IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ARUBA NETWORKS, INC. : CONSOLIDATED
STOCKHOLDER LITIGATION : C.A. No. 10765-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, October 9, 2015
10:00 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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SETTLEMENT HEARING and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
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THE COURT: Welcome, everyone.

ALL COUNSEL: Good morning, Your Honor.

MR. ANDREWS: Good morning, Your Honor. Peter Andrews, Andrews & Springer. We're here today for the final approval of settlement in the Aruba Networks consolidated litigation.

I'll make some introductions. To my left, with your permission, Mr. Nespole will be arguing from Wolf Haldenstein.

MR. NESPOLE: Good morning, Your Honor.

MR. ANDREWS: To his left is Mr. Don Enright from Levi & Korsinsky.

THE COURT: Good to see you.

MR. ENRIGHT: Good morning, Your Honor.

MR. ANDREWS: Mr. Kevin Cooper from Wolf Haldenstein, and my esteemed colleague, Brian Long from Rigrodsky & Long.

MR. LONG: Good morning, Your Honor.

THE COURT: Welcome to all of you. I'm happy to get under way unless --

MR. SORRELS: Your Honor, good

morning.

THE COURT: Good morning.

MR. SORRELS: Brad Sorrels from Wilson Sonsini Goodrich & Rosati on behalf of Aruba Networks and the director defendants.

MR. DUPRE: Hello, Your Honor. Andrew Dupre, McCarter & English for Hewlett Packard. And I have with me, from Morgan Lewis & Bockius, Marc Sonnenfeld and Laura McNally.

THE COURT: Good morning, Mr. Sonnenfeld. How have you been?

MR. SONNENFELD: Well, Your Honor. Good morning.

THE COURT: Things still chugging along up there?

MR. SONNENFELD: Very well.

THE COURT: Good.

MR. NESPOLE: Your Honor, may I approach?

THE COURT: You may.

MR. NESPOLE: Good morning, Your Honor. This is the time Your Honor set aside to decide whether to grant plaintiffs' request for final approval of the proposed settlement and our request

for fees in the Aruba Networks litigation.

May it please Your Honor, I'd like to address a few housekeeping matters before we get to the substance of the discussion, including what Your Honor put in the scheduling order about the Aeroflex decision, which we're prepared to discuss at length. First, Your Honor, you entered a scheduling order on July 17. Notice was in fact issued. I think over 60,000 notices went out. We have the affidavit that notice was done properly. We have no objectors, albeit one issue where one firm did contact us and request information, the Bernstein Litowitz firm. We responded. We haven't heard from them again.

THE COURT: You call that the Grant & Eisenhofer firm in your brief.

MR. NESPOLE: Both. Both firms working together, apparently, in an appraisal action as well. And we did provide them with our deps, our docs, other documents. Haven't heard from them again, and I don't think they're here and did not lodge a formal objection.

With respect to class certification, I think, Your Honor, it's a prototypical situation. It's appropriate under Delaware Chancery rules. So

unless Your Honor wants to sort of discuss the issues on class, I'd like to get to the issues with respect to the case and take on, Your Honor, issues with respect to Aeroflex and the release.

Your Honor, this case, to me, was rather interesting, because it had a personal piece to it. When I learned that HP was buying Aruba, I had known of Aruba for quite a long time based upon my working in public school systems as a volunteer. Aruba was part of a process and a program to build what they call the E-Rate system, which was going to bring internet wireless capacity into public schools; in particular, less-advantaged schools. And people were waiting for it, and so was Aruba. They were waiting for government approval. They also had this very interesting technology, the wand technology, which was ostensibly to turn the internet from a two-lane highway to a four-lane highway. My sons, I think, can explain it better.

But the point is, through one point you can operate all sorts of devices. And the folks at Aruba really were on the cutting edge of developing that technology, as well as being, really, one of the choice entities to go to to put in the wireless

capacity in malls, hotels, universities, both in the United States and China.

So I had serious concerns, I did, from the outset, with respect to pricing. Because I thought this company had a tremendous future. We filed an action on behalf of our investor, our client. We did, in fact, move to expedite, premised upon what I perceived as initial pricing concerns.

THE COURT: So just pricing initially?

MR. NESPOLE: Initially just pricing, because I hadn't yet seen the definitive -- I hadn't seen the proxy. Where the process concerns came to light --

THE COURT: So it was a 34 percent premium. What did you think the pricing ought to be?

MR. NESPOLE: I thought, actually, based upon what I had read about, that the upside on the E-Rate program, and what I had read from a number of analysts, is what they called the Osborne effect. Namely, that folks were waiting to make orders, holding back their orders from Aruba until they saw if Aruba got the deal from the government; that there was a lot of pressure in the pipeline; that going forward in the next two to three years, Aruba would be worth a

lot more money. I'm not a banker, I'm not an analyst, but that was my reading of both the analyst reports, the company's press releases about their future.

THE COURT: So why would pricing issues have given rise to a litigable claim?

MR. NESPOLE: At that juncture, I thought the price wasn't high enough.

THE COURT: Why would that give rise to a litigable claim?

MR. NESPOLE: Well, it could if you don't think that, for example, they went out and they looked for anyone else other than HP.

THE COURT: Ah, but that's a different issue. That's a process issue; right?

MR. NESPOLE: And that --

THE COURT: And you said at the time you filed you didn't know anything about the process.

MR. NESPOLE: Not very much. Not until the proxy came out. When the proxy came out, we had even greater concerns.

THE COURT: So focusing just on the pricing issue, and not on anything that you learned later, at the time you filed, why would a pricing issue give rise to a claim?

MR. NESPOLE: Pricing issue give rise to a claim? Because frankly, I thought it was probably a breach of their duty to take the price that they were offered, given what I thought and what the analysts seemed to say the company was worth over the next several years.

THE COURT: So analyze that for me. Which duty was breached?

MR. NESPOLE: I think the breach of the duty of care.

THE COURT: You think it was a care issue?

MR. NESPOLE: Initially. Which I think might have been not exculpated if we got behind the scenes and saw they thought about really only doing a deal with HP, which is what we thought early on. They were focused on HP.

May I? Dealing -- so we continued the process. We got expedited discovery. We got documents and began to take depositions. I took Dominic Orr's deposition, the CEO of the company. And it became apparent to me quite quickly that they had a lot of problems. They had headwinds. They had a very big problem. It was Cisco. And that this company,

while it appeared to have, going forward, the best mousetrap for wireless capacity, they lacked a switching partner. And they needed to find a switching partner to grow.

And based upon my analysis, discussions with our expert, reading more about the company, I was fairly convinced that they probably were capped, going out over the next few years, unless they found some sort of partner to provide it with the switching they needed to bring the wireless capacity that they were developing. Not yet fully developed.

THE COURT: So you described, on page 14 of your brief, the discovery that you conducted as involving extensive document review and deposition taking. Does the modifier "extensive" apply to both document review and deposition taking?

MR. NESPOLE: Took two depositions before -- before the signing of an MOU.

THE COURT: So you see where I'm going with this. That's what you call "extensive"?

MR. NESPOLE: I think 12,000 documents, on an expedited basis, taking two depositions within a week of getting the documents, one of them being someone like George Boutros of

Qatalyst -- who is a very, very smart man. It was a tough deposition. I think that's extensive work.

THE COURT: All right. That's -- look, it's good to know what you think is extensive. That's what I'm asking.

MR. NESPOLE: I agree with you. There's --

THE COURT: No, look --

MR. NESPOLE: There's all sorts of degrees of extensive. But I think during the truncated period of that, where I was running around the country taking the deps, writing the briefs on the plane, dealing with guys like Boutros at Qatalyst -- who is not an easy guy to depose. In fact, we videotaped it, because he and I have had some very interesting depositions.

THE COURT: I read it. I'm glad you videotaped it.

MR. NESPOLE: Okay.

THE COURT: So what I'm hearing you say is that the 12,000 documents and --

MR. NESPOLE: Pages. Pages, Your Honor. Not documents.

THE COURT: 12,000 pages. Okay.

Yeah.

MR. NESPOLE: The record should be clear. It wasn't --

THE COURT: 12,000 pages and two depositions is supportive of your characterization of that as "extensive"?

MR. NESPOLE: Coupled with the two thereafter depositions of an outside director and Mr. Francis of Evercore, who was critical --

THE COURT: Well, page 14 was talking about your pre.

MR. NESPOLE: I then stand by it. I think that the two depositions taken in that truncated period, the document review, the analysis of the company's documents -- because the 12,000, I think, is not inclusive, for example, of thumbing through all their Q's and K's.

Your Honor, I --

THE COURT: Was it all internal documents that they produced?

MR. NESPOLE: They probably, as always is the case, produced the merger agreement, which one can get off the SEC. So in terms of netting out of the 12 what I could have probably found in the public

domain, I can't tell you. But for the most part, no. Of course it was bankers' books, it was e-mails, it was correspondence, it was presentations to the board.

They -- they know that we're capable of going on the SEC website and finding those materials, and they're not going to necessarily Bates stamp them and send them to us. But they have -- I mean, I can't remember exactly if they gave me the MOU -- excuse me, the merger agreement. They probably did. And so 150 pages, of the 12.

But if I may, when -- sorry.

THE COURT: I'd actually like to know.

Defendants --

MR. SORRELS: Yes.

THE COURT: Was it all internal documents?

MR. SORRELS: So I guess if the question is was it limited to documents that were back and forths with the bidder, it's not. It --

THE COURT: No. Mr. Nespole -- we started this dialogue -- I'm sorry. I always pronounce the "e," and apparently I shouldn't. Mr. Nespole told me that, basically, the 12,000 pages of documents should be viewed favorably as supporting

a characterization of "extensive" because it was really all internal documents. And I'm curious about that.

I know that there is the customary production, but I also know that it's nice to be able to cite big numbers. And so one of the things that people do is they produce a lot of documents, including stuff that can be described as chaff. And so what I am trying to find out here is did you guys -- and if you did, that's great. If you did, it's consistent with Mr. Nespole's representation. If you did, did you only produce internal documents that couldn't otherwise be located, like the proxy statement or the merger agreement or things like that?

MR. SORRELS: Yeah. I can confirm there was no chaff. It's possible, as Mr. Nespole mentioned, that we produced the merger agreement, but --

THE COURT: I'm calling it chaff. Did you produce --

MR. SORRELS: We produced all internal documents.

THE COURT: It was all internal?

MR. SORRELS: That's correct.

THE COURT: All right. Great.

MR. NESPOLE: May I?

THE COURT: Yeah. You don't have to ask me every time.

MR. NESPOLE: I'm not sure if you want me to continue or there's another question.

So I did take Mr. Orr's deposition. During the course of it, I learned quite quickly they had a problem. They had a probably which actually augered against my thought the price ultimately should have been higher. The problem was that over the next couple years, they were going to tap themselves out. They did not have a switching partner. Hence, the reason why they were seeking someone else.

I remember asking in the deposition, "Who is your biggest competitor," and Mr. Orr said "Cisco, Cisco, Cisco." I think I even asked, sort of with a smile on my face, "Did you ever think about merging with Cisco?" And the thought of it was abhorent to him, so they sought a merger partner -- indeed, HP -- because they needed an HP to grow.

That gave me some pause. Gave me some pause on the pricing issue. But during the course of this deposition, and then when we received --

obviously we received the proxy before -- an interesting disclosure issue, an interesting conflict issue arose. For some reason, Your Honor, in the middle of the process, though Qatalyst was engaged, Mr. Stu Francis of Evercore -- used to be at Barclays -- was retained to be the face, to be the front person, to be the negotiator.

And the proxy was pretty silent with respect to why that suddenly happened. There was just a note in the proxy that there was a statement during a board meeting whereby the decision was made to retain Evercore, Mr. Francis. And that became something I thought was interesting. Did it have an effect on price? And we had some initial concerns that the people at HP, premised upon the deposition of Mr. Orr, had said, "We're not negotiating with Qatalyst," for whatever reason.

THE COURT: That's what they did say, right, based on the deposition of Mr. Orr?

MR. NESPOLE: Pretty much, yeah. Pretty much. And the reasons we found out was there was bad blood. They went back to probably Ms. Whitman's tenure at eBay.

THE COURT: That's what you were told

in the deposition. So, I mean, why are you qualifying this as suspicions and probably? That's actually what the answers were in the --

MR. NESPOLE: Well, because I -- that's what they told me. And there was also, I guess, some static and some stress concerning the Autonomy transaction, and we explored that. And the concern was that, premised upon that issue, was HP exerting unnecessary and undue pressure on Aruba to get a better price? And I think that was a reasonable concern.

But when you look closely at the proxy and do the math, after they retained Francis -- and we did ask those questions, "Did you vet Francis with Whitman and her team?" And Aruba was very -- very specific, as was Qatalyst, "No. We informed them we were retaining this person, this bank, and that was it." Mr. Francis came in, and in the nine or ten days he was there, I believe that the ultimate price achieved was, I think, $108 million more that was on the table than before Mr. Francis came.

We also continued to explore what happened. Qatalyst remained behind the scenes. It took the company around to different potential

partners. It ran analyses on possible stand-alones, which was not a viable option, given what we just discussed. They needed a partner. We explored whether or not Mr. Francis's prior relationship with Barclays, who was the banker to HP on this deal, was potentially a conflict. My deposition of Qatalyst and Mr. Orr, and thus confirmed later with Mr. Francis, convinced me it wasn't, and Mr. Warmenhoven, who was an outside director, who really was very much the business person who was working with Mr. Orr, who really is a brilliant engineer.

And I was fairly convinced. I was convinced that that had no effect on price. And frankly, at the end of the day, Your Honor, it was very interesting, should have been disclosed, but was probably more deal-book chatter than it was necessarily a governance issue. But it should have been disclosed and it was disclosed.

And indeed, what we achieved -- our disclosures are, I think, three-pronged. One of them is greater disclosure with respect to why the folks at Aruba went out and retained Mr. Francis and Evercore. Secondly, disclosure with respect to Evercore's prior -- excuse me, Barclays' prior relationship with

Mr. Francis and HP.

But then the other thing that was very interesting that we unearthed during discovery, and particularly Mr. Orr's deposition and in the docs, which was not in the proxy at all -- the proxy led one to believe that they only began negotiating Mr. Orr's and his inner circle's retention with HP sort of right at the end of the process, when they asked in February of '15 to amend a confi so that HP could speak to Mr. Orr and his guys and gals. And then it says in the proxy that after the deal was announced, they had more formalized discussions.

Well, we found that that was -- it was inaccurate; that from day one, back in '14, when HP and Ms. Whitman and Mr. Neri, I believe, her assistant, began speaking to Orr and his group, it was apparent that HP wanted Orr and his group, because they needed their expertise. Now wait. Why is that actually important in this, as opposed to any other case where, "Okay. Great, great. You got a disclosure that they spoke to this guy earlier on"?

Well, the real reason why HP wanted this company -- other than the tech, which is still in development -- is the people. Because HP could buy

this business, but they couldn't develop this business. They couldn't develop this line of technology. They needed Orr and his people from day one.

And I thought it was important the proxy actually disclose that that was a consideration from day one, that HP was looking to buy the company and retain these people to develop the company's tech. So I thought that was a little bit more substantial, Your Honor, than, "Oh, we just got more color with respect to when discussions happened."

I think here we got more color as to when they had begun and why it was significant that they began then. Because from day one, everyone at HP knew the only way to get this deal done was to find a way to do it to keep Orr and his people. Orr had sold other companies, had retired before, had gone into private equity; I think actually took a year or two off and taught. So there was some concern that he was going to sell and leave. And that, I think, was not viable for HP. I mean, they need him to develop. They're not in this business per se. They needed him. So I thought that was significant.

So we got more color, I think

significant color, on that issue. I think we vetted and had disclosed more detail with respect to what initially looked really suspicious -- i.e., Qatalyst and Ms. Whitman -- but I think, at the end of the day, again, it was just more it wasn't that -- it was interesting, but I don't think it really changed the landscape. And as I said before, I think Francis came in and helped get more money for Aruba stockholders. That sort of augers against the theory that Francis wasn't -- and Evercore wasn't really working hard for the people at Aruba.

We also got additional disclosures, Your Honor, on some of the comparables. It's -- there was the medians and the means were disclosed, but we got more granular detail, as one can see in the 8-K, about the comps that were used, and there's more detail. For example, some comps were not -- their details weren't necessarily implied -- excuse me, implied into the analysis, and we got that disclosed. I think that's okay. I'm not going to tell you that's an A plus disclosure, Your Honor. I'm just not -- I've read the case law. It's not. But I think it was important.

But I think the other two were

significant, given the case here. One, we recognized that we had, I think, some issues proving that the price was ultimately unfair. I think the price fell within the realm of fairness. I think Mr. Boutros was very clear with respect to that. He explained away, quite frankly, one of the issues that several arbs have called me about; namely, why Qatalyst uses such a high dilution factor in its DCF -- and they do. They're known throughout the industry as doing that -- I think a 29 percent dilution factor, which obviously lowers the overall cash flow figure. When you bring it out and you bring it back, you have this lower range. He explained it very well why they do it.

THE COURT: Actually, he spent most of the time telling you that you didn't understand it.

MR. NESPOLE: But that's the fourth time in a deposition he's told me that. And -- and --

THE COURT: I mean, it wasn't like he sat down and explained it. He didn't parse through a bunch of issues. I mean, you just said he explained it very well.

MR. NESPOLE: I understood it when he was done. And I think that it was -- I understood it, why he did it. And I think when he says that in their

professional judgment at Qatalyst and Quattrone and the guys who invented it, it's tough to say that I, or anyone else necessarily, can look at Frank Quattrone and the guys at Qatalyst and say, "All right. In your professional judgment, you shouldn't do it that way." It's a high figure. I've seen it --

THE COURT: So you think they invented the idea of handling dilution that way?

MR. NESPOLE: No. I don't think they invented it.

THE COURT: You said they invented it.

MR. NESPOLE: They said they invented it?

THE COURT: No. You said.

MR. NESPOLE: They invented it using a higher figure than I've seen other people use. And their view is in the tech business, the tech industry, where they are focused out in San Francisco, for the most part, that remuneration is mostly in the form of stock. And these types of companies require that type of dilution figure. It's not a -- you know, it's not a -- it's not General Electric. It's not even Microsoft anymore, which doesn't remunerate people like that so much.

His view is these tech companies do it that way. And he did it in this case, and he did it in the case earlier in the summer where I deposed him. I probably shouldn't get -- because it's not in front of Your Honor. I don't think it's in front of Your Honor. And they used the same percentage in that case with another tech company on the West Coast.

THE COURT: Who are your financial experts?

MR. NESPOLE: We used -- was it Nat Morris or Travis Keath?

MR. ENRIGHT: I believe it's Travis Keath.

MR. NESPOLE: Travis Keath from Value, Inc., in Texas. He's very smart. He does a lot of these cases.

THE COURT: The stipulation refers to "experts" in plural.

MR. NESPOLE: Yeah. I -- we also spoke to other people. We spoke to an accountant, who I spoke to to help me go through some of the numbers, which wasn't -- he wasn't remunerated. We have an in-house financial analyst from Wharton at Wolf Haldenstein who helped me break down these books. So

yeah, I would deem, for example, that gentleman as an expert on, for example, reading Q's and K's.

But Mr. Keath is the person who really broke down the books.

THE COURT: But if I were reading the paragraph in the stipulation that says that you engaged and consulted extensively, "The Plaintiffs engaged and consulted extensively with their respective financial experts," plural, the financial expert that you engaged was singular. This guy with the very fine name Travis.

MR. NESPOLE: Well, it's poor wordsmanship, and I apologize.

THE COURT: Well, no. It's a representation about what you did, and it has to be accurate. Because it's not poor wordsmanship to imply that you engaged and consulted extensively with multiple financial experts if, in fact, you engaged one and, you know, happened to have these other guys around.

MR. NESPOLE: I would say we retained and remunerated one and we consulted with others. And I suppose you're right, that's not engagement. I apologize to the Court.

THE COURT: Well, look, I just want to understand what happened. And that's one thing that jumped out at me, and so I'm glad that's your answer on it.

MR. NESPOLE: Not to fence with Your Honor but, you know, Keath does have staff. He's not the only person we worked with there on the matter. There are also accountants and the like. But I understand your point.

THE COURT: Keath?

MR. NESPOLE: Travis Keath, the Value, Inc. fellow. But I understand your point, and it's -- it's well -- it's understood.

If I may talk a little bit about why I think we're very different here than Aeroflex, if this is the appropriate time. The release that we negotiated is -- is very carefully worded. It is only on behalf of stockholders for a very limited period of time. It is not going to eliminate any securities fraud claims --

THE COURT: So you didn't compare the language of the stockholder reference in your release to the language in other releases, including the Aeroflex release. Is it different?

MR. NESPOLE: Is it different? I can't tell you offhand, standing right here, word for word if it's different.

THE COURT: So how do you know that by saying "stockholders" in this case, you actually achieved something different and more limited than what's in virtually every release we see?

MR. NESPOLE: Because we actually, I think, closely vetted whether or not there were "unknown claims," even though I --

THE COURT: That's a different issue. Right now we're talking about your first argument which was, "Hey, we're doing a good job, Your Honor, because we set out and we limited the release only to capacity of stockholders." And so what I asked you is, focusing on that issue, how is that different from other releases out there? Not if we shift to another issue, as to unknown claims, but focusing on that issue.

MR. NESPOLE: I suppose the language, then, is probably quite close to other releases that are before Your Honor. But I think the background -- I think the work to get to that language, what we did to make sure that language was appropriate, I think,

sets it apart.

THE COURT: Elaborate on that for me.

MR. NESPOLE: Yeah, sure. With respect to what might constitute -- we're very careful to, again, make sure that the language, whether or not it comports with this release or that release, dealt only with this case. But --

THE COURT: But we're shifting now to the scope.

MR. NESPOLE: I --

THE COURT: But as to stockholders, as to the focus on stockholders, what you basically gave me on stockholders is, "Hey, Your Honor tried to explain in Activision the limitation of the stockholder concept."

MR. NESPOLE: Uh-huh.

THE COURT: And so I'm focusing right now on the stockholder chunk of the release. I'm not focusing on the unknown claim chunk of the release. I'm not focusing on the laundry list of items, romanettes (i) through whatever, that define the scope of the release as it applies to this case. I'm focusing on what your first argument was to me, which was, "Hey, Your Honor, we did a great job here,

because we took to heart the need to limit these things by focusing on what it meant to sue in the capacity of stockholders."

MR. NESPOLE: Right.

THE COURT: And that's what I want to know. I mean, did you limit anything there, or is this the same type of language I see in all these?

MR. NESPOLE: I think it's the same type of language, but --

THE COURT: So why did you tell me you limited it?

MR. NESPOLE: Because we limited it -- I can't speak to the other -- in this, it's limited to stockholders for a very specific period of time with respect to the merger claims.

THE COURT: So now we're going to shift to the other two. So let's shift --

MR. NESPOLE: I'm sorry I'm conflating them. I am.

THE COURT: Well, there are three issues in your brief. When you put your brief in front of me, your brief makes three separate arguments. And your first argument, which is one of the most -- you know, certainly it gets equal weight,

is, "Hey, Your Honor, it's all good here, because we read Your Honor's decision in Activision and that alleviates any concern we might have had about broader releases. Because by definition, a release that's limited to stockholders can't release these securities claims, can't release these other things, so it's all great."

So that's what I'm trying to push on. I'm trying to push on is this, like, undiscovered wisdom, that we have been worried about this aspect of this release for a long time and, really, because of a trial court decision -- because remember, that's a trial court decision. It's not Delaware Supreme Court. That's one member of this Court. Because one member of this Court tries to reason through, in Activision, what it means for Delaware stockholder claims to pass from one to the other, this is now sort of the insight that solves the problem.

MR. NESPOLE: Your Honor, Aeroflex, Aeroflex -- we're saying Activision, but we're --

THE COURT: Yeah. Because you cited Activision.

MR. NESPOLE: Oh, I see. I see.

THE COURT: Activision is the case

that you relied on.

MR. NESPOLE: Uh-huh.

THE COURT: To say, "Your Honor, 'stockholders' is no longer a problem anymore because it's 'capacity as stockholders.'" Is that new to you?

MR. NESPOLE: No, no. It's not new to me, Your Honor. I think -- and I'll say it again. I think you're right. The language of this release probably comports with the language of the releases Your Honor has seen in this courtroom for years. But given what I have read, especially in Aeroflex, is the concerns as to why a release should be entered into. The relief that one achieves to justify the release, the looking behind the scenes with respect to the possibility of unknown claims and other claims that might be released by something where I have not necessarily achieved what might be perceived as a tremendous result for class -- namely, a price bump -- that all of that, the fact that -- yes, that language probably does comport with the other language you've seen.

THE COURT: Okay. Great. Then we can move off that.

MR. NESPOLE: Fine, then. Fine.

THE COURT: See, I'm going through the issues in your brief and trying to perceive where you're coming from on them. So we can take that issue and we can set it aside. And we can accept that, for that one, there's actually no difference.

So now let's move to the second one which you want to talk about, which is the narrowing of the scope. And the limiting to what was at issue in this case. Tell me about that one.

MR. NESPOLE: We were very careful, again, with the definition of the class. The class period, what was --

THE COURT: How does the definition of the class period differ from what I understand?

MR. NESPOLE: I would think the class period on an M&A case is almost always similar, but I have seen efforts in other courts to -- other courts, not Delaware -- to try to open up that class, to try to get people who have had other claims pending out there swept in.

THE COURT: I don't think you've ever seen that in Delaware.

MR. NESPOLE: Not in Delaware. Not in Delaware. I've seen it elsewhere.

THE COURT: I've seen it a lot in Delaware. I've seen defendants reaching back to the start of the earliest date referenced in the proxy, and I see plaintiffs signing off on it. Again, you didn't do it in this case.

MR. NESPOLE: I haven't done it. Ever.

THE COURT: I'm not saying you have done it. You said that you've never seen it in Delaware.

MR. NESPOLE: I've never seen it because I haven't done it. I haven't done it.

THE COURT: That's great. All right. So relative to the overreach, but in terms of what your date range would be in an M&A case, what did you guys use?

MR. NESPOLE: I think we used the -- what? The date of the announcement to date of the final close. I need to check.

THE COURT: So how does that differ from other releases I've seen?

MR. NESPOLE: Other releases have tried to open up well before when there was an earlier -- for example, in this case there was a

negotiation as early as 2014. And one could try to say there might have been some sort of misrepresentation back then concerning what was said during that process. I mean, the proxy is pretty clear they were talking. I'm not trying to release anything with respect to that.

THE COURT: Is it narrower? Did you -- again, the premise, at least I thought, was "Hey, we did something narrower here." So your point is you didn't overreach, but did you carve back on what would be customary?

MR. NESPOLE: What would be customary for me, no.

THE COURT: Okay. So now let's go to the third one. Is the third one scope of unknown claims?

MR. NESPOLE: We can finally get to that, yeah.

THE COURT: Why don't we talk about that.

MR. NESPOLE: We analyzed that closely. We took depositions. I took depositions of people who, frankly, if there was a reason to think there was a serious fraud claim out there, I think I

would have unearthed it. Because, frankly, I've done 10b-5 cases for a long time. I went back into the company's stock price, looked for anything that looked like inflation premised on misstatement. Couldn't find any. There were no curative disclosures with respect to what looked like malfeasance. There was a drop a few months back in the stock's price, but it was a function of earnings.

The statement before that drop in the earnings was not overly bullish. It didn't even, you know, rise to puffery. So I could find no -- and there was no offerings to give rise to a 33 claim. A derivative claim obviously would be extinguished. There was no reason to think there was any sort of double-derivative or anything else out there. There was no antitrust claims that we're aware of.

With respect to any patent litigation these people may have at Aruba -- and there's a -- I'm sure there's a few of them, I think -- we're not releasing those. We were careful to make sure that any language that we put in the release had nothing to do with that. Indeed, I'm sure if we had tried, there would have been a great deal of noise from all sorts of different angles.

But, you know, we -- I did it. I went back and I looked carefully to make sure there was nothing there.

THE COURT: I just want to understand what the argument is.

MR. NESPOLE: Your Honor -- I'm sorry.

THE COURT: The argument is not that your definition of unknown claims is tighter or different. The argument is that you believe that you investigated?

MR. NESPOLE: Your Honor, that's correct.

THE COURT: All right.

MR. NESPOLE: And I -- I think I did. I know I did. That's how we got to that release. And it was hard-fought. It was --

THE COURT: So it's not that you tailored the release. It's that you used the same release, but you think you diligenced the case?

MR. NESPOLE: Yeah, Your Honor. I think that's fair.

THE COURT: All right. Because, I mean, the brief I got said you guys tailored the release. And so I spent time thinking about whether

you actually tailored the release.

MR. NESPOLE: I apologize to the Court. It --

THE COURT: No, look --

MR. NESPOLE: If it wasn't written well, I do -- if it wasn't written well --

THE COURT: It's not a case of whether it's written well or not. It's the case of actually telling me what you did.

MR. NESPOLE: See -- may I? Having read Aeroflex closely a couple of times, it seemed to me as if it wasn't just a mechanical analysis of "There's the release, this is what was achieved." It struck me as if the whole process now here, it was bigger. It was a -- this whole concept, you had to take it all in at the same time. You had to assess the release, the language, relative to what you learned during the case, what you should have learned during the case; what, if you were diligent, you should have learn during the case.

And then, when I came to you and said, "Your Honor, we achieved something here" -- not to get up on a box and say, "Oh, we gave you the sun and the moon." I read very carefully the references to

transmissions and tires. But to come to Your Honor and say, "We achieved, I think, some significant things. That's what we got for the stockholders."

In exchange, we gave these people a release. And the release wasn't just automatically a function of what we got for the stockholders. It was also a function of our diligence, to make sure that we weren't giving anything away that, frankly, they didn't deserve.

And also, I read Aeroflex to -- and I'm told by some of my colleagues I'm reading it too far, and I guess I'll find out. But in Aeroflex there was an argument that doesn't happen here, that the relief brought in support of the settlement was, I think, two prongs. It was matching rights and reducing a topping fee, when the motion to expedite argued that there was a controlling stockholder and there was a third party that was locked up. He was shackled.

So when counsel walked in here and said, "I have this relief for you and I want 800 and some-odd thousand dollars for it" -- big number. Big number. "And the relief is these two things." And Your Honor said to him, "That's great.

Congratulations. But there's only one person in the world that could avail himself of that, or itself of that, and you didn't do anything to unshackle that investor. You left him tied to that confi, that nondisclosure, whatever he was tied to. So thanks. You brought the stockholders this terrific relief. You want a release. You want to get paid. But nobody can avail themselves of it."

I was mindful of that from day one. I think what we got here -- see, that's why I combined the concept of the release and the relief. Here, what we got that we're giving them a release for actually has value. Is it the most significant result in the history of M&A litigation in this courthouse? I'm not going to tell you it is. One day I might, in another case. But I'm not. And that's why I asked for I think what is a modest fee, in terms of what the fees are in this state. I didn't come in here and ask for something ridiculous, because I was mindful of what we achieved.

THE COURT: Look, I think you're reading Aeroflex correctly in terms of it's a holistic analysis. Where I think you're perhaps not reading it sufficiently is part of the problem in Aeroflex was

those guys didn't tell me about the controller. They presented it as if it was an open shopping process. And part of what you guys --

MR. NESPOLE: I -- please.

THE COURT: -- part of what the generalization of the plaintiffs bar needs to recognize is you actually have to be accurate in your papers. And what I repeatedly see -- and it dates back to the first time I came down on you guys for it, which was the Revlon situation -- what I repeatedly see is people saying things in their stips that aren't accurate, and then I get briefs that aren't accurate. And they're either not accurate in an affirmative sense, in terms of saying things that aren't true, or there are big omissions. And the big omission in that case was the controller situation.

So are you right to draw the holistic inference? Yeah. But what you ought to be drawing is also what I've been calling you on, which is this stuff has to be right. And it's not just wordsmithing. You're actually here presenting me with a factual record on which I am supposed to make a decision as to whether this is in the best interests of the class.

And so I agree with you in terms of holistics, agree with you in terms of your assessment of distinctions between this case and Aeroflex. The parallel that you didn't mention, which I would hope you would draw, and your colleagues at the tables would draw going forward, is this stuff better be right.

MR. NESPOLE: I -- I'm sorry. I'm ashamed. I'm embarrassed. I really thought it was right. But you're right, the -- the word "experts," "consultants" is not --

THE COURT: If a knucklehead like me, who knows nothing about the facts --

MR. NESPOLE: Sorry?

THE COURT: If a knucklehead like me, who knows nothing about the facts, can pick out errors, I think what would happen, if you actually had somebody on the other side -- like, think if this were actually an adversarial proceeding where, you know, Mr. Sonnenfeld was coming at you hammer and tongs. When I see little errors, it makes me suspect that there's actually really big errors in here, and that if I had the voice of the defendants, they would rip this thing apart. Because again, if somebody like me,

operating in an informational vacuum, finds mistakes, it is a huge red flag.

But as to the holistic thing, you're spot on.

MR. NESPOLE: I -- again, I am sorry. I'm sorry. We -- it's taken to heart. And it's not something I'm very proud of. But --

THE COURT: Let me --

MR. NESPOLE: But I hope that it doesn't necessarily reflect poorly upon the entire body of work we tried to do here, including work closely to understand how to deal with issues raised in Aeroflex and what has become a very difficult area of the law to litigate.

So again --

THE COURT: All right. Well, thank you.

MR. NESPOLE: Thank you, Your Honor.

MR. ENRIGHT: Your Honor, might I speak briefly? Because I feel like there's a couple of issues that were just raised that I think --

THE COURT: Yeah. Come on up, Mr. Enright.

MR. ENRIGHT: -- I might be able to

elucidate on.

THE COURT: When I saw you getting pro hac'd, I thought you were going to be talking today, so I shouldn't deny you the opportunity.

MR. ENRIGHT: I got pro hac'd just in case, and I see that it may have been a good idea.

Your Honor, candidly, any errors in the brief were my fault. Okay? But I'm not sure that they were errors. When we hire an expert firm like Value, Inc., which has a lead expert like Travis Keath working on it, and then he has a staff of other people with CFAs that are working on it with him, we call them our experts. That is the normal nomenclature that I use.

THE COURT: Don't do that. Because, you know, when you're dealing with somebody who, in the litigation context -- had this gone forward and you had designated an expert, you would not have designated ten people at Value, Inc.

MR. ENRIGHT: Absolutely correct, Your Honor.

THE COURT: Right? So when I read "experts" plural, I think, all right, these guys talked to multiple guys.

MR. ENRIGHT: And to some extent we did, as Mr. Nespole said. But that language was really supposed to capture our experts at Value, Inc. To the extent that that common nomenclature, which I use often, is troubling to Your Honor, I hereby undertake to stop it right now.

THE COURT: Let's just be more accurate about it.

MR. ENRIGHT: Absolutely.

THE COURT: And the same thing. It's the pattern of overstatement. And I finally -- it took about three years, but I finally got you guys to stop telling me that you had "mastered complex financial information," when you hadn't done anything to master complex financial information. So then we worked on "vigorously," and I got you guys to back off that everything you did was vigorous.

In this one, it seems to be "extensive." "Extensive," to me, actually means you did a lot. Two is not a lot. Two is two. Three is three. Three to fourteen is a few. Two is a couple. You know? It's not extensive. It's a couple. We didn't take "extensive" depositions. We took a couple of depositions.

And you're dealing with somebody who, for better or for worse, reads this stuff. The problem is -- and I think all my colleagues, I think all judges, read this stuff. It's how quickly you read it. And if you're reading through something and blowing through it -- not blowing through it, but reading more rapidly because you don't have an adversarial presentation, it's really easy to get suckered in by plurals like "experts," by puff words like "extensive." And then, when you actually go and look at the depositions and things, you get a different picture.

And so what I can't stress enough for you guys is particularly -- and don't forget, there is a heightened professional conduct obligation of disclosure when you are in an ex parte context. And this is not a true ex parte context, the defendants are sitting here, but they have agreed not to oppose the settlement. So you are the speakers. You are the mouthpiece. Unless I break protocol, as I did today, and look at the defendants and ask them something, or unless they feel the settlement going down the tubes and they want to stand up and try to defend it, they don't say anything.

So you guys have a heightened obligation to actually be accurate. And as people who are dedicated -- I mean, the way you guys read proxy statements, I know you are dedicated to accuracy. You are dedicated to accuracy and thoroughness. You are not people that believe that things ought to be glossed over. You are not people that believe that things ought to just be sort of referred to. You don't get to turn that stuff on when you're focusing on these guys and then turn it off when you're doing your own work. All right? You're either going to live up to a standard or you're not. And so, that's what I'm saying. And actually, the obligation is higher once you get to this context, because these guys are turned off.

So that's why I keep getting up on my soap box. I've been doing it since I got here. This stuff has to be truthful. And I'm not saying that you guys are consciously saying, "Oh, I'm going to lie to Laster." I don't think you'd do that for a second.

MR. ENRIGHT: No.

THE COURT: I think there's a degree of laxity that comes from presenting these things on a relatively recurring and formulaic basis. And as a

result, I get stuff that, when I read it, it doesn't hold true to me. And then I ask you guys about it. I give you guys credit. I give Mr. Nespole credit. Now, I like it that you take responsibility for it. That's not enough. It's not enough. It's got to be accurate from the get-go.

MR. ENRIGHT: Your Honor, I can tell you that we are all extremely mindful of our obligation to be not just truthful, but direct and candid with the Court.

THE COURT: I didn't get it in Aeroflex. I got no reference at all to the controller.

MR. ENRIGHT: Your Honor --

THE COURT: And I know it wasn't your case.

MR. ENRIGHT: -- I was not in that case.

THE COURT: It wasn't your case. I'm just saying. So what I see is I see patterns of practice. And certainly, when I get in here, I will take comfort if Mr. Enright's getting up to make statements, because, you know, you've been in front of me a lot, and you've taken the hit at times. And

then, after you've taken the hit on one thing, I actually see changes in your behavior. Very positive.

MR. ENRIGHT: I try very hard to, Your Honor.

THE COURT: That's a good thing, right? That's a good thing.

So I'm more speaking as to the impression -- and I want you guys to hear it. This stuff has got to be right.

MR. ENRIGHT: So --

THE COURT: So what else do you want to cover? You stood up to cover the expert. It's a fair point on the expert.

MR. ENRIGHT: Sure.

THE COURT: Please don't do that anymore.

MR. ENRIGHT: Absolutely.

THE COURT: What else is on your list?

MR. ENRIGHT: Similarly with the "extensive" thing. I apologize for that. That's, you know --

THE COURT: Advocacy.

MR. ENRIGHT: Yeah. Advocacy that, frankly, in this context, I understand, Your Honor,

our obligation of candor to the Court, particularly in this context, requires us to be more careful, and we will be.

THE COURT: Yeah. It was better than if you said "vigorous and extensive," but I --

MR. ENRIGHT: We will be mindful of this, Your Honor. I can tell you for certain, I will make sure that we're more mindful of this, at least in my cases, in the future.

With regard to the release, Your Honor, I wrote that section of the brief personally. And I did not intend, in that brief, to give the impression that we did something -- oh, that we saw what happened in Aeroflex and we did something different. I'm pretty sure that the release that we negotiated here was negotiated before Aeroflex happened, so we could not have done that. Okay? And so I wasn't trying to say in the brief there that, "Oh, we saw what you said and we negotiated a more narrow release here." Because frankly, Your Honor, that's not what happened.

What happened here was, number one -- I'm going to blow my own horn for a second here. I am, in general, I think, more mindful about releases

than most of my colleagues in the plaintiffs bar. I've always paid attention.

THE COURT: You were early on the securities law carve-out. I'll give you that. Again, you can blow your own horn, and Mr. Nespole afterwards will be like, "Ah, come on, man. What pile of you-know-what was that?" But regardless, you were early on the carve-out for securities, and I appreciate it.

MR. ENRIGHT: And that's one thing that actually came to Your Honor's attention. That's just one thing. I actually pay attention to this language, and I always actually -- almost always push back on release language when we're negotiating with defendants in these contexts. That said, this was not trying to -- we did not try to narrow this in response to Aeroflex or any other decisions. This was, I think, a fairly standard release that was negotiated here. It is different from Aeroflex in some respects. Not with regard to the "in capacity of stockholders" language, because that was present in Aeroflex.

THE COURT: Yeah.

MR. ENRIGHT: Okay? It is somewhat different in terms of the scope of the claims release,

the limitations, as far as in relation to the merger, et cetera. I think that language is actually a little bit broader in Aeroflex. I don't think it makes a huge practical difference.

THE COURT: That's what I was going to tell you.

MR. ENRIGHT: No, I --

THE COURT: I think it's the equivalent of having a list of ten synonyms and cutting it back to a list of six synonyms.

MR. ENRIGHT: And you know, Your Honor, this is the thing about these releases that I really -- the whole reason I put my pro hac in is because I wanted to have a chance to get up and talk about this. I don't think this release is intergalactic. I don't. It has a lot of words. It's hard to parse, but it's not impenetrable. And when you actually analyze it, what ends up ultimately being released here is really what we investigated and prosecuted and litigated. Derivative claims are extinguished already. I don't believe the 10b-5 claims are released here. And even if they would be covered by this release language, we looked. There are no lost causation -- Dura Pharmaceuticals lost

causation events here that could give rise to a 110b-5 claim, and because the stock no longer trades, none can happen in the future. So I don't see anything being released here. I guess 220 actions -- the company no longer exists. 220 actions are gone.

So what's really being released here? Direct stockholder claims in connection with the merger. And that's what we litigated here. So I don't think that this is an intergalactic release. I think it's a release that is poorly worded with too many synonyms, as you say. It's hard to parse, but at the end of the day, when you really do analyze it, the release is what we litigated here.

And what really, I think, differentiates this case from Aeroflex is not the release so much, or the wording of the release, but, as Mr. Nespole said, what we did beforehand and the quality of the consideration. It's not so much the give that's different. It's just that the get here actually made a difference in terms of the quality of the disclosure. Where, as you said in Aeroflex that the disclosures there were immaterial and that the therapeutics were unhelpful, here we actually obtained disclosures that would have been injunction worthy, in

my opinion. We filed our PI brief here. We were ready to bring them before Your Honor in argument. You know, I -- I sort of even like to do that.

And I actually did win an injunction from Your Honor on that same exact issue regarding the employment communications, in Complete Genomics, that is present here. And I think that that -- here, it's arguably an even bigger get than in Complete Genomics, because here, this wasn't just supplemental. This was corrective. I believe the proxy, before we fixed it, was actually, arguably, misleading; whereas now it's truthful.

And these issues, again, involving Qatalyst being pushed into the background, that bespeaks a power dynamic in those negotiations with HP, but the shareholders really should have known, particularly given the fact that they then were talking about hiring Evercore, mentioned that to HP, got the thumb's up on it from HP.

Whether or not that was, you know, just a stray conversation or an intentional trial balloon to get a reaction, I don't know. But that power dynamic, again, a truly material fact that I think the shareholders needed to have here to

understand what actually transpired here.

And with regard to the other thing, the multiples -- well, and then the fact that Mr. Francis had actually been with Barclays, HP's banker, until five months earlier, as the head of the practice group that they were negotiating against, also obviously material in my view.

And then, with regard to the multiples, the issue there was that some of the comparable companies that were listed, they didn't actually get multiples from and plug them in. So listing those and then giving a mean and median, without disclosing that there were no multiples derived from some of the companies on the list, giving that mean and median, and without giving that information, it's misleading as to what that mean and median actually constitute. And so that's why I think we actually got real, corrective, important stuff here that just wasn't there in Aeroflex, and that's the difference between the cases. And that's why this case, this settlement, should be approved.

And that was really what I wanted this brief to convey to Your Honor. And the fact that it -- that it gave a different impression, I

apologize. That really was not what I intended.

THE COURT: No. You know, if there's one thing that was obvious to me, both in practice and certainly on the bench, is I am no less fallible than anybody else. And so I can misread things just like anybody else. I think the difference, the only difference, when I come out and berate you guys in these settlement hearings is when I feel like you're not even trying or when I feel like you're telling me things that aren't accurate. Because I may get a lot of stuff wrong, but one thing that I do know -- and again, I have a privileged perspective into what I do. I know how much time I put in reading this stuff and running this stuff down and trying to figure out what went on, despite the fact that I've got a one-sided presentation. And so it bothers me when, based on that, I feel like I'm getting inaccuracies.

Now, obviously, I don't have the same privileged viewpoint into how much you guys prepare. You-all may come in with exactly that same type of effort and feel, therefore, unjustly beaten about the head and shoulders by me when I come in. But that's the disconnect that you're hearing from me this morning, and other people have heard from me in other

cases. When I feel like I see something where people are, at least in the first instance, somewhat going through the motions, and then, in the second instance, telling me stuff that, when I look at it, I'm like, "This is not fairly reflecting what went on."

So that's what generates ire from this side of the podium. And it's probably unfair to you-all, but that's the origin of it.

MR. ENRIGHT: Your Honor, I certainly do not want to earn your ire. Quite the contrary. But one thing I can tell you is that these little items -- and I shouldn't call them little. These items of concern that you raised, the multiple of experts and "extensive," and things of that nature, I'm going to undertake to make sure that that doesn't happen. Not just in front of you, but in general, in the future. I'm going to genuinely take that to heart.

THE COURT: The great thing is you've got with you Delaware guys who probably have a majority of the market share. So at least in terms of Delaware, you have the ability to fix this.

MR. ENRIGHT: Absolutely.

THE COURT: They do. So these are not

things that ought to be recurring.

MR. ENRIGHT: But what you said earlier was that when you see little things like that, it makes you think that there are big things lurking in the background. Your Honor, I'm telling you, we might slip on a piece of puffery, like saying "extensive" where maybe that word isn't entirely appropriate -- although I do think that the discovery we took here is fully appropriate, maybe "extensive" isn't the right word. I mean, I've been in -- Greg Nespole and I did a nine-year 10b-5 case together in which we reviewed 2 million documents and took 30 depositions --

THE COURT: That's extensive.

MR. ENRIGHT: -- and, you know, recovered $45 million.

THE COURT: That's good. That's real money and that's extensive.

MR. ENRIGHT: So in the context -- but what I want to express is that we slipped by saying "extensive" there, and I apologize for that. And the nomenclature of referring to our experts at Value, Inc., when, you're right, if we actually designated an expert from Value, Inc., it would be one guy. It

would be Travis Keath. I apologize for that.

But there are no big issues lurking out there here. We take our job seriously. And I don't know if this will comfort you or not. When we're in front of you, we are really extra careful because, frankly, we're all scared of you and of -- and of doing something that will earn your ire, frankly. So we really, we did this carefully. I apologize for those two errors, but there aren't those big issues lurking from the background.

THE COURT: Well, I will try to be kinder.

MR. ENRIGHT: No, Your Honor. I don't mean that as a criticism.

THE COURT: I know.

MR. ENRIGHT: I don't. I mean simply to say we don't want to screw up in front of you, and we're very careful to try not to.

THE COURT: I appreciate that. Thank you.

MR. ENRIGHT: I have nothing further, Your Honor.

THE COURT: All right. Well, I appreciate everyone's presentations today.

I am not going to approve this settlement. First of all, I don't think the case was meritorious when filed. At the time it was filed, what the market evidence suggested was an arm's-length strategic buyer, a 34 percent premium to unaffected market price, and an even higher premium based on other metrics. Qatalyst was involved. If anybody has a reputation for driving price up as the inheritors of the "bid-them-up Bruce" appellation, it's Qatalyst. Price alone isn't a claim. You have to have something that suggests a lack of reasonableness, some type of conflict. You don't just get to come in and say "Price inadequacy. Therefore, gross negligence." That is not a claim.

Once the proxy comes out, the background of the merger section -- and here is another beef for you-all. Give me the proxy when you are presenting a settlement. You guys did attach it to the affidavit filed in support of your preliminary injunction. And so, yeah, when we couldn't find -- and I use the "we" to refer to my clerks and me -- when we couldn't find the proxy statement in the materials that you guys gave me for purposes of the settlement, then we went back and pulled it. But what

you gave me was the Hewlett Packard 10-K. It's nice and beefy. You gave me the supplement. You gave me a few other things. The first thing I read is the proxy. The first thing I read is the background of the merger in the proxy.

So anyway, when I went back and pulled the proxy and read the background of the merger, it was not suspicious. These were facts that were, as far as price claims, confirmatory. You had outgoing calls pre-deal. You had a board that actually wasn't single-mindedly focused on the deal. They took a mid-process pause that refreshes, to consider whether they should be remaining in stand-alone, before they went back and talked more to HP. It was cash, so there were appraisal rights available as a back-end check. This just wasn't something that I can understand how it attracted a type of filing that is all too common.

Then did something fall in your lap? Yeah. Something fell in your lap. You got an indication in discovery -- you got direct evidence in discovery, in the form of these e-mails -- that the proxy was materially inaccurate and misleading as to the timing of the executive talks. That was a get.

That was something that would support a disclosure-based injunction. I actually think it might support even more meaningful relief. I mean, people just don't get to put incorrect stuff into a proxy statement. And when you're signing onto that and saying it's true, I don't think the remedy is just, "All right. Well, tell the truth the next time around."

Now, is it necessarily a deal-bump remedy? A price bump-up remedy? I hadn't thought so coming in. But what Mr. Nespole explained this morning is, yeah, it could have been, because this was a situation where management was important, and management really made this a private-value situation, and so maybe it was potentially a post-closing damages situation.

But remedies aren't all-or-nothing things. Part of what a court of equity can do is tailor remedies. I just had a case where people asked -- belatedly, so I didn't give it to them, because it was too late in the process. They asked for it post-trial, which is a little late -- but they asked for disgorgement of some compensation based on what the trial record showed.

Well, if you're going to include false statements -- and I don't know what the mental state was, I don't know what the scienter was behind this -- but I do know that there was something that, in the proxy statement, implied something directly contrary to what the record showed about when the employment negotiations took place. Why wouldn't there be some possibility for some other remedy, other than just "Well, tell the truth next time"?

So I think about those things. I did think that the Qatalyst issue was more of a "tell me more" variety. I didn't think that that one could support money coming in. Right now, perhaps it could. It could lead to some disgorgement. I mean, maybe you require the second banker fees to come out, because they were essentially insisted upon by HP. I don't know. It would all depend upon what was proved at trial. But there are ways here to potentially get things for stockholders based on what you uncovered, other than the ephemeral benefits of information. Important information? Sure, but not actually anything tangible.

So what I have here, when I think about it -- and I do approach this holistically. I

do. I think Mr. Nespole is exactly right on that -- but I have a situation, when I look at it, it looks like a harvest. And when I think about why it looks like a harvest, I get initial indications of no claim. Then I thought the discovery record here was really weak. I really did.

Mr. Nespole, I know you are very experienced, but I couldn't tell what you were trying to do in that Boutros deposition. I read it. And I am not the world's greatest deposition taker -- never was -- and I know depositions are not a series of Perry Mason moments. But I couldn't tell if you were taking that like a discovery deposition, where you were trying to exhaust the witness and pin him down on what he potentially could say in terms of an affidavit or at trial. In fact, I think you affirmatively weren't doing that, because you seemed to be very targeted.

As to the things you were targeted on, I don't really get why you were being targeted. You're targeted with third-party witnesses that are not likely to come to trial. This guy was likely to put in an affidavit, if there were further proceedings, or, if there was a merits hearing, come

to trial. And the things you were targeted on, perhaps there's other areas where you do a better job questioning witnesses, but it wasn't a deposition that gave me comfort.

Nor did the other depositions give me much comfort. And so, having read those, when I juxtaposed those with the types of descriptions that I've now already discussed with you-all, in terms of "extensive" document production and "extensive" depositions, that was a red flag for me.

In terms of the presentation, there were other red flags for me. Again, nobody bothers to give me the proxy. I get a canned brief. I mean, read the statement of facts in your brief, after we get out of here, and go back and also read the Tripodi affidavit and highlight the things in there that are deal specific, like actual background fact type stuff that allows me to assess the claims you've made, as opposed to being essentially a recitation of docket entries. I think you'll find a complete absence of deal-related facts. There's deal-related facts later in the brief. There's deal-related facts in the back end of the brief. But they're not in the statement of facts.

Then, in terms of the release, I probably did misinterpret you. I thought you guys were telling me that this was a narrower, non-intergalactic release. What I understand you are telling me from this morning is actually you disagree with the term "intergalactic" and that really, unless people are being overzealous and reaching back into earlier time periods, M&A releases themselves are not intergalactic. To use Vice Chancellor Glasscock's term, perhaps they're Jovian. To use the term we all used to use, before we ventured into interstellar space and beyond, perhaps they are simply global.

Basically what this pitch was is "You don't need to really worry about anything you've been worried about." Again, I'm not buying that. I think that we have reached a point where we have to acknowledge that settling for disclosure only and giving the type of expansive release that has been given has created a real systemic problem. We've all talked about it now for a couple years. It's not new to anybody. But when you get the sue-on-every-deal phenomenon and the cases-as-inventory phenomenon, it is a problem. It is a systemic problem. And so when you're faced with that systemic problem, to me, it is

not a convincing response to say, "It's cool. This release actually isn't a big deal."

I think that if you'd only released disclosure claims, I would have given you that. Why would I have given you that? I would have given you that because then, if somebody decides later on, "You know what? We read these disclosures and it actually, we think, was wrong, absolutely wrong, and a diversion of merger proceeds. And, therefore, it gives rise to a direct claim for actually money, for somebody to have essentially lined up employment at the start. We want to sue on that." With a disclosure-only release, they could do that and sue.

Now, I think that, again, the disclosures were something. You got disclosures. So release the disclosures. I don't know why you get to release for nothing these other claims. The historical basis for this has just been the defendants' desire for complete peace. I would like complete peace. I would like peace in our time, without appeasement. But just because you want it doesn't mean you get it.

The question is, is what you're giving enough for the Court, in its evaluation, to sign off

on it? Here, I don't think it is. I don't think the idea that derivative claims have -- I'm going to read directly from the brief. "Any Aruba derivative claims have been extinguished by consummation of the Transaction, so there are no longer any derivative claims that could be asserted." I don't think you can say that after Countrywide, the Supreme Court's two decisions in Countrywide. And you guys cite Countrywide. You cite the two earlier decisions in Countrywide. You don't cite the Supremes.

What happened in Countrywide was a disclosure-only settlement released all claims. The argument was made and accepted by the Court of Chancery, "hey, don't worry here, because the derivative claims are gone. It's all good. The merger is extinguishing standing. No problem. They're valueless, et cetera."

What we later find out from the Delaware Supreme Court in Arkansas Teachers II was that those derivative claims for purposes of the merger became direct claims and were released by the global release. Now, I don't know what derivative claims are here, but you don't just get to say, after Arkansas II, "Hey, don't worry about derivative

claims. Standing, is extinguished." Because we know from Arkansas Teachers II this global release of direct claims is covering all of those formerly known as derivative claims that could be used by someone to attack the merger under Parnes. At least that's what I read from it. The Delaware Supreme Court enforced the global release and said, "You people that were suing elsewhere, you can't bring these claims anymore because they really were direct, and they got traded away for zero." It actually wasn't traded away for zero. It was traded away for supplemental disclosures.

I appreciate the representations that have been made about people diligencing these things. In the context of a settlement hearing, where there is only a one-sided presentation, I am not going to rely on that. It's not because I don't believe you guys. It's not because I don't think you-all are great 10b-5 lawyers. It's because of the dynamics of this process.

I have no independent source of information. I can't go look up the Kelly Blue Book value of the released claims, when you're telling me that these claims really were junkers and worth

nothing. I have been told a lot of glowing things in the context of settlements that are less than reliable. And I don't think you're doing it consciously. I think it is the dynamic here, because the path to getting paid is to reassure me. One thing we know is when people have a path to getting paid, behavior starts to reflect how one gets paid.

There's actually something I heard about this week in social science called Campbell's Law, developed in 1976 by Donald T. Campbell, a social psychologist. What it says is this: "The more any quantitative social indicator (or even some qualitative indicator) is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor."

So before anybody gets fired up, I am not saying anybody is consciously corrupt. The point is, when he uses "corrupting" in this context, he is talking about biasing the process because we are all imperfect and subjectively limited humans. I certainly fall into that category.

An obvious example of this in practice

is teaching to the test. A test is a great metric when you have ordinary teaching, but once people start teaching to the test, it loses its efficacy. You can think about it for short-termism with quarterly numbers and the stock price. You can find business cases like Sears Auto Centers. They were once the go-to place for reliable repairs. Then they started focusing on sales targets. It generated a big scandal around sales targets, because they were driving sales at the expense of quality. The indicator that was being used for social decision-making got corrupted.

The social decision-making context here is resolving cases and adjudicating settlements. That's the social decision that I have to make. It's whether to approve a settlement. The duty of disclosure is obviously important. You can grant injunctions based on disclosure. But once disclosure becomes the be-all and end-all measure for this form of social decision-making, then you start to get this repeat-process phenomenon and the indicator is no longer reliable. Parties respond strategically. You end up with a misshapen legal regime. So no. And it's not because I don't think you guys are nice people, but I am not comfortable simply taking the

word of someone who says, "Yeah, I looked at it," when I know it's the path to your payday.

Don't tell me. Show me. And what you showed me in this case was a discovery record where -- again, I've already insulted Mr. Nespole about this, so I'll say it again -- I wasn't impressed with it. I didn't find it reassuring.

The last thing I'll talk about is this idea of expectations and whether there's a reliance interest in the past practice of granting these types of releases, such that I should give it to you today because you've been able to do this in the past. For better or for worse, I don't think you had that reliance interest from me. I've been giving these a hard look for a while now.

And why do I know you-all know that? Because I hear you-all complaining about it. I hear the defense lawyers complaining about it, because they recommend these settlements to their clients and then they don't get approved and then they look bad. I hear the defense lawyers complaining about it because they've negotiated a fee, they want to get this thing resolved, and then, again, they look bad and it's uncertain going forward.

Clearly the plaintiffs lawyers don't like it. You guys aren't happy. I understand that. And I see the responsive behavior. I would say I probably have the highest incidence of settlements in other jurisdictions. Litigation gets filed here and then gets settled in other jurisdictions. I would say I also have, by far, the highest incidence of assign and dismiss. So seven or eight cases will get filed on a deal. The Chancellor -- who gets sole discretion over which cases get assigned to whom -- assigns it to me. Boom. I see seven notices of dismissal.

Now, I'm not offended by that. That is perfectly fine with me. I actually don't like dealing with junky things, and I would prefer to devote judicial resources to real litigation, not pseudo-litigation. So I'm not crying the blues. It's my job to do this. I do have empathy for you-all, but I still have to consider these things. I'm saying this now because I don't think you had the expectation that you had a reliance interest from me, and so I don't think I am disappointing your reliance interest by doing this.

Now, the next question comes. What grounds am I not going to approve this settlement?

The grounds tend to align, because if you don't have an adequate get for the give, the settlement itself falls outside the range of reasonableness. And you also then have a question about adequacy of representation that infects the class certification decision. So it's all connected.

I think the best way to deal with this -- and I have passed on this before. I have not gone the inadequacy of the representation route before. This time I'm going to, and I will not certify the class on that basis. I will not approve the settlement on that basis. And I will dismiss as to the named plaintiffs on that basis. And I say that because this does look to me like a harvesting-of-a-fee opportunity. It looks to me like it was set up as a harvest case, because there wasn't a basis to file in the first place. Then, once you guys actually had something fall into your lap, in terms of a litigable "something", it was just dealt with through the disclosure and the fee.

I'm not telling you you're bad people. I write decisions that get reversed. I write decisions that get criticized. I could probably be cited in those instances for inadequacy of judicial

representation. Everybody makes mistakes. But this one, I am not going to pass on. So as I say, because I think it was inadequate, I am going to dismiss as to all the named plaintiffs. So this will resolve this case, because I am not going to let the named plaintiffs go forward, based on the inadequacy to date.

What you should infer from that is I'm also not going to sign off on any mootness fee. If the defendants want to pay some mootness fee out of the goodness of their hearts and disclose it and then have the potential knock-on challenges that Chancellor Bouchard has discussed, that's fine with me. I'm not going to get involved in that. But if it comes to me, in terms of a dispute over the mootness fee, I will not give one. And I will not give one because I have people in front of me who believe in the benefits of disclosure, and I have people in front of me who believe that disclosure is a valuable benefit.

I have just compensated you with lengthy disclosure about this case, so you've gotten now what you got for the class. I would not personally give you any more. It may not be disclosure you like, just like a lot of times, when I

get objections from class members, they look at the disclosure that you guys got for them and say, "What is this about? We don't need this. This is not helpful at all." You probably don't think what I've told you is helpful at all. That's fine. But you've had the benefit of disclosure.

So I will enter an order to this effect. Thank you all for coming in. I appreciate you-all listening to me. I apologize to the extent that I've had to be blunt in this setting but, again, that's just the function of the job. I'm confident that there are situations -- in fact, I know of many situations -- where the people involved on the plaintiffs' side in this case have done a very good job. So this is not an indictment of you for all time, any more so, I hope, than the fact that I get reversed is an indictment of my ability to judge. It may be. It may well be as to me. But this is not intended as such as to you. It's intended as an "in this case I'm not buying it." In other cases you guys might do a great job.

We stand in recess.

(Court adjourned at 11:23 a.m.)

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CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 58 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, except for the rulings at pages 58 through 75, which were revised by the Vice Chancellor.

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

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public