INSIGHTS

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IN THE COURTS

"The Business Judgment Rule Under Siege: *Tower Air*, *IT Group*, and Notice Pleading in Federal Court"

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The business judgment rule has long been a cornerstone of corporate law and business practice in America. Under the law of corporations of most states, the business judgment rule provides a presumption that the directors of a corporation have acted on an informed basis and in the best interest of the corporation.[1] In order to bring an action against corporate directors and officers, plaintiffs have long been required both to plead and to prove facts sufficient to overcome the protections of the business judgment rule.[2] As applied for decades by Delaware courts, plaintiffs have long been required to advance more than merely conclusory allegations that corporate fiduciaries have breached their fiduciary duties or mismanaged the affairs of the corporation. Rather, plaintiffs must allege specific facts sufficient to rebut the business judgment rule's presumptions.[3]

The requirement that plaintiffs allege, with specificity, facts sufficient to overcome the business judgment rule's presumption of diligence, good faith, and independence by corporate directors and officers is fundamental to the law of corporations.[4] Indeed, in order to serve its purpose, the business judgment rule must be effective at the pleading stage of litigation. If a director or officer could be subjected to expensive and time-consuming discovery based on bare allegations of mismanagement or conclusory allegations of a fiduciary duty breach, a principal purpose of the business judgment rule would be undermined. Complaints advancing nothing more than conclusory allegations of fiduciary duty breaches have therefore typically been dismissed by courts in Delaware and in other jurisdictions.[5]

In a recent decision in the Tower Air bankruptcy case, however, the US Court of Appeals for the Third Circuit held that the liberal notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure trumps the more stringent pleading requirements imposed by Delaware's business judgment rule. In *Stanziole* v. *Nachtomi (In re Tower Air)*, a panel of the Third Circuit Court of Appeals reversed the dismissal of a complaint under the business judgment rule by the US District Court for the District of Delaware on the grounds that the requirement that a plaintiff allege with specificity facts sufficient to rebut the business judgment rule's presumption does not apply in federal courts. The appellate panel held that, in federal court, Rule 8 of the Federal Rules, and its *de minimis* notice pleading requirements,[6] trumps more exactly pleading requirements under Delaware law.[7] In particular, the Third Circuit held that, unlike Rule 8 of the Delaware Chancery Court, Rule 8 of the Federal Rules of Civil Procedure does not "require a claimant to set out in detail the facts on which he bases his claim."[8] Accordingly, a complaint that would not survive a Rule 12(b)(6) motion to dismiss in the Delaware Chancery Court could well survive a motion to dismiss in federal court, the Third Circuit panel noted.

Taken at face value, the Third Circuit's decision in *Tower Air* largely eliminates, in federal court, the protections traditionally afforded by the business judgment rule at the pleading stages of litigation. Following *Tower Air*, in order to survive a motion to dismiss and proceed to discovery in a district court in the Third Circuit, a plaintiff need only advance a short, plain statement that the directors and/or officers have breached their fiduciary duties or committed mismanagement.[9] And if the decision in *Tower Air* is more widely adopted, directors and officers of many an American corporation can expect to be subject to more costly and time-consuming litigation challenging ordinary course business decisions.

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In re Tower Air, Inc.

Tower Air was a Delaware corporation founded in 1982. The company existed primarily as a charter airline operating flights from the United States to overseas destinations. By 1999, Tower Air operated 14 Boeing 747's and employed more than 1,400 people worldwide.[10] By the mid-1990s, the Company was operating at a loss and experiencing financial difficulties. In 2000, Tower Air was forced to file for protection under Chapter 11 of the Bankruptcy Code. In 2001, the Tower Air bankruptcy case was converted from a Chapter 11 proceeding to a Chapter 7 proceeding. Thereafter, the Chapter 7 Trustee sued the Tower Air directors and officers for breach of fiduciary duty.[11]

This conflict between Chancery Rule 8 and Rule 8 of the Federal Rules of Civil Procedure must be resolved in favor of the Federal Rules and its liberal notice pleading requirements.

The adversary complaint filed against the Tower Air directors alleged various acts of mismanagement but did not allege any self-dealing or conflicts of interest on the part of the Company's directors or officers. Count One of the complaint alleged that "Tower Air's directors breached their fiduciary duty to act in good faith by consistently declining to repair Tower Air's older engines in lieu of leasing or buying new engines." Count Two of the adversary complaint alleged that "Tower Air's officers also breached their fiduciary duties to act in good faith by leasing or buying new jet engines, by failing to tell the directors about maintenance problems, and by failing to address the maintenance problems." Count Three alleged that "Tower Air's directors breached their fiduciary duties to make decisions in good faith when they approved multi-million dollar leases and purchases without consideration." Count Three also alleged that "the directors failed to keep themselves adequately informed regarding the daily management of Tower Air by ignoring Tower Air's maintenance problems, letting [the CEO] run the Tel Aviv office independently, not reviewing [the CEO's] decision to fly the Santo Domingo route, and failing to establish management controls to ensure that used tickets were processed." Count Four alleged that the Tower Air officers breached their fiduciary duty as a result of the same conduct alleged in Count Three against the directors. Count Five of the complaint challenged the same conduct alleged in counts one through four and labels the conduct "gross negligence." Count Six challenged the same conduct and alleged that the conduct constitutes "corporate waste" by the Tower Air directors. Count Seven of the complaint alleged that the Tower Air officers were also liable for "corporate waste."[12]

The US District Court for the District of Delaware dismissed the adversary complaint under the business judgment rule. The District Court held, in particular, that the adversary complaint failed to allege facts sufficient to overcome the business judgment rule's presumption that directors "'making a business decision, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest.'"[13] In a generally well-reasoned decision, Judge Kent A. Jordon dismissed the complaint in its entirety on this basis.[14] The Third Circuit reversed the District Court's decision in significant part.[15] The Third Circuit of Appeals based its decision on the perceived difference between notice pleading under the Federal Rules of Civil Procedure, on the one hand, and notice pleading under the Delaware Chancery Rules on the other hand. The Third Circuit held, in particular, that, notwithstanding the fact that the text of the relevant parts of Federal Rule 8 and Chancery Rule 8 are identical, the heightened pleading standard required to overcome the business judgment rule in fiduciary duty cases brought in the Delaware Chancery Court is a function of Chancery Rule 8.[16] The Court held further that Rule 8 of the Federal Rule of Civil Procedure does not impose a similar heightened pleading requirement on plaintiffs seeking to bring fiduciary duty claims in federal court: "By requiring Stanziale to allege specific facts, the District Court erroneously preempted discovery on certain claims by imposing a heightened pleading standard not required by Federal Rule of Civil Procedure 8."[17]

The Court concluded that this conflict between Chancery Rule 8 and Rule 8 of the Federal Rules of Civil Procedure must be resolved in favor of the Federal Rules and its liberal notice pleading requirements. As a consequence, to state a claim in federal court in the Third Circuit, a plaintiff seeking to bring a fiduciary duty claim need only plead a "simple brief statement of claims of irrationality or inattention [that] gives the directors and officers fair notice of the grounds of those claims."[18]

Although the Court let stand the District Court's dismissal of certain claims in the adversary complaint, it reversed the District Court's dismissal of other claims that clearly fall within the protections traditionally afforded by the business judgment rule. For example, the Third Circuit reversed the District Court's dismissal of a claim for breach of fiduciary duty based on the Tower Air directors' alleged approval of multimillion dollar jet engine leases. Not only did the court overturn the District Court's dismissal of this claim under the business judgment rule, the Court of Appeals concluded that the question of whether the plaintiff had stated a claim for breach of fiduciary duty on this basis was not even a "close question."[19] The Court of Appeals, moreover, went one step further. The court held that these allegations, not only clearly stated a claim for breach of fiduciary duty, but these same allegations also stated a claim for *bad faith*.[20] Though not discussed in any detail in the decision, the practical effect of this holding was to deny the Tower Air directors, at least at the pleading stage, the protections traditionally afforded under Delaware's exculpation statute, Delaware General Corporation Laws § 102(b)(7). The fact that the Third Circuit allowed the plaintiff to plead around both the business judgment rule and Delaware's exculpation statute with such apparent ease is particularly noteworthy.[21]

In re IT Group, Inc.

Shortly after the Third Circuit's reversal of his decision in *Tower Air*, Judge Jordan had another opportunity to weigh in on the business judgment rule in the case of *IT Litigation Trust* v. *D'Aniello (In re IT Group, Inc.)*. [22] The Creditors Committee in the IT Group, Inc. bankruptcy case filed suit against the directors and officers of IT Group, Inc. as well as the Carlyle Group, a private equity firm that had made a convertible preferred investment in IT Group and had appointed five of ten members of the IT Group's Board of Directors.[23] Following the filing of an amended complaint in the action, the defendants moved to dismiss the complaint in its entirety. While partially dismissing certain of the counts in the complaint, the Court left in tact many of the counts. In declining to dismiss entirely several fiduciary duty claims against both the IT Group directors and the Carlyle Group, Judge Jordan explicitly acceded to the binding effect of *Tower Air*.[24] At the same time, Judge Jordan took the opportunity, in an extraordinary three page footnote, to criticize the Third Circuit's holding in *Tower Air*.[25] Judge Jordan's analysis points out several shortcomings in the Third Circuits *Tower Air* decision and his thoughtful analysis deserves close attention by any court adjudicating such issues in the future.

The IT Group was a Delaware Corporation that provided consulting, engineering, construction, environmental remediation, and facilities and waste management services.

The Carlyle Group invested $45 million in the IT Group in 1996. In return, Carlyle received convertible preferred stock and the right to elect a majority of the IT Group's directors.[26] Beginning in 1998, the Company embarked on a "roll-up" strategy that involved acquiring several firms in the same industry as IT Group. Between 1998 and 2000, the Company acquired some 11 firms and grew IT Group's revenues from $360 million to $1.4 billion. IT Group's debt, however, increased from approximately $172 million to $1 billion in 2000. By January, 2002, IT Group filed for bankruptcy. Thereafter, the Company was liquidated.[27]

The Creditors Committee in the IT Group bankruptcy proceeding filed suit against the directors and officers of the Company and against the Carlyle Group, advancing claims for breach of fiduciary duty, corporate waste and deepening insolvency. The Creditors Committee also challenged some $8.9 million in dividends as well as $850,000 in consulting fees paid to Carlyle, alleging that such payments were preferential payments and fraudulent

conveyances under Section 547 and Section 548 of the Bankruptcy Code, respectively.[28]

In reaching its decision to deny the defendants' motion to dismiss the complaint, Judge Jordan noted that the core fiduciary duty allegations in the amended complaint were deficient in several respects. Judge Jordan observed that the core allegations in the complaint—namely, that the dividend and consulting payments made to Carlyle, and the IT Group directors' approval of those payments, amounted to violations of the directors' fiduciary duties as well as unlawful dividends—state a claim under Delaware law only if the directors approving those payments lacked independence from Carlyle.[29] Yet, with respect to the directors' independence, the complaint merely alleged that Carlyle "took control" of IT Group and "possessed and exercised control over the IT Group." The court held that such "conclusory" allegations of interestedness were nonetheless sufficient under *Tower Air* to survive a motion to dismiss:

> [W]hile I seriously doubt that the conclusory allegations of control in the Complaint would survive a 12(b)(6) motion in the Delaware Chancery Court, they do put defendants on notice that the claim here is based on the Carlyle Defendants' actual control of the IT Group and the lack of independence of the directors concerning the payments to this controlling group. Given that the Third Circuit has emphasized the view that the Federal Rules of Civil Procedure do not require a plaintiff to plead detailed facts to make out a claim for breach of fiduciary duties under Delaware law, *Tower Air*, 416 F.3d at 236–39, I am bound to hold that the Plaintiffs' allegations are sufficient in this case.

For this reason, the District Court allowed many of the plaintiff's claims to survive the motion to dismiss.[30]

In his three page footnote in *In re IT Group*, Judge Jordan criticized the Third Circuit's decision in *Tower Air* on both legal and public policy grounds.[31] With respect to the legal deficiencies of the decision, the court noted that the *Tower Air* decision is founded on the fundamental principle that "when a state procedural rule conflicts with an on-point Federal Rule of Civil Procedure, a federal court should apply the Federal Rule." As the court points out, however, application of this principle to cases like *Tower Air* and *IT Group* presupposes that the heightened pleading required to overcome the business judgment rule under Delaware law—and under the law of many other states—is a function of procedural and *not* substantive law. For, if the requirement is a substantive law, then, under the long line of cases following *Erie* v. *Tompkins*, a federal court should apply the state substantive law, rather than the Federal Rule of Procedure.[32] As Judge Jordan explained:

> [T]he Delaware requirement that there be more than conclusory allegations to support fiduciary duty claims does not appear to me to be simply a matter of procedure. Rather, the pleading requirements shape the substance of fiduciary duty claims by enforcing the business judgment rule, which is fundamental to Delaware corporate law. . . . The rule is a matter of substantive corporate law. *See Citron* v. *Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989) ("The [business judgment] rule operates as both a procedural guide for litigants and a substantive rule of law.") First, it prevents the courts from second-guessing the decisions of directors and officers based on results of those decisions rather than on the care, loyalty and good faith of the directors making the decision. . . . Second, the business judgment rule protects "against the threat of sub-optimal risk acceptance.[33] *Gagliardi*, 683 A.2d at 1052.

Because it is a substantive rule of law, Judge Jordan argues, *Erie* requires that the heightened pleading requirement of the business judgment rule, prevail over Rule 8 of the Federal Rules.[34]

As for the policy deficiencies in the *Tower Air* decision, the District Court stressed the *ex ante* costs to shareholders of a rule that permits shareholder plaintiffs to freely challenge director decisionmaking.[35] In particular, the court made the critical point that the costs of forcing directors to defend loosely-pled complaints and face the inconvenience, stress and expense of protracted litigation based on nothing

more than a "short plain statement" of inattention, is a cost that will be borne in no insignificant part by the shareholders themselves.[36] How? By deterring optimal risk taking by directors and officers.[37] As Delaware Chancellor William Allen observed in *Gagliardi v. Trifoods*, shareholders and courts should be cautious about endorsing rules that impose personal liability on directors:

> Corporate directors of public companies typically have a very small proportionate ownership interest in their corporations and little or no incentive compensation. Thus, they enjoy (as residual owners) only a very small proportion of any "upside" gains earned by the corporation on risky investment projects. If, however, corporate directors were to be found liable for a corporate loss from a risky project on the ground that the investment was too risky (foolishly risky! stupidly risky! egregiously risky!—you supply the adverb), their liability would be joint and several for the whole loss (with I suppose a right of contribution). Given the scale of operation of modern public corporations, this stupefying disjunction between risk and reward for corporate directors threatens undesirable effects. Given this disjunction, only a very small probability of director liability based on "negligence", "inattention", "waste", etc., could induce a board to avoid authorizing risky investment projects to any extent! Obviously, it is in the shareholders' economic interest to offer sufficient protection to directors from liability for negligence, etc., to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith and meet minimal proceduralist standards of attention, they can face liability as a result of a business loss.[38]

In re IT Group, Inc. II

The final chapter in the litigation over the business judgment rule in the *IT Group* litigation has not yet been written. Presumably as a prelude to pressing the *Erie* analysis, the defendants in *In re IT Group* had sought an order from Judge Jordan certifying for a decision by the Delaware Supreme Court the fundamental question of whether the heightened pleading required to overcome the business judgment rule is a procedural rule or a substantive rule of law under Delaware law. On February 9, 2006, in a brief decision, Judge Jordan declined to certify this question, noting that the matter had been decided already by the Court of Appeals in *Tower Air* and that the District Court was therefore bound by that decision. Judge Jordan noted that the defendants were free to address "their concerns, and perhaps mine, regarding the pleading standard, if this matter is heard by the Third Circuit on appeal."[39] It remains to be seen whether the case will be appealed.

Conclusion

It remains to be seen also whether the Third Circuit will reconsider its *Tower Air* decision, either on appeal from Judge Jordan's decision In re *IT Group* or in another such case. It likewise remains to be seen whether other District Courts and Courts of Appeals in the United States will adopt the Court of Appeals' analysis in *Tower Air,* on the one hand, or Judge Jordan's analysis in *IT Group*, on the other hand. The resolution of these questions will likely be of great significance to the law of corporations, to directors and officers and ultimately to shareholders of the US corporation.

NOTES

1. *Aronson v. Lewis*, 473 A.2d 805, 812 (1984).
2. *See, e.g., Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989); *Aronson* at 473 A.2d, 812.
3. Compare the Delaware Chancery Court's pleading requirements in cases alleging breaches of the fiduciary duty of disclosure by directors of a Delaware corporation. *See, e.g., Loudon v. Archer Daniels-Midland Co.*, 700 A.2d. 135, 140 (Del. 1997).
4. *Orman v. Cullman*, 794 A.2d 5, 19 (Del. Ch. 2002) ("'A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.' The business judgment rule is a recognition of that statutory precept.") (*quoting Aronson*, 473 A.2d at 811.)
5. *See, e.g., Spiegel v. Buntrock*, 571 A.2d 767, 777–778 (Del. 1990); *Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d. 345, 361 (Del. 1993); *Citron*, 569 A.2d at 64; *Krim* v. *Pronet, Inc.*, 744 A.2d 523, 527 (Del. Ch. 1999) ("If the proponent fails to meet her burden of establishing facts rebutting the presumption, the business judgment rule, as a substantive rule of law, will attach to

protect the directors and the decisions that they make.") (citing *Smith* v. *Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *In re BHC Communications, Inc. S'holder Litig.*, 789 A.2d 1, 4 (Del. Ch. 2001) ("Of course, it is a bedrock principle of Delaware corporate law that, when a claim for breach of fiduciary duty fails to contain allegations of fact that, if true, would rebut the business judgment rule, that claim should ordinarily by dismissed under Rule 12(b)(6)."); *Gaylord Container Corp. S'holder Litig.*, 753 A.2d 462, 475 (Del. Ch. 2000)("Of course, the business judgment rule exists in large measure to prevent the business decisions of the board from being judicially examined for their substantive reasonableness."); *Ash* v. *McCall*, No. Civ. A. 17132, 2000 WL 1370341 (Del. Ch. 2000); *In re CareMark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 967–968 (Del. Ch. 1996)("[T]he business judgment rule is process oriented and informed by a deep respect for all good faith board decisions."); *Gagliardi v. TriFoods, Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) ("Thus, to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary *acting in a good faith pursuit of corporate purposes*, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect.").

6. *See In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 323–324 (S.D.N.Y. Feb. 19, 2003).

7. *Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 237 (3d Cir. 2005) (herein *In re Tower Air*).

8. *Id.*

9. *Id.* at 239.

10. *Id.* at 231.

11. *Id.* at 233–234.

12. *Id.* at 234.

13. *Id.* at 234 (*quoting Stanziale* v. *Nachtomi*, No. 01-403, 2004 WL 878469 at *3 (D.Del. April 20, 2004)).

14. The Third Circuit rightly points out in its decision that Judge Jordon's decision blurred the distinction between pleading facts sufficient to allege demand excusal under Rule 23.1 and pleading facts sufficient to state a claim in spite of the business judgment rule. *Id* at 236. Courts reviewing the sufficiency of allegations under Rule 23.1 require plaintiffs to plead "with particularity" facts sufficient to satisfy Rule 23.1's demand requirement. *See, e.g., Aronson*, 473 A.2d 805; *see also* Fed. R. Civ. P. 23.1. Courts reviewing the sufficiency of allegations under the business judgment rule have required plaintiff's to plead "specific facts" sufficient to rebut the business judgment rule's presumption of non-liability. *See Grobow* v. *Perot*, 539 A.2d 180, 188 (Del. 1988); *see also Mills Acquisition*, 559 A.2d at 1279, *but see Tooley* v. *AXA Fin., Inc.*, CA No. 18414, 2005 WL 1252378 *5, n. 21 (Del. Ch. May 13, 2005). Partly, this confusion is inherent in the Rule 23.1 analysis, which itself incorporates business judgment review as one of the two "prongs" of analysis. *SeeAronson*, 473 A.2d 805 and its progeny. Partly, this confusion is a by-product of those Delaware decisions analyzing claims under both Rule 23.1 and Rule 12(b)(6). *See, e.g., See In re Walt Disney Deriv. Litig.*, 731 A.2d 342, (Del. Ch. 1998), *rev'd on other grounds Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000).

15. *In re Tower Air*, 416 F.3d at 242.

16. *Id.* at 236–237.

17. *Id.* at 237.

18. In its decision, the Third Circuit raised the question: "What should the District Court have required Stanziale to allege?" The Court then reviews the US Supreme Court's endorsement in *Swierkiewicz v. Sorema*, 534 U.S. 506. 512 (2002) of Form 9 of the Federal Rules of Civil Procedure, which demonstrates that a complaint consisting of a single sentence can state a claim of negligence under Federal Rule of Civil Procedure 8. *Id* at 238; *see also In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d at 323–324 ("'A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts.' *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir.2002). 'The courts keep reminding plaintiffs that they don't have to file long complaints, don't have to plead facts, don't have to plead legal theories.' *Id.* To comply with Rule 8, plaintiffs need not provide anything more than sufficient notice. It can be read in seconds and answered in minutes.' *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir.1996).")

19. *In re Tower Air*, 416 F.3d at 240 ("The District Court appeared to wrestle with [this issue], but we do not think it presents a close question. We conclude that Stanziale plainly states a claim of inattention on [this basis.]")

20. *Id.* at 240 ("Stanziale argues on appeal that the directors' alleged rubber-stamping of major capital expenditures is consistent with bad faith. We agree.")

21. The blurring of the line between breaches of the fiduciary duty of care, which are subject to exculpation, and breaches of the fiduciary duty of good faith, which are not subject to exculpation, is a separate but related development in corporate litigation in recent years that also suggests increased exposure of directors and officers. *See Brehm v. Eisner*, 746 A.2d 244, 267 (Del. 2000).

22. *IT Group Litigation Trust* v. *D'Angiello (In re IT Group, Inc.)*, No. 02-10118, Civ. 04-1268, 2005 WL 3050611, *2 (D.Del.)

23. *Id.* at *8.

24. *Id.* at *8, n.10.

25. *Id*

26. *Id.* at *2.

27. *Id.* at *3.

28 *Id.* at *4.

29. *Id.* at *8.

30. *Id* at *16.

31. *Id* at *8, n. 10.

32. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Fiat Motors of N. Am. Inc.* v. *Wilmington*, 619 F. Supp. 29, 32 (D. Del. 1985); *In re General Motors Class E Stock Buyout Sec. Litig.*, 790 F. Supp. 77, 80 (D. Del. 1992).

33. *In re IT Group*, 2005 WL 3050611 at *8, n. 10.

34. *Id.*

35 *Id.*

36. *Id.*

37. *Id.* (citing *Gagliardi*, 683 A.2d 1049).

38. *Id.* at 1052.

39. *IT Litigation Trust* v. *D'Angiello (In re IT Group, Inc.)*, No. 02-10118, Civ. A. 04-1268-KAJ, 2006 WL 319000 (D. Del.).