Jones* as allowing a minority shareholder to bring a personal action alleging 'a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value.'

Id. at 1257-58 (citation omitted).

The direct cause of action here falls squarely within this line of cases. In each, there were transactions by which the majority shareholder benefitted in a way that was not available to the minority shareholders. The SAC alleges that defendants conspired with the majority shareholder, Vishay, to engage in a series of related party transactions that favored Vishay and disfavored Siliconix. While the claim may not have been brought under Delaware law in a California District Court the claims is well founded. It survived the Delaware Tender Offer Litigation and Delaware Judgment

G. Plaintiffs' Claims for "Quasi Appraisal Rights" under Delaware Law Survived the Delaware Judgment

The SAC clearly states a claim for quasi-appraisal. Delaware courts permit plaintiffs to seek the remedy of quasi-appraisal when defendants fail to comply with the requirements of Del. Code Ann. tit. 8, § 262 ("8 *Del. C.* § 262"), thereby depriving plaintiffs of their statutory appraisal rights. The SAC includes factual allegations that defendants failed to comply with their statutory obligations under 8 *Del. C.* § 262(d)(2) to notify Siliconix shareholders of their appraisal rights "within ten days" after the merger. In particular, paragraph 59 of the SAC alleges both that "many Siliconix shareholders received no notice whatsoever of their appraisal rights" and that "[t]hose who did receive notices were nonetheless harmed because those notices did not contain adequate financial or other information to allow the shareholders [to] determine the fair value of their shares." The Delaware courts have consistently held such allegations sufficient to support the remedy of quasi-appraisal. See *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 311-12 (Del. Ch. 2005) (granting remedy of quasi-appraisal when defendants failed to provide adequate information about the corporation's financial condition); *Nebel v. Southwest Bancorp, Inc.*, Civ. A. No. 13618, 1995 WL 405750, at *7 (Del. Ch.

July 5, 1995) (unpublished) (granting remedy of quasi-appraisal when defendants failed to include copy of proper statute in appraisal notice).

Defendants acknowledged at the District Court that Delaware law permits the remedy of quasi-appraisal but contended, wrongly, that the remedy is a narrow one and that plaintiffs' claim for relief is barred by the Delaware Judgment. Contrary to Defendants' argument, the settlement of the Delaware Tender Offer Litigation in no way establishes, as a matter of law, that adequate notice of appraisal was given. First, as shown above, that settlement is not binding here. Second, even if the settlement were binding and the court's statements there applied here, plaintiffs' appraisal cause of action is explicitly excluded from the release in the settlement. In their summary judgment motion at the District Court point to paragraph 8 of the settlement agreement, which they contended released claims of misrepresentations "in connection with tender offer or short form merger." (ER 0424-33) What defendants conveniently omitted was that the release ends with a statement that it excludes from its terms "any claims by Siliconix stockholders for appraisal pursuant to 8 *Del. C.* § 262." As shown above, plaintiffs' cause of action for quasi-appraisal arises directly from defendants' violation of that statutory provision, i.e., from defendants' failure to give the adequate notice of appraisal rights required by the

statute. In essence, defendants are contending to this Court that the appraisal claim is released by a settlement that explicitly declines to release appraisal claims.

To address the weaknesses of their argument, defendants pointed to a provision in the Stipulation and Agreement of Compromise for the Delaware action stating that counsel for the Delaware plaintiffs had the opportunity to review, in advance, the disclosures to be provided to the Siliconix shareholders in connection with "the short form merger and shareholder appraisal rights" and that plaintiffs' counsel was "satisfied that those disclosures complied with all legal requirements, including fiduciary duties." Defendants claimed that this prior review barred the present challenge to the disclosures actually given. Even assuming the settlement of the Delaware Tender Offer Litigation has some binding effect in this action, defendants' argument is deeply flawed. First, while the Memorandum of Understanding ("MOU") provision described in the Stipulation certainly conferred on plaintiffs "the opportunity to review in advance any disclosures to Siliconix shareholders related to the short-form merger and shareholder appraisal rights," that MOU provision in no way stated or implied that Siliconix shareholders simultaneously waived their rights to challenge the adequacy of the disclosures actually given (or that defendants were otherwise absolved of their responsibility for those disclosures); indeed, the express language of the MOU, preserving "any

claims by Siliconix shareholders to appraisal pursuant to 8 *Del. C.* § 262" (emphasis added), suggests just the opposite. Second, interpreting the MOU to constitute an advance waiver of the Siliconix shareholders' rights to challenge the content of appraisal notices under 8 *Del. C.* § 262 conflicts with the settled principle of Delaware law that, in general, "mandatory provisions [such as 8 *Del. C.* § 262] may not be varied by terms of the certificate of incorporation or otherwise," including, presumably, by memoranda of understandings or settlement agreements. *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 976-77 (Del. Ch. 1997) (emphasis added) (permitting waiver of appraisal rights, but only with respect to preferred stock, which the court characterized as essentially "contractual in nature," and only when the waiver "is quite clearly set forth" in the document creating the security); see also *Hintmann v. Fred Weber, Inc.*, No. 12839, 1998 WL 83052, at *10 (Del. Ch. Feb. 17, 1998) (unpublished) (questioning whether waivers or alterations of appraisal rights would ever be permissible with respect to common stock). Finally, even if the MOU is interpreted to bar challenges to the content of the appraisal notice, the MOU in no way precludes challenges based on the failure to mail such notices, as alleged in paragraph 59 of the SAC. (ER 0810)

Plaintiffs have submitted with this Opposition in a declaration establishing that adequate notice of appraisal rights was not given. Fitzgerald Decl. At the very

least, such declarations establish a factual issue which cannot possibly be resolved on summary judgment: whether defendants gave proper notice of the settlement of the Delaware Tender Offer Litigation. Indeed, such factual disputes about the amount and adequacy of notice are particularly important in quasi-appraisal proceedings, where "the inquiry as to whether the amount of information that accompanies a notice of short-form merger is sufficient to satisfy a majority shareholder's common law duty of disclosure is highly contextual." *Gilliland v. Motorola, Inc.*, 859 A.2d 80, 87 (Del. Ch. 2004). In particular, because the deadlines of 8 Del. C. § 262 are strictly construed, there can be little doubt that a Delaware court would reject any notice sent by defendants after the ten-day period specified in 8 Del. C. § 262(d)(2), particularly if the notice was sent to the stockholder's attorney (as an attachment to another document), rather than to the stockholder himself or herself. Cf. *Borruso v. Communications Telesystems International*, 753 A.2d 451, 454-55 (Del. Ch. 1999) (noting that corporation failed to comply with the requirements of 8 Del. C. § 262 when it delayed mailing notice of the merger to petitioners until 17 days beyond the time period permitted under 8 Del. C. § 262(d)(2)).

CONCLUSION

For the foregoing reasons, the District Court's Dismissal Order relying on application of *res judicata* from the Delaware Judgment and the Delaware Injunction and its dismissal of this action under Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 56 were in error. The Dismissal Order should be reversed.

The District Court's denial of Plaintiffs' motion to remand this action to California State Court was also in error. It should be reversed and the case remanded to Santa Clara Superior Court, from which it was removed, for further proceedings.

DATED: February 5, 2008

Respectfully submitted,

HENNEFER FINLEY & WOOD, LLP

By _____

James A. Hennefer
Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of this Court, Appellants and their counsel of record state that they are unaware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14 points and contains 13,965 words of text, as calculated by the word processing program used to prepare the brief. The text of the brief is double-spaced.

DATED: February 5, 2008

Respectfully submitted,

HENNEFER, FINLEY & WOOD, LLP

By _____

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PROOF OF SERVICE BY HAND

I, Tessie Francisco, declare as follows:

I am employed with the law firm of Hennefer & Wood , whose address is 425 California Street, San Francisco, California 94104. I am readily familiar with the business practices of this office for hand deliver of legal pleadings and for delivery of Federal Express packages. I am over the age of eighteen years and not a party to this action.

On February 5, 2008 I served the following:

OPENING BRIEF OF APPELLANTS; EXCERPTS OF RECORD

on the below parties in this action by placing true copies in a sealed envelope and depositing them in the United States Mails.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, on February 5, 2008

Tessie Francisco