

TAPE RECORDED ARGUMENT BEFORE THE DELAWARE SUPREME COURT

IN RE: BENIHANA

The following is an audiotaped hearing before the Delaware Supreme Court, held on June 14, 2006 and transcribed by Elaine G. Parrish, RPR, CRR.

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1 THE CLERK: Please rise. The court is now
2 in session. Please be seated.

3 THE COURT: Good morning.

4 MR. VARALLO: Good afternoon, Your Honor.
5 I rise first for introductions if I may. It's Gregory
6 Varallo for the appellees. I'd like with the court's
7 permission to introduce my colleague from the Florida
8 bar, Mr. Dennis Nowak of the Tew, Cardenas firm.

9 THE COURT: Welcome to Delaware.

10 MR. VARALLO: Your Honor, also knows my
11 colleague, Lisa Brown. You may not know a newly
12 admitted colleague of mine, Geoffrey Grivner, and I also
13 would like to introduce with the court's permission two
14 of my clients, Mr. Dornbush, Mr. Schwartz, both
15 visiting.

16 THE COURT: Welcome.

17 MR. VARALLO: Thank you, Your Honor.

18 MR. HARRIS: May it please the court, John
19 Harris on behalf of appellees, John E. Abdo and BFC
20 Financial Corporation. With me today is my co-counsel,
21 Alan Fine.

22 THE COURT: Welcome.

23 MR. HARRIS: Mr. Fine will be arguing on
24 behalf of Mr. Abdo and BFC Financial Corporation. With



1 the court's permission I'd like to introduce my client,
2 John E. Abdo.

3 THE COURT: Welcome.

4 MR. HARRIS: Thank you.

5 MR. FLYNN: Good morning, Your Honor,
6 C. Barr Flinn from Young, Conaway for the appellate,
7 Benihana of Tokyo. Brief introductions, I have with me
8 Jonathan Rosenberg from the O'Melveny & Myers firm in
9 New York.

10 THE COURT: Welcome.

11 MR. FLYNN: Sasha Lewis also from O'Melveny
12 & Myers, and Ms. Fon Muttamara-Walker from my firm. Mr.
13 Rosenberg and Ms. Lewis have been admitted pro hac, and
14 Mr. Rosenberg will be, with the court's permission,
15 making the presentation today.

16 THE COURT: All right.

17 MR. ROSENBERG: May it please the court, we
18 have asked to reserve five minutes for rebuttal.

19 Based on the undisputed facts in the record
20 and the findings below the transaction at issue was the
21 product of a tainted negotiation process. Board member
22 John Abdo, with full knowledge of the company's
23 negotiating strategy for a convertible preferred
24 issuance, negotiated against the company on behalf of



1 BFC and obtained for BFC material terms that he was told
2 in confidence the company would resist but concede if
3 necessary.

4 Not only did Abdo negotiate on inside
5 information, but he negotiated without competition
6 because he extracted from Benihana a no-shop commitment,
7 and when the Board approved this transaction it was not
8 told that Abdo had negotiated on BFC's behalf. It was
9 not even shown the private placement memorandum from
10 which Abdo negotiated, and it was not told that the
11 changes that Abdo negotiated from the PPO were terms
12 that he had been told in confidence that Benihana would
13 concede if necessary. Because of this tainted process
14 the Court of Chancery erred in applying good business
15 judgment rule.

16 But the Court of Chancery also committed
17 error in failing to apprehend the undisputed facts
18 showing why this tainted process was allowed to occur.
19 Those facts show that the objective of the process was
20 not to find the best terms for raising capital for
21 Benihana, but rather to raise capital in a way that
22 diluted BOT's control. What are those undisputed facts?
23 I just want to touch briefly on four.

24 First, Benihana's senior management was



1 concerned about BOT's control power in late, 2003 and in
2 August of 2003 explored ways of diluting that control
3 power. This was the finding of the court below.

4 Second, senior management hired the
5 investment bank Morgan Joseph in October, 2003 and as
6 its very first project senior management had Morgan
7 Joseph analyze the cost, calculate the cost of buying
8 out BOT's control stock and explore the company's
9 options for dealing with BOT's control.

10 Third, just two months later Morgan Joseph
11 and Benihana management recommend issuing 20 million
12 dollars in convertible preferred stock with immediate
13 as-of-converted voting rights even though Benihana had
14 strong cash flow, was conservatively leveraged as
15 measured by its total debt over IBITDA, had many, quote,
16 "highly feasible debt options" in the word of Fred
17 Joseph, and was projected to be even more conservatively
18 leveraged over the term of the renovation plan even if
19 it financed the entire cost of it entirely with debt
20 rather than equity.

21 And, fourth, after the dilution that BOT
22 suffered in the first 10 million dollar tranche takedown
23 from 50.9 percent voting power to 42.5 percent voting
24 power did not prevent BOT from winning a proxy contest



1 in the fall of 2004, Benihana management drew down the
2 second 10 million dollar tranche in August, 2005 two
3 years before it had to under the contract, and when
4 Benihana's already conservative leverage was a minuscule
5 0.15, meaning that Benihana's cash flow in one year can
6 pay down its total debt six times over, and at that
7 point that further diluted BOT's voting power from 42.5
8 percent to 36.5 percent.

9 And what of the timing? It was just
10 immediately before the shareholder meeting in the fall
11 of 2005 and a director election at which Messrs.
12 Dornbush and Yoshimoto would be up for reelection. The
13 failure of the Court of Chancery to understand the
14 import of these undisputed facts led it to a reversible
15 error.

16 Now I first want to focus in a little bit
17 more detail on the tainted negotiation process. Morgan
18 Joseph's January, 2004 Board book at page A481 told the
19 Board that the terms of convertible preferred issuances
20 very widely and are, quote, "heavily negotiated". The
21 court found that John Abdo attended the February 17th
22 Board meeting during which Morgan Joseph discussed
23 with the Board the terms on which it anticipated having
24 to make concessions during the upcoming negotiations,



1 thus Abdo was privy to the company's negotiating
2 strategy for a transaction that was supposed to be
3 heavily negotiated.

4 What did Abdo negotiate from? Well, he
5 negotiated from the PPM that Morgan Joseph prepared and
6 issued in early April of 2004 which Abdo testified was
7 quote, in his words, fair to both sides. Yet after
8 obtaining the company's commitment not to shop this PPM
9 to any other investor Abdo negotiated the following four
10 changes for BFC.

11 First, even though the PPM provided for the
12 company's option on the second 10 million dollar
13 tranche, Abdo, knowing from the February 17th Board
14 meeting that the company would concede if necessary on
15 that, negotiated a mandatory second tranche on the 10
16 million dollars.

17 Second, even though the PPM provided for a
18 minimum of five years between the two tranches, Abdo,
19 knowing that if necessary the company would concede the
20 tranches altogether and would agree to do 20 million all
21 at once, lowered it from a minimum of one year between
22 the two tranches to a maximum of three years.

23 Even though the private placement
24 memorandum provided for a perpetual maturity, Abdo,



1 knowing from the February 17th Board meeting that the
2 company would agree to a five to ten-year maturity,
3 negotiated a ten-year maturity for BFC. And even though
4 the private placement memorandum provided for no
5 preemptive rights, Abdo, knowing that the company would
6 concede on that from the February 17th Board meeting,
7 negotiated for preemptive rights.

8 Now critically, Benihana's CEO, Joel
9 Schwartz, conceded at trial that all of these changes
10 were materially adverse to Benihana.

11 But the court missed these critical facts.
12 And how do we know that? We know it by comparing page
13 23 of the court's opinion to page 18 of the court's
14 opinion. On page 23 the court lists the terms that Abdo
15 negotiated for, and the court included among those terms
16 a mandatory second tranche and preemptive rights. On
17 page 18 the court listed the areas on which Morgan
18 Joseph told the Board on February 17th that the company
19 might have to make concessions. But when the court
20 listed those on page 18 it left out the mandatory second
21 tranche, and the preemptive rights. But Joseph
22 testified at trial that those were two areas he told the
23 Board on February 17th he might have to concede in
24 negotiations. Indeed, the mandatory second tranche was



1 the subject of dramatic testimony that we cited in our
2 briefs in which Joseph said because of Abdo's
3 participation in the February 17th meeting all he could
4 do was fake insisting on an optional second tranche
5 takedown.

6 How else do we know that the court missed
7 the significance of Abdo's negotiating advantage? By
8 virtue of the court's analysis of Abdo negotiating the
9 ten-year maturity from the perpetual maturity in the
10 PPM. On page 23, footnote 78, the court states, quote,
11 "this result was consistent with Morgan Joseph's
12 prediction that it would be difficult for Benihana to
13 get a perpetual maturity in the issuance." Well, it
14 would have been a prediction if Morgan Joseph was
15 negotiating against an unrelated arm's-length third
16 party. But since he was negotiating against Abdo who
17 had been at the February 17th meeting it was a
18 self-fulfilling prophecy.

19 Section 144(A)1 could not apply because the
20 Board did not know all the material facts regarding the
21 transaction. And what does materiality mean? It means
22 facts that are relevant and of a magnitude to be
23 important to directors in carrying out their fiduciary
24 duty of care in their decision making. In the insider



1 transaction context duty of care requires that directors
2 investigate whether the insider has gotten an unfair
3 negotiating advantage. Therefore, it was insufficient
4 for the court to rely on Joseph's view that Benihana,
5 quote, "ended up where we wanted to be", which is what
6 the court relied on in page 56. Rather, in the Section
7 144 materiality context the question was whether the
8 Board knew of the negotiating advantage that Abdo had,
9 and how he used that advantage in a way that no
10 arm's-length third party could have done.

11 But even if this court finds that Section
12 144(A)1 does not require that the Board have this
13 information, the business judgment rule still should not
14 have applied because Abdo breached his fiduciary duty of
15 loyalty.

16 What is the conduct constituting that
17 breach? Basically five things: He negotiated for BFC
18 from the PPM with full knowledge of the terms on which
19 Benihana anticipated having to make concessions. He
20 extracted from Benihana terms he was told on February
21 17th that the company would resist conceding but would
22 concede if necessary. He did so even though he viewed
23 the PPM terms as fair to both sides. He did so knowing
24 he had no competition because he made the company agree



1 to a no-shop commitment. And fifth, he never disclosed
2 to the Benihana Board his conduct even though he
3 appeared in front of them on May 6th, the day they met
4 to approve this transaction.

5 I want to focus on why we believe that the
6 Court of Chancery also committed reversible error in its
7 finding that there was no primary purpose to dilute.
8 And we have argued in our brief that the court
9 essentially made a legal error and abused its discretion
10 on the facts.

11 What's the legal error? The court found
12 that Schwartz had a demonstrated interest in diluting
13 BOT. That's because he was concerned in late 2003 about
14 BOT's voting control and he explored ways in eliminating
15 it, including by issuing 16.5 million Class A shares.
16 Once the court found that Schwartz had a purpose to
17 dilute at the time this transaction was under
18 consideration it was legal error to conclude that that
19 dilutive purpose was not the primary purpose of this
20 transaction. The law, as the court recognized on page
21 65 of its decision, is that if there is both a
22 legitimate and an illegitimate purpose, like a dilutive
23 purpose, that motivated transaction it would be a
24 mockery to deem the illegitimate purpose, the dilutive



1 purpose, merely incidental.

2 Well, it was -- it is just that mockery
3 that occurred when the court held on page 70 that
4 Schwartz's dilutive purpose to not, quote, "infect this
5 decision making regarding this dilutive transaction".
6 Thus the court committed legal error in failing to find
7 that Schwartz's dilutive objective was the primary
8 purpose of this transaction.

9 But even if the court below did not find
10 that dilution was one of the purposes motivating
11 Schwartz in this particular transaction, the court below
12 still abused its discretion. And how did that happen?
13 Because the court did not understand the dual purposes
14 that senior management had in hiring Morgan Joseph in
15 October of 2003. What does the court say about the
16 purpose of Morgan Joseph's hiring? It says on page 15
17 of its opinion, quote, "Benihana retained the investment
18 banking firm Morgan Joseph to determine what other
19 financial options the company might use to carry out its
20 five-year construction and renovation program." Close
21 quote.

22 But the evidentiary record is clear that
23 finding funding sources was not the only reason that
24 Morgan Joseph was hired. There was a second reason, and



1 that was dealing with BOT's voting control. The very
2 first presentation that Morgan Joseph made in early
3 November, 2003 was in calculating the cost of buying out
4 BOT's voting control, and that's a book that's at A206
5 of our appendix, and then on November 10th, 2003 Morgan
6 Joseph met with Benihana management to discuss not only
7 the renovation plan but the BOT situation. And the
8 agenda for that meeting is at C203 of our appendix.

9 I want to quote from that agenda the
10 portion that deals with BOT. It says, quote, "discuss
11 potential sale of control interest, issues with the
12 trust, meaning BOT, trust long-term and short-term goals
13 and desires, impact on operations, impact on Board,
14 company options for dealing with the potential sale,
15 i.e. of the control interest, purchasing for cash,
16 exchanging for other securities, diffuse ownership."

17 The court mentioned -- the court never
18 mentioned these November, 2003 discussions between
19 management and Morgan Joseph in its 79-page opinion.
20 Thus the court could not appreciate the link between the
21 October, 2003 hiring of Morgan Joseph and Morgan
22 Joseph's recommendation to the Board in January of 2004
23 that it issue preferred stock with immediate
24 as-of-converted voting rights. In fact, the court



1 mistakenly found on page 23 of its opinion that it was
2 BFC that negotiated for immediate as-if-converted voting
3 rights. Abdo didn't need to negotiate for that, because
4 it was a fundamental component of Morgan Joseph's
5 recommendation right from day one, and it was part of
6 the PPM, that there would be immediate as-of-converted
7 voting rights. And yet Mr. Joseph when he testified at
8 trial could not recall focusing on or having done any
9 work on whether a company in financial circumstances
10 similar to Benihana had ever issued preferred stock with
11 as-if-converted voting rights.

12 THE COURT: You indicated you wanted to
13 save five minutes for rebuttal.

14 MR. ROSENBERG: I do.

15 THE COURT: It's up to you. You do
16 whatever you like.

17 MR. ROSENBERG: I do, Your Honor. I think
18 the only other thing I'll mention is on the primary
19 purpose analysis what the court also overlooked is one
20 of the written rationale that Morgan Joseph provided on
21 the convertible preferred issuance in January, 2004.
22 And that is getting Benihana a, quote, "new investor
23 class and balance for its concentrated ownership
24 structure." Of course the flip side of this balance is



1 that BOT would get diluted. Now, we have also argued in
2 our brief that if the court -- if the court upholds the
3 primary purpose analysis that there should be a modified
4 Unical test and we have described why we believe that
5 the entire fairness test should apply. But at this
6 point I'll rely on the briefs and ask the court that it
7 reverse the judgment of the Chancery -- of the Court of
8 Chancery and remand for further proceedings on the issue
9 of the appropriate remedy.

10 THE COURT: Thank you.

11 MR. VARALLO: May it please the court,
12 Gregory Varallo for all appellees other than BFC
13 Financial and John Abdo.

14 Today I will address issues common to all
15 Defendants and Mr. Fine will take five minutes of the
16 time allotted in this argument to address issues
17 peculiar to his client, Mr. Abdo and BFC. As we see
18 them, Your Honors, the issues for decision today are as
19 follows:

20 First, are the trial court's findings
21 relating to the Board's exercise of due care on this
22 record supported by the evidence and consistent with an
23 orderly and logical reasoning process?

24 Second, are court's findings which are



1 based on live witness credibility determinations that
2 the sole or primary purpose of the Board was not
3 entrenchment entitled to deference?

4 Third, should the court extend Unical to
5 adopt a new standard of review?

6 Fourth, did the court below improperly
7 interpret the Benihana certificate of incorporation?

8 And, finally, are the trial court's
9 findings that director Abdo did not breach his duty of
10 loyalty, again based on specific credibility
11 determinations entitled to deference?

12 THE COURT: Mr. Varallo, should I take it
13 from your outline of the points that you believe that
14 the issue about extending Unical was fairly presented to
15 the Vice Chancellor?

16 MR. VARALLO: No, Your Honor, you should
17 not. But rather than quibble with my friend about
18 whether Rule 8 should bar that issue I am prepared to
19 address it on the merits. Should Your Honors believe
20 that it wasn't fairly presented, we're perfectly happy
21 that you don't address it.

22 The fact of the matter is the case which
23 my friend cites which is called Gregory against
24 Correction Connection in the Eastern District of



1 Pennsylvania was never cited to the Vice Chancellor or
2 argued to the Vice Chancellor. This case was a sole or
3 primary purpose of entrenchment case. That's how it was
4 tried and that's how it was decided. Nobody argued
5 Unical below.

6 Your Honor, a bit of background, if I may.
7 It's -- this is a case about the decision of a Board
8 made up of a majority of concededly disinterested and
9 independent directors to finance a five-year renovation
10 plan that even BOT trustees agree was necessary for this
11 company, and that decision was made to finance with a
12 mixture of debt and equity and not solely debt. That's
13 the case in a heart -- in a nutshell.

14 Before I launch into my argument I think
15 it's important to call a few factors to the court's
16 attention. At the beginning I think it's critical for
17 the court to understand that my friends have conceded,
18 conceded on this record, that they are not challenging
19 the court below's findings relating to the independence
20 and disinterest of a majority of the Board. That's at
21 page 1, footnote 2 to their reply brief.

22 Secondly, I think the court is probably
23 aware but I'm going to direct your attention anyway,
24 there are a number of express credibility determinations



1 made in the opinion based upon live witness testimony.
2 This is important, of course, because just last week
3 this court reaffirmed en banc that its standard of
4 review with respect to live witness credibility
5 determinations was that they would be upheld,
6 quote-unquote from the Disney opinion.

7 The trial court found that Kevin Aoki, one
8 of the appellant BOT's trustees, was not credible. It's
9 an express finding at page 12 of the opinion. The trial
10 court also found that the express testimony of witnesses
11 Abdo, Joseph and Dornbush was each critical -- credible,
12 and those findings are at pages 12, 60 and 67 of the
13 opinion below, finally, the trial court made credibility
14 determinations that exonerate director Schwartz who also
15 testified live at trial. Those findings are at pages 61
16 and 70 of the court's opinion.

17 If I can turn briefly to the due care
18 record at trial. The record showed careful deliberation
19 over how to proceed by this concededly disinterested and
20 independent Board over no fewer than five separate Board
21 meetings. Those meetings were January 20, February 17,
22 May 6, May 20 and June 11 of 2004, five separate Board
23 meetings. The Board had an outside investment banker
24 present at each of these meetings and the Board also



1 retained a consulting engineering expert, expert in the
2 restaurant industry, WD Partners, to attend several of
3 those meetings and to give its advice concerning the
4 renovation program.

5 The investment banker walked through
6 options available to finance this renovation program
7 with the Board. The investment banker considered and
8 reported to the Board and discussed getting bank debt,
9 getting high yield debt, getting -- doing equity or
10 doing a sale/lease-back type transaction.

11 In addition, between the first and second
12 meetings, those in January and February, and between the
13 second and third and fourth meetings, the directors were
14 encouraged to bring home their materials and study
15 before they took final action and they, in fact, did so.

16 The outside investment banker recommended
17 that the Board pursue an equity issuance, and the logic
18 for doing so in this particular case was compelling.
19 The company continued to be conservatively leveraged.
20 This was a matter of great concern to the directors,
21 almost all of whom were veteran insiders in the
22 restaurant industry. Mr. Pine, for example, who ran
23 publicly held Restaurant Associates for some number of
24 years testified at trial that he had seen a situation



1 where Restaurant Associates had taken on too much debt,
2 lost its leverage, lost its ability to quickly respond
3 to changing market conditions, and wound up in grave
4 financial distress. This was a group of business
5 executives who had lived through exactly this kind of
6 decision before. So not only did they continue to be
7 conservatively leveraged, issuing equity rather than
8 debt gave the company more flexibility in dealing with
9 its banks, and it matched long-term financing with a
10 long-term capital need.

11 Finally, it avoided very onerous
12 performance covenants that the record shows would have
13 come with the debt, and provided flexibility for this
14 Board of Directors to take care of potential acquisition
15 opportunities as they arose in the future. Moreover,
16 these directors made a conscious decision to take less
17 leverage rather than more. My friends fought that
18 decision, but this was a decision of the Board of
19 Directors convened with many, many years of inside
20 experience. The Board then sought out and received a
21 fairness opinion before finally approving the
22 transaction.

23 Thereafter, when BOT counsel, the
24 appellant's counsel, produced a number of purported



1 alternative offers, what did the company do? First, it
2 convened an ad hoc committee of independent directors to
3 consider the first of those offers. It sent each of the
4 offers to its outside investment bank for analysis and
5 advice, and then it convened as a Board to accept the
6 recommendation of the ad hoc committee and the
7 investment banker and decided after hearing those
8 presentations not to go forward with the alternatives.
9 Your Honors, this is a case far closer to the best
10 practices that Justice Jacobs wrote about for this court
11 in Disney than merely satisfying due care.

12 After a four-day long trial, the trial
13 judge carefully and methodically considered the totality
14 of the record before him, explicitly weighed and made
15 findings of credibility with respect to the live
16 witnesses who testified before him, and issued a
17 carefully reasoned and thorough 80-page post-trial
18 opinion, an 80-page opinion just full of challenges --
19 full of findings.

20 Let me move, if I can, to my friend's
21 challenge to the safe harbor. Under 144(A)1 the issue
22 framed by the court below was whether the Board knew or
23 had sufficient information concerning the material facts
24 concerning the transaction to fit within 144(A)1.



1 My friend basically attacks on 144(A)1 and
2 says that finding, that holding was incorrect because
3 the Board did not know that Mr. Abdo was involved in the
4 negotiations.

5 Your Honors, the trial court correctly
6 concluded based on the testimony presented that prior to
7 the May 6th Board meeting - now May 6th is the meeting
8 at which the BFC transaction is presented after it was
9 negotiated with Mr. Abdo - that prior to that meeting
10 Mr. Schwartz did, in fact, tell Messrs. Becker, Sturgis
11 and Sanno and possibly Mr. Pine, in one-on-one
12 conversations of Abdo's role, that's in the record,
13 probably the easiest place to find it is at A-53 at
14 pages 89 and 90. Moreover, the trial testimony fully
15 supports that finding, that's Mr. Schwartz's testimony
16 at trial. But perhaps more to the point, the May 6th
17 Board book that Morgan Joseph, the banker, prepared and
18 presented to the Board, said in its first point under a
19 heading called introduction that, quote, "Morgan Joseph
20 was approached by John Abdo, BFC Financial Corporation's
21 vice-chairman and a member of Benihana's Board of
22 Directors, indicating that BFC would be interested in
23 investing in the company on terms comparable to those
24 contemplated", close quote, and that's at A-446 should



1 you want to look at it.

2 Likewise, Your Honors, every director knew
3 that Abdo was only one of two principals at BFC, and Mr.
4 Abdo himself made the presentation on behalf of BFC at
5 the Board meeting before recusing himself so the Board
6 could discuss and act.

7 Mr. Pine, the director who may not have
8 been told in advance of Mr. Abdo's personal role as
9 negotiator, testified that it wouldn't have made a
10 difference to him because he knew that Abdo would be one
11 of the ultimate decision makers. That's at A-135, 994
12 and 95.

13 Let me turn, if I may, briefly to
14 substantive due care. First of all, my friends raise
15 three challenges in the briefs. Those challenges are,
16 one, whether the Board knew who negotiated. That I
17 think merges with 144(A)1 for purposes of this
18 particular case so I won't repeat myself.

19 Two, whether the Board knew about certain
20 changes to the term sheet.

21 And three, whether the Board knew correct
22 net debt figures.

23 As for changes to the term sheet, it's a
24 red herring. The Board got the term sheet on or about



1 April 30. It's in the record. It's undisputed. When
2 the Board convened on May 6th it had the term sheet,
3 could have compared it to the earlier term sheet if it
4 wanted to. There is testimony in the record that the
5 Board also discussed specific changes between the
6 earlier term sheet, the so-called wish list of January,
7 February, and the April 30 term sheet. That testimony
8 is found at B-27, 919 and 20.

9 Third, the court credited live testimony
10 that the directors understood and expected there to be
11 changed in the term sheet, and indeed there were some
12 changes.

13 And finally, the court made an express
14 credibility finding with respect to the testimony of
15 Mr. Joseph, the banker, at page 60 of the opinion, that
16 Joseph honestly believed that the changes that were made
17 were not significant and that he did not mislead the
18 Board.

19 With respect to net debt figures, it is
20 true that there were incorrect net debt figures in the
21 January and February meetings. Again, however, a red
22 herring because by the May 6th meeting those net debt
23 figures were corrected and not only were they corrected,
24 Your Honors, but the banker called the correction to the



1 Board's attention. The banker's testimony is he said to
2 the Board, these were in error, they have been fixed, it
3 doesn't change my recommendation.

4 Let me move briefly to sole or primary
5 purpose. It's been in our law a very long time, tracks
6 back probably to the Scnhell versus Criscraft test. My
7 friends argue that in the face of a concession of an
8 independent majority of the Board and in the face of
9 express credibility determinations that somehow there
10 still ought to have been a finding of sole or primary
11 purpose. In the court below and in the briefing my
12 friends focus on two separate directors. They focus on
13 Mr. Dornbush and Mr. Schwartz with respect to the
14 alleged sole or primary purpose to entrench.

15 With respect to Dornbush, the court
16 reviewed the evidence, held that he was at the time 75
17 years old, then not an equity partner in his law firm,
18 not a profit-sharing partner in his law firm, and that
19 he did not act with the sole or primary purpose of
20 entrenchment. The court further stated that it
21 expressly found him, a live witness testifying at trial,
22 to be credible. So the court made its sole or primary
23 purpose determination with respect to defendant Dornbush
24 based upon a credibility finding.



1 With respect to Mr. Schwartz, it is not
2 correct, as Mr. Rosenberg said, that the court had
3 concluded that Mr. Schwartz had a purpose to dilute.
4 Mr. Schwartz was by the court found to have been
5 concerned in 2003 about control of BOT. Mr. Schwartz at
6 the time was 63 years old, and as the court found below
7 he had a five-year, non-cancellable employment contract,
8 taking him through age 68 or 2009. That's at page
9 eight, footnote 20 of the opinion. The court also found
10 there was no special relationship between Schwartz and
11 BFC, the buyer of this equity, and that BFC would expect
12 Schwartz to perform just like any other manager, hold
13 Mr. Schwartz to the same level of accountability as any
14 other shareholder.

15 The court reviewed in detail the evidence
16 that my friends brought before it that Mr. Schwartz had
17 considered the effect of stock dividends or stock
18 issuances on the continued special voting rights of BOT
19 and found that this evidence tended to show Mr. Schwartz
20 was concerned. But in light of Schwartz's testimony at
21 trial and the totality of the evidence, the court also
22 made a finding, and the court's finding at page 70 is as
23 follows with respect to Mr. Schwartz: Quote,
24 "Schwartz's concern did not infect his own or the



1 Board's decision-making process in connection with the
2 BFC transaction", close quote.

3 Finally, the court found that even if it
4 was wrong about Mr. Schwartz's subjective motivation,
5 since a majority of concededly disinterested directors
6 voted to approve the transaction and their assent was
7 not the result of fraud or manipulation, a finding the
8 court expressly makes, the transaction would still
9 stand. That's old laws, Your Honor. That's Puma versus
10 Marriott and that's the CD case that we cited as well.

11 Let me, if I may, move briefly --

12 THE COURT: Mr. Varallo, I'm afraid you're
13 out of time.

14 MR. VARALLO: I will sit down then, Your
15 Honor. Thank you.

16 MR. FINE: May it please the court, I'm
17 here to discuss the breach of fiduciary duty issues
18 raised by BOT vis-a-vis Mr. Abdo. I found the briefing
19 on this issue rather remarkable in that as we pointed
20 out in our briefs the breach of fiduciary duties raised
21 in the post-trial are very, very much different than
22 those actually tried. Basically they break down into
23 two themes, as I understand them: The first is that Mr.
24 Abdo misused confidential information -- confidential



1 information in the negotiations, and the second theme is
2 that Mr. Abdo didn't tell the Board that he was involved
3 in the negotiations. Mr. Varallo hit on some of the
4 facts showing that as to that second argument the Board
5 was well aware of Mr. Abdo's role in the negotiations.

6 The overriding theme at trial as to these
7 charges was that Mr. Abdo was focused on -- always
8 focused on acquiring BOT's stock through Kevin Aoki and
9 on those points, on those central themes the court made
10 specific findings that Mr. Aoki was, quote, "not
11 credible, unreliable", and that Mr. Abdo was credible
12 and convincing. Nevertheless, BOT trudges on and I want
13 to examine each argument.

14 With regard to the issue of the misuse of
15 confidential information, we have heard counsel talk
16 about that today. The question is -- the first question
17 is what do they consider to be confidential information?
18 And in their brief they tell us, in their reply brief at
19 2 and 3 counsel argues that Kevin Aoki was told that
20 everything said in the Board room is confidential. Of
21 course that can't be what confidential information is
22 because at a Board meeting public information is
23 discussed, common sense and common market knowledge is
24 discussed. It's got to mean something else.



1 So what in terms of this appeal does BOT
2 consider to be confidential information that Mr. Abdo
3 misused? We know what it's not. We know that it's not
4 -- it had nothing to do with any information regarding
5 what Mr. Joseph and every other witness considered to be
6 the key negotiating points of the transaction and those
7 points include things like price, the coupon rate, and
8 the number of Board seats that the purchaser would be
9 getting. And the reason counsel doesn't argue about
10 that is that they were all negotiated in Benihana's
11 favor.

12 Mr. Joseph testified - and the court
13 thought this was so important that he actually quoted --
14 the court quoted it twice - he said you have got to
15 remember what's important. On important points we ended
16 up where we wanted to be, and in that regard the court
17 referred to Mr. Joseph's beliefs as credible, honest and
18 sincere.

19 So what are we talking about in this
20 appeal? We're not talking about the key negotiating
21 points or whether or not the ultimate deal that was
22 negotiated was fair. Rather, we talk about three
23 points: The mandatory second tranche, and you can find
24 these, they're called five points, three points, two



1 points, I think at pages 18 and 21 of the original brief
2 BOT identifies three: The mandatory second tranche,
3 preemptive rights, and perpetual maturity.

4 As to the first, it goes back to what is
5 confidential, mandatory second tranche. If a Board
6 director says gee, I think we ought to get a thousand
7 times earnings and the investment banker says well,
8 you're not going to get that. You're not going to get
9 that. Saying you're not going to get that is not
10 dramatic testimony as counsel suggested it was today.
11 It is market reality. It is what people in the
12 marketplace know. Mr. Abdo testified that he didn't
13 need Mr. Joseph or anyone else to tell him that no one
14 was going to agree to a transaction in which -- in which
15 the -- Benihana had the choice as to whether it was a 10
16 million dollar transaction or a 20 million dollar
17 transaction to be decided some time in the future. So
18 that certainly was not confidential information.

19 Preemptive rights, with regard to that, as
20 we pointed out in our brief there is no record that that
21 was even discussed at the February 17th meeting, and
22 when you look at the court's listing of what was
23 discussed at page 18 it's not there.

24 And with regard to perpetual maturity, the



1 court noted that Mr. Joseph found, as the market
2 realized, that it was far more typical to find a five to
3 ten year plan that and -- but, nevertheless, was able to
4 negotiate the situation where Benihana could pay back in
5 stock which made it effectively perpetual in any event.

6 THE COURT: Thank you, Mr. Fine.

7 MR. FINE: Thank you.

8 MR. ROSENBERG: Very briefly, Your Honors,
9 as I have three and a half minutes. Counsel makes the
10 point that the primary purpose finding is based on the
11 credibility of live witness testimony. But in Packer
12 versus Yambel then Vice Chancellor Jacobs found that
13 even if there was no subjective intent to dilute, that
14 based on the objective facts of the -- of the
15 non-diluted means that the Board did not explore, that
16 an -- that a primary intent to dilute could be inferred.
17 So it's not just based on live witnesses. It's based on
18 the totality of the circumstances and that's what all
19 the primary purpose cases do.

20 And one other thing, Schwartz never
21 testified, there is no -- there is no testimony from
22 Schwartz in the record that he didn't have a dilutive
23 purpose at the time of this transaction.

24 Counsel talks about how Benihana wanted to



1 keep its leverage down and how it wanted financial
2 flexibility. Well, the testimony is, again, that the
3 company would still have been conservatively leveraged
4 even if it had its cake and ate it, too, it did all of
5 its renovations and it did all of it through debt and it
6 got everything that it needed, it still would have been
7 conservatively leveraged at the end of 2007.

8 It wanted financial flexibility. Joseph
9 testified that even if it did this entire -- the company
10 did this entire transaction through debt it would still
11 have financial flexibility at the end of 2007. Indeed,
12 if it, under the company's own projections, it still
13 would have had 26.8 million dollars left for
14 acquisitions which is one of the things that Mr. Joseph
15 said that the Board should be able to do or should have
16 the flexibility to do. 26.8 million. The only
17 acquisitions that the company had done previously were
18 from between 8 to 12 million dollars, and even without
19 that 26.8 million if it needed to acquire companies that
20 themselves would provide IBITDA for the company it could
21 have issued more equity and found other funding sources.

22 The Board did not know that Abdo negotiated
23 on BFC's behalf and it did not know the changes that he
24 negotiated from the PPM. The court found that the Board



1 did not know. The court found that even though Board
2 member Pine asked, the Board did not know, and all --
3 all the testimony that appellees cite, it just stands
4 for the proposition that the Board knew that somehow he
5 was involved. And, in fact, all the court said is that
6 the Board knew that presumably Abdo was the ultimate
7 decisionmaker. Presumably the ultimate decisionmaker
8 could have been somebody who stood back, withdrew from
9 the process, recused himself, just like he did on May
10 6th, and let Allen Lavan, his partner in BFC, negotiate
11 the terms of the deal, and then at the end when Lavan
12 came back to him with a deal negotiated at arms-length
13 from an independent third party who didn't have access
14 to confidential terms on February 17th then Abdo could
15 have said yeah or nay and that would have been fully
16 consistent with his fiduciary duties and the Board would
17 have had all the material information under those
18 circumstances.

19 I believe my time is up. I will sit down
20 at this point.

21 THE COURT: Thank you very much.

22 MR. ROSENBERG: Thank you, Your Honors.

23 THE COURT: Thank you, counsel. We will
24 take the case under advisement.



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C E R T I F I C A T E

I, Elaine G. Parrish, Registered Professional Reporter and Notary Public, do hereby certify that the foregoing record, pages 1 to 34 inclusive, is a transcript of my stenographic notes taken from an audiotape in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 5th day of July, 2006, at Wilmington.

 Elaine G. Parrish
 Certification No. 170-RPR
 (Expires January 31, 2009)

