IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ORCHARD ENTERPRISES, INC. : Consolidated
STOCKHOLDER LITIGATION : C.A. No. 7840-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, January 9, 2014
2:30 p.m.

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

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ORAL ARGUMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT

CHANCERY COURT REPORTERS
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THE COURT: Welcome, everyone.

ALL COUNSEL: Good afternoon, Your Honor.

MR. ANDREWS: Your Honor, Peter Andrews, Faruqi & Faruqi. We're here today on cross motions for summary judgment. I'd like to make introductions. First to my left is Mr. Sam Lieberman from --

THE COURT: Who is Mr. Lieberman?

MR. ANDREWS: From Sadis & Goldberg.

THE COURT: Nobody's standing up so I have no clue who Mr. Lieberman is.

MR. LIEBERMAN: I am, Your Honor.

MR. ANDREWS: Jennifer Sarnelli --

THE COURT: Thank you. That's really one of the only duties local counsel has, is to make sure that counsel stands up when they introduce him. Whatever you're paying this guy --

MR. ANDREWS: He failed to follow my instructions, Your Honor.

THE COURT: That's right. That's what it was. You told him but he didn't listen.

MR. ANDREWS: He also didn't listen to the instructions at the beginning of the court

proceedings.

THE COURT: It's not a good day. Not boding well.

MR. ANDREWS: So we have Ms. Sarnelli from Gardy & Notis. To her left is Mr. Notis from Gardy & Notis.

THE COURT: Mr. Notis knows to stand. I see Mr. Notis regularly.

MR. ANDREWS: And at the back table we have Mr. Springer, Craig Springer, from Faruqi & Faruqi, and Paulina Stamatelos from Sadis & Goldberg also. And I knew I'd mess that name up, so I apologize.

THE COURT: Who is arguing for the plaintiffs?

MR. ANDREWS: With the Court's permission, Your Honor, Mr. Lieberman from Sadis & Goldberg is going to make the argument.

THE COURT: Great. Thank you.

Mr. Trainer, how are you, sir?

MR. TRAINER: I'm well, Your Honor. Happy New Year. Hope you're well.

THE COURT: Good to see you.

MR. TRAINER: Likewise. Your Honor,

if I can make introductions, from Ashby & Geddis, Toni-Ann Platia. I believe she was before Your Honor before, and from Dentons in Washington, D.C., Ken Pfaehler and David Ackerman.

THE COURT: Welcome.

MR. TRAINER: And with the Court's permission, Mr. Pfaehler will be presenting these.

THE COURT: Fine.

MR. TRAINER: Thank you.

THE COURT: So what order are we going in? You-all enlightened me, with three motions and nine briefs.

MR. LIEBERMAN: Plaintiffs are perfectly ready to start, Your Honor, if you'd like.

THE COURT: Fire away.

MR. LIEBERMAN: Okay. May it please the Court, and Happy New Year to Your Honor and your staff. Your Honor, this case is extraordinary, because it involves an affirmative misrepresentation that the defendants admit right in the Section 251(c) notice of stockholder meeting in, of all contexts, a self-dealing controlling stockholder cash-out deal. And the defendants falsely stated, right in the notice, that Dimensional Associates, the controlling

stockholder, had a right to a liquidation preference in the deal that required the allocation of all the buyout consideration to Dimensional. Now, they said that to get around this what they would do is they would amend the certificate to avoid that application and, therefore, create value from minority stockholders that otherwise, by rights, should have gone to Dimensional.

Now, defendants now admit, Your Honor, that all this was totally false. In fact, Dimensional had no liquidation preference in a cash-out merger and, in fact, Dimensional was actually affirmatively barred from engaging in a cash-out merger under their certificate of designations. This is not just material, but it was coercive. And the reason is it told minority stockholders that if they didn't vote yes for the buyout, they faced a false status quo where Dimensional could effectuate a minority buyout where it paid itself all the consideration.

It also falsely portrayed the financial attractiveness of the buyout by suggesting that, in fact, the buyout was actually providing to minority stockholders $2.05 that otherwise should be allocated to dimensional. Now, this is not just --

this is as critical as it was coercive in the context of a minority cash-out, because in that situation what the minority is doing is voting on the financial attractiveness of retaining their shares and sharing the company's going-forward cash flows and the price in the merger. This told them, in fact -- in fact -- you might not get anything. This was a false Hobson's choice between 2.05 and zero.

And it's material not only because of the false Hobson's choice. It's material because of where it was. There are several misrepresentations in the proxy, but what is most troubling is the one in the notice, because there is a requirement under Section 251(c) that a notice of a merger meeting should set forth the purposes of the meeting. And, in fact, the Nebel case describes a similar requirement. And it says where there is a statutory requirement to set forth information to stockholders, when you violate that requirement it forecloses any argument against materiality.

But what's even more important, and what the defendants don't address, is what it said about it. Where you actually have to put information in one of the statutorily required notices, it

involves a subsidiary requirement that what you put in has to be truthful. What was put in there, everyone admits, was false. And it was false in a significant way.

Now, the defendants try to say a 251(c) notice should be different from a 262 page of an appraisal statute. But we submit, Your Honor, that, in fact, in this context nothing could be more important to the franchise than the information about what people are voting on in the context of a cash-out merger.

And Your Honor has noted in the Hockessin case, in the analogous situation of a special directors meeting, that when the notice falsely sets forth a false purpose -- when a notice sets forth a false purpose for the meeting, anything that happens at the directors meeting is invalid. The same should apply a fortiori to a stockholders meeting under 251(c) in the fundamental context of a cash-out merger.

And the materiality, Your Honor, we submit, is clear from the valuation that was done in the appraisal action. The valuation was 4.67 per share. That is 2.3 times more than the $2.05 per

share price that was offered in the merger. This wasn't close to a fair transaction.

In fact, the effect of the improper allocation of the liquidation preference here had a $2.84 per share effect on Orchard's common stock value. The $25 million liquidation preference was, in fact, 68 percent of Orchard's $37 million value. And as Americas Mining recently said, in a situation like this, of entire fairness, the paramount consideration is the fairness of the price. They didn't come close here, Your Honor, and we think they didn't come close to satisfying the overall standard.

Now, it wasn't that this statement was isolated, either. As we've noted in our briefs, on page 90 of the proxy they describe the amendment to the certificate of designation, and they said that the effect of the amendment would be to allow Dimensional to consent to the nonapplication of certain provisions requiring the allocation of consideration for any transaction constituting a change of control event among the holders of Series A convertible preferred stock.

THE COURT: Let me ask you to slow down just a little bit.

MR. LIEBERMAN: Yes, sir.

THE COURT: Not only for my benefit, but also for the court reporter. She's very fast, very good. You're very fast and flying.

MR. LIEBERMAN: Okay. Sorry, Your Honor.

THE COURT: That's okay. Relax. We got time.

MR. LIEBERMAN: Absolutely. So the point is -- we've pointed out page 90 in our briefs.

THE COURT: As long as I've interrupted you, too, Mr. Lafferty will be very offended at your pronunciation of "Hockessin." So --

MR. LIEBERMAN: Fair point. The accents aren't provided in the cases.

THE COURT: Very ambiguous. I empathize with you. I did not grow up in Delaware, so I have made some of those pronunciation errors myself. And having been personally chastised, I wanted to share with you.

MR. LIEBERMAN: Absolutely. I don't know what I'm going to do when I get to the Parnes case.

THE COURT: Parnes. Yeah. Just one

syllable.

MR. LIEBERMAN: Thank you, Your Honor. And we'll get to that case eventually.

So this statement about the nonapplication of provisions requiring the allocation of consideration was stated not just on page 90. We also mentioned in the brief on page 77 of the proxy, where they talk about the conditions to completion of the merger, they say the same thing: the nonapplication of certain provisions requiring the allocation of consideration.

Your Honor, that's because this lie was not just an incidental lie. It showed up in the notice of stockholder meeting because it was the central premise of how this deal was presented to minority stockholders. And then they came back and -- in the financial discussion of the deal they came back and closed the loop. And they said, "Although we'd be making a liquidation payment inapplicable here, in fact, the liquidation preference is a $25 million ongoing liability that Orchard is obligated to pay to Dimensional."

Now, in the appraisal action the Court addressed that, and this was litigated. No, it's not

an ongoing liability because, in fact, in a minority buyout, if the company kept operating into perpetuity, the preferred stock preference would not in fact have to be paid. There was no contractual obligation to pay it.

And beyond that, think of that presentation of the facts with what they concealed. There were -- on October 29, 2009, the CFO of Orchard was directed to put together a memo analyzing the certificate of designations, in two contexts. There was a Dimensional minority buyout and there was a third-party sale. When discussing the third-party sale, he laid out the application of the liquidation preference. For the Dimensional minority buyout, no mention of a preference. This was not only provided to the financial advisor, it was provided to two members of the special committee, and it was brought out again at a December 11, 2009 board meeting.

There are additional instances in which it was brought out, but we think it's sufficient to lay that out here. And we say this was a material part of their analysis, again, not presented in the proxy.

Now --

THE COURT: When you call the liquidation preference issue a lie, are you connoting scienter by that phrase? And is scienter necessary to your ability to recover?

MR. LIEBERMAN: Scienter is not necessary to the ability to recover. Not only because the controlling stockholder self-dealing fiduciary's state of mind is not relevant, so -- for purposes of the Orchard defendants, but also the duty of disclosure at -- as stated in the situation under Malone does not itself require scienter.

Now, with respect to certain special committee defendants there are certain state-of-mind issues that may arise, but with respect to the controlling stockholder, which is Dimensional, with respect to the controlling stockholder's co-owner which is Mr. Stein -- and we may make arguments later about Mr. Navin as well, but at least for those two it's not required. And that is important here, Your Honor.

THE COURT: So let me ask you --

MR. LIEBERMAN: Go on.

THE COURT: Do you distinguish between a statutory violation of the notice requirement and

the remedy that would flow from that, and who would pay it, as opposed to a fiduciary duty claim?

MR. LIEBERMAN: Well, that's an interesting question, Your Honor. Distinguishing as to who would pay it for purposes of -- well, I think there could be -- well, I think there's a difference in that with the underlying duty of disclosure, there is -- the fiduciaries are held responsible. Statutory -- I would argue the statutory violation establishes materiality of fiduciary duty violations as well. A statutory violation could also impose liability on the surviving corporation.

THE COURT: That's what I was wondering. Is the distinction that? Because the statutory violation runs against the entity that had the statutory obligation, and so the statutory obligor here who had to send out the notice -- and an accurate notice -- was in fact the entity, not the individuals. So is there a distinction in this?

And I think that the -- well, I'll have to double-check, but maybe you know off the top of your head, whether the quasi-appraisal remedy in Nebel ran against the surviving entity or whether it ran against the individuals. I would bet that it ran

against the surviving entity, and if that's true it would bolster my view that there's a distinction here between a statutory claim and a fiduciary duty of disclosure claim.

MR. LIEBERMAN: Well, while there are differences, I think they're certainly overlapping, Your Honor, because --

THE COURT: They may arise from the same facts.

MR. LIEBERMAN: Oh, I think they're over -- yes. But I also think a statutory claim -- well, let's put it this way: In this situation, the 251(c) notice of meeting was issued -- and the proxy says this on its face -- by order of the board of directors.

THE COURT: So your view is that even if it's a statutory requirement, there's an overarching fiduciary overlay to get the notice right?

MR. LIEBERMAN: Yes. There could be, you know -- I think you've referenced in some of your discussions about the 1995 Arnold decision, and there are differences between quasi-appraisal as damages and quasi-appraisal as just the recreated appraisal by replication, I think you've used.

And the 1995 Arnold decision talks about a slightly different remedy, which would be the surviving corporation is liable -- I'll give you the text. Which said that if a misinformed stockholder is -- when a misinformed stockholder could lose his rights at a statutory appraisal, this Court may provide a quasi-appraisal remedy to place them in the position they would have been but for the board of directors' inadequate disclosure of a material fact. But, notice, they also recommended that it was the board of directors that provided it.

It says, "Stockholders do not" -- sorry -- "have to prove a cause of action against the surviving corporation because the surviving corporation is already statutorily obligated to provide dissenting stockholders with appraisal rights." So there is a quasi-appraisal of replication claims here with respect to the surviving Orchard entity. There is that. But we also believe that there is quasi-appraisal damages claims to be asserted against the directors. And we think it's paramount, and something that specifically --

THE COURT: Would you agree with me that there's two separate claims here? There's

statutory violation, runs against the entity. Some type of remedy for the breach of the statutory notice -- you know, again, assuming that all that flows. And that statutory remedy could be a quasi-appraisal, but that quasi-appraisal would run against the entity that had the obligation. That's remedy one, or that's cause of action one.

Cause of action two is the fiduciary overlay. The fiduciary overlay is the directors have a fiduciary duty to get the contents correct, not make anything materially misleading. That is a fiduciary remedy, and that runs against the directors, and that could be also measured by quasi-appraisal. You have the same measure in both places, but there are different claims leading to a different defendant being held liable.

MR. LIEBERMAN: Yes. I agree that there could be a -- that the statutory quasi-appraisal's replication that could stand on its own, yes, could run against the surviving corporation, yes. And that there is a quasi-appraisal damages that may run against the directors and any other fiduciary involved with the proxy.

THE COURT: The claim is different.

The second claim is a breach of fiduciary duty claim. And so we've got to parse through fiduciary duty stuff, like 102(b)(7) and things like that. The first claim is a statutory obligation claim. It's not a fiduciary duty claim at all. So it's, "Did you meet the statute?"

MR. LIEBERMAN: I agree that there are two distinct -- they are two district claims to be made there, I agree. And while we think that the violation in 251(c) meets the statutory definition and is something that itself justifies liability against the surviving corporation, as Arnold discussed, we think that, in addition, the fact that this was issued by order of the board of directors and that the proxy, as it indicates on page 113, is issued by the board of directors -- which includes Dan Stein of Dimensional -- we think that gives rise here. And we think, given the coerciveness and the inherent significance of the misrepresentations here, we think it rises to that fiduciary claim.

THE COURT: Now, what your friends say is, "Look, your position now" -- it's always fun when people throw people's past positions against them. Your position now about the materiality of this and

whether or not the proxy statement is accurate is inconsistent with what fine lawyers said in the appraisal action. And you say the same thing about them.

Given the fact that all these fine lawyers have been able to disagree about things, at least until Chancellor Strine cleared things up, why should I decide this as a matter of law instead of waiting and doing it all at once post-trial?

MR. LIEBERMAN: The reason is because the proxy is clear here. At the end of the day --

THE COURT: It wasn't clear to your guys before.

MR. LIEBERMAN: No; well, actually, Your Honor --

THE COURT: It's become clear.

MR. LIEBERMAN: Wait. Well, we didn't -- the reason is the appraisal case didn't focus on the contents of the proxy. We had clients who said, "You know what? $2.05 seems not enough for this company. Do you want to know something? This seems strange." And then, as we developed the case, we looked into it and we're like, "Wait a second. There seems to be this problem with this liquidation

preference."

And then we got to trial and we're reading through everything and we're like, "Oh, well. You know, it looks strange." And I think the Technicolor cases talk about that this; that in fraud cases, often it will be the case that it's only through the appraisal action that discovery of the misrepresentation will be found. And so in that case they let the same plaintiff argue both disclosure claims and appraisal claims, even though he asserted the disclosure claims almost three years later.

And that's exactly what happened here. We got through the case and that's what became clear. What ended up happening is it was through Chancellor Strine's opinion that he made the observation, in fact, the certificate as it then existed wasn't triggered at all. Then that is a fundamental thing that stockholders said, "Wait a second. That's not how this was presented to us." That's what gave rise to it.

So they say, "Well, you shouldn't be able to get a second bite at the apple."

And we say, "Well, in fact, we're within the statute of limitations and, in fact, it's

the inherent coerciveness and the realties of what happens in controlling stockholder" --

THE COURT: I'm not so much focused on your second bite of the apple issue. I'm focused on their total mix issue and whether I really should try to step up now and figure out whether this, in fact, is material in light of total mix, or whether that's sufficiently a mixed question of law and fact that I ought to see how things play out at trial. Because, who knows, maybe I don't even have to reach some of these issues.

MR. LIEBERMAN: Well, you know, the validity of -- and the accuracy of a document, the proxy, is something that's ripe for determination at the summary judgment stage. And particularly in this situation, where it's stated right there on the notice. Particularly in that situation, and given what has been said here, it's ripe for determination, as well as the fact that when you have controlling stockholders and self-dealing plaintiffs, you don't have to look into the state of mind.

And with respect to the valuation already having been set, Your Honor, they've cited the Orman v. Cullman footnote, I believe it's 36. So long

that by the time I get to it, I forget, you know, what the number is.

THE COURT: A meaty footnote. A meaty footnote.

MR. LIEBERMAN: It is an intellectual discourse of its own. And I appreciate it. And you know, what it says at its heart, though, is that although entire fairness cases will likely lead to a full trial, the thing that really causes it is the difficult determination of price. Well, that's been done here, as Your Honor's done in the Reis case, harmonized the various standards and interpreted Weinberger for discussing --

THE COURT: Yeah. I don't think I did it. I think it's what Weinberger said.

MR. LIEBERMAN: Yes, yes. That's right. That's a fair point.

THE COURT: It wasn't me. It was Justice Moore.

MR. LIEBERMAN: That's exactly right. And he said they're identical. That's his language. He said the standards are identical. And he talked about general -- the general standards of valuation in the business community, and the first thing he cited

was the appraisal statute for that.

THE COURT: But your view of the world is even if there's some range that could be in an entire fairness case, these guys are so outside it --

MR. LIEBERMAN: That's exactly right. 4.67 is nowhere close to $2.05. And that's -- and that's not because it's $2.62. It's because it's 2.3 times more.

And the purpose, from the Cinerama cases, in giving a little bit of latitude is for fiduciaries who have acted properly. When you get the notice of stockholder meeting absolutely wrong, as they admit, fiduciaries haven't acted proper. And, in fact, in the world of a self-dealer that is the case. They have a duty to ensure that people are getting the same -- that people are getting a fair deal. And they have to ensure that the proxy is correct. And they are liable for the difference between the fair price and between the merger consideration.

THE COURT: Well, again, what they say on the -- they say, "Yeah, we made a mistake on the notice," but they make a vigorous argument that when you read the proxy as a whole and you don't fixate just on the notice, that there are corrective and

balancing disclosures in there.

MR. LIEBERMAN: It's certainly vigorous, and it's a lot of paper. But not one of them actually uses the word "right to a liquidation preference." Not one of them addresses the certificate of amendment and says, "You know what? Under the original certificate there was no right." And not one of them says -- not one of them says with any clarity, "Well, this, in fact, was barred under the original certificate."

Instead their statements are, "Ladies and gentlemen, forget your notice. Turn to page 25 in the middle of the merger consideration section." They're saying that because we said the liquidation preference is not going to be paid under the merger agreement, that reveals the truth.

That doesn't reveal the truth. The truth is that the certificate amendment was not necessary to avoid allocating it, and the lie here was that we're preventing a liquidation payment. So by saying there's no liquidation payment, you're not correcting a lie that there's no liquidation payment, that we've prevented the liquidation payment. You have to say, in fact, there was no right to --

THE COURT: Well "lie" to me involves like consciously misleading. And maybe that's a bit of --

MR. LIEBERMAN: Okay.

THE COURT: -- a semantic peculiarity, but I think of things being incorrect, which is like you made a mistake, we don't know why, but it's wrong.

I think what your friends are conceding is that they got the notice wrong. I don't think any of them concede it was a lie. I think they -- there is deposition testimony where they maintain, "We actually thought otherwise," but I don't think anybody is conceding -- unless you'd like to point me to where they do -- that they thought otherwise and they intentionally put it in wrong.

MR. LIEBERMAN: I hear what you're saying. Based on that semantical reading of "lie," you're right. I will use the word "misrepresentation."

THE COURT: No; because when I hear you say "lie" that makes me think that we're kicking into the land of scienter.

MR. LIEBERMAN: Uh-huh.

THE COURT: And that you want to get

these people for scienter.

MR. LIEBERMAN: Oh, well, at trial we may go after for scienter for certain people who have not been adjudicated. We don't think we need scienter for the purposes of the controlling stockholder and Mr. Stein.

But with respect to the falsity point, what I'd say is there are cases in this context that address the type of vague one-line qualifiers that they're talking about, and whether they're sufficient. In Lynch there was this statement. The statement is "The company's worth is not less than 200 million and it could be substantially greater." That wasn't enough, when the CFO did a valuation that indicated the price was 250.8 million.

In Arnold they said there were certain potential indications of interest but no genuine bids. That's not sufficient to cure the misrepresentation that, in fact -- or the concealment, sorry, the concealment that there was a highly-contingent bid of 37 percent above the merger price. And it's important to know that they never -- that their briefs, which are voluminous, they don't address the standard of complete candor here. The controlling stockholder

defendants even go so far as to say Weinberger isn't a duty of disclosure case.

THE COURT: Well, I mean here is the thing on that, and I will tell you that that has some resonance with me because, first of all, we're not even supposed to use the words "complete candor" anymore. Again, it was Justice Moore. In Stroud he said, "We don't like complete candor. We're going to change the nomenclature, and we want to talk about a duty of disclosure of material information." It's a lot more cumbersome, doesn't trip off the tongue like "complete candor." So since 1992, we're not even supposed to use that phrase.

But anyway --

MR. LIEBERMAN: Material information. Okay.

THE COURT: But the duty to disclose. Again, it's not nearly as cool.

MR. LIEBERMAN: I agree. "Complete candor" sounds like "The glove doesn't fit, you must acquit." I agree.

THE COURT: And I think that's what they were bothered by. I mean that's what it seems to be, in Stroud, that he's getting at. It sounds too

tough. I mean the nice thing about it is it distinguishes -- it easily distinguishes a duty of disclosure claim from a federal disclosure claim, because they're not both called the same things. But regardless, here we are.

MR. LIEBERMAN: That's true, but I don't believe Stroud has limited the precedent of Arnold and Lynch.

THE COURT: No, no. It hasn't. It hasn't. It hasn't.

I'll confess to you, I've completely lost my train of thought with the digression, so you'll have to get back to where we were.

MR. LIEBERMAN: Well, your point was complete candor, let's get the nomenclature right. That's a good point.

THE COURT: That wasn't my end-game point. That was my preliminary point. Now I've forgotten what I was going to say was my real point. I'm sure it will come back to me.

MR. LIEBERMAN: I'll keep talking. My point is that the case law specifically addresses it. Then Vice Chancellor --

THE COURT: Oh, I know what it was.

There, you did. You got it back in my mind. Weinberger is a disclosure case. So Weinberger is an entire fairness case --

MR. LIEBERMAN: Uh-huh.

THE COURT: -- where the lack of fairness rested on bad disclosures.

MR. LIEBERMAN: That's right.

THE COURT: So why isn't that how I have to analyze this? Like it's an entire fairness case, and one aspect of the unfairness is bad disclosures. It seemed to me from your brief that you wanted me to analyze this as a duty of disclosure case. So it's literally like duty to disclose, breach, damages, boom, boom, boom, boom.

Weinberger, again, seems to me to say, "Now that we're in this phase, we are in the world of entire fairness." Well, one aspect of fairness is fair process, and part of the fair process inquiry is the disclosures. And when the disclosures are el stinko, that means you've got a fair process claim.

MR. LIEBERMAN: You touch on the point, I think the case law talks about -- you said there are two different remedies. There are arguably three; right? There's the quasi-appraisal as

replication, there's the quasi-appraisal as damages, and there's also an overlapping entire fairness standard that seems to hang out there and also overlaps. I think that you can analyze them separate, but I think that the -- I think that at the end of the day, in terms of addressing the claim, the --

THE COURT: Let me ask you something in terms of that. Let's assume that these disclosures were bad, and let's assume, therefore, you had a claim for breach of the duty of disclosure that we will all agree for purposes of this hypothetical is a lay down, and you get summary judgment on it. But the price was 10 bucks. It was like a super blowout compared to a fair value of $4. Entirely fair?

MR. LIEBERMAN: Well, I would say no, because I think you can't have an entire -- entirely unfair transaction even with a fair price. Because the defendants' obligation is to prove both fair process and fair price. You may have a damages problem there. You may have a damages problem at the end. There may be nominal damages you're looking for, but you still have -- you still have a problem there. You still have a claim.

THE COURT: So my opinion would, in

that regard, say, in considering the unitarian aspect of entire fairness, unitarian standard of entire fairness, as to the fair price aspect they crush it. This is one of the most fair things. It's 2.5X times fair value. But as to the fair process point, they blew it. Therefore, not entirely fair, but no damages.

MR. LIEBERMAN: Or nominal damages, possibly.

THE COURT: All right. A buck. We'll give you a buck. Not a buck a share, but a buck.

MR. LIEBERMAN: It's possible you could get to that. It's possible.

THE COURT: Well --

MR. LIEBERMAN: But here, Your Honor -- I mean my point is I suppose it's theoretically possible, since we're addressing that issue. But here we have a $4.67 valuation.

THE COURT: No. Well, look, if that's the way you think it works, then you're right that price would trump disclosure. I'm not sure -- and we'll see what the defendants say, but I'm not sure the defendants wouldn't say under those circumstances that the unfairness of the disclosure is so swamped by

price that rather than saying unfairness plus nominal damages, I would say overall fairness. Wasn't perfect. In fact, they messed up, but overall fairness.

MR. LIEBERMAN: Well, it's also possible they can get a fairer price.

THE COURT: What?

MR. LIEBERMAN: A fairer price. There is a notion of a fairer price.

THE COURT: There is definitely a notion of a fairer price. That's why I put in such a -- you know, 2 1/2 times, where it would be tough to say fair. But I hear what you're saying. All of this is a backdrop to me saying is there really a separate duty of disclosure claim in this context, or is it an entire fairness claim in which disclosure is part of the fair process remedy?

MR. LIEBERMAN: Well, I think -- look. It depends on if you want to try to narrow prior cases. But -- I think the duty of disclosure has been a separate claim, but I think it's also been described as intertwined. So, you know, I think the fact that it has been identifiable in the past as a separate claim -- and Malone talks about it as a separate

claim -- I think that means it really is a separate claim.

And while I know the duty of disclosure has been described as nebulous in certain contexts, in the context of a self-dealing transaction it has complete vigor. And it has been identified as a sufficient basis for relief even in the entire fairness context, dealing with the case of Lynch, dealing with the case of Weinberger.

And it's worth noting in Weinberger that there was a majority of minority vote. And what the Court said about the majority of minority vote is that it's meaningless. It's rendered meaningless by disclosures. The defendants are going to come up here and they're going to say, "Oh, we met. We had a lot of meetings and worked out a lot of things. We got a majority of the minority." But what they did was they misrepresented the right to a liquidation preference. And what they also admit is that they never even asked a question about it here. They never even asked about it.

And, in fact, it's worth noting that the financial advisor in this case, his testimony, Fesnak's testimony in the record, even for the special

committee defendants -- who we've not moved against -- they've got a real problem here because they're admitting that they knew the preference wasn't triggered.

They never asked a question about it, yet Fesnak's testimony is that the special committee defendants directed him to subtract it and said that was part of the deal with Dimensional. That's -- when I said I'd get to Parnes, that's my point on Parnes. Even for the special committee defendants they've got a good faith claim issue, because you know what? They have no basis for it. They put all their weight on saying, "We relied blindly on Fesnak."

Fesnak said otherwise. That means for the four we haven't moved against, they'll go to trial and point their fingers at each other. Then we'll sit there, and you can look at their demeanor and say, "Who is telling the truth? The person who is the fairness advisor or the four special committee members?"

Now with respect to Donahue, who we've said, "Hold on. We think he should be singled out." What we said about Mr. Donahue is he came into the proxy and he said, "You know what? I'm a Dimensional

designee, but I have no other relationship with them." He didn't say, "I have no other relationship that requires disclosure." He said, "No other relationship." But, in fact, he was a coinvestor in four direct deals. I'm not -- there is one where he is a passive investor, but he is a coinvestor in four deals, including one where Jeff Samberg was the lead investor. Jeff Samberg isn't just a brother of the Joe Samberg and the people controlling it. He is also a limited partner in JDS Capital, the owner of Dimensional. He is also an investor in JDS Capital Management. He is an affiliate of Dimensional. When you are a limited partner, that's the situation. He -- but Donahue said otherwise twice.

You know what else he did? We deposed him in the appraisal action. We said, "Did you do any consulting for Orchard?" He said, "Yeah, up until the merger. And then I started consulting" -- "I started working on their board, August, 2011."

Okay. We deposed him again in this action. We said to him, "Hey, did you do any consulting for Orchard?" You know what he said? "You know what? Up until the merger, and then May, 2011." And on his LinkedIn profile he says, "I worked until

July 30, 2010 and then March, 2012, I started working for Orchard again."

Well, in fact, when we asked for documents after Donahue's deposition, what we found is that two days before the merger he was -- he was offering advice to the company as to how to work on the second-half plan. He was sending e-mails to Joe Samberg and to Brad Navin, the CEO, advising them how to handle the CFO. And, most importantly, by September 20th he had a six-figure consulting agreement hashed out that gave him an equity interest.

So Donahue, we think, merits special mention that he -- you can call it charitably how you want. He misrepresented again and again and again. But it goes beyond that. He is the main person who was involved with negotiating this.

THE COURT: I hear you. You got a lot of great stuff on him, but he's got some push-back. So is that a summary judgment issue?

MR. LIEBERMAN: Well, it might be. I mean it might be. I mean it's -- it's pretty overwhelming for him. I mean Donahue is also the person who receives the letter from Viet Dinh -- sorry. Viet Dinh -- he has received letters from Viet

Dinh, but he receives a letter from Tuhin Roy saying, "I offered 32 million in a combination of cash and equity to Dimensional. Dimensional demanded more. I think that that's not worth it and I can't do it."

And then he put out a disclosure saying that Roy's offer didn't contemplate 25 million bucks and he said that, in fact, Dimensional's counteroffer was 25 million in cash. I mean having received that, you know, at some point the genuine part -- the genuine issue of material fact starts to come in. And the evidence that they're pointing to primarily is Donahue's self-serving testimony, which often isn't sufficient.

Now, I think, based on the disclosures, that it's getting to a pretty persuasive case to be resolved there. But I think, you know, that's our submission, and that's your decision to make. I think, though, with respect to what is -- what we believe is absolutely ripe for summary judgment is the controlling stockholder and Dimensional and Stein. Now, they've said they're not connected to the proxy at all. Well --

THE COURT: Now, you guys dealt with that.

MR. LIEBERMAN: What's that?

THE COURT: You guys dealt with that.

MR. LIEBERMAN: All right. So, you know, that's our point. And I think we've noted that the appraisal action valuation should apply here. I think your cases speak to that.

You know, so I think, you know, those are the main thrusts of what we have to say. If you have any questions, you know, I can respond to them.

THE COURT: No, no. I will tell you that my main misgiving, as I always have when I get this volume of material, is that this is a trial-record level of material. If I were to write on this, I almost have to write two opinions: one opinion saying, "Here's all the facts as viewed from the perspective of the plaintiff's motion for summary judgment, and here's what comes out on that." And then I would write an opinion that would look dramatically different, as different as your-all's respective briefs. And it would be, "Here are all the facts that have to be viewed for the defendants' motion for summary judgment."

It does not seem to me to be terribly efficient, particularly if whoever is aggrieved goes

up and ably convinces the Supreme Court there are, in fact, issues of fact, for me to do all this, rather than to simply have you in for a few days and then write one decision.

MR. LIEBERMAN: Well, I would say two points on that: Number one, we'd point to the Nebel case, where there were separate fiduciary duty and appraisal cases, and on remand in 1999 the disclosure issue on the valuation was resolved at summary judgment. They even had a motion to dismiss there. And so there was even more procedural issues.

But I think the Court should also think about the possibilities that sometimes when liability is established as to certain people, especially the ones who drove the transaction, that can have an effect on whether or not the case ever goes to trial. You know, there are some issues there.

The fact that there are grounds here -- the fact that this case involves something, what we believe is so egregious that it involved implicating even the special committee, I don't think should take away from the fact that with respect to the controlling stockholder and the self-dealing co-owner Stein, that that case is any less compelling.

THE COURT: Okay. Thank you.

MR. LIEBERMAN: Thank you for your time, Your Honor.

THE COURT: Mr. Lafferty, how are you, sir?

MR. LAFFERTY: I'm doing fine, Your Honor. Thank you.

May it please the Court, I'm here on behalf of the former outside independent directors of Orchard, Michael Donahue, Viet Dinh, David Altschul, Nate Peck and Joel Straka. We've heard very little today about any one my clients besides Mr. Donahue.

My clients were the members of the special committee that was formed to consider the merger issue here, and they have moved for summary judgment based on the 102(b)(7) provision of the company's amended and restated certificate that was in effect at the time of the merger.

And I anticipated Your Honor's comments at the end, in thinking about my opening here. And I recognize that this Court is sometimes reluctant to grant summary judgment in case like this, for precisely the reason Your Honor identified. You have mountains of papers, well-written briefs from

both sides. But for reasons that I will get into in some detail in a moment, this shouldn't be one of those cases. And I think it is important to step back, Your Honor, and think about the dynamics of this situation, particularly from the perspective of outside independent directors who are involved in these types of cases.

Summary judgment, frankly, needs to be a real option for them in these cases. If it's not, the dynamics of the cases -- and I know this isn't necessarily a legal issue Your Honor has to decide, but from a policy perspective and from this Court's perspective, summary judgment really needs to be a viable option; at least one that's on the table. Otherwise, the dynamics of litigation change, the settlement dynamics, and just how you litigate a case in this Court.

And I don't think that the Court ought to be shy about wanting to delve into this record. And I think -- and I'm going to get to the crux of why that is. Notwithstanding all the hyperbole that we saw in the plaintiffs' briefs accusing my clients of "the big lie" and things like "playing hide and seek with the truth" -- which, by the way, do necessarily

require a scienter. I mean you don't play hide and seek with the truth or engage in a big lie unless you knowingly did something; right?

And the record in this case shows that none of my clients did anything intentionally to lie to anyone or mislead anyone. Mr. Lieberman pointed to nothing in the record that had any hint of that. Lyondell and the other cases from this Court require Scienter. Plaintiff must prove that the directors intentionally disregarded duties or knowingly and completely failed to undertake their duties. There is no evidence at all that my clients engaged in such contact. None whatsoever. Accordingly, my clients would request that their motion be granted and the plaintiffs' motion accordingly be denied. And I think Mr. Lieberman basically conceded that his motion against my client, Mr. Donahue, needs to be denied because there are issues of scienter that come up in connection with his claims against my client. That he has moved on, anyway.

So before I turn to what I view as this sort of question of did my clients act in bad faith or n some knowing or intentional way, I think it's important to understand the procedural history

here a little bit, too, because it lends the important background of what my clients are faced with.

This is not the first case that's been in this Court, obviously. Back after the deal was announced in 2010, in March, an entity called Rapfogel Partners filed a class action. It wasn't an individual action. It was a class action brought on behalf of all of Mr. Lieberman's clients in this Court challenging the merger and seeking an injunction. So that was round one with my clients being sued as defendants. Rapfogel asserted, among other things, that one of the bidders, Mr. Roy, was treated unfairly, and he alleged that Roy had submitted a higher bid and the committee did not fairly consider that offer.

Turns out that Rapfogel Partners was an entity that was controlled by Mr. Roy's uncle and his mother. Rapfogel didn't assert any disclosure claims at that point premerger, and nothing challenging the proxy statement at all, or the 251(c) notice.

During the hearing on the motion to expedite before Chancellor Strine, he told Rapfogel's counsel, for the benefit of Mr. Roy, to get real. And

if he wanted to get real, he needed to submit a real offer with real financing commitments. And he gave him time to go do that.

And what did Mr. Roy do? Well, he waited another month, came back in and -- so that hearing was in May of 2010. In June, Mr. Roy reemerges, reengages with the committee, submits a $40 million offer, $41 million offer -- if you can call it an offer. The committee met, considered it all over again, went through all of the things it needed to do to consider whether or not it was going to lead to a superior proposal so they could actually engage in negotiations under the way the no shop worked in the merger agreement. But Mr. Roy never provided committed financing. And when Mr. Roy came back to this Court again in late July, about a week before the merger was scheduled to close, Chancellor Strine again declined to order expedition and said that Mr. Roy was too late and that he wasn't real.

So the notion that somehow -- and I'll come back to it later when we get to disclosures about Mr. Roy and what was said earlier. That's all -- it all was superceded. All of that, and all of the subsequent issues relating to Mr. Roy were disclosed

in a proxy supplement in July prior to the meeting. So all of that was out there. Anything that could have possibly been a disclosure violation in the original proxy relating to earlier discussions with Mr. Roy were rendered moot by subsequent events; just totally, totally not -- no way that those earlier things could have been -- possibly been material in the eyes of the stockholder.

So after that the merger closed, and then in August certain of the shareholders filed an appraisal action in this Court. And certain of the lawyers in this action, including Mr. Lieberman, were involved in that action. The appraisal action was based on the exact same premise that's really at issue here, which was whether or not the $25 million liquidation preference on the preferred should have been taken into account when valuing Orchard.

After trial the Chancellor issued an opinion, in July of 2012, in favor of the petitioners, found that the price was 4.67 a share, not the 2.05 paid in the merger, and he said that it was not appropriate, for purposes of determining fair value under the appraisal statute, to have deducted that, because you have to look at going-concern value. But

the Court recognized, I think, on more than one occasion in the opinion that this wasn't a fiduciary duty case and that market realities might require that the preference be factored in on any market-based, fair-market-value valuation.

Two months after the appraisal decision we get a complaint in this action that starts things off. And it's interesting, because I want to talk a little bit about that complaint as I get into the substance of the claims. The complaint is as bare-bones as one can get in this Court. There are no allegations -- the word "bad faith" is never used. There -- there is no 251(c) violation alleged in that complaint. First time we heard about it was in connection with briefing on these motions. There's no statutory claim pled. So it's -- all of this has come up in briefing, but it's interesting if you go back and actually look at what's pled. It's just not there.

So let me turn to the allegations that certain of my clients breached their duty of loyalty because they weren't disinterested and independent. And, again, this is another area where the plaintiffs have conjured things up in the briefing but the

complaint says absolutely nothing. Nothing. All it says, in one place, is that it calls my clients "the so-called independent directors." That's it. There are no facts pled whatsoever, and there's nothing there at all that shows that somehow my clients were beholder to Dimensional in some way, or would have favored Dimensional's interest in this.

So as to interestedness, nothing in the complaint indicates that the special committee defendants received anything unique out of this transaction. They received the same exact merger consideration as the minority stockholders. There's no dispute about that. As to independents, there's -- in the complaint there's only a conclusory reference to, as I said, my clients as "the so-called independent" -- no facts, nothing else, nada, zilch. And despite the evidence -- the efforts to come up with more conflicts in their briefing, there's nothing showing that my clients had any disabling ties.

My clients were blue-chip directors on a small company. There was roughly a $7 million public float here, that's what we're talking about, yet this company had an incredible array of outside directors. Really talented guys. And there's no

evidence, not a shred, that any of them would have risked their reputations -- and their quite stellar reputations -- by somehow just favoring the interests of Dimensional.

THE COURT: So, Mr. Lafferty, the difficulty I have with this analytical approach is that it really strikes me as a business judgment rule approach. In other words, you're focused on saying, "Well, they haven't shown that there isn't independence throughout. They haven't shown that there is an interested problem," as if you-all are getting the presumption.

But my understanding, at least, was that we're entire fairness, and entire fairness is applied when there's a situation where you have this, you know, looming specter of the controller, and so the burden of proof then becomes shifted to you-all to show that everything was good.

So why don't I have to analyze it from a standpoint that if we get to trial and you-all don't convince me that basically your folks had good motives and done adequate -- et cetera, that if the evidence is in equipoise, or even tips their way, that you-all actually can be liable?

MR. LAFFERTY: Well, I'm not sure I totally followed the last point. I mean my view is, and my position is, that we have -- we have met our burden on summary judgment. They, for example, on the issue -- and there are two prongs, I think, to the attack here. One is that we breached our duty of loyalty. The only way they avoid liability -- my clients have a 102(b)(7) defense which basically would exculpate them from any monetary liability arising from the breach of duty of loyalty or failure to act in good faith. And --

THE COURT: Right. So isn't the question -- so the core question is did they serve the interest of the minority stockholders? Did they knuckle under to the controller and effectively, thereby, act for an improper purpose? And what I hear you saying is plaintiff has to come forth with evidence that would call into question disinterestedness or independence as if this was a pleading-stage business-judgment-rule case.

But what they've pointed to -- and they've got this idea -- "they've all testified that they knew, actually, the liquidation preference didn't apply. There's this CFO memo, and they're on a

committee where one of the committee members is controller affiliated," or at least I assume so for purposes of today.

Why isn't that enough, at least at summary judgment -- and even at trial if your guys come in and are absolutely nonconvincing -- to permit an inference that they in fact were acting for the benefit of the controller?

MR. LAFFERTY: I don't think there's a logical inference that can be drawn to that effect, Your Honor. I think -- and if you let me go through some of the facts relating to it I will show you why. And, indeed, we didn't hear any of it -- we didn't hear a lot of the facts about what this committee did and, you know, frankly, who they are. And I think I'll leave to my papers, because I think time will be short, the backgrounds of these directors --

THE COURT: Yeah. They're impressive guys.

MR. LAFFERTY: -- and their stellar reputations. One of them is even a University of Virginia law grad.

THE COURT: That's a strike against him.

MR. LAFFERTY: We'll put that aside for a second.

THE COURT: But, yeah, I really thought they should start their own law firm. It would be a high-caliber law firm.

MR. LAFFERTY: Let me just talk a little bit about what this committee did. I think -- and I will back up if I need to to deal with the alleged conflicts. I think Your Honor has some concern about Mr. Donahue, and I'll come back to them. His relationship -- and it's admitted. We don't dispute that he had a personal friendship with Jeff Samberg, who is the brother of the controller of Dimensional. And he -- Jeff Samberg is a minority investor in one of the entities in the chain, in the -- what is it? JDS Capital, which is the ultimate controller of Orchard now.

THE COURT: Yeah. But to drill down on that, just hear what I'm saying.

MR. LAFFERTY: Of Dimensional, I'm sorry.

THE COURT: I'm framing this in terms of standard of review.

MR. LAFFERTY: Yeah.

THE COURT: So, again, I think it matters to me that this is an entire fairness case involving a controller transaction, as opposed to a business judgment rule case. So I mean it's open to debate. I mean three of your guys, they don't have anything against that would undercut disinterestedness or independence if this was a business judgment rule case.

MR. LAFFERTY: I don't -- under my understanding of the law and the way it's been applied, at least in some cases, I don't think that that's necessarily the case. I think my clients have a viable opportunity to show that they're entitled to the protections of 102(b)(7) whether there is an entire fairness case or a business judgment rule case. Indeed, it's been applied not only in summary judgment stages before, but even in a pleadings stage we've seen 102(b)(7) applied. But certainly Chancellor Strine had dismissed the independent directors in the Southern Peru case on summary judgment. And certainly my clients have, I think, a very -- a much stronger position than the directors did there.

You know, here, the -- I mean, again, I go back to the relative burdens here, and my

clients' position is there's no showing at all. There's no evidence in the record that they acted in ways that would ever prevent the application of 102(b)(7). Zero.

THE COURT: Why isn't the now-adjudicated unfairness of price at least some evidence? I mean what you have is a situation where I can't peer into your guys' hearts, but what I have is, you know, material price disparity, procedural weirdness of various types, in a controller situation. That's what I keep trying to -- in a controller situation. And if there really is some heft to the idea that being across from a controller has loyalty implications, again, why do you approach 102(b)(7) in that context, as if it's like a business judgment case where the burden is on them?

MR. LAFFERTY: Well, again, I'm not approaching it that way. I really am not coming at this as if it's business judgment.

THE COURT: But you guys cited a ton of pleadings in those cases. You cited Rales, which is a 23.1 pleadings case. Most of your cases are business judgment rule pleadings stage analysis.

MR. LAFFERTY: Well, my own thinking

about it is different. That's certainly not what we were trying to get across to Your Honor in the briefing. I believe -- and I believe that our law is -- I think it's clear on this point -- that we have -- we, as independent directors, and -- you know, we have the protections of 102(b)(7). We should be entitled to put forth a motion at this phase and on this record where we can show what -- and I think it's a very -- it's a very solid record, that these directors were independent, that they hired independent advisors, they got a fairness opinion from an outside investment banking firm. They met umpteen times over the course of eight months. They negotiated with the controller in a setting where the price was initially $1.65, when market was $1.35. They negotiated up in three bumps to the final price.

They basically tell the controller, "We're not doing this deal without a majority of the minority vote." They -- the controller ultimately concedes the majority of the minority vote. To top it off, we not only get that in, but we also get a right to contingent consideration in the case of a flip to, you know, some other buyer that had been around in the prior process. And we got the right to go out and

shop, a period of which was extended for some period of time during the shopping.

And that record, under the standard, is a far cry from, you know, directors who knowingly and completely failed to undertake their responsibilities. That's the standard in Lyondell. And I don't see how there's any way one could come to a different conclusion, based on those undisputed facts.

THE COURT: Lyondell wasn't an entire fairness.

MR. LAFFERTY: It wasn't, but it was a Revlon situation.

THE COURT: I mean it was an arm's length deal. And, again, I think the whole question comes down to, at least to my mind, how you approach this question of the idea that even facially independent, disinterested people can deviate from the ideal path when confronted by a controller. And the point of entire fairness is to get to the substance of what they did, rather than the form of what they did.

Your guys have -- and what you've described is a very reassuring form. I'm with you 100 percent on that. But again, I struggle. And

Chancellor Strine -- I guess we'll have to call him something different pretty soon -- he doesn't feel bound by Emerald. I actually feel bound by Emerald Partners and when I can apply 102(b)(7). I actually feel that what Emerald Partners is saying is in this situation where there is an allegedly overweaning controller and you're worried about subjective states of mind of the directors and whether facially independent people are acting properly, you really can't adjudicate that until you judge their credibility. Because when they have the burden of proof, they actually might not be able to -- you know, these guys might actually come in, and -- is it unlikely? Yeah, it's unlikely, but we're on summary judgment. Unlikely gets them past it.

MR. LAFFERTY: Well, I don't even know what the issues are of subjective state of mind of my clients at this point that have been raised in these briefs.

THE COURT: Well, one of them is that they knew. And they all testified that they knew -- that this liquidation preference didn't apply.

MR. LAFFERTY: That's correct.

THE COURT: Yeah. And yet, again,

they sort of took a financial advisor that treated the preference as if it applied, and then they put out a disclosure document where the notice doesn't apply.

Now, am I saying that that stack of evidence is equal? I'm not saying that stack of evidence is equal. Am I saying that that stack of evidence on the independent directors' side is more than a scintilla? Yeah. Particularly when you throw in the CFO memo.

MR. LAFFERTY: Your Honor, there's no evidence that the CFO memo was ever given to any of my clients.

THE COURT: You see, that's the thing. And this is another question about the entire fairness test, because you guys are going to have the burden. The CFO memo is out there. These guys could all come in and testify at trial, "No, we didn't see it. No, we didn't get it." But, again, it's their burden. So if they're not credible -- and I'm not trying to say these are not credible people. I'm dealing with the reality that there is a possibility that they could be disbelieved. And if people with the burden can be disbelieved, then they haven't met their burden.

MR. LAFFERTY: Your Honor, I would

respectfully disagree with that way of thinking, particularly about that document, when there is no evidence, zero evidence, that that document was given to my clients. There's no documentary evidence showing that they got it, and all the testimony is to the contrary.

What have the plaintiffs come forward with that says anything -- that would call into question the subjective state of mind of my clients surrounding that document? And, indeed, how could my clients have disclosed it when they never got it? Again, the plaintiffs have some burden here to come forward with some fact that might undermine that. And there's zero.

THE COURT: See, again, it's a pretty major proof problem when you're not in the room, you weren't there, they don't have a percipient witness that they can call. So what they're left to present is circumstantial evidence. And, again, like business judgment rule, I'm with you. Not a business judgment rule case. And that's where I'm struggling and having trouble.

MR. LAFFERTY: I'm not sure I'm going to move you off that. You know, I guess I want to be

helpful, and I don't want to waste Your Honor's time.

THE COURT: Why am I not at least capable of drawing an inference of scienter from directors who testified that they didn't know -- I'm sorry. Directors who testified that they knew the preference didn't apply, and then a disclosure document that said the preference did apply. Aren't there two plausible interpretations of that; one of which is they put out a false document, the other one is they made a mistake?

MR. LAFFERTY: Well, I don't think there is, Your Honor, based on this record, with these directors and the record that they went through. I mean independent outside directors who go outside and hire counsel -- and the company had outside counsel as well -- who do all the things that I've already talked about, are not directors who are acting in a way that's in bad faith.

And what -- I mean there is no plausible reason -- and none has been offered and no evidence has been offered -- as to why outside independent directors, who basically put a stake in the ground in the negotiations with the controller and say, "We are not doing this deal without a majority of

the minority," that they are going to then intentionally, knowingly, go out and not comply with their duty of disclosure. There's zero evidence that they did that. None.

THE COURT: Yeah. And, again, like --

MR. LAFFERTY: And there's nothing at all that would support that notion.

THE COURT: And don't --

MR. LAFFERTY: And that to me is what's so -- so stark about it, is even if you assume that there's a disclosure violation in there, what basis would you be able to find that my clients knowingly and intentionally engaged in it? And I do think that there is a scienter issue there, and there's no -- there's no evidence of that.

THE COURT: Except they're the board and they're responsible for it. They put it out, they read it. So, again, when I -- assume I screw up in an opinion, as I often do. You know, one possibility is that I just made a mistake, I put the wrong guy's name in or I wrote a number wrong, et cetera. You know, somebody who doesn't like me would probably say, "Oh, that's Laster, he's making stuff up," or something like that.

I mean at what point -- in a business judgment case I think your guys get the presumption and you're out. But I struggle with the entire fairness context of it, given the showing that the plaintiffs have made.

MR. LAFFERTY: Your Honor, I guess the way I look at this is particularly -- and I think it does go back to the issue of loyalty here. I understand -- like in Your Honor's ruling in the Trados case, Your Honor denied summary judgment in that case, but there was a different dynamic; which was Your Honor found that each of the directors that were on the board in that case -- entire fairness was the standard and Your Honor found that they each had a financial conflict of some sort, and there was some motivation by which those directors might have -- you know, might have done something that would have resulted in something being a violation of their fiduciary duties.

That's not this case, on its face, and on the evidence. The directors were outside independent directors, and they have no financial interests in this that were different than the common stockholders. And they did all the things that one

would expect the outside independent directors to do; importantly, to have lawyers and bankers that are advising them along the way.

And as for, you know, Fesnak's analysis, you know, I come back to it -- and obviously Chancellor Strine decided the appraisal case the way he did. And I think it's important that he acknowledged that it was -- I mean he was constrained to apply the appraisal law, which is different -- he acknowledged that it might be different than somebody looking at this from a fair market value approach. And that's what Fesnak did. And so the notion that he would deduct the preference in his valuation is not -- it's not at all a crazy idea. And I think the Chancellor recognized that.

And yes, it does lead to a difference in value, but remember what was happening here was the controller was buying the common. The common at the time is trading at a buck 35 a share. Controller wants to buy those shares from the common stockholders. What does it have to do? It needs to pay them a premium to get them to sell. And that was negotiated, and wound up being a 50-some percent premium to market. And that's what the transaction

was that was being negotiated real world.

And what Fesnak did -- again, whether you conclude at the end of the day whether it's right or wrong -- and we submit it was right. And if we have a trial some day, we'll have an expert that's going to come in and back up what Fesnak did. No question about that. You don't need to decide that issue today. But whether it's right or wrong at the end of the day still does not implicate my clients in a knowing and intentional violation of their fiduciary duties. It just doesn't.

And Vice Chancellor Parsons recognized that -- again, in a pleading-stage case recently. And I'm going to forget the name of the case, but we had it in our briefing as well. DiRienzo. Yeah, the DiRienzo case.

But, look, Your Honor, I want to -- there are a lot of other points I could make. There are two or three other disclosure points. I could go through the disclosures. I think our papers go through them in some detail. I really want to try to address any other questions Your Honor has --

THE COURT: I don't think I have --

MR. LAFFERTY: -- if there's something

else I can --

THE COURT: I don't think I have any questions. I just have a deep discomfort with doing this on summary judgment. And, you know, my discomfort is not based on the fact that I think that the plaintiffs have shown that they have a preponderance of the evidence against your client going in, or clear and convincing -- anything like that. Again, I don't feel like I can disregard Emerald Partners, and I do feel like there is at least some evidence. And so that's where, personally, because it's summary judgment in an entire fairness case, I struggle with how I deal with your clients. I'm not denying that he did it in Southern Peru. I'm not denying it at all. Not denying that he did it in probably a couple other cases as well.

MR. LAFFERTY: And all I would say, I would come back to and I would ask Your Honor to think about this; which is, you know, summary judgment needs to be a real option. I think it -- as a policy matter, this Court needs to send a message, I think, out to the community that it is a real option and it is viable. Even in a case like this, where fairness might be the standard, that there has to be some

burden in that context to come forward, from the plaintiffs, with some evidence that shows that they could get around the 102(b)(7) provision.

And here there's just not -- there's no record that would support that. And I think that's an important policy for our state. I really think it changes the dynamics of litigation in these cases.

THE COURT: Thank you.

MR. LAFFERTY: Thank you.

MR. PFAEHLER: Good afternoon, Your Honor. Ken Pfaehler for The Orchard, Dimensional & Associates, Mr. Stein, Mr. Navin. And we share Your Honor's discomfort with resolving many of these issues on summary judgment, as we've made clear in our briefs. We also join in everything that Mr. Lafferty said about the disclosures: the facts, the process, and everything else.

I'd like to, that said, go first, then, very briefly to our summary judgment motion and then maybe touch on a few points that were raised with respect to the plaintiffs' summary judgment motion. I really think our summary judgment motion is different, Your Honor. It's focused on three narrow issues. They are clean legal questions. They don't require a

lot of resolution of the facts. They will narrow the case.

The first one is can the plaintiffs have a quasi-appraisal remedy when the merger was not short form and where the plaintiffs had every opportunity to exercise their appraisal rights? Didn't exercise them. As Your Honor knows, that's required by statute. They waited until after the decision by the Chancellor in the appraisal action. We know of no authority where a plaintiff has been able to bring a quasi-appraisal action after a long-form merger after -- 15, 20 months after they should have been exercising their rights. And after they did not exercise their rights, took the merger consideration and then waited to see if they liked the result in the appraisal, and then bring the case.

Why are we not able to find any of these cases, Your Honor? We would submit it's because it would allow stockholders to evade the legislature's requirements for appraisal. They clearly spelled out strict adherence. As you know, Your Honor, it's required. It would allow them to evade the risk that the statute puts on stockholders when they demand their appraisal rights, which risk is built into the

generous legal remedy that's given in the appraisal action, which is a standard, as Chancellor -- or at least as the Chancellor found in our case, which is a standard of fair value or fair price that is much more stringent than the standard that's applied in an entire fairness analysis.

The Chancellor determined that all he could consider in terms of the value of the preferred stock was the as-converted value, and his reading of Cavalier Oil, his understanding of what Cavalier Oil requires. And the fact is that ruled out, in the Chancellor's view, all of the market impacts and all of the effect of the liquidation preference. And those are things that have to be taken into account in an entire fairness review. Entire fairness, in many cases -- including Your Honor's own decision in Reis, of course -- depends on what a reasonable seller would do under all the circumstances, including the market.

What the plaintiffs are trying to do here with a quasi-appraisal is also contrary to the logic of the quasi-appraisal remedy. Quasi-appraisal is available in two circumstances: One, in a short-form merger case when there's no appraisal rate found. That's discussed in Berger. And, two, when

the plaintiff has been utterly deprived of his or her right to appraisal under Section 262. And such a deprivation requires a real failure to give notice of appraisal rights, failing to attach the text, having something that absolutely blindsides the plaintiffs. And that's not what happened here.

The plaintiffs could have exercised their appraisal rights. Ten percent of the stockholders did just that. Many of them were represented by Mr. Lieberman, who is presenting to you argument today. Appraisal was available. There is no authority we know of that would allow quasi-appraisal under these circumstances.

The cases that have been offered by the plaintiff, Nebel -- which we've heard discussion today -- was a short-form merger case. Gilliland vs. Motorola, they rely on short form. Ryan and Emerging Communications were consolidated appraisal and fiduciary duty claims. Wacht vs. Continental didn't involve quasi-appraisal.

So we would submit, Your Honor, that the question of whether there can be a separate claim under Count III in the complaint on quasi-appraisal -- for quasi-appraisal, we would submit, Your Honor, that

there cannot be under the law of the state and under the fact of the distinctions that this Court made in Reis vs. Hazelett Strip-Casting, where the Court found that where you're just talking about a disclosure violation, you can't have a quasi-appraisal type -- the Court said it was -- that the appraisal value was different than the value that's -- the determination that's performed in an entire fairness case, but the logic of that would apply here, where what we're really looking at are just some entire fairness claims.

Your Honor, the second ground for our motion for summary judgment is that the plaintiffs are not entitled to rescissory damages. And we think this is a clean question of law. It's an aggressive attempt to capture the new value that The Orchard has created by Dimensional's post-merger investments and transactions and The Orchard's post-merger transactions.

Plaintiffs waited years after the merger closed to file suit. The plaintiffs didn't participate in the earlier class action brought by Mr. Rapfogel before the merger was closed. They waited two years after the merger. They waited months

after the Dimensional transaction. The eggs have been scrambled, Your Honor. The plaintiffs could have sought injunctive relief. They could have joined it. They didn't. Having delayed, they have forfeited the right. It's a well-established principle of equity that the plaintiff waives the right to rescission by delaying to seek it. And what we have here is trying to capitalize on the windfall post-merger.

In respect to the third ground for summary judgment we would seek, Your Honor, is we would submit that The Orchard as a defendant is entitled to summary judgment on all claims against it. The plaintiffs have offered no evidence in this case -- and nothing is pled -- that The Orchard had any involvement with the supposedly inadequate disclosures. They -- you know, The Orchard -- they believe they've stated a claim for that against the directors and stated it against The Orchard.

In their opposition to our brief they simply say that, "Well, maybe The Orchard could be found liable for aiding and abetting." That's not pled in the complaint. They haven't filed a motion to amend their complaint. You can't aid and abet things with yourself. You can't conspire with yourself on

your directors' and officers' actions, and you have to have two people for a conspiracy.

THE COURT: I agree with you on all that. So I mean I think as to fiduciary duties, the corporation, Arnold; fiduciary duties, Arnold. As to aiding and abetting, Arnold. The corporation can't aid and abet its fiduciaries in breaches.

I understood them to be saying that the corporation had the duty to put up a notice. That was the discussion that I had with your colleague. So I understood them to be saying that the way you hook Orchard is that Orchard is the entity that violated the statute, and that that cause of action flows at Orchard because that is the entity that had the statutory obligation. What is your view on that?

MR. PFAEHLER: Your Honor, the statutory obligation was to give a notice that to -- and to give a proxy statement that in the full mix provided an accurate description. And --

THE COURT: Well, Delaware obligation is to give them notice. And you've got a fiduciary obligation to give disclosures.

MR. PFAEHLER: And the notice, Your Honor, accurately described what is required in the

statute to be described in that notice. We have no claim in the statute for violating the notice provision. We -- I'm sorry. We have no claim in the complaint for violating the notice provision in the statute. That's not there. What we have in the complaint is a complaint for a quasi-appraisal remedy, which would depend on a finding that --

THE COURT: I tell you, I am happy to admit to you that I did not go back and read the complaint. So I mean that may be. And so it may be -- and Mr. Lafferty made this same point -- it may be that I can enthusiastically deny summary judgment because it wasn't pled in the complaint. But that's what I understood these guys to be getting at.

So if they amend up -- do you agree that the notice obligation runs to the corporation? It sounds like you're -- I think it sounds like you might be agreeing that the notice obligation runs to the corporation but disagreeing that the notice was inaccurate?

MR. PFAEHLER: That's correct, Your Honor. We would be disagreeing that the notice was inaccurate on the matters that the statute requires the notice to be accurate on: what were the subjects

that would be presented at the meeting, when would the meet being held, and what would be voted on. That's what the statute requires. That's in the notice.

If there's an obligation running to the corporation on that, it's been met. What they're arguing is that in the notice of the meeting there was an inaccurate statement about the transaction and that statement was -- and, you know, from our understanding and from the pleading of the complaint, what we've seen the argument has been, that that deprived the plaintiffs of being able to exercise their appraisal rights, which they were clearly notified of. The appraisal statute was quoted, and everything that was supposed to be done was done in the proxy statement.

And what we're saying, Your Honor, is no. Given the total mix of information, given the numerous statements in the proxy that clearly laid out exactly what was being decided with respect to amending the certificate of designations, there was no inability of the plaintiffs to know whether they had an issue that would make them want to exercise their appraisal rights.

We would also point out that the sentence that they claim is false in the notice is a

sentence that discusses the amendment of the certificate of designations. And the amendment of the certificate of designations was something that only had to be approved by the majority stockholders, by the majority stockholder. It wasn't subject to a majority of the minority vote. Therefore, it could not have been material in the decision whether to exercise 262. 262 rights.

THE COURT: Okay. What else should I know?

MR. PFAEHLER: I'd like to just address a couple points with respect to their motion, Your Honor. We would submit that the remedy -- or the value determination that was made in the appraisal action cannot simply be imported into this case as a finding of a now-adjudicated unfairness of the price in terms of a breach-of-duty entire-fairness decision. It's a different standard. They've cited to language from Weinberger and Tri-Continental and the discussion of those cases to say it's the same standard. But Weinberger, as you noted, was decided in 1983 and Tri-Continental in 1950. And the Chancellor has decided that Cavalier Oil, decided after them, requires them to use a narrower standard and to value

the stock only on an as-converted basis.

That's -- therefore, the Chancellor expressly did not consider the market value and other relevant factors around the liquidation preference in his analysis. He expressly distinguished the appraisal case from a fiduciary duty case in that regard. The overhang -- which it was undisputed in the last case and will be undisputed again here -- was the overhang of the liquidation preference, which was the major determinant of the value of the company and the value of the shares on the market was something that the Chancellor felt he could not consider. And something that obviously has to be considered here is we look at what a reasonable seller -- what would be a fair price with a reasonable seller, looking at all the considerations and all the circumstances.

THE COURT: What is a reasonable seller buying?

MR. PFAEHLER: Excuse me, sir?

THE COURT: Sure. What is a reasonable buyer buying, and what is a reasonable seller selling?

MR. PFAEHLER: Well, the company's being sold, Your Honor, in this case, or the stocks.

THE COURT: Is it the company as a whole or the minority shares?

MR. PFAEHLER: It would be -- well, if the company is being sold on the market, it would be the company and all the shares, including the --

THE COURT: But that's not the transaction you-all did.

MR. PFAEHLER: Not the transaction we did. The question here was what was the price for the minority shares; what were they really worth. That has to be --

THE COURT: So why would I consider the triggering of the liquidation preference in a third-party sale when that wasn't the transaction you did? Why wouldn't I look at what a reasonable seller would pay and what a -- I'm sorry. What a reasonable buyer would pay and what a reasonable seller would sell for, in terms of minority shares.

MR. PFAEHLER: The liquidation preference was a fixed preference, Your Honor. There was no way for -- in the market, the market accounted for that liquidation preference. And the market valued the stock well below what was offered here, for years, because of that.

And when offers were made during the go-shop process and during the earlier process -- I forget which was the earlier one, the offers and the interest that came in all recognized that it had to account for the value of preferred shares and the value of the liquidation preference.

THE COURT: Did they get full-dollar value for the liquidation preference?

MR. PFAEHLER: Tuhin Roy was offered a partial value for the liquidation preference. I believe that -- I believe the additional offer was contemplating the value of the company considering the full liquidation preference.

THE COURT: When was the liquidation preference otherwise going to be paid?

MR. PFAEHLER: Well, the liquidation preference was a contractual right, Your Honor, that the preferreds had and that they could control. There could not be a change-of-control event. There could not be a sale to a third party. There could not be a purchase of the shares.

THE COURT: But when was it going to happen?

MR. PFAEHLER: That would happen in

connection with any -- with any transaction with a third-party, Your Honor. And the question is what would a reasonable seller --

THE COURT: But that was going to happen at some time in the future; right?

MR. PFAEHLER: That was going to happen at some time in the future, that's correct, Your Honor.

THE COURT: So we would at least have to discount it back, wouldn't we?

MR. PFAEHLER: You could do some discounting back but, Your Honor, you have to look at it as it affected the value of the shares of the minority -- of the common shareholders on the day of the transaction. And it had an enormous effect.

THE COURT: You say based on market?

MR. PFAEHLER: Based on market, based on what people were willing to offer. Remember, the fair price test is a test around what's a fair price for the sale of this company. What's a fair price for, in this case, the purchase of those shares. And that has to take into account how the market was valuing the company and how other purchasers of the company were valuing it. It was a real value --

Dimensional paid $25 million. They put $25 million of real money, that's not contradicted -- more, frankly -- into the company. And in return they got this preference.

THE COURT: Your brief said that nobody could get any money out without paying the preference.

MR. PFAEHLER: That's correct.

THE COURT: Why couldn't they have paid dividends?

MR. PFAEHLER: The company was not in a position to be paying dividends at that point.

THE COURT: But from a legal standpoint, why couldn't they have paid dividends?

MR. PFAEHLER: I suppose in a theoretical sense dividends ultimately could have been paid, but the company would have been -- had to have been a bit more profitable first.

THE COURT: From a legal standpoint people could have gotten money out, notwithstanding the preference?

MR. PFAEHLER: It's a conceivable fact. It's counterfactual, frankly. It never happened. Not a consideration.

THE COURT: Not historical, but in terms of your claim that the legal rights precluded anyone from getting any money out, that is not what the legal rights did?

MR. PFAEHLER: The entire fairness test looks at the circumstances --

THE COURT: Can you answer my question?

MR. PFAEHLER: -- at the time of the transaction.

THE COURT: Can you answer my question?

MR. PFAEHLER: And at the time of the transaction there was no way for --

THE COURT: That's not my question.

MR. PFAEHLER: -- the minority shareholders --

THE COURT: Are you having trouble answering my question?

MR. PFAEHLER: I'm sorry, Your Honor. I -- no. I'm not having trouble. No dividend was declared, Your Honor. It was --

THE COURT: My question was did the legal rights of the preferred preclude people from

getting money out of the company via a dividend?

MR. PFAEHLER: It did not preclude a dividend from being issued, Your Honor. And I'm sorry if I wasn't answering you directly a second ago.

THE COURT: Why don't you get back to the point that you wanted to make.

MR. PFAEHLER: A couple more points I'd like to make in response to the plaintiffs' motion, Your Honor. The plaintiffs have a higher burden here on fiduciary duty because they waited to bring these claims until after the merger. They could have brought them earlier. Transkaryotic Therapies applies a higher standard for claims brought post-closing.

THE COURT: Is that a squeeze-out case?

MR. PFAEHLER: I believe it was, Your Honor.

THE COURT: No, it wasn't. It was A third-party deal case.

MR. PFAEHLER: I'm sorry. It certainly applies a higher standard for claims brought post-closing, Your Honor. I don't know that it limited the decision to the basis of a third-party

case. And it did require that there be evidence that the directors who authorized the disclosures breached their duties. I don't believe we have that here, Your Honor.

Your Honor, there was discussion earlier about whether state of mind, showing state of mind is required for Mr. Stein. We believe it is. He's not the controlling stockholder. Dimensional is. He is only sued as a director. Mr. Stein had -- and Mr. Navin, both of our clients, had no involvement in the process of preparing the proxy or the disclosures.

THE COURT: So you would say end up at trial on those guys. What about Dimensional? Do you agree that there's no state of mind requirement for Dimensional because they're the squeezer?

MR. PFAEHLER: Your Honor, I would agree that there's no state of mind requirement for Dimensional. However, there is a requirement that Dimensional have substantially participated in preparing the disclosures that are alleged to be disclosure violations. And it's Shell Petroleum, Tri-Star, controlling shareholder's liable for disclosure violations only where that stockholder participates substantively and substantially in the

proxy preparation process. We have no evidence of that here, Your Honor, and it is, at a minimum, a disputed issue of material fact as to that.

I don't have anything further at this time, Your Honor.

THE COURT: Okay. Thank you.

MR. TRAINER: Ken, I'm sorry. Just two.

MR. PFAEHLER: Yes. Your Honor, Mr. Trainer has pointed out an important fact with respect to your question on dividends. Let me answer it even more directly than I did a moment ago. The certificate of designations provides, in Section 1, that "The Corporation shall not declare, pay, or set aside any dividends on shares of Common Stock unless the holders of a Series A Preferred Stock then outstanding shall first receive, or simultaneously receive, a dividend in an amount equal to the dividend they would have received if all outstanding shares of Series A Preferred Stock ... had been converted ... on the record date fixed...."

THE COURT: So it has to be paid with them?

MR. PFAEHLER: Yes.

THE COURT: Okay.

MR. PFAEHLER: Thank you, Your Honor.

THE COURT: That's the way I understood it to work. So the common couldn't get it separately, but you could get money out if it went to everybody?

MR. PFAEHLER: Yes. And that, of course, did not happen.

THE COURT: I get that it didn't historically happen.

MR. PFAEHLER: Yes.

THE COURT: But again, it jumped out at me -- and perhaps I'm too fixated on this formalism -- it jumped out at me when you read the statement that you couldn't get any money out without paying the liquidation preference, when I thought you could get a pari passu dividend out notwithstanding the liquidation preference. That's why I balked at that statement, because it didn't seem to me to be -- it seemed to me to be an overstatement. But I'm glad we've cleared that up and we understand one another.

MR. PFAEHLER: Thank you, Your Honor.

THE COURT: Reply?

MR. LIEBERMAN: Yes, Your Honor. A

few points that I want to address. First -- where to start? You know, with respect to this -- the fair price, fair valuation, the market realities argument they're making is the same argument they litigated and lost in the appraisal action. They made the argument of market realities and Chancellor Strine addressed it and rejected it. In fact, they're just trying to relitigate the same value point that they've already had the opportunity to address in the other action.

THE COURT: Hold on. If the standard in this action were what you could sell the corporation as a whole for to a third party, they'd be right.

MR. LIEBERMAN: That's not --

THE COURT: Because in that situation you'd look at what a willing buyer and a willing seller would pay. A willing buyer and a willing seller would take in the overhang. I think the evidence suggests that willing buyers weren't able -- weren't willing to pay full pref. But, look, that's a fact issue not here.

But that isn't the thing that was being bought and sold. What was being bought and sold is the minority. The transaction is a squeeze. So

the property right being sold is the same as what would be valued in the appraisal.

MR. LIEBERMAN: Precisely. And so I won't say anything more on that.

And that's the point. They never come to terms with it. That's why they cite the Transkaryotic case, which they overlooked that you litigated, and both in that case and in John Q. Hammons, it was stated that it did not apply to a case of bad faith or self-dealing.

And then their argument with respect to quasi-appraisal, they have it backwards. Short-form mergers -- it was not clear that quasi-appraisal was available in short-form mergers until Berger v. Pubco, but it had been offered in many other cases before that. They don't address the Turner v. Bernstein long-form merger, which in Turner v. Bernstein, the then Vice Chancellor made clear that Wacht was also a quasi-appraisal proceeding. And then there's Weinberger. Technicolor, also, as well. There have been many cases dealing with that.

And with respect their argument that, oh, they can just -- they can make a misrepresentation and then, hey, if they get away with it for long

enough it wouldn't apply -- well, you know, in fact, the Bloodhound case dealt with that. And I note that --

THE COURT: See, you're citing my own stuff to me, and I automatically discount my own stuff.

MR. LIEBERMAN: Exactly.

THE COURT: You got anything like Turner? Turner is --

MR. LIEBERMAN: Turner is Vice Chancellor Strine.

THE COURT: Actually, there's two Turners. There's a Justice Jacobs' Turner, and now a hopefully-soon-to-be-that-level-personage Strine decision.

MR. LIEBERMAN: Exactly. And that was a long form. And that is what happened there. Wacht, which both the Arnold and the Turner v. Bernstein cases noted was a long-form merger, also was a long-form merger. Technicolor, a long-form merger. Weinberger, a long-form merger.

They are trying to create some -- they love what Transkaryotic says about a nonself-dealing case, and they would just love to apply it everywhere.

That would mean, hey, look, people have a one-month statute of limitations on it. I don't think this Court wants that, because then you'd have to sue even on the cases that weren't $500 million mergers and were below, and everyone would be in your courtroom every day.

And it makes no sense in a self-dealing context. Rabkin, Weinberger, both made clear that appraisal is not adequate where you have self-dealing, where you have loyalty issues, where you have bad faith.

With respect to rescissory damages, they just don't address Strassburger, which awarded rescissory damages four years after the transaction at issue even though there was a delay of nine months. Ginsburg and --

THE COURT: It's the degree of intervening changes in the business that I think is -- you know, delay is obviously analogous, but it seems to me that their strongest hook on rescission here is their view, their explanation, that there have actually been substantial changes in the entity. It's not the same sort of clean type of analysis as if this entity had continued to be operated in almost

effective stand-alone, and we could see what had happened.

MR. LIEBERMAN: At a trial they can present an expert who tries to say, "Well, in fact, the company wasn't worth the $9.17 per share it was valued. It actually had the value for it implied based upon the valuation of Fesnak just 18 months later in the new transaction."

I think that is the most relevant third-party context. They turned it around 18 months later, they were negotiating within a year -- this was things we had to move to compel to get -- and they sold it. Company was worth about $120 million combined with another entity, plus Dimensional was able to extract its liquidation preference from that. Now, they can say, "Oh, this was based on cost-saving measures." That's pretty good cost-saving measures. We think there will be a fact issue. That's four and a half times more than the value of the deal. I think that raises an issue.

With respect to the argument with respect to The Orchard surviving entity, we did cite the Arnold case in our opposition. It is a quasi-appraisal claim and, you know, we mentioned in

the complaint that it's quasi-appraisal that we're looking for. We are bringing a claim against The Orchard entity. Things have happened since we put the pleadings out. We've had discovery. We believe the evidence supports it.

And then I want to address a couple of issues with respect to what the special committee defendants said. And I saw where the -- I'll be brief, but Mr. Lafferty appears to have -- maybe have been confused when he's talking about the preferred stock transaction memo. Just to be clear, on October 29, 2009, Nathan Fong, the CFO, sent to Mike Wolf and Fesnak and Michael Donahue and Joel Straka the special committee transaction memo, and at the December 11, 2009 meeting it was circulated again. All the defendants attended that one.

The point we want to make -- then the other point is he keeps saying zero, zero, zero. I really want to make the point that there is testimony from Fesnak where he said -- and it's Exhibit 34. This was at trial, not at deposition. He said that on multiple occasions he received oral and written representations from the special committee that the deal with Dimensional was to give them the preference

and instructions to subtract it. So he's saying they told me to do it.

So when he says zero, zero, zero, he's completely overlooking Fesnak's testimony. We just want to make sure that that concrete evidence that he was directed by the special committee to do it is understood. It's not zero, zero, zero. The person in the room with him, the financial advisor, said the opposite. And when you couple that with the fact that they admit they knew it wasn't triggered, that is conscious disregard.

Mr. Lafferty doesn't want to address, for some reason, the bad faith claim we think --

THE COURT: Well, here's where I think he's got a fair point: You don't have any confessions and you don't have any financial interest. So what you have to say is that this isn't evidence. These are conflicts from which one could draw an inference.

MR. LIEBERMAN: Uh-huh.

THE COURT: Fair? You don't have any director that said "I acted in" --

MR. LIEBERMAN: Yeah. I agree. I think you can infer from this what happened.

THE COURT: And I have to infer.

MR. LIEBERMAN: Yeah.

THE COURT: So to the extent Mr. Lafferty is right and you actually need sort of specific evidence of this, as opposed to circumstantial evidence that gives rise to an inference, I mean --

MR. LIEBERMAN: Well, I think the reason why I cited Fesnak's testimony is he's saying, "I was in the room with them and this is what they told me to do." So it's someone saying that this is exactly what they said. "They said it's attractive. They said our deal was to give it to Dimensional." Then you add the evidence of what they admit, which is they admit they knew it. So that's two pieces of evidence.

Now, what's in their head, what's going on -- maybe that's an inference, but what we know is there's testimony that they told him to do it. It wasn't him. They told him, "Subtract it." They told him also that the deal was to give Dimensional the preference. And there are the admissions that they knew Dimensional wasn't entitled to the preference. I think that's more than an inference. The only question is really just a fact issue. Who is

telling the truth? Is it Fesnak or is it the special committee members?

Inference is more there was something in the notice, which is a two-page document which is issued by order of the board of directors. They knew it wasn't -- there was no right to the liquidation preference how they said it.

So I think it's -- I think it's more compelling than that, because you actually have the testimony from Fesnak. They couldn't even pay a financial advisor to take responsibility for this. You know, that -- that's my point.

And if there's anything Your Honor would like me to address otherwise, I will do it, but that's all I have to say.

THE COURT: Is there anything that you can do to clean up -- I mean to the extent you're now alleging this 251 issue. As I say, I haven't gone back and looked at your complaint.

MR. LIEBERMAN: Oh, yes, Your Honor, absolutely. They say I haven't alleged a 251(c) claim, but in the first six paragraphs of the complaint, in a bullet point, we cite and quote, you know, misrepresentation from the notice. We put it

right there. They're saying we don't use the words "251(c)." We quoted that statement right in our bullet -- right in the bullet point in the front of the complaint. Their claim that there was no mention of the notice. That's actually baloney. We put three statements in there. It was -- actually, at least two statements. It was the notice misrepresentation and then the misrepresentation on page 31. We say, "these are the misrepresentations." We're specific about it.

The fact that we do not specifically say 251(c) -- we put it there. And so their claim that it's not in there, it's -- it may be based on a lack of recollection, but the complaint specifically talks and quotes from it. I mean I quoted it and I make a claim based on it. How can they claim that I didn't allege a violation based on it? I said, "They lied right in their notice of stockholder motion."

THE COURT: Right.

MR. LIEBERMAN: We put it right in there. And you're right, I went so far --

THE COURT: I suspect they would say you don't have a count right? You have a count for quasi-appraisal.

MR. LIEBERMAN: I have a count for

quasi-appraisal.

THE COURT: But you don't have a count that spells out the 251 notice theory running against a corporation in the same type of exquisite detail that we have discussed it today.

MR. LIEBERMAN: Yes, exactly. And that's why your point --

THE COURT: But your point is that it's inferable and that they're on fair notice?

MR. LIEBERMAN: Exactly. And that's why your point about lie versus misrepresentation comes back here. It's notice pleading on this issue. It's not 9(b) type particularity. So that claim would seem not to have standing or basis.

THE COURT: Okay. Thank you.

MR. LIEBERMAN: You're welcome. Thank you, Your Honor.

THE COURT: I don't want to cut people off. Is there anything else that anybody else would like to add before we recess?

MR. LAFFERTY: Your Honor, could I make one short point?

THE COURT: Sure, Mr. Lafferty. That would be helpful.

MR. LAFFERTY: I'm not going to retread any ground that we've already covered, but I think there was one -- sort of a factual point surrounding the disclosures that I thought has gotten lost in the shuffle. And, again, when you step back and look at the entirety of the disclosures -- and, you know, we've admitted that there is this problem in the notice, but if one steps back and looks at that proxy statement and a 14-page description of an investment banker's work -- not just the fairness opinion. This one went further. It described every book that was given to the special committee, in some detail. And to top it off, this is a 13(e)(3) transaction and that gets lost in the many reams of paper, where the stockholders had available to them the same analysis that the special committee members -- my clients -- had available to them, that explained what the rationale -- or lack of rationale, what everyone views it as -- that Fesnak provided surrounding its opinion. And it's all laid bare for the stockholders to have, and they had access to that when they made their decisions.

And I think that's an important thing to put, again, in context. And I come back to, again,

the standards applicable to my directors, which is, you know, is there any evidence that they knowingly or intentionally disregarded their duties? And I submit there isn't any. And I think those additional facts lend credence to that.

THE COURT: I didn't ask you-all this earlier, but -- and I suspect I may know where you-all are coming from this, but I'll ask it anyway. So the teachings of our Supreme Court are that the adequacy of disclosures are a mixed question of law and fact. He says -- and by "he" I mean the plaintiffs -- he says material falsehood regarding preference, clean. You guys say total mix. When I'm confronted with that, is that on the fact side of the mixed question or is that on the law side of the mixed question?

MR. LAFFERTY: It's -- obviously, it is a mixed bag. I'm not sure I can answer that in a helpful way other than, again, when you're looking at it from the -- at least through the prism -- and maybe I'm coming at this -- I come at it, obviously, from the perspective of my clients, which is when you're looking to see whether or not they completely and utterly failed or knowingly disregarded their duties, one cannot look at the disclosures in isolated pieces.

One has to look at the overall picture of what they did.

And again, I've heard nothing here today as to why there's -- because they have no financial interests that are different than the minority stockholders. And, indeed, they had options that were canceled, you know, as part of this because they were under water. They fought hard for a majority of the minority vote, and then they're going to turn around and intentionally and knowingly try to hoodwink the stockholders? It just doesn't make any sense. And so it is all a mixed bag. I mean there are some legal issues in there, and it's factual. But again, I think my clients' motion is different than my colleague's motion, which really is focused on that 102(b)(7) prism. And that's the way we come at it.

THE COURT: Okay. Thank you.

MR. LAFFERTY: Thank you, Your Honor.

THE COURT: Anything else that you'd like to add on this mixed question issue?

MR. PFAEHLER: Yeah. I mean briefly, Your Honor, I would say that I would come down, with respect to the adequacy of the disclosures, for the exercise of the 262 remedy purpose, at least, as it's

on the law side at this point. The fact is the disclosures are in the proxy statement, they're there for the Court to read, and we think they clarify the one lone misstatement in the notice.

Thank you, Your Honor.

THE COURT: Thank you. Anything you wanted to add?

MR. LIEBERMAN: Well, since you didn't ask on the question of mixed law -- I don't have anything further other than to say that we think based on the disclosures, they do count, is all --

THE COURT: Right. So you think it's resolvable as a legal matter?

MR. LIEBERMAN: Yes. I think that's correct.

THE COURT: Great.

Well, thank you, everyone. You-all certainly did yeomen's work in terms of briefing this and providing me with lots of good materials to read. I definitely appreciate all the hard effort that went into it, and you-all obviously also put in a lot of effort today being ready to argue. Thank you all to the people who came in from out of town.

I'm not going to give you any answers

right now, but I will do my best to get back to you promptly.

We stand in recess.

(Court adjourned at 4:18 p.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 the foregoing pages numbered 3 through 100, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing 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 this 13th day of January, 2014.

/s/ Julianne LaBadia

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