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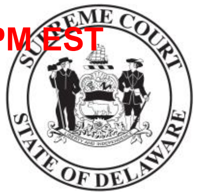

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMUEL ZALMANOFF, Plaintiff-Below/ Appellant, v. JOHN A. HARDY, KENNETH I. DENOS, FRASER ATKINSON, ALESSANDRO BENEDETTI, RICHARD F. BERGNER, HENRY W. HANKINSON, ROBERT L. KNAUSS, BERTRAND DES PALLIERES and EQUUS TOTAL RETURN, INC., Defendants-Below/ Appellees.	)	No. 609, 2018 COURT BELOW: Court of Chancery of the State of Delaware C.A. No. 12912-VCS

APPELLANT SAMUEL ZALMANOFF'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

The trial court applied Delaware's reasonable stockholder standard incorrectly when it held that material deficiencies in a proxy soliciting stockholder action were excused as a matter of law because the omitted information was set forth in one of Equus Total Return, Inc.'s ("Equus" or the "Fund") prior Form 10-K's that was mailed to stockholders along with the proxy. In reaching its decision, the court committed two fundamental errors in violation of law, each of which requires reversal.

First, it is undisputed that Equus's Schedule 14A (the "2016 Proxy") filed with the United States Securities and Exchange Commission (the "SEC") and distributed to stockholders in connection with the Equus Board of Directors' (the "Board") request for stockholder approval of an Equity Incentive Plan (the "Equity Incentive Plan") contained materially deficient disclosures. Nevertheless, the trial court found the Board satisfied its duty of disclosure because the omitted information was purportedly set forth in Equus's Form 10-K for the fiscal period ended December 31, 2015 (the "2015 10-K"), which was mailed to stockholders along with the 2016 Proxy. This was legal error because the 2016 Proxy did not reasonably inform stockholders that information material to their vote on the Equity Incentive Plan could be found elsewhere, including in the 2015 10-K.

Second, even assuming the trial court correctly determined the 2015 10-K's contents were incorporated into the 2016 Proxy, the disclosures were materially incomplete and gave the misleading impression that Equus's management had carte blanche to run the business as they saw fit.

This Action arose because the members of Equus's Board solicited stockholder approval of the Equity Incentive Plan the Individual Defendants (defined below) granted to themselves after Equus's principal operations had ground to a halt, while the Fund was on the brink of merging itself out of existence, and without disclosing all material facts in the 2016 Proxy. The material facts omitted and misstated in the 2016 Proxy include, *inter alia*, (i) the omission of any statement regarding Equus's efforts to facilitate the merger or consolidation (the "Consolidation") of Equus with and into MVC Capital, Inc., ("MVC") pursuant to a 2014 plan of reorganization (the "Plan of Reorganization"), (ii) that Equus's operations had ground to a halt, and (iii) that Equus previously sold shares to MVC based on their net asset value ("NAV") while the Equity Incentive Plan sought to grant options based on the current market value of Equus's shares, which represents a substantial discount to their NAV.

The court's erroneous application of Delaware's reasonable stockholder standard should be reversed.

SUMMARY OF ARGUMENT

I. The trial court erred in holding that the 2015 10-K's contents were incorporated into the 2016 Proxy because the documents were mailed together to Equus stockholders. Instead, the 2016 Proxy's boilerplate reference to other SEC filings by the Fund failed to inform reasonable stockholders that material facts respecting the stockholders' vote on the Equity Incentive Plan could be found in the 2015 10-K.

II. Even assuming, *arguendo*, that the 2015 10-K's contents were fairly incorporated into the 2016 Proxy, the disclosure was still inadequate because it failed to disclose the fact that Equus's discretion to pursue its traditional line of business had been contractually restrained through a Share Exchange Agreement Equus had entered into in connection with the Plan of Reorganization, which, among other things, imposed a one-sided contractual obligation on Equus to use its best efforts to complete the Consolidation with MVC.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. Parties

Plaintiff Samuel Zalmanoff is a stockholder of Equus and has held Equus's stock at all relevant times. A263, ¶7.[1]

Defendant Equus, at the time Plaintiff's Complaint was filed, was classified as a business development company ("BDC") under the Investment Company Act of 1940, 15 U.S.C. § 80a, *et seq.*, and previously focused on investment in non-public debt and equity securities. A261-62, ¶4. Equus's shares of common stock trade on the New York Stock Exchange (the "NYSE") under the symbol "EQS." A263, ¶8.

Since announcing the Plan of Reorganization in May 2014 providing for Equus's Consolidation with MVC, another BDC, Equus has not made any material new investments and instead keeps the majority of its assets in U.S. Treasury or other similar risk-free cash equivalent investments. Notwithstanding the lack of any real investment activity, Equus has turned into a lucrative source of compensation for the Fund's senior executives and directors. The example of such lucrative compensation Plaintiff challenges here is the so-called Equity Incentive Plan. A263-64, ¶¶9-11, 13.

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[1] Citations in the form "A__" refer to the Appendix filed herewith. Citations to "¶__" refer to Plaintiff's Verified Shareholder Class Action Complaint.

Defendants John A. Hardy, Kenneth I. Denos, Fraser Atkinson, Richard F. Bergner, Henry W. Hankinson, Robert J. Knauss and Bertrand Pallieres comprise Equus's Board of Directors and, at times, are collectively referred to hereinafter as the "Individual Defendants." A261-65, ¶¶4, 7-15.

B. The Plan of Reorganization

On or about May 13, 2014, Equus publicly disclosed its intention to merge or consolidate with MVC pursuant to the two-step Plan of Reorganization. A261, ¶2.[2] The first step in the Plan of Reorganization provided that Equus would sell/swap MVC 20% of Equus's outstanding shares in return for shares of MVC pursuant to the Share Exchange Agreement. A261, ¶2. The terms of the share sales/swap were based on Equus's and MVC's respective NAV and closed in or about May 2014. *Id*. Through the share sales/swap, MVC acquired 2,112,000 shares of Equus representing 20% of all of Equus's outstanding common stock. Equus, in turn, acquired 395,839 shares of MVC valued at roughly $4 million, representing the largest investment in Equus's portfolio.[3] The second step in the Plan of Reorganization provided for the Consolidation of Equus and one of MVC's portfolio companies. A261, ¶3.

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[2] *See* also A23.

[3] A87.

The Share Exchange Agreement contains a Best Efforts Clause obligating Equus to "undertake its reasonable best efforts to effect the Events of Reorganization, including working expeditiously towards closing each of the Events of Reorganization and taking all reasonable steps to that end."[4] The Best Efforts Clause is one-sided and MVC has no reciprocal obligation to undertake any efforts to pursue the Consolidation or otherwise complete the Plan of Reorganization. Thus, the Plan or Reorganization left Equus in limbo until MVC, on its own accord, proposed a Consolidation partner with Equus. The Best Efforts Clause is also not limited in its temporal scope. Indeed, Equus's subsequent disclosures show the Fund continues to actively undertake efforts to complete the Consolidation and even went so far as to put in place a mechanism to effect a withdrawal of Equus's classification as a BDC.[5]

C. Equus's New Investment Activities Have Come to a Virtual Halt Since the 2014 Plan of Reorganization

With respect to the Plan of Reorganization, the 2014 8-K disclosed that Equus would "conduct its operations in the normal course" while waiting for the

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[4] A39. The Share Exchange Agreement, in turn, defines the Events of Reorganization to include: (i) the Consolidation of Equus with and into a subsidiary of MVC, (ii) the termination of Equus's election to be classified as a BDC, (iii) maintenance of Equus's NYSE listing, and (iv) the facilitation of additional Equus share sales to MVC. A38.

[5] A323-24; A347.

Consolidation to occur.[6] Equus's business was to invest in debt and equity securities of small and middle market capitalization companies that are not publicly traded at the time of investment. However, after entering into the Plan of Reorganization, Equus ceased to engage in any meaningful investment activity.

Equus reported just $4.5 million in investment activity (roughly 7% of its available assets) to the SEC after announcing the Plan of Reorganization in May 2014.[7] A265, ¶18. The lion's share of that investment "activity" was passive. Approximately $2.5 million of Equus's 2015 investment activity was derived from the sale or redemption of certain previously owned debt instruments. *Id*. The remaining $2 million represents an investment in Biogenic Regents, LLC, a company in which MVC itself heavily invests. *Id*. Indeed, at or about the time the Fund's stockholders were asked to vote on the Equity Incentive Plan, 46% of Equus's total assets took the form of cash or cash equivalents.[8] The lack of activity was inconsistent with Equus's fundamental purpose as a BDC which was to invest, rather than hold, cash.

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[6] A54.

[7] A132.

[8] Moreover, 17% of Equus's assets took the form of MVC stock. A173.

D. The Board Proposes the Equity Incentive Plan and Distributes the 2016 Proxy

On April 18, 2016, the Board filed the 2016 Proxy in connection with, *inter alia*, the Board's request for approval of the Equity Incentive Plan at the Fund's annual stockholder meeting on June 13, 2016.[9]

However, the 2016 Proxy failed to disclose and/or misstated several essential facts concerning the request for stockholder approval of the Equity Incentive Plan, including:

a. The reasons why the Consolidation has not been completed and the current status of that transaction;

b. That Equus no longer engages in any meaningful new investment activities, including as a direct result of its contractual obligations under the Share Exchange Agreement, and holds nearly half of its assets in cash or cash equivalents, making the claimed premise of needing to compensate Equus's executives or the Board through awarding stock options false or misleading;

c. That Equus previously sold shares to MVC at prices reflecting the Fund's NAV while the Equity Incentive Plan seeks to grant options to Equus insiders based upon current market value which represents a substantial discount to their NAV;

d. That Equus is in the process of being acquired by MVC, which acquisition was expected to be commenced and/or completed in 2016, which, at a minimum, raises serious questions as to the necessity of providing additional compensation to Equus's executives and directors through the proposed Equity Incentive Plan; and

[9] A207.

e. The statement in the 2016 Proxy that the purpose of the Equity Incentive Plan was to encourage the retention and dedication of Equus's officers, directors and employees.

Defendants did not expressly incorporate the 2015 10-K's contents into the 2016 Proxy. The 2016 Proxy did, however, contain the following language:

> A copy of the Fund's 2015 Annual Report to Stockholders on Form 10-K and copies of the Fund's quarterly reports on Form 10-Q are available without charge upon request. Please direct your request to Equus Total Return, Inc., Attention: Secretary, 700 Louisiana Street, 48th Floor, Houston, TX 77002, or call our proxy solicitor Georgeson, LLC, toll-free at (800) 561-3497. Copies also may be requested through the Fund's website at *www.equuscap.com*. (Information contained on the Fund's website is not incorporated into this proxy statement.) Copies are also posted via EDGAR on the SEC's website at *www.sec.gov*.[10]

The 2016 Proxy made no other relevant reference to the 2015 10-K.

The materiality of the omitted information Plaintiff complains of was not in dispute for purposes of the trial court's decision. *See* Opinion at 6 ("While Defendants have not conceded the materiality of the information that Plaintiff alleges was missing from the 'total mix,' they have not sought summary judgment on materiality.").

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[10] A239.

II. THE PROCEEDINGS BELOW

Plaintiff filed his Complaint on November 16, 2016.[11] On January 27, 2017, Defendants filed a motion to dismiss under Court of Chancery Rule 12(b)(6), claiming that Plaintiff's Complaint failed to state a claim upon which relief may be granted.[12] The trial court heard argument on Defendants' Motion to Dismiss on July 24, 2017 and, on August 2, 2017, issued a ruling denying Defendants' Motion to Dismiss in all respects save for Plaintiff's disclosure claim directed to a Defendant director's overlapping board service which is not at issue in this appeal.[13] In connection with the Motion to Dismiss ruling, the trial court found Plaintiff to have stated a valid claim that information material to stockholder approval of the Equity Incentive Plan was omitted from and/or misstated in the 2016 Proxy.[14]

On September 22, 2017, Defendants filed a Motion for Summary Judgment under Court of Chancery Rule 56. The trial court heard argument on Defendants' Motion for Summary Judgment on October 22, 2018, and, on November 13, 2018, issued a Memorandum Opinion granting Defendants' Motion for Summary Judgment (the "Opinion"). This appeal timely followed.

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[11] C.A. No. 12912-VCS (Del. Ch.) Trans. ID 59843560.

[12] C.A. No. 12912-VCS (Del. Ch.) Trans. ID 60043611.

[13] *Zalmanoff v. Hardy*, Del. Ch., C.A. No. 12912, Slights, V.C. (Aug. 2, 2017), Tr. at 14-17.

[14] *Id.* at 14.

ARGUMENT

I. THE TRIAL COURT APPLIED THE REASONABLE STOCKHOLDER STANDARD INCORRECTLY

A. Question presented

Whether the trial court erred by finding that (i) a reasonable Equus stockholder was fairly charged with knowledge of the contents of the Fund's previously filed Annual Report filed on Form 10-K with the SEC simply because the 10-K was mailed along with the operative solicitation document;[15] and (ii) the contents of the 2015 10-K cured the 2016 Proxy's material omissions?[16]

B. Scope of Review

Where an appeal is taken from a grant of summary judgment and no dispute of fact exists, this Court's standard of review on appeal is whether the trial court's decision was correct as a matter of law. *Abdul-Akbar v. Figliola*, 584 A.2d 1228, 1990 WL 197844, at *1 (Del. 1990) (TABLE). The trial court's misapplication of Delaware's reasonable stockholder standard is a legal issue.

C. Merits of Argument

The trial court held that "when the disclosures provided in the operative proxy statement are considered alongside those made in a simultaneously mailed Form 10-

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[15] A374-83; A405-07; A417-27. In addition, the trial court considered the issue in its Opinion. Opinion at 9-14.

[16] A384-86; A406; A427-34. In addition, the trial court considered the issue in its Opinion. Opinion at 7-9.

K, it is indisputable that Defendants adequately fulfilled their disclosure obligations." Opinion at 1.

Two principal errors undermine the trial court's holdings that the 2016 Proxy provided Equus's stockholders with all material facts respecting approval of the Equity Incentive Plan. First, the trial court determined that the 2015 10-K's contents were incorporated into the 2016 Proxy because the two documents were mailed together to stockholders and the 2016 Proxy otherwise included a boilerplate provision which referenced the 2015 10-K. This decision was erroneous because the 2016 Proxy did not indicate where material facts outside of the 2016 Proxy pertaining to approval of the Equity Incentive Plan could be found (or that they even existed in the first place). Second, the trial court erroneously determined that the information contained in the 2015 10-K cured the 2016 Proxy's material deficiencies.

1. Defendants Were Required to Disclose All Material Facts in the 2016 Proxy

As the solicitation material presented to Equus's stockholders in connection with the Board's request for approval of the Equity Incentive Plan, the 2016 Proxy was required to disclose all material facts "or at the very least, point to where the disclosure can be found." *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 308 (Del. Ch. 2005); *see also ODS Techs., Inc. v. Marshall*, 832 A.2d 1254, 1262 (Del. Ch. 2003); *In re Trans World Airlines, Inc. S'holders Litig.*, 1988 WL 111271, at *10 (Del. Ch.

Oct. 21, 1988) ("Nor can I agree that if a fact is material, that a failure to disclose it is necessarily cured by reason that it could be uncovered by an energetic shareholder by reading an SEC filing."); *see also Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993) (The standard is "an objective one, measured from the point of view of the *reasonable investor*.") (emphasis supplied), *aff'd*, 681 A.2d 1050 (Del. 1996).

Defendants do not dispute that the 2016 Proxy omitted the material facts respecting approval of the Equity Incentive Plan that Plaintiff complained of. Instead, relying on *Wolf v. Assaf*, 1998 WL 326662 (Del. Ch. June 16, 1998), Defendants contend the 2016 Proxy's material deficiencies were cured by mailing a copy of the 2015 10-K along with the 2016 Proxy. However, inclusion of the 2015 10-K with the mailing of the 2016 Proxy did not cure Defendants' disclosure violation because the 2016 Proxy did not identify for the reasonable stockholder where material information outside of the 2016 Proxy respecting stockholder approval of the Equity Incentive Plan could be found, *i.e.*, cross-referencing the particular disclosure.

Five years after *Wolf,* the Court of Chancery decided *ODS Technologies* and rejected the defendants' argument that a Form 10-K mailed along with the proxy cured any disclosure deficiencies in the proxy itself, holding the Form 10-K could not be fairly deemed incorporated by reference because "the portions of those agreements relevant to a reasonable shareholder are neither highlighted nor

mentioned directly in [the Proxy]." 832 A.2d at 1262. Similarly, in *In re Trans World Airlines, Inc. Shareholders Litigation*, the defendants argued that a Form 10-Q addressing an operative fact and filed with the SEC just three days after the proxy acted to cure any material omissions. 1988 WL 111271, at *11. Because shareholders were told nothing of the operative fact in the proxy statement distributed by the board, the court gave little credence to defendants' separate disclosure. *Id.*

Accordingly, where directors seek to excuse their disclosure obligations by incorporating prior disclosures by reference, applying Delaware's reasonable stockholder standard is not so simple as whether the information omitted from the solicitation document was disclosed in a prior SEC filing mailed along with the operative solicitation document. Rather, the material information contained outside the proxy must, at a minimum, be identified with sufficient particularity.

Proxies sent for purposes of soliciting stockholder action should clearly and concisely set forth all material facts. Permitting directors charged with providing stockholders material information to employ a company's vast swath of prior disclosures to satisfy a present disclosure obligation threatens to create a "super shareholder" requirement that would, in turn, "create almost limitless opportunities for deception of the reasonable stockholder." *ODS Tech.*, 832 A2d at 1262; *see also Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, 532 A.2d 1324, 1340 (Del. Ch.

1987) (recognizing that if a fiduciary's disclosure violation could be cured by reference to information outside of the proxy, the result would be to "thrust" "the disclosure burden owed by the fiduciary [ ] upon the beneficiary to whom the duty is owed").

Accordingly, the 2015 10-K's disclosures concerning the Plan of Reorganization and Equus's investment activity cannot fairly be deemed to be incorporated in the 2016 Proxy because that solicitation document did not highlight, or for that matter even identify, where such material information relating to Equus's request that stockholders approve the Equity Incentive Plan set forth outside of the 2016 Proxy could be found.[17]

2. The Disclosures Contained in the 2015 10-K, Even if Deemed to be Incorporated by Reference, Failed to Inform a Reasonable Stockholder of Relevant Material Facts

Assuming, *arguendo*, that the trial court properly determined that the 2015 10-K was incorporated into the 2016 Proxy, the 2015 10-K's limited disclosure concerning the existence, status and basic terms of the Consolidation did not provide Equus's stockholders with all material facts. Specifically, the 2015 10-K does not explain that the Board's ability to operate Equus's traditional line of business was impaired by the Best Efforts Clause. As the stagnancy of Equus's business activities has demonstrated, the Best Efforts Clause meant that Equus could not and did not

[17] *ODS Techs.*, 832 A.2d at 1262; *Gilliland*, 873 A.2d at 308.

operate as it had prior to the Share Exchange Agreement – a reality that was certainly material to a reasonable stockholder considering an Equity Incentive Plan for executive management. Thus, the reality of the stalled Consolidation of Equus with MVC was that the 2014 8-K's representation that, notwithstanding the Fund's entry into the Plan of Reorganization Equus "shall conduct its operations in the normal course," turned out by 2016 to have been false with the Fund not engaging in any meaningful investment activity.[18]

This omission was materially misleading because of the impression created by Equus's prior disclosures. Equus's Form 10-K for the fiscal year ended December 31, 2014, in discussing the Plan of Reorganization, referenced Equus and MVC seeking to complete the Plan of Reorganization within 12 months, during which time Equus would be restricted to certain limited business operations.[19] However, that disclosure is absent from the 2015 10-K and later disclosures, thereby giving the misleading impression that Equus's Board was no longer contractually restrained from operating the Fund's business in its discretion.[20] In reality, the Board

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[18] A54.

[19] A75.

[20] *Id.* Specifically, the italicized language was affirmatively deleted from the 2015 10-K's discussion of the Plan of Reorganization: "Our intention is to consummate a Consolidation with MVC or one or more of its portfolio companies within a year from the date of this announcement, although actual completion may require additional time. *If, however, we do not complete the Consolidation within a time frame agreed with MVC, it could require us to repurchase the Equus shares issued*

was still bound by the Best Efforts Clause, which provides the undisclosed reason for why Equus's operations had ground to a halt since the Fund's entry into the Plan of Reorganization.

Nor was the Best Efforts clause within the total mix of information available to a reasonable Equus stockholder. Instead, the only way an Equus stockholder would have learned of its existence was if they independently located the copy of the Share Exchange Agreement filed as an Exhibit to the 2014 8-K (but disclosed nowhere else), reviewed its contents, independently identified the Best Efforts Clause as being relevant, and then deciphered the legal terminology. Such "disclosure" is plainly inadequate under Delaware law. *See ODS Techs.*, 832 A2d at 1262 ("[E]ven if a shareholder read through the entirety of the [Agreements], it is incredible to suggest that a reasonable shareholder would identify the Board Representation Clause or Cross-Default Clause as significant [to the request for shareholder action] when the Proxy Statement itself mentions neither [the large stockholder serving to motivate the Board's actions] nor these provisions specifically when discussing those same Amendments."). Moreover, Equus never discussed the Best Efforts Clause in its disclosures with respect to the Plan of

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as part of the Share Exchange by returning to them all of the MVC shares we hold. A rescission of the Share Exchange, if effected by MVC, could have a material adverse effect on our financial condition and results of operations."

Reorganization. Accordingly, to assume that an Equus stockholder would know to look for the Best Effort Clause in the first place is antagonistic towards Delaware's protections afforded to the reasonable stockholder. *Gilliland*, 873 A.2d at 308 (emphasizing that it is the reasonable stockholder who may be "neither so well-informed nor so well-equipped … [whose] interests demand protection" under Delaware law); *In re Trans World*, 1988 WL 111271, at *10 (Delaware law does not impose an "energetic shareholder" requirement).

Directors of Delaware corporations have a burden to concisely provide stockholders with all material facts when soliciting stockholder action. The 2016 Proxy was the document Equus's directors provided to stockholders to solicit approval of the Equity Incentive Plan. The 2016 Proxy is the document in which they were required to disclose all material facts. Charging Equus's stockholders with independently reviewing the 2015 10-K to gather information that rightfully should have been set forth in the 2016 Proxy – or at the very least specifically cross-referenced – imposes an unreasonable burden.

To illustrate the point, consider the perspective from a reasonable Equus stockholder being asked to vote on the Equity Incentive Plan. The stockholder receives a thick mailing with two documents. The first is the 2016 Proxy, which expressly tells the stockholder it is being sent for purposes of soliciting their vote and that the stockholder should take care to read all of its contents before voting.

The second document, the 2015 10-K, is considerably more voluminous than the 2016 Proxy and pertains to the Fund's operations over the past year.[21] Outside of a boilerplate reference to the 2015 10-K, the 2016 Proxy makes no reference to the fact that material information respecting the stockholder action solicited thereby is located somewhere else. This scenario affords faithless fiduciaries an opportunity to obfuscate the disclosure of material facts by providing them within an avalanche of other immaterial information. *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) (citation omitted) (discussing risk that companies may "bury [ ] stockholders in an avalanche of trivial information"); *ODS Techs.*, 832 A.2d at 1261.

The trial court further erred in finding that the Best Efforts clause "speaks for itself" and that the contention was not fairly plead in Plaintiff's Complaint. Opinion at 9. As an initial matter, this Court has observed that "there is no particular coherence" in Delaware law concerning what reasonable best efforts require. *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *16 (Del. Ch. June 24, 2016). Accordingly, the impact of the Best Efforts Clause on Equus's operations is not self-evident. Moreover, the Best Efforts Clause at issue here presents a unique circumstance because it imposed a one-sided obligation on Equus;

[21] *Compare* A207 *and* A129.

MVC is left free to operate its business in any way its sees fit while Equus is left in limbo to await the Consolidation (or MVC's abandonment thereof). Accordingly, the trial court erred in holding the Best Efforts Clause speaks for itself such that no further disclosure was needed.

In addition, Plaintiff's allegation respecting omission of the Best Efforts Clause directly relates to Plaintiff alleging that the 2016 Proxy was materially misleading because it omitted any discussion of Equus's investment activity and business operations (or lack thereof). A270-71, ¶38. As Equus's lack of meaningful investment activity has demonstrated, the Best Efforts Clause meant that Equus could not and did not operate as it had prior to the Share Exchange Agreement. The Complaint further alleges that the 2016 Proxy failed to disclose that Equus is in the process of merging with MVC. *Id.* Disclosure of the Best Efforts Clause would have been required in order to provide stockholders with a full and fair description of the situation.

Accordingly, even assuming, *arguendo*, that the disclosures set forth in the 2015 10-K were deemed to be incorporated into the 2016 Proxy, Defendants still failed to satisfy their duty to provide Equus's stockholders with all material facts relating to the Board's solicitation of stockholder approval of the Equity Incentive Plan.

CONCLUSION

Because the trial court granted Defendants' Motion for Summary Judgment based on errors of law, the trial court's Opinion of November 13, 2018 must be REVERSED.

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CERTIFICATE OF SERVICE

I, Samuel L. Closic, do hereby certify on this 5th day of February, 2019, that I caused a copy of Appellant Samuel Zalmanoff's Corrected Opening Brief to be served by eFiling via File & ServeXpress upon counsel for Appellees as follows:

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