

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
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1 APPEARANCES:

2 GINA M. SERRA, ESQ.
Rigrodsky & Long, P.A.

3 -and-

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5 The Weiser Law Firm, P.C.
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6 EDWARD P. WELCH, ESQ.
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9 GREGORY V. VARALLO, ESQ.
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11 MICHAEL E. SWARTZ, ESQ.
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12 for Defendant Aeroflex Holding Corp.

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1 THE COURT: Welcome, everyone.

2 ALL COUNSEL: Good morning, Your
3 Honor.

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

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

8 THE COURT: Good.

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

13 MR. FICARÓ: Good morning, Your Honor.

14 THE COURT: Good to see you.

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

17 THE COURT: Mr. Weiser.

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

21 THE COURT: Thank you.

22 MS. SERRA: Thank you.

23 THE COURT: That's your cue.

24 MR. WEISER: Good morning, Your Honor.

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

5 THE COURT: Welcome.

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

8 THE COURT: Whatever that's worth.

9 MR. WEISER: Whatever that's worth.

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

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

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

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

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

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

3 There were 85 million shares
4 outstanding at the time the transaction was announced.
5 76 percent of them were locked up or otherwise owned
6 by insiders.

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

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

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

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

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

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

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

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

6 Settlement relief here falls in two
7 general categories. We had the merger agreement
8 modifications where the termination fee was reduced by
9 40 percent. That was 32 million to 18 million. There
10 was also a reduction in the -- excuse me. We reduced
11 the matching rights period from four days to three
12 days.

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

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

23 MR. WEISER: I understand that.

24 THE COURT: What was the divergence of

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

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

5 THE COURT: That's perhaps the
6 problem.

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

12 MR. WEISER: Right.

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

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

24 THE COURT: So there turned out not to

1 be any problem with that.

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

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

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

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

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

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

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

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

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

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

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

14 MR. WEISER: Yes, sir.

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

17 MR. WEISER: That's right.

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

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

24 THE COURT: Again, that's perhaps part

1 of the problem.

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

4 MR. WEISER: Okay.

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

8 MR. WEISER: Didn't fix the problem.

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

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

20 MR. WEISER: That's right.

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

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

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

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

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

17 MR. WEISER: Okay.

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

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

1 them by some incremental amount.

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

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

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

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

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

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

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

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

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

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

1 company's perspective that --

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

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

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

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

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

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

1 all?"

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Yes, in some grand cosmic sense,
13 getting reductions in termination fees and even
14 potentially a shortening of a match right might, in
15 some situations, be worth something to someone. It
16 might be worth a lot of things to a lot of people in
17 the right circumstance. But why here does it have any
18 causal benefit whatsoever when you've got, A, a
19 76 percent stockholder; and, B, a bidder who is
20 saying, "The impediment to our bid is an NDA because
21 we need to talk to somebody about acquiring one of the
22 businesses and we can't do that with the NDA"?

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

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

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

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

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

24 I do wonder if the Court's comments

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

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

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

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

13 MR. WEISER: Right.

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

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

21 MR. WEISER: Right.

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

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

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

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

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

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

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

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

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

1 with the idea that this is cosmetic.

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

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

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

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

23 THE COURT: No not --

24 MR. WEISER: -- an effect --

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

4 And what I'm saying here is, look,
5 again, if we had diffuse stockholders, if we didn't
6 have the NDA issue, if we had things that you had some
7 evidence of conflicts so what you got actually was
8 providing some meaningful protection, those would all
9 be different situations. But what you got is a
10 76 percent fully aligned holder, no divergent
11 interest, no reason to sell to anybody but in the best
12 deal reasonably available. And your answer is, "But,
13 hey, we got this reduced termination fee."

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

19 THE COURT: It was meritorious when
20 filed.

21 MR. WEISER: I'm sorry?

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

24 MR. WEISER: In other words, if we

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

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

7 MR. WEISER: And we could talk
8 about --

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

10 MR. WEISER: Okay.

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

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

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

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

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

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

12 MR. WEISER: No.

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

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

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

24 The point I was disagreeing with a

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

5 THE COURT: What was the problem?

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

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

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

24 That's why when we started this, my

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

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

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

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

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

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

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

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

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

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

1 MR. WEISER: And Mr. Welch --

2 THE COURT: But once you get in
3 there --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 THE COURT: I know. They were the
21 advisors.

22 MR. WEISER: And Goldman Sachs was the
23 banker.

24 THE COURT: Show me the misalignment

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

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

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

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

17 MR. WEISER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. WEISER: That's right.

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

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

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

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

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

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

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

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

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

10 MR. WEISER: I'm sorry?

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

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

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

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

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

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

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

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

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

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

19 THE COURT: I apologize for that.

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

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

24 MR. WEISER: All right. Maybe after

1 today, somebody would.

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

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

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

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

23 THE COURT: Interco. '88.

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

1 '89.

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

10 And earlier, if I was suggesting
11 otherwise --

12 THE COURT: No.

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

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

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

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

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

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

9 MR. WEISER: Okay.

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

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

1 the consideration that you did get is minimal to
2 nonexistent.

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

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

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

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

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

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

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

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

18 THE COURT: Really?

19 MR. WEISER: Yeah.

20 THE COURT: As anything else?

21 MR. WEISER: Well, regarding this
22 case.

23 THE COURT: I was going to say --

24 MR. WEISER: No, no, no.

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

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

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

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

1 and you see which is better.

2 MR. WEISER: Or maybe here, to
3 continue the analogy, maybe it was one in the hand and
4 1.2 in the bush.

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

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

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

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

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

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

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

12 MR. WEISER: Sure.

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

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

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

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

24 THE COURT: Certainly.

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

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

6 MR. WEISER: Okay. Thank you.

7 (A recess was taken.)

8 THE COURT: Welcome back, everyone.
9 Mr. Varallo, you seem to have the
10 conn.

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

16 THE COURT: Thanks for coming down.

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

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

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

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

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

22 THE COURT: They were justifiably
23 discriminated against.

24 MR. VARALLO: Correct, Your Honor, but

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

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

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

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

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

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

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

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

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

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

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

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

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 Mr. Welch.

17 MR. WELCH: Good morning, Your Honor.

18 THE COURT: Good morning.

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

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

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

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

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

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

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

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

15 THE COURT: What is the solution?

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

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

21 MR. WELCH: No, sir.

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

24 MR. WELCH: Absolutely, Your Honor. I

1 agree.

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

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

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

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

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

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

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

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

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

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

14 THE COURT: All right. Thank you.

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

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

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

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

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

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

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

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

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

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

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

1 it usually goes on much further than that.

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

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

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

17 As indicated by Chancellor Allen in a
18 1995 decision involving Solomon versus Pathe
19 Communications, we have long permitted these types of
20 settlements, largely out of sympathy for the
21 defendants. It has long been thought, particularly
22 after the Supreme Court's decision in Santa Fe
23 Industries, also a 1995 case, that you didn't have
24 much of a chance on a motion to dismiss in an enhanced

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

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

12 Just before I joined the Court, one
13 could regard the going rate for a disclosure-only
14 settlement as having climbed to between 700 and
15 \$800,000, nearly double what it had been three to four
16 years before. The statistical studies by the
17 professors don't show that big a change. That's as
18 much of my impressionistic view of where the asks were
19 and where the agreements were as anything else but,
20 certainly, the fees were creeping up.

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

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

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

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

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

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

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

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

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

1 running this show? What is going on here?"

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

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

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

24 So what all that tells me is that the

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

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

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

1 maximize value on the part of the defendants.

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

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

1 particular bidder.

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

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

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

24 And part of what I looked at, at

1 least, was the match between the claims that were
2 asserted and the relief that was obtained, the match
3 between the potential problems with the deal and the
4 relief that was obtained, and the match between the
5 types of the claims and relief and the scope of the
6 release.

7 Here, there were two buckets of
8 consideration. The first was two modifications to the
9 merger agreement. One was a reduction of the
10 \$32 million termination fee by 40 percent, so
11 \$14 million reduction. In addition, there was a
12 one-day reduction in the time period for the match
13 rights, from four days to three.

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

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

23 Here, you had a big holder with
24 75 percent, approximately, of the stock. You had no

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

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

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

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

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

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

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

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

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

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

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

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

1 providing protection against a vast universe of
2 unknown unknowns.

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

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

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

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

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

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

14 So what you had here was basically a
15 \$14 million reduction. What the data from several
16 decades of topping bids shows is that in any deal, you
17 have about a 5 to 10 percent chance of a topping bid.
18 So right off the bat, you have to discount the
19 \$14 million face benefit by that amount. So you're in
20 the 1.4 to \$700,000 range.

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

1 this full historical amount.

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

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

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

24 I've looked at these disclosures. I

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

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

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

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

4 Thank you, everyone. We stand in
5 recess.

6 (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