IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RAMON ACEVEDO, On Behalf of Himself and All Others Similarly Situated,	:	
Plaintiff,	:	
v.	:	Civil Action No. 7930-VCL
AEROFLEX HOLDING CORP., HUGH EVANS, LEONARD BOROW, JOHN BUYKO, RAMZI M. MUSALLAM, PRESCOTT H. ASHE, JOE BENAVIDES, BRADLEY J. GROSS, JOHN D. KNOLL, RICHARD NOTTENBURG, BENJAMIN M. POLK, CHARLES S. REAM, MARK H. RONALD, PETER J. SCHOOMAKER, ARMY ACQUISITION CORP., and COBHAM PLC,	:	
Defendants.	:	

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, July 8, 2015
10:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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SETTLEMENT HEARING AND REQUEST FOR ATTORNEYS' FEES AND THE COURT'S RULINGS

CHANCERY COURT REPORTERS
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

APPEARANCES:

GINA M. SERRA, ESQ.
Rigrodsky & Long, P.A.
-and-
ROBERT B. WEISER, ESQ.
JAMES M. FICARO, ESQ.
of the Pennsylvania Bar
The Weiser Law Firm, P.C.
for Plaintiff

EDWARD P. WELCH, ESQ.
LAUREN N. ROSENELLO, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendant Army Acquisition Corp.

GREGORY V. VARALLO, ESQ.
Richards, Layton & Finger, P.A.
-and-
MICHAEL E. SWARTZ, ESQ.
of the New York Bar
Schulte Roth & Zabel LLP
for Defendant Aeroflex Holding Corp.

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THE COURT: Welcome, everyone.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: Ms. Serra, how are you doing?

MS. SERRA: Good morning, Your Honor. Well. How are you?

THE COURT: Good.

MS. SERRA: Good morning, Your Honor. May it please the Court, Gina Serra from Rigrodsky & Long on behalf of plaintiff. I would like to introduce to the Court James Ficaro --

MR. FICARO: Good morning, Your Honor.

THE COURT: Good to see you.

MS. SERRA: -- and Robert Weiser from The Weiser Law Firm.

THE COURT: Mr. Weiser.

MS. SERRA: Mr. Weiser has been admitted pro hac vice in this action and will be presenting today's argument.

THE COURT: Thank you.

MS. SERRA: Thank you.

THE COURT: That's your cue.

MR. WEISER: Good morning, Your Honor.

It's nice to see you again. It's been a little while. I did want to take an opportunity to introduce a summer clerk to my firm, Jonathan Zimmerman, sitting in the back.

THE COURT: Welcome.

MR. WEISER: We brought him down here to show him what he's getting into exactly.

THE COURT: Whatever that's worth.

MR. WEISER: Whatever that's worth.

THE COURT: We're always glad to see the New Yorkers.

MR. WEISER: It's good intuition, Your Honor.

We are here on an unopposed motion for final settlement approval, as the Court knows.

Just a few housekeeping matters in connection with the settlement. Kurtzman Carson did the notice here. 3300 notices were mailed. We didn't receive any objections. There's a -- we filed last week I guess the affidavit and notice of mailing.

I could briefly talk about class certification. Of course, Your Honor is well aware of the status for class certification. Essentially, this is a textbook case in that the injury fell upon all

shareholders equally as a result of the alleged common conduct on behalf of defendants.

There were 85 million shares outstanding at the time the transaction was announced. 76 percent of them were locked up or otherwise owned by insiders.

Unless Your Honor has any questions regarding class certification, I'd like to talk about the settlement and settlement relief.

We really feel quite good about this settlement. As I was just saying to Mr. Welch a moment ago, one of my observations is that it seems as though you've had this raft of these kind of small, tiny cases. In this Court over the past couple years, there have been a couple of quite large cases. And it struck me that there are kind of few in the middle anymore where you kind of have a good solid case and a good solid settlement that's not a gigantic settlement but that is clearly far more valuable than the types of transactional cases that people are screaming about.

And I don't mind saying for the record, because it's been a while since I've seen Your Honor, my firm doesn't file those cases. We didn't

when I was at Schiffrin & Barroway years and years ago and we haven't since I founded this firm. If the transaction is tiny and there is no claim, my firm doesn't file a case. It's that simple.

We were quite interested in this case because it was majority/minority deal. As the Court is well aware, that type of scenario presents opportunities. I think the thing that is interesting about this case and the issue that probably would have been the most litigated issue, especially at the preliminary injunction stage, was the existence of Company A, this alleged third party who was interested in making a bid for some or all of Aeroflex at various moments in time.

We do think that kind of makes the case different than perhaps the garden-variety case. I think I would also add that that actually is one of the reasons why the settlement relief is so valuable here. And I'm going to talk about that in just one second.

The standards for settlement approval are well known in this Court. Generally speaking, very old Delaware law basically requires that settlements be fair and reasonable. It's interesting

to me that those standards haven't been touched in years and years. Even with all the changes in merger litigation, development of Delaware law in myriad ways, basic settlement standards are essentially unchanged since the '60s.

Settlement relief here falls in two general categories. We had the merger agreement modifications where the termination fee was reduced by 40 percent. That was 32 million to 18 million. There was also a reduction in the -- excuse me. We reduced the matching rights period from four days to three days.

As Your Honor is well aware, we particularly were thinking about Compellent even at the time we were litigating the case. And in light of Compellent and a lot of its progeny, the idea that if stockholders are creating a dynamic whereby it's more likely for a topping bid to --

THE COURT: It's not its progeny. It's its antecedents. The transcript rulings that you cited in your briefs where Vice Chancellor Strine said similar things were all before Compellent.

MR. WEISER: I understand that.

THE COURT: What was the divergence of

interest between the 76 percent stockholder and the stockholders as a whole?

MR. WEISER: I'm sorry, Your Honor. I don't quite follow.

THE COURT: That's perhaps the problem.

What was the divergence of interests between the large stockholder and the interests of the stockholder as a whole? You started out saying that this case attracted you because it looked like a majority sale situation.

MR. WEISER: Right.

THE COURT: And the fact that there are large stockholders involved is a problem when there is a conflict, which is present in a squeeze, or in a situation where the large stockholder gets differential consideration, or where the large stockholder has differential incentives. Otherwise, the fact that the large stockholder is getting the same deal is a positive.

MR. WEISER: And that's ultimately what we determined in connection with discovery. As Your Honor is well aware --

THE COURT: So there turned out not to

be any problem with that.

MR. WEISER: Correct. And perhaps I should have been more clear with that to begin with.

THE COURT: Yeah, because you said that's how you got into the case. And, look, I can understand why, early on, you see this and you see a bidder out there for nominally more consideration, and so you're curious about it. But I'm correct that nothing panned out there.

MR. WEISER: That is correct. And we really did do quite an intensive discovery process here, although the window was relatively short. We found no actual conflicts, no suggestion that anyone's interests materially diverged in any kind of way.

I should say that Company A never did make an offer, and I'm using that term quite literally.

THE COURT: And what was the reason why it didn't push for the --

MR. WEISER: Well, it did push. As we detailed --

THE COURT: Right, but what did it cite in its communications and what was referenced in background of the merger as the impediment?

MR. WEISER: I think it would be fair to say that Company A was never really interested in acquiring all of Aeroflex. It was interested in acquiring its core business and selling its secondary business.

THE COURT: Yeah. So what was the defensive impediment? What was the problem that they kept mentioning in their communications?

MR. WEISER: That they couldn't be released from their -- they wanted to be released from their NDA.

THE COURT: Yeah. Exactly. So you focused in your relief on the termination fee.

MR. WEISER: Yes, sir.

THE COURT: And getting a one-day reduction in the topping window.

MR. WEISER: That's right.

THE COURT: What indications do you have that those had anything to do with how the process played out, as opposed to the NDA, which, actually, everyone was talking about?

MR. FICARO: I'm not 100 percent sure I understand Your Honor's question. I apologize.

THE COURT: Again, that's perhaps part

of the problem.

So if I say to you, "The problem with my car is the transmission" --

MR. WEISER: Okay.

THE COURT: -- and you bring it back to me and you say, "We changed the oil and we gave you a new air filter" --

MR. WEISER: Didn't fix the problem.

THE COURT: -- you didn't fix the problem.

So I read the background of the merger. The problem seemed to be the NDA. Assuming your theory is -- and you've already told me your theory didn't pan out. But assuming your theory is that there is some divergent interest on the part of the funds, the problem that the funds are -- the defense that the funds are wielding to favor cash over supposedly a higher combination of cash and stock is the NDA.

MR. WEISER: That's right.

THE COURT: Your settlement then gives me a new oil change and an air filter. Why?

MR. WEISER: Okay. I do understand. And I do appreciate Your Honor clarifying that.

I think it would be fair to say that nothing that we turned up in discovery -- because, look, as Your Honor knows, we did tee this up for a preliminary injunction. But nothing in discovery suggested that Goldman Sachs or Cobham or anyone else was being improperly favored at the expense of Company A. And it would be my respectful suggestion that releasing somebody from an NDA, we would have required more litigation pressure than I believe we thought we had.

I agree with Your Honor in that your car analogy is very good. I agree with Your Honor that that probably was the home run relief here, perhaps, but I don't know that we had home run facts.

THE COURT: Let's get back to my car analogy.

MR. WEISER: Okay.

THE COURT: Why should I pay you for giving me an oil change and an air filter that my car didn't need?

MR. WEISER: Well, here's where I would respectfully disagree with Your Honor. To the extent that Company A was really interested, showed interest all along, we certainly opened the door for

them by some incremental amount.

THE COURT: But they were blocked by the NDA. So my car won't drive because of the transmission, and you bring it back to me and say, "I gave you an oil change and an air filter. Pay me for that."

But I say, "I still can't drive it. What value have you given me?"

I mean, look, you put time in, and that's what you did here. You put time in. But what I still have is an undriveable, broken car. You fixed something that didn't need fixing, and you're saying that it's worthy of a release and a fee. That's where I'm getting off the train, and I need you to get me back on the train.

MR. WEISER: Okay. Regarding the deal modifications -- I know Your Honor practiced for a long time -- I think the amount of leverage you have in a case varies from case to case all the time. It was always plaintiff's understanding that increasing the likelihood of a topping offer is the reason why you do one of the cases in this context.

THE COURT: Look, so far we're on the same page. I agree with that, and there's evidence

that other people agree with it too. Now there's, as I say, distinguished people who think it's manure, but leaving that aside, I will boldly continue to think that increasing the chance of a topping bid has some benefit.

MR. WEISER: Well, and I think that was what we were trying to achieve here.

THE COURT: But what you have to do is you have to explain why. Because if I am telling you that my car won't drive and we agree that it's because of the transmission -- and you've agreed that it was because of the NDA; that was very helpful -- then the fact that you have changed my oil and given me a new air filter has not increased the chances that my car will drive.

MR. WEISER: Here's where the car analogy I think may break down, Your Honor, in that we don't really know exactly what was in Company A's -- they were not party to this litigation. And as Your Honor knows, there are many different reasons why a company may or may not be interested in acquiring some or all of the business.

And regarding the NDA specifically, I think it would be fair to say that perhaps from the

company's perspective that --

THE COURT: Look, from my standpoint, maybes and perhapses -- I don't know anything other than what you've given me. What you told me is you did very thorough discovery.

MR. WEISER: We did, in a relatively short window, but yes.

THE COURT: So this is all stuff that, again, before you come in and tell me that you ought to be giving a global release, big give -- I mean, a global release is global. Again, as our Chief Justice stays, "intergalactic." Big. Huge. You're giving a global release. Right? Before you do that, you ought to look into these things. And you ought to have an informational basis from which to make a decision.

The question is what's the informational basis on which you concluded that this was good stuff?

MR. WEISER: Your Honor, to the extent that the Court's question is "why isn't the relief better?" I think my answer is I don't think we were in a litigation position for them to drop the NDA.

THE COURT: That's not the question. The question is "Why is your relief worth anything at

all?"

MR. WEISER: Because a long line of authority from this Court suggests that if you modify deal terms that increase the likelihood of a topping offer, it's valuable. And, in fact, it's highly valuable because, again, we don't know exactly what was in Company A's mind other than the fact that --

THE COURT: This is another -- again, I'm blanking on the transcript. I don't have all my transcripts committed to memory. And I know I'm not supposed to refer to transcripts, but this is another Vice Chancellor Strine -- might have been a Chancellor at the time -- situation.

He had a situation where just like this, people came in and said "Oh, we got great relief. We lowered a termination fee."

He looked at the proxy statement. He saw, as here, there's a majority stockholder. And he said, "You know what? When you've got a majority stockholder, that's a big impediment. It's convincing that guy to sell, not whether you have opportunities to top or anything like that."

And I don't remember whether it was that he didn't approve it or he just cut it

dramatically, but he recognized that it wasn't relief.

MR. WEISER: I would respectfully disagree, Your Honor. And I don't have --

THE COURT: But the reason you're respectfully disagreeing is because of Rumsfeldian absence of knowledge. We just don't know. And it's possible that this could have had some effect.

MR. WEISER: Without breaching a settlement confidence or anything of that sort, I would feel comfortable representing to the Court that to the extent that that idea was on a settlement table, it was either rejected out of hand or it wasn't considered seriously. If you're asking plaintiff why they never demanded it or never thought about it to begin with --

THE COURT: No, I'm not asking you that at all. I'm asking you what is the benefit of what you got me.

Again, you bring me back my car and you've given me a new air filter and an oil change, and it was only like 1,000 miles since the last air filter and oil change. And I'm asking you, you gave me something. I didn't need it and it doesn't benefit me because my transmission is still broken. So you've

brought me something. No question you brought me something. And you brought me something that the defendants were willing to give. So why is what you brought me worth anything?

I mean, it's like you brought me a voucher for an airplane ticket that can be used for a free ticket for someone who is 13 or under. I'm not under 13. So I look at you and I say, "Yes, this might be worth something to someone, but what's it worth to me?" And that's the situation we're applying here.

Yes, in some grand cosmic sense, getting reductions in termination fees and even potentially a shortening of a match right might, in some situations, be worth something to someone. It might be worth a lot of things to a lot of people in the right circumstance. But why here does it have any causal benefit whatsoever when you've got, A, a 76 percent stockholder; and, B, a bidder who is saying, "The impediment to our bid is an NDA because we need to talk to somebody about acquiring one of the businesses and we can't do that with the NDA"?

And you're coming in and saying, "Well, look, we can't do any of that stuff, but we got

you a reduced termination fee and one day shorter on the match right."

So I'm not asking you why you didn't ask for things. I'm not asking why the defendants didn't give them. I'm asking you why is what you got worth anything? Why isn't it a voucher that somebody who is under 13 can use for a ticket when I'm multiples of that age?

MR. WEISER: I respectfully disagree, Your Honor. I mean, doing something like cutting the termination fee when you have a third party lurking could be enough to make them, you know, get in the game.

And, again, it's like I don't know what Company A's motives were all along. It appeared that they were interested, but they never made an offer. The board, the Aeroflex board, had a firm no-strings offer in hand that it was prepared to accept. We didn't find any conflicts of interest with respect to the transaction itself. And Company A was talking a lot. And what it would have ultimately done, we don't know, other than the simple fact that it never did make a topping bid.

I do wonder if the Court's comments

from a moment or two ago are, with due respect, are a little inconsistent, perhaps, with some other things the Court said at other points in time, which is that you assess the value of the relief at the time it was entered into and not --

THE COURT: That's what I'm doing.

MR. WEISER: -- and not after the fact.

THE COURT: So at the time, at the time, you've got a bidder that's saying it's the NDA. Nobody is saying it's the term fee or it's the four days instead of three on the matching rights.

MR. WEISER: Right.

THE COURT: And what I'm also saying, which I think is consistent with Compellent, is you just don't get to make categorical claims about these things.

One of the big criticisms of Compellent is I spent so much time in that case going through the specific features of the deal protections.

MR. WEISER: Right.

THE COURT: And I did that because I am not one who adheres to the notion of garden-variety packages of deal protection measures. I don't think

there are such things. I think these things are very carefully crafted. I think they work differently depending on the combinations and they work together. And you can't just come in and say, "Hey, I've got a term fee. I've got a match right. These things happen all the time. This is run-of-the-mill stuff. Let's get going."

Likewise you, as a plaintiffs' lawyer, can't just come in and say, "Hey, it's run-of-the-mill stuff. You got a reduction. Let's get some money and give a release."

You actually have to look at the context. You have to actually look at what you got. And so I'm doing that, which is what I did in Compellent, which is what I think we're supposed to do. I'm doing that.

And what I'm seeing is you got, you know, a reduction in an already reasonable termination fee that was unlikely to be triggered. You got a day's shortening in a match right that, again, I'm not sure what benefit there was to it. What the bidder was actually talking about was the NDA. And you've already said that the board -- you found no evidence of conflict. The board was fully aligned, fully

motivated, as large stockholders. And so they could be expected to do the right thing.

That's probably the most important point here. You got in there and you found no evidence of divergence of interest. So what all that adds up to in my mind is you got nothing. That's what it adds up to, to me. You got something that is cosmetic but you got something that's, A, nothing, because the real impediment was the NDA; and, B, nothing, because this was not a conflicted board.

These are people who, if the topping bidder had been real and if there really had been value to that overbid, what you've told me is you got in there and you looked, and these guys, there wasn't a problem. And that's good. Look, I'm glad. I think most of these cases, there's no problem. But, again, what that all adds up to in my mind, that adds up to cosmetic change providing no real relief, not to great change in the merger agreement that supports settlement or a fee. That's where I'm having trouble.

MR. WEISER: I understand that. And, obviously, it's Your Honor's discretion regarding settlement approval or approval of any fee agreement. We respectfully disagree with Your Honor, especially

with the idea that this is cosmetic.

It feels to some degree that you're looking at it after the fact. You know, I'm not aware of the string of cases where, especially through an injunction stage, where companies were willing to abandon the NDA. If a case or two exists out there --

THE COURT: But nobody -- again, I'm not. Focus on the NDA, not in the sense of me telling you that it's relief you should have gotten or relief the defendant should have given. I'm not saying that. I'm saying it breaks your chain of causation. It is a supervening cause that blocked the bidder from going forward such that the changes you made have no causal effect. That's what I'm saying.

MR. WEISER: Well, you could say that in any case, Your Honor, where various relief, various deal relief, especially -- where various deal relief is enacted but no topping bid occurs.

I mean, I don't understand what makes this different in that regard than a slew of authority on the subject, because what I hear Your Honor saying is unless the thing you settle for actually caused --

THE COURT: No not --

MR. WEISER: -- an effect --

THE COURT: Had some plausible -- the causal standard you've got to clear is really low. There's got to be something.

And what I'm saying here is, look, again, if we had diffuse stockholders, if we didn't have the NDA issue, if we had things that you had some evidence of conflicts so what you got actually was providing some meaningful protection, those would all be different situations. But what you got is a 76 percent fully aligned holder, no divergent interest, no reason to sell to anybody but in the best deal reasonably available. And your answer is, "But, hey, we got this reduced termination fee."

MR. WEISER: Well, going to the merits for a second, Your Honor, I think I would also add that if we went for an injunction or if part of this is -- the Court's comments a moment ago kind of go to the "meritorious when filed," it kind of sounds like.

THE COURT: It was meritorious when filed.

MR. WEISER: I'm sorry?

THE COURT: I think it was meritorious. If you had come to the --

MR. WEISER: In other words, if we

briefed up a preliminary injunction or briefed up a motion to dismiss, on the one hand, do we think the deal suffered from a fatal conflict? The answer is no. On the other hand, was there smoke there? Sure.

THE COURT: Yeah. That's what I'm saying.

MR. WEISER: And we could talk about --

THE COURT: I'm going to stop you now.

MR. WEISER: Okay.

THE COURT: At the motion to expedite phase, yeah, I would have expedited this, because at that point, it was colorable. You didn't know that there was no divergent interest. And we had a bidder out there who was making noise about a higher bid. So, yeah, it's colorable.

If you had filed a motion to dismiss, I don't know. Now, I read your complaint. There wasn't evidence of divergent interests, even an allegation of it. So who knows on the motion to dismiss standard. But certainly by the PI, when you've got nothing, you've got nothing.

And so what I don't think you're recognizing is sometimes when you've got nothing,

you've got to acknowledge you've got nothing and just go away. You don't get to then sort of try to salvage the case and say, "Oh, but, you know, we're going to settle for a reduced termination fee." If you get in there and find out that fiduciaries have really done a good job, you go away.

MR. WEISER: I'm not sure I would go that far.

THE COURT: So you think even if there is no claim there, that it's in the best interests for you to extract a settlement --

MR. WEISER: No.

THE COURT: -- that gives you a fee even if there is no claim?

MR. WEISER: No, that's not what I'm saying at all, Your Honor. And if it came out that way, I apologize.

What I was taking issue with was this notion that the directors necessarily did a good job with their fiduciary duties here. I'm not sure about that. We have arguments. On balance, we thought the case was settleable and we thought it was a reasonable settlement.

The point I was disagreeing with a

moment ago was concluding unequivocally that the directors absolutely did a good job with complying with their fiduciary duties. If Your Honor puts it like that, I'm not as certain.

THE COURT: What was the problem?

MR. WEISER: But we're talking about matters of degree, Your Honor. One potential issue is there's some evidence that suggests that Company A reached out to Aeroflex the day before they entered into an exclusivity agreement.

Now, we deposed folks on that issue and they had varying answers. But if Your Honor is wondering about potential conflicts or favoring one party at the expense of another, we had some facts that suggested, that could have raised an inference that perhaps --

THE COURT: There was an inference you've already told me you didn't believe. So, clearly, there was differential treatment because they went exclusive and they didn't waive the NDA. So you have the fact of differential treatment. Differential treatment itself is not a breach. Differential treatment can be used for good or used for ill.

That's why when we started this, my

first question for you was -- you may have even volunteered it; I don't remember -- "Was there any evidence of divergence of interest?" Because you've got a big holder. And so unless there is divergence of interest, the big holder is aligned. The big holder is going to do a better job of policing this situation than you and I ever could because the big holder has its own money at risk.

So once we have no evidence of misalignment of interest, frankly, we are done here. And so once you reached that conclusion, you had nothing. And that's my fundamental point.

MR. WEISER: But isn't it a testament at all to our efforts in the case that defendants were willing to settle? The counsel, look --

THE COURT: No. It's a testament to the holdup value of a lawsuit.

MR. WEISER: Your Honor, this wasn't a holdup. This was not a holdup settlement by any means. The settlement is better than that and the efforts we undertook were better than that. I would strongly disagree with that characterization.

THE COURT: But you opened the door to it by saying, "Why would these defendants settle a

case they otherwise could win?" And the answer is that any lawsuit that can inflict costs on the defendant has value. That value can be in excess of the actual merit of the claim. Which, again, I think once you said there was no conflict, your case has no merit.

And once you have that -- the definition of a "holdup," it simply means -- there's holdup lawsuits. There's holdup assertions of veto rights. There's all kinds of holdups. All "holdup" means is that you have the ability to inflict more cost and pain on the other side and so they're willing to settle to go away. That is an alternative explanation that is other than your proffer and an answer to your proffered question, "Why would the defendants settle with us if our claims weren't meritorious?" That's one answer. It was cheaper.

MR. WEISER: It is one answer. And here's one thing I said at the beginning today. We pick and choose cases carefully. And I'm not going to name names or call out other people.

THE COURT: And that's great, and I'm glad you do. And you're definitely not here as often as some repeat players, and that's all a good thing.

MR. WEISER: And Mr. Welch --

THE COURT: But once you get in there --

MR. WEISER: I'm sorry. I apologize.

THE COURT: Once you get in there, sometimes it doesn't pan out. And if you get in there and you find out, "You know what? These guys, they did a fine job," the answer is you reach over to Mr. Welch, you shake his hand and shake Mr. Varallo's hand and you say, "You know what? This wasn't one."

And that's why we get big contingent fees that are in excess of our hourly rate, because we pick our cases but sometimes we pick wrong, and sometimes we get in there and there's nothing there. And if there's nothing there, you know, you win some, you lose some. That's why when you win some, you get a big contingent fund.

MR. WEISER: And, Your Honor, I've done that in cases. I was specifically reminded of the backdating case, just by way of example. As Your Honor may recall, there was a lot of statistical modeling related to the backdating.

THE COURT: That's pretty persuasive in my view.

MR. WEISER: Well, but there were also a number of cases, Your Honor, where the numbers tripped defendants. And company counsel or defense counsel called us up and said, "Wait a minute. Wait a minute. We see what you see. We get it. But let us explain to you why that didn't happen here. And we understand why it looks fishy, but that wasn't the case."

Look, I personally think my firm is more likely maybe than anyone, or we're on a short list, if we're dead in the water, I think we're more likely to shake Mr. Welch's hand than maybe almost anyone. We didn't view this as that type of case. And I don't think defendants did either, Your Honor.

Like, on the one hand, Your Honor was speaking very conclusively a few moments ago about, you know, no breach. Good faith. Or you noted that perhaps the directors did a very good job here I think was the term you used. My own takeaway was that they acted reasonably. And to me, there's a gap. And I'm not trying to quibble with the Court regarding language, but we are in the language business to some degree, and I think there is a gap between a reasonable response and absolutely doing the best

possible job that a fiduciary could do. I think there is a gap between those two ideas.

THE COURT: Okay. Who is disputing that? And why is that relevant?

MR. WEISER: That's relevant because it goes to litigation risk that defendants faced at the time.

THE COURT: So all they had to show was range of reasonableness. We don't second-guess within a range of reasonableness. If a nonconflicted fiduciary makes reasonable decisions, particularly where they had their own money on the line, it's something that this Court defers to. So that's my point.

My point is once you come in and you say, "Hey, look, we looked at this. Large holder. No conflict. Yeah, you know, I might have done something different if it had been me in there. I might have picked a different -- but these guys had a lot of money and they had a reason to maximize it. We can't find any reason why they didn't." My point is simply at that point, you're done. I mean, there is no reason for anybody to second-guess that.

MR. WEISER: And I don't know that --

and, again, this goes back to what people were thinking and doing almost a year ago, almost this time last summer.

THE COURT: That's why I'm asking you. You're the one who knows. And what you came in and told me was that's what you found out. So I'm believing you. I'm taking you at your word.

MR. WEISER: That's what we ultimately concluded, Your Honor, that it was a reasonable settlement. In fact, we believed it was a good settlement. And --

THE COURT: Well, it is a good settlement when you have nothing. It's a great settlement when you have nothing.

MR. WEISER: Well, thank you, but I don't think we had nothing, Your Honor. For example, one of the big investors that made up the 76 percent group that you're referring to was a Goldman Sachs investment fund.

THE COURT: I know. They were the advisors.

MR. WEISER: And Goldman Sachs was the banker.

THE COURT: Show me the misalignment

and how you diligenced it and what conclusions you came to.

MR. WEISER: Perhaps under some scenario Goldman Sachs could be more interested in protecting its banking fee or more interested in the deal that's certain versus not.

THE COURT: So that gets you past a motion to expedite. Who knows? Depending on how fleshed out it is in the complaint. I actually don't remember seeing that, what you just articulated, in the complaint. You talked about Goldman Sachs being the advisor but I don't think there was actually a spelling out of the conflict. But I agree with you, that's conceivable.

But now you get in there. You've had the benefit of discovery.

MR. WEISER: Right.

THE COURT: You've seen that, and you've come in and told me, "You know what? Wasn't there." That's great. We're happy. As Americans, we're happy. People did their jobs. Right?

MR. WEISER: Well, I felt we were doing our job last summer, that we were trying to get -- we haven't even talked about the disclosures at

all, Your Honor. And I understand that you think regarding the financial terms of the transaction that we, you know, fixed your air conditioning instead of changing your muffler. I understand the -- or the transmission, rather.

Going back to where we were last summer, we thought the deal modifications were valuable. We thought the disclosures were equally valuable. In particular, we really focused in the proxy regarding the conflicts of interest or potential conflicts of interest that existed at the time of the transaction.

THE COURT: And, again, what you found was that there was no problem. So here's the disclosure. During the two-year period -- here's the additional disclosure. "During the two-year period ended May 19, 2014, the investment banking division of Goldman Sachs has not received any compensation for financial advisory and/or underwriting services provided directly to Cobham and/or its affiliates."

So what you did was you got in there and you looked. And I'm fully in favor of that. As I said, I would have expedited. I think you initially had colorable claims. But you got in there and you

looked, and what you found was nothing to see here. Right? That's what this says. What this says is "has not received any compensation." What this says is, "Nothing to see here, folks. We were worried about it and there wasn't anything."

MR. WEISER: Although I would also add that Cobham got brought into the process by Goldman Sachs, which wasn't disclosed in the initial proxy. And Goldman Sachs considered them a client even though they hadn't actually paid them any fees in connection with anything. In other words, we reached a conclusion that, on balance, these were good settlement terms and this was a reasonable result for this case.

I guess one of the things I'm struggling with is the idea that we were dead in the water the moment we discovered that Cobham hadn't paid any fees to Goldman. We respectfully --

THE COURT: You are Mr. Extremist. Everything I have put in as a consideration for a factor, you have framed in the most extreme way possible. No one is saying you were dead in the water as soon as you found out that they didn't pay any fees. The point is that that was the disclosure. You

didn't disclose anything of any conflict whatsoever. And so it's consistent with your original statement that there was no divergence of interest. It's not that that one thing makes you dead in the water. It's that you didn't find anything.

MR. WEISER: Fair enough. Although again, like, in an adversarial process, we're not certain how Your Honor would have looked at some of these facts. And, again, you know, I've been right enough and wrong enough times to know that if you come in for a PI, you don't know what's going to happen.

Again, going back to a discussion from a few minutes ago, one of the things I started with today is that I don't file these garbage, junky cases. When those cases are filed, you get what Your Honor described as the garden-variety disclosures that clearly are not material and you get a $200,000 fee that's at some risk because everybody knows you didn't do anything and everybody knows you didn't put any litigation pressure on, and Your Honor certainly knows all that.

And those cases are dying. And I think that's to the good. I never understood why it was worth filing those cases.

THE COURT: Look, I'll commend you for that.

MR. WEISER: And I never thought this case was that.

THE COURT: And when you got into it, no question. But, again, then once you -- part of this is you only know what you know from the outside.

MR. WEISER: That's right.

THE COURT: And that's why it's perfectly acceptable. And I certainly am not criticizing you for filing this. As I say I would have expedited this. You guys agreed to expedition. I think that was a very reasonable approach. There was a higher topping bid out there or a facially higher topping bid. There was cash and stock. So there was a question as to why people were sticking with the lower cash value deal instead of going with the higher value deal. There was a question there. There was a litigable question.

But then you got in there and, again, I just -- I'm fine with it. You guys found that there was nothing here. You found that people did not have a conflict. And that's what drives our law. We are worried about people having conflicts. If it is an

independent decision-maker, the independent decision-maker gets to make the decision.

So you found out. You got in there. You're like, "You know what? Independent decision-maker." So at that point, I'm glad you triage at the front. That's great. Pat on the back. Good stuff. But you've also got to triage once you get. Because sometimes you get in there -- and, again, you say you do this -- but sometimes you get in there and you're -- all I'm saying is that when I look at this and I look at the facts, as presented, I read the proxy statement, I look at what you got, I don't think you had anything. And I think you knew you didn't have anything.

I think that's why the defendants gave you the sleeves off their vest in terms of the term fee and the one-day reduction, because while the case might have had legs when you first got into it, this was Oakland. There was no "there" there.

MR. WEISER: Well, Your Honor, a few minutes ago, you said that, essentially -- well, I don't want to be too extreme. You suggested that one of the possible -- one of the reasons for this possible outcome was that the case was a holdup. You

also suggested a few minutes after that that it's a great result because we had zero and we had some kind of settlement anyway.

You know, without trying to sound too corny, I wonder if the middle ground isn't the ground that you stand on for something like this. Look, I don't -- what I mean by that --

THE COURT: You don't understand how it can not be a great case --

MR. WEISER: I'm sorry?

THE COURT: You don't understand why it can be a great settlement relative to the nothing you had and yet still be the product of the type of holdup-type pressure where defendants see it as cheaper to settle than litigate?

MR. WEISER: Could be both. You're right. I made it a binary choice but, really, it's mixed in.

But I think one of the -- getting back to legal standards for a second, you know, one of the things that the Court is supposed to consider in connection either with a settlement or fee is opposing counsel. And I'm going to suggest to you -- and Your Honor knows these garbagey settlements better than I

do. You know, I would suggest that Skadden Arps, Richards Layton, those guys don't roll over. They didn't treat this as a rollover case. They must have thought they faced either a huge tax or some litigation pressure.

And, you know, would it be fair to say that -- would it be fair to characterize it at the time as some litigation pressure? I would respectfully submit that it was. You know, was it tremendous pressure where they were running for the exits? No. Was it a complete flyer that -- nobody was acting -- this time last year, last August, nobody was acting as if our claims or a PI were one in a million. It was something between we were rolling them and having a puncher's chance that our litigation pressure was somewhere in the middle of those two extremes, to use Your Honor's term. And we thought it was a good result for the time. We continued to think it was a good result.

I think it was a testament to our skill because, to me -- and the reason why I fall on that, not only is it in my own interest, but, to me, this doesn't look like a holdup. This doesn't look like holdup relief to me.

THE COURT: Look, it doesn't, but your brief didn't really put it in context either. Your brief talked about, you know, reduction in the termination fee and shortening of the match right.

And I read the proxy statement. And when I read the proxy statement, I saw a line of people, actual pre-signing process, although they eventually did go exclusive, but actual pre-signing process, exclusivity, and focus on the NDA, and no indications of misaligned interests.

So, I mean, when you put it in context -- like, yeah, you're right. When you first look at this thing, you think, "Wow, they got some deal protection reductions. That ain't bad."

MR. WEISER: Look, I hear Your Honor. And, you know, one of the things that I was thinking about, I told you, we were even reading Compellent last summer --

THE COURT: I apologize for that.

MR. WEISER: No, no, no. And, frankly, I thought it was --

THE COURT: Don't say anything nice. Nobody will believe you.

MR. WEISER: All right. Maybe after

today, somebody would.

You know, I thought it was high time that somebody tried to, like, value these different ideas. And that, to me, was the most fascinating part of the case. But also the idea in Compellent that they got them to drop the rights.

Even Your Honor said -- I don't want to misquote the Court, but Your Honor's comment was, "It was excellent." "Unusual" I think you wrote at one point.

THE COURT: Yeah. I think I said something like "rare in the annals of the court's law." The only time anybody had ever enjoined a rights plan in the injunction phase was the good Chancellor Allen, and he almost caused heart attacks to sprawl across the New York corporate bar, and it generated the Lipton memo. So the idea that people would agree to that kind of relief, that was relatively impressive to me.

MR. WEISER: And I agree. And I would say that Chancellor Allen opinion you referred to I believe was like nineteen eighty --

THE COURT: Interco. '88.

MR. WEISER: I was going to say '88 or

'89.

Would getting them to release them from the NDA be the home run? Would that be the thing that was most directly -- if part of this is asking plaintiff to acknowledge that the most direct line between the two points, what appeared to be the problem, and the solution, the potential solution to that problem, plaintiff would acknowledge that that was the most direct line between those two points.

And earlier, if I was suggesting otherwise --

THE COURT: No.

MR. WEISER: -- I'd like to clarify that.

THE COURT: I don't think you were suggesting. I was trying to focus in on that and trying to say that's the causal connection.

MR. WEISER: And maybe that was the best relief. Maybe that would have been the best deal modification, especially before an injunction hearing.

And going to my point a moment ago, you know, I felt like we had some litigation leverage last summer. Respectfully, perhaps that's home run relief. I can't think of a case -- Jimmy would maybe

know better than me. But I can't think of a case where somebody dropped their NDA absent an order of the Court, at least recently.

THE COURT: Well, depends on what you mean by dropping your NDA. If you mean releasing people from "don't talk, don't waive," that is actually becoming the thing. It did happen specifically I think in Ancestry.

MR. WEISER: Okay.

THE COURT: So those are some examples of that. I mean, this would be something similar. You didn't have to do a full-blown release where they could have gone hostile on you or something like that. But there might have been something targeted like "Hey, you're saying you need to talk to financing sources or potential people about acquiring this one business. We'll let you do that but, otherwise, you're still locked."

Again, my point is not to second-guess the nature of the consideration that you got versus what you should have gotten. What I am evaluating is the value of the consideration that you did get. And given the fact that there was this much bigger named impediment out there, it seems to me that the value of

the consideration that you did get is minimal to nonexistent.

We'll change our analogies here. Since we're talking about Revlon and Unocal and things like that, we'll go to the medieval analogies of the barbican and the portcullis and the moat and all that type of stuff, when you think about Unitrin. Right?

You had these problems. You had the barbican, the portcullis and the moat. And outside of that, you had some stakes that were sharpened and pointed the way of the bad guys. What you got them to do was take down the stakes.

Is there some value to taking down the stakes? Yeah. Look, it would have been a hassle to go over the stakes. But you still had the moat, the barbican and the portcullis. And Company A here kept saying, "Look, guys, it's the portcullis."

And so when you come in and say, "Hey, I got you the stakes," I look at it and I say, you know, "Steaks would be nice. I like mine medium rare. That's good, but all you did was deal with the stakes."

MR. WEISER: And dealing with the stakes seemed like the best option we had at the time.

THE COURT: No, no, that may be true. It's just a question of why you should get paid for it and be able to give a release for it. I'm not quibbling with the fact that it was the best option that you had at the time. In fact, I will fully endorse it was the best option that you had at the time.

MR. WEISER: Well, I appreciate that, Your Honor.

It's a strange situation. It's certainly not the first time this has ever happened where a company was kind of floating around a deal. And what Company A's relative level of seriousness was is an intriguing question. And, frankly, I probably spent as much time either last summer or more recently, I've probably spent as much time pondering that as anything else.

THE COURT: Really?

MR. WEISER: Yeah.

THE COURT: As anything else?

MR. WEISER: Well, regarding this case.

THE COURT: I was going to say --

MR. WEISER: No, no, no.

THE COURT: -- that would be an amazing feat. If that's the case, then you are either writing your dissertation on that subject or have a strange obsessive-compulsive disorder. But all right. Good. I'm glad we clarified that.

MR. WEISER: And here's one way to look at removing the stakes. Could we have reasonably believed at this time last summer that removing the stakes would have been enough to cause Company A to actually get in the game and make a bona fide offer? I think that was a reasonable conclusion for us to reach at that time. And that's what the weight of Delaware authority says.

On the other hand, and going to Your Honor's comments about the board's conduct, Aeroflex's board's conduct here, as Your Honor is well aware, a bird in the hand is worth two in the bush. That, to me, is one of the fundamental precepts of Delaware law when it comes to the deal arena.

THE COURT: You at least compare it to the risk-adjusted value of two in the bush. It may not be worth two in the bush but you look at the risk-adjusted value of two in the bush and you compare it to the risk-adjusted value of the bird in the hand

and you see which is better.

MR. WEISER: Or maybe here, to continue the analogy, maybe it was one in the hand and 1.2 in the bush.

I don't think you could fault Aeroflex's directors for accepting the deal where -- I know Your Honor is looking at me -- for accepting the deal where Cobham came in; there were no bells and whistles; they had a pretty short negotiation process, there were one or two little price bumps along the way; that, comparatively speaking, Cobham was acting like an inquisitive suitor.

THE COURT: To that, I say, "Right on, man." We are in full agreement on that. The question then is what does a lawyer in your position, representing a class of stockholders, do? Do you then say, "Wow. I got a weak hand, but I'm going to settle for what I can"? Or do you say, "These guys did a good job. I'm going to call up Mr. Welch and Mr. Varallo and I'm going to say, 'You know what? We're pulling out on this one' because I know we're going to get multiples in successful cases, and part of the price of that is that sometimes we get nothing"?

MR. WEISER: I don't disagree with Your Honor's principle. I didn't think this was that case, truly. And I couldn't be more sincere than that. And I would slightly restyle the question that you phrased a second ago by saying, could the class benefit from the settlement here, either through the enhanced disclosures -- which we think are collectively material, by the way. We spent very little time talking about the disclosures. We actually think there were material disclosures here and we do not think they are the cookie-cutter disclosures that sometimes are the settlement consideration. And we thought by removing the stakes, we thought the class benefited.

That was the -- so it's interesting, it -- and, again, this may be -- maybe it's not a binary choice where we know we're absolutely going to win the PI versus having so little as to be meaningless. You know, maybe the question that should be asked is can we benefit -- can we potentially do something that would really benefit the class? If so, I think it's my fiduciary duty to try to do that, as class counsel. And I think the rub is is the relief benefiting the class? I think if it does, then you're

absolutely doing your job and you would be remiss to just take a pass.

And I would be curious to hear what defendants thought about the litigation pressure, again, kind of at this moment in time last summer. Because I thought it was -- there was enough of a risk and not just a tax, but a risk.

THE COURT: If that's the signal for the handoff, let's do it, because we've been having this dialogue for about an hour now and we need to move on.

MR. WEISER: Sure.

THE COURT: Defendants are normally not accustomed to adding anything. Do you all feel the need?

MR. WELCH: Your Honor, may I have a moment to consult with Mr. Varallo?

THE COURT: Why don't we take 7 minutes. We'll come back at 10 after, and you all can let me know if you feel that you need to add anything to the proceedings.

MR. WELCH: Your Honor, thank you very much.

THE COURT: Certainly.

MR. WEISER: I would be happy to discuss the fee if you think it's appropriate, Your Honor.

THE COURT: We're going to take our break.

MR. WEISER: Okay. Thank you.

(A recess was taken.)

THE COURT: Welcome back, everyone.

Mr. Varallo, you seem to have the conn.

MR. VARALLO: May it please the Court Gregory Varallo for Aeroflex and its directors. I begin by introducing my colleague from New York, Michael Swartz from Schulte Roth & Zabel who has come down to visit with the Court this morning.

THE COURT: Thanks for coming down.

MR. VARALLO: Your Honor, I'm going to be very brief.

Mr. Swartz and I had the benefit of being in the boardroom when this deal was approved. We gave advice. We looked our clients in the eyes and we were able to share with them whatever modicum of learning we have amassed over the years of practice we've been privileged to practice.

And, you know, Your Honor, you asked a number of very interesting questions of my friend from the plaintiff's side. From our perspective, it's a fundamentally simple question. At the point at which the deal was struck with the plaintiffs, were there claims? Yes. Were they weak? Yes. Was consideration given? Was valuable consideration given to the class? The answer is yes.

I understand that Your Honor, through Your Honor's questioning, that you have questions as to whether or not the consideration matched up with the concerns expressed by Party A, but there are a number of things that are set forth in the proxy that I would like to focus Your Honor on about Party A just for a moment.

Party A, for whatever it did and whatever it said, it didn't seem to be able to get its act together. There was no real bid made by Party A. Party A was not discriminated against. Party A was part of the process, was invited to make a final bid, and could have made a final bid at any point in time.

THE COURT: They were justifiably discriminated against.

MR. VARALLO: Correct, Your Honor, but

this was not a circumstance where we turned our backs on Party A for all time and we shut them out of the process. This wasn't a capable and reputable bidder in there who knew how to do its thing, who otherwise complied with the rules of the road and then was just cast aside.

As the proxy articulates, Your Honor, the numbers put on the table, never a formal bid by Party A, but the numbers put on the table were up to X dollars. We're going to pay so much in cash and then up to X dollars on top of that. This was a capable and well-advised board. And when it was faced with a decision as to whether to continue a dialogue with someone who couldn't even make a binding proposal as opposed to a dialogue with someone who had cash, they chose cash.

Now, Your Honor, the question you framed today really had to do at the end of the day with was there sufficient consideration to release the claims that are in litigation?

THE COURT: And anything that could have been in litigation.

MR. VARALLO: And anything that could have been in litigation.

And, Your Honor, do we want a release? You bet we want a release. And why? We want a release because we gave consideration. Whether or not Your Honor thinks it's the best consideration, the fact of the matter is that this termination fee was cut almost in half.

Was it reasonable to begin with? You bet. We thought it was reasonable. Did it become more reasonable? Yes, it did. From an economics point of view, was it more likely with a lower termination fee that someone would have come in? Yes. Because, by definition, we're imperfect.

THE COURT: You have the benefit of the choir on that one.

MR. VARALLO: So, Your Honor, we live in a world where we selected the bidders. We went out to the bidders, Goldman Sachs, who we thought were most likely to come in and buy this defense contractor. We went out to 15 of them. But were we perfect? Is it possible that there could have been someone in some corner of the world we hadn't talked to? Absolutely.

And by reducing that fee, did we make it theoretically more likely that they could come in

and make a topping bid? As a matter of economic fact, we did. That is value. We gave it up. It's out there already. The class benefited from that. And we're standing before Your Honor today asking for the benefit of that value, that is to say, a release.

In the circumstances, it's up to Your Honor to decide whether to grant that or not, but I rise only to suggest that the plaintiffs did add value here. It may not have been as much value as in other cases, but it was valuable. And we would suggest and the reason we signed the settlement agreement is because we believe it was valuable enough in the context of a weak case to get the release.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Welch.

MR. WELCH: Good morning, Your Honor.

THE COURT: Good morning.

MR. WELCH: I guess it still is the morning, in any event.

THE COURT: I hope that doesn't mean you plan to take 45 minutes.

MR. WELCH: I have no intentions, Your Honor, of doing that.

I'll be very limited in my remarks. I would say this, Your Honor. In a perfect world, when a company decides to explore a potential merger, you go forward, as Mr. Varallo just pointed out, and you explore your alternatives. You do the best job you can. You get down to negotiating with one party, two parties, or more. And, ultimately, you follow that process and you let the stockholders vote.

The difficulty is this is not a perfect world. When a deal gets announced, lawsuits get filed. Lawsuits got filed here in New York. Lawsuits got filed here in Delaware. Lawsuits get filed. And it's incumbent upon the defendants, be they the buyer or the seller, to have to deal with those and to recognize that there's a risk analysis that's built into all these various components, as Mr. Varallo pointed out.

I would join in the notion that Mr. Varallo asserted that was there value provided here with respect to the consideration? I think absolutely there was. Indeed, it might not be, you know, materially different, although the nature of the weak claims might be different, and I'll certainly join in that, because we thought the claims were weak

as well. But is there value, like in the other cases where this Court has approved a settlement and, indeed, has granted a full release? I think there's much to be said for that, Your Honor.

Delaware offers a solution to the conundrum that folks like us, when we're representing either the buyer or the seller, are faced with. You're faced with litigation in New York. You're faced with litigation in Delaware. You're faced with claims which you may have powerful views that are just not meaningful claims and they're not particularly valuable but, that said, Delaware offers the solution. And it's a good thing for Delaware. There's precedent here --

THE COURT: What is the solution?

MR. WELCH: Well, the solution is -- and there's a lot of cases that have approved settlements very much like this one.

THE COURT: I thought you were talking about forum selection provisions.

MR. WELCH: No, sir.

THE COURT: That is something that we now offer, and it's been statutorily affirmed, but --

MR. WELCH: Absolutely, Your Honor. I

agree.

THE COURT: -- to the extent that it's the settlement route, that's not Delaware-specific. People can settle anywhere.

MR. WELCH: Understood, Your Honor. My only thought is that there is case after case after case where this Court has said consideration like this is valuable. And under the circumstances --

THE COURT: Right, but we're talking about something different now. We're talking about whether this is a unique Delaware solution. And it doesn't seem to me that this is something -- look, there may be states that want to be in the business of facilitating file on every deal, settle on every deal situations. I don't get the impression from our Chief Justice that that's something we want to be in the business of.

MR. WELCH: I get the same impression, Your Honor.

THE COURT: We want to be in the business of seeing good cases litigated, and we don't want people to file junky cases.

MR. WELCH: I understand that, and I'm also mindful of Your Honor's dialogue with plaintiff's

counsel going forward. All I'm saying is there was value provided, as Mr. Varallo said. Was there value? Absolutely. Should we get a full release in exchange for that value, as has occurred and did occur in so many of these other cases, by Vice Chancellor Strine, by --

THE COURT: Everybody. You'd have -- me. Not that that matters. Everybody. We've all done it. No question.

MR. WELCH: Yes, sir. Yes, sir.

So I would respectfully request that a full release be entered and that Your Honor approve that.

THE COURT: All right. Thank you.

I'm going to go ahead and give you my ruling now.

Today's hearing is so that I can consider the proposed settlement of the class action in Acevedo versus Aeroflex Holding Corporation. This litigation concerned the acquisition by Cobham PLC of Aeroflex Holding. Aeroflex was the surviving entity in the merger but emerged as a subsidiary of Cobham.

Mr. Acevedo filed this class action on June 3rd, shortly after the announcement of the merger

agreement, perhaps a little bit longer than is often the case -- it was about, looks like, three weeks -- alleging that the board of directors of Aeroflex breached their fiduciary duties and that Cobham had aided and abetted the board's breaches of fiduciary duties.

Tom Turberg, who is actually a repeat player -- he's a guy that I've had as a plaintiff in front of me -- Tom Turberg filed a similar class action in the state of New York that same day, but that case was stayed pending the final resolution of this case.

On July 3rd, Aeroflex filed its preliminary proxy. On July 14th, the plaintiffs amend the complaint to allege omissions of material fact from their preliminary proxy. They also sought to enjoin the merger.

So the motion for a preliminary injunction was filed on July 24th. On August 15th, so, again, about three weeks later, the parties reached an agreement in principle and entered into a memorandum of understanding for the settlement. At a special meeting held on September 10th, the merger was approved and it closed on September 12th.

The plaintiffs have conceded and stated in the stipulation that they believe that all material facts were provided to the stockholders in connection with that stockholder vote.

The usual tasks for settlement approval are class certification, a review of the adequacy of notice of this hearing and the settlement, settlement approval, and the award of attorneys' fees. I can dispense with all but the third, approval of the settlement, because this is not a settlement that I can approve in its current form.

I will begin by acknowledging what Mr. Welch ably points out, which is that this is the type of settlement which courts have long approved on a relatively routine basis. The main components of these settlements are the following:

First, the defendants, defined broadly to encompass anyone having anything to do with the transaction, get a broad class-wide release that extinguishes all claims against them. Not only all claims that were asserted in the litigation but all claims arising out of or relating to any of the facts and issues that were in the litigation or in the complaint or in the documents referenced in it. And

it usually goes on much further than that.

Since the complaint is based on a proxy statement and the public filings related to the deal, that is a truly expansive scope of relief. Our Chief Justice has appropriately described those types of releases as "intergalactic" in scope.

The second major component is that plaintiff's counsel gets substantial attorneys' fees. Here, the amount that the defendants agreed not to oppose was $825,000. That was $825,000 for three weeks' work.

The class in this situation gets nothing. Zero. Zip. The only consideration they theoretically get is therapeutic relief. Usually that means only disclosures. Here it means disclosures plus two tweaks to the merger agreement.

As indicated by Chancellor Allen in a 1995 decision involving Solomon versus Pathe Communications, we have long permitted these types of settlements, largely out of sympathy for the defendants. It has long been thought, particularly after the Supreme Court's decision in Santa Fe Industries, also a 1995 case, that you didn't have much of a chance on a motion to dismiss in an enhanced

scrutiny case. In other words, without a settlement, there wasn't any way for the defendants to get out of the case without costly litigation. So these types of settlements essentially seemed like a necessary evil. And since the plaintiffs weren't asking for much in fees, it didn't seem to be much of an evil at that.

But we've learned a lot since 1995. One of the things we learned was that with easy money to be had, M&A litigation proliferated. I won't repeat the statistics. They are common knowledge by now. And fees climbed.

Just before I joined the Court, one could regard the going rate for a disclosure-only settlement as having climbed to between 700 and $800,000, nearly double what it had been three to four years before. The statistical studies by the professors don't show that big a change. That's as much of my impressionistic view of where the asks were and where the agreements were as anything else but, certainly, the fees were creeping up.

We also have learned a lot more about the negative effects of this type of litigation. For example, as shown by Professor Steven Davidoff Solomon and his co-authors, Professors Fisch and Griffith, the

disclosures provided by these settlements do not provide any identifiable much less quantifiable benefit to stockholders. Instead, the ubiquitous merger litigation is simply a deadweight loss.

Perhaps more importantly, in my view, the omnipresent litigation undercuts the credibility of the litigation process. When every deal is subject to dispute, it is easy to look askance at stockholder litigation without remembering that stockholder litigation is actually an important part of the Delaware legal framework.

Routine settlements also mean that some -- indeed, probably many -- cases that should be litigated actually don't get litigated because once you get in the habit of settling everything for, to use Chancellor Allen's phrase from Solomon, "a peppercorn and a fee," you're in the habit of doing that.

We also now know that the intergalactic releases extinguishing all claims cover a lot more than anything that the plaintiffs ever have time to or do diligence in the short period between the time of filing and the time when these MOUs are agreed to.

If the acquired company faced pending or potential derivative claims, then the combination of a global release of individual claims plus the transfer of control provides virtually blanket protection against any type of recovery.

If the acquirer issued stock to fund the deal, the global release provides protection against claims under Section 20 of the '33 Act. The global release also provides protection against claims under the '34 Act. The global releases have been invoked to block antitrust claims.

In other words, what we thought was a nice way of getting rid of meritless Delaware litigation, in fact, sweeps much more broadly and has overall significant deleterious effects leading to the types of levels of litigation documented by Professor Davidoff and by the Cornerstone Research studies.

And I think, worst of all, it undercuts Delaware's credibility as an honest broker in the legal realm. When directors hear that although they've run a pristine process, have no conflicts and, really, in their view, have done nothing wrong, yet are being sued in multiple jurisdictions and facing multiple complaints, they understandably say, "Who is

running this show? What is going on here?"

So, in other words, what we've learned is that routine approval of these settlements carries real consequences, all of them bad. Personally, I think that when one gains new information, one should take into account the new information.

The other thing that we now know is the trap that defendants traditionally faced in which they really had no way out of these lawsuits is no longer a trap. We've come a long way since Santa Fe. We now know that you can get enhanced scrutiny claims dismissed at the pleading stage, and it's not so hard. You can do it under Section 102(b)(7). If there's been fully informed stockholder approval, as there was in this case, you can do it under the business judgment rule.

You've always been able to get the sort of "tell me more" type disclosure claims dismissed. Post-closing, we now know that the plaintiff not only has to show materiality but also causation and damages. One of the things that the Davidoff research tells us is there are no damages. And it's not that expensive to file these motions.

So what all that tells me is that the

trend in which the Court of Chancery looks more carefully at these settlements is a good one. We also have seen this trend in other jurisdictions where other courts who haven't seen the steady progression of these settlements and haven't gotten used to approving them have looked at them and said, "Really? This is what you're briefing?" So we have high-profile decisions coming out of outer courts, respected courts such as the state courts of New York, saying, "This just does not make sense."

So, as I say, I think it's important to continue the trend that Chief Justice Strine embraced and really led when he was on the court of looking carefully at these settlements.

Here, the claims the plaintiffs advanced would have warranted an expedited proceeding. It was a cash deal calling for enhanced scrutiny. There were allegations that a higher bidder was being excluded from the process. There was an inference sufficient to state a colorable claim that the board was using the NDA to hold the line against a topping bid. But once the plaintiffs got in and evaluated the case, there was nothing to support it. And that's not too surprising. There were big economic incentives to

maximize value on the part of the defendants.

In that sense, this was a case that's very similar to Synthes. The company's largest stockholder was VCG Holding, which owned 65 million shares representing 76.3 percent of the outstanding voting power. VCG was an entity held by the following funds: Veritas Capital Partners; Golden Gate Capital; GS Direct, a private equity arm of Goldman Sachs; as well as some insiders: Leonard Borow, John Buyko, other officers and directors. These are people who one might think had strong incentive to maximize the value of their stock.

Now, there could have been reasons for divergences of interest. One might have discovered, for example, through discovery, that Veritas or Golden Gate had some interest in cash over a mixed cash-stock deal because they had some differential reason involving their funds. People seem to do things when they're in the harvest period. There is an urgency for a sale that isn't there at other times. Or maybe, as the plaintiff suggested today, Goldman Sachs would have been incented by its deal fee, and that could have undercut the incentives of its stock ownership. Or maybe the insiders had some reason to favor a

particular bidder.

So at the colorable claim stage, at the motion to expedite stage, those were all things worth looking at. I don't fault the plaintiff for filing this case. I'm glad Mr. Weiser doesn't file junky cases. I'm glad about that. And I don't think initially this was a junky case. But once you get in there and find out that there isn't any misalignment, I think you've done your job. Once you find that there is no evidence of divergence of interest, as was conceded this morning.

This is one where you took the shot, it wasn't a bad shot to take, and it didn't pan out. And that's why you get high contingent fees in other cases, because not all of your cases pan out.

And I think the fact that there really wasn't anything there comes through in the settlement consideration. I have looked at it, I have thought about it, and I've thought about it from precisely the point of view that Mr. Weiser advocates and which I think is correct. The question is, can we do something to help the class? Is this settlement in the best interest of the class?

And part of what I looked at, at

least, was the match between the claims that were asserted and the relief that was obtained, the match between the potential problems with the deal and the relief that was obtained, and the match between the types of the claims and relief and the scope of the release.

Here, there were two buckets of consideration. The first was two modifications to the merger agreement. One was a reduction of the $32 million termination fee by 40 percent, so $14 million reduction. In addition, there was a one-day reduction in the time period for the match rights, from four days to three.

The plaintiffs have analogized this to Compellent and said, "Hey, these are big gets. You've got to award a big fee."

I am not one who thinks you just put labels on things and then say, "Oh, you got a reduction in defensive measures, and that's great." I think you have to look at these things in context. That's what I took the time to do in Compellent. That's what I think you always have to do.

Here, you had a big holder with 75 percent, approximately, of the stock. You had no

basis to believe there were divergent interests. The company ran a real process. There was no reason to think that the board would not do the right thing in this situation.

There is also no reason to think that these actually were the impediments that were blocking Company A. What Company A said is that it wanted a waiver of the NDA so it could talk to somebody about partially financing its bid through a sale of one of the company's business units.

So there is no match between the problem that's in the proxy statement; i.e., Company A -- and, again, I'm not saying it's a problem. I credit that, given the fact that these were fully aligned people, they were making judgments about how to maximize their interests, and there's really no reason to think that they weren't properly incented to get the best deal. And, hence, their refusal or decision not to waive the NDA was something that fell within the range of reasonableness. But if you assume otherwise and you want to focus on the NDA as the problem, it's the NDA that was the problem. It's not the termination fee or the period of time for the match rights.

The other bucket of consideration is supplemental disclosures in the proxy. These supplemental disclosures are precisely the type of nonsubstantive disclosures that routinely show up in these types of settlements. I will disagree with Mr. Weiser on that.

Essentially, what the disclosures say is, "We looked and there wasn't any problem here. There wasn't any problem with any differential interests on the part of the financial advisor. There wasn't any problem with the deal." In fact, the plaintiffs represented that their financial advisor internally advised them that the value of the deal was within the range of fairness.

I don't think this relief is sufficient to support an intergalactic release. I don't know what's covered by an intergalactic release and I don't think the plaintiffs know either. I think what we know is that there was essentially, once they got in there, no merit to their Delaware breach of fiduciary duty claims. I don't think we know anything else beyond that.

I also think that rather than supporting a global release, what the relief here

arguably did was render the plaintiff's claims moot. Certainly that's true on the disclosure front.

So I will give you two options going forward. I will not approve the settlement as framed.

One alternative is that you could reframe this as a mootness dismissal. The plaintiff would say that its claims have been rendered moot. Its enhanced scrutiny claims were rendered moot by the discovery record and certainly rendered moot by whatever the value of the relief was. And its disclosure claims are concededly rendered moot because the plaintiffs have said that all information, material information, was provided to stockholders.

If you want to go that route, you can follow the procedures discussed in Advanced Mammography and elaborated on by Chancellor Bouchard and others.

Or if you want to come back with a release that's limited to the Delaware fiduciary duty claims; i.e., just the enhanced scrutiny breach of fiduciary duty claims and the disclosure claims, that would be a release that would match up with what the plaintiff actually investigated, what they actually addressed, and would not have these problems of

providing protection against a vast universe of unknown unknowns.

There, of course, is another alternative. The defendants could simply move to dismiss. You could essentially write me a two-page motion that says "Malpiede." Because you've got a fully informed stockholder vote that's concededly fully informed. That lowers the business judgment rule. It's all business judgment now.

Now, I wouldn't really want you to write that short a motion. I'd actually like to you do something that does a little more of my work for me. I'm a lazy person. But short of that, I mean, I don't feel at all that I'm putting you in any bind by not approving this settlement, because to get out of the case at this point, given the plaintiff's concessions, all you need is that motion to dismiss.

Now, you'd still have to, I think, pay a fee because you have agreed that there's some value to this stuff, and you did moot things out, but that would be a different question.

So those, I think, are your three choices. I'm not approving the settlement. You can do it as a mootness dismissal and I don't need to be

involved anymore except to the extent of the Advanced Mammography procedure. You can come back with a settlement that limits it to the Delaware breach of fiduciary duty claims. Or you can simply move to dismiss. But there is no reason for this case to go on and burden you all in any way. I don't feel like I'm putting any imposition on you.

I do want to talk a little bit about attorneys' fees. I think the merger agreement modifications here had very little value. What I tried to show in Compellent was not that the value of these things was really big but, rather, that these changes had to be heavily discounted.

So what you had here was basically a $14 million reduction. What the data from several decades of topping bids shows is that in any deal, you have about a 5 to 10 percent chance of a topping bid. So right off the bat, you have to discount the $14 million face benefit by that amount. So you're in the 1.4 to $700,000 range.

But then what I said in Compellent is it's not that. I used that full figure in Compellent because we went from there being no chance of a top to some chance of a top, so it was appropriate to use

this full historical amount.

You're looking at the delta. And, here, I think the delta was negligible. And the delta was negligible because the problem facing Company A was with the NDA, and you already had a termination fee that was pretty reasonable. So what are you going to say the incremental value here was? I don't know. Maybe 1 percent? Less than 1 percent? Very small.

Then you take the fact that this case settled early, so you're in the 10 to 15 percent stage as a percentage of the benefit. And when you add all those things or multiply those things out, you get to a fee for the merger agreement changes that's, what, like 50,000? 40,000? It's very small.

As to the disclosures, I continue to take responsibility for advocating the $500,000 baseline. I did that because I thought that the fees awarded for disclosure-only cases were driven by this hydraulic process of "sue on every deal" and were getting out of whack and spiraling out of control. But the $500,000 fee, it wasn't intended to be a number for all time, and it wasn't supposed to be something that would displace case-specific analysis.

I've looked at these disclosures. I

don't think there is anything here of any moment. To the extent that there were projections and enhancements to the banker's valuation, et cetera, this was a deal where there was a process, a real process. And this is a deal where the big boys, the big holders, the big boys and girls -- I shouldn't be sexist -- were getting the same consideration. That tells the stockholders infinitely more about whether this is a good deal or not than some additional numbers in the banker's analysis. So, again, what do you have here? Perhaps 200,000-ish? It's certainly a low-end disclosure fee.

Now, I know that has not made anyone happy. I obviously haven't made the plaintiffs happy. They're very disappointed. I haven't made the defendants happy either. They don't get their global release. And I'm sure that the expert attorneys who were in here advised their clients that this was a good settlement and a good fee range, and so now I've undercut their credibility. So I apologize to you all for disappointing you all around, but this is the type of settlement that I cannot endorse.

You have three paths for dealing with this case. You can choose any one of them. I'm happy

to see you back if you need me. But I will enter an order denying the final order so that you have it on the record.

Thank you, everyone. We stand in recess.

(Court adjourned at 11:45 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 79 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 9th day of July, 2015.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter