

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL SCULLY, on behalf of himself :
and all others similarly situated, :
:
Plaintiff, :
:
v : Civil Action
: No. 5890-VCL
NIGHTHAWK RADIOLOGY HOLDINGS, INC., :
DAVID ENGERT, PETER Y. CHUNG, DAVID J. :
BROPHY, CHARLES R. BLAND, JEFF TERRILL, :
VIRTUAL RADIOLOGIC CORPORATION, and :
EAGLE MERGER SUB CORPORATION, :
:
Defendants. :

- - -

Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, December 17, 2010
9:01 a.m.

- - -

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

- - -

COURTROOM STATUS CONFERENCE

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 BLAKE A. BENNETT, ESQ.
3 R. GRANT DICK, IV, ESQ.
4 Cooch and Taylor, P.A.

-and-

5 SHANE ROWLEY, ESQ.
6 JUAN E. MONTEVERDE, ESQ.
7 of the New York Bar
8 Faruqi & Faruqi, LLP
9 for Plaintiff

10 KENNETH J. NACHBAR, ESQ.
11 Morris, Nichols, Arsht & Tunnell LLP

-and-

12 LUKE A. LISS, ESQ.
13 of the California Bar
14 Wilson, Sonsini, Goodrich & Rosati, P.C.
15 for Defendants NightHawk Radiology Holdings,
16 Inc., David Engert, Peter Y. Chung, David J.
17 Brophy, Charles R. Bland, and Jeff Terrill

18 COLLINS J. SEITZ, JR., ESQ.
19 BRADLEY R. ARONSTAM, ESQ.
20 Connolly, Bove, Lodge & Hutz LLP

-and-

21 JOSHUA S. AMSEL, ESQ.
22 of the New York Bar
23 Weil, Gotshal & Manges, LLP
24 for Defendants Virtual Radiologic Corporation
and Eagle Merger Sub Corporation

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1 THE COURT: Good morning, everyone.

2 ALL COUNSEL: Good morning, Your
3 Honor.

4 THE COURT: All right. I asked for
5 this status conference after receiving the plaintiff's
6 letter informing me of a disclosure-based settlement
7 and the decision to submit that settlement to the
8 Arizona courts for approval.

9 You all will recall that there was a
10 motion to expedite in this case. You will recall that
11 it was vigorously briefed by the defendants on merits
12 grounds. I got big, thorough briefs from the
13 defendants. I read the entire preliminary proxy. And
14 during that argument we essentially preliminarily
15 reviewed the merits of the case. Why did we do that?
16 Because in Delaware you only grant expedited
17 proceedings where there's a colorable claim and a
18 threat of irreparable harm.

19 Now, you also will recall that
20 reviewing the proxy myself, I regarded the disclosure
21 claims as not colorable. That's page 23 of the
22 transcript. I also made clear that I thought that
23 there were meaningful, litigable process laws in this
24 deal. In fact, folks will remember that I was

1 somewhat incredulous that the plaintiffs were only
2 seeming to pursue disclosure theories as opposed to
3 taking a shot at the deal.

4 Things went on in this process that if
5 there was a real bidder with real money on the table,
6 like a topping bidder, they'd be going after with
7 gusto; yet my concern at that point was that the
8 plaintiffs seemed only to be litigating soft
9 disclosure claims for the purpose of setting up a
10 disclosure-based settlement.

11 So imagine my surprise when last
12 Friday I got a letter informing me that the parties
13 had agreed to a disclosure-based settlement. So, in
14 other words, the settlement consideration was the
15 claims that I already said weren't colorable. There
16 was no apparent effort to address the claims that I
17 thought were colorable. And rather than coming back
18 to me on this, the parties had decided to go to the
19 Arizona state courts.

20 Now, let me be clear. I intimate no
21 criticism of the Arizona state courts. I am sure they
22 are as busy and as good as any in the country. In
23 fact, I'm sure that they are far better than are we
24 here in Delaware on many things, most notably Arizona

1 law. I don't know anything about Arizona law. I also
2 have no problem generally with other courts approving
3 settlements and then coming to this Court and having a
4 full faith and credit dismissal. That's done. But
5 this was a situation where only this Court had put
6 work into the case. This was the only court that had
7 looked at these things. This is a case that involved
8 issues of Delaware law on the internal affairs
9 doctrine, yet here the parties were running to a
10 different court not familiar with Delaware law to seek
11 approval from a court that hadn't done anything to
12 look at the case yet. In fact, the cases hadn't even
13 been consolidated under a single judge, and that case
14 doesn't regularly apply Delaware law.

15 So I had serious concerns when I got
16 that MOU that what was going on here was collusive
17 forum shopping. Now, worst of all that I thought is,
18 there wouldn't be any reason in the ordinary course in
19 the Arizona courts to find out about these things. I
20 see a lot of settlement briefs. People don't go into
21 detail in their settlement briefs about this type of
22 information. So what would happen is, an Arizona
23 state judge, without any prior information about the
24 case, would be asked to approve a settlement. He

1 wouldn't have any reason to know about what had gone
2 on in Delaware. Now, I am sure that there would be
3 some rogue recitation in the settlement papers about
4 there having been a proceeding here, but I don't think
5 anybody would have been candid with him about the fact
6 that what this Court said in terms of the disclosure
7 claims not being colorable and the process claims
8 being fairly litigable.

9 Now, hence, my order. So then what I
10 got in terms of submissions was essentially a
11 submission from the plaintiffs that effectively
12 confirms my concerns.

13 So who's going to speak for the
14 plaintiffs today?

15 MR. BENNETT: Your Honor, Blake
16 Bennett from Cooch and Taylor --

17 THE COURT: Is what's in your letter
18 true and correct?

19 MR. BENNETT: Yes, Your Honor.

20 THE COURT: Who else was involved in
21 the negotiations over forum selection for the
22 defendants besides Mr. Berger?

23 MR. BENNETT: Your Honor, I rise to
24 introduce my colleagues, Juan Monteverde and Shane

1 Rowley of Faruqi & Faruqi. These two gentlemen were
2 most involved in negotiating with the defendants. And
3 I believe each will be able to present different
4 aspects of -- of the activity in this litigation.

5 THE COURT: Okay. Whichever one of
6 you can answer my question, please come to the podium.

7 MR. MONTEVERDE: Good morning, Your
8 Honor. Juan Monteverde with Faruqi & Faruqi.

9 THE COURT: Who besides Mr. Berger on
10 the defense side was negotiating to get this
11 settlement into the Arizona state courts?

12 MR. MONTEVERDE: My entire discussions
13 for the defendants were with Mr. Berger exclusively.

14 THE COURT: Okay. Why, when they were
15 essentially twisting your arm to go into Arizona,
16 didn't you come back to me?

17 MR. MONTEVERDE: Your Honor, at the
18 time we were considering doing that as well, but we
19 did not feel strong about coming back. We felt that
20 our neglect to pursue the go-shop at the expedited
21 hearing on October 21st had put us in a very weak
22 position. Also, our state of mind at the time, we had
23 a couple other cases pending before this Court in
24 addition to previous experience. Me personally, I was

1 involved in the Bear Stearns two years ago where
2 Delaware stayed in deference to New York, and at the
3 same time I had a conference before Vice Chancellor
4 Noble who stayed us right before we signed the MOU the
5 day prior. And all that really built our state of
6 mind that we thought there would be a good chance of
7 not being able to move forward. And we saw an
8 opportunity that entering into a settlement would
9 provide not only the disclosures but actually the
10 opportunity to get documents and discovery we would
11 not be privy otherwise. And that discovery has not
12 been provided. We intend to participate actively in
13 confirmatory discovery and can assure this Court that
14 if we have evidence of the process issues that Your
15 Honor certainly spoke of at the hearing on
16 October 21st, we do intend to press them and not
17 pursue the settlement.

18 THE COURT: I had the impression that
19 Mr. Berger extracted your firm's agreement as a
20 condition to getting discovery that essentially you
21 wouldn't attack the settlement. What is the status of
22 that?

23 MR. MONTEVERDE: That is not correct,
24 Your Honor, quite -- that's not it. In fact, I will

1 tell Your Honor -- and I don't have the specific
2 dates; but I recall when negotiating -- thanks, Shane
3 -- when discussing the discovery, we know that Arizona
4 was obtaining discovery that was after the hearing
5 with Your Honor and we wanted to get that discovery as
6 well. We first received it November 5th, and it
7 indicated to us for settlement purposes only. I
8 objected. I immediately sent an e-mail and I said "If
9 this is not litigation discovery, it ends here and I'm
10 going to Vice Chancellor Laster." I put that in
11 writing. I told Mr. Berger that. Within 10 minutes
12 he responded "No problem. It's acceptable for
13 litigation purposes."

14 We reviewed the board minutes. We
15 reviewed the banker book. The board minutes that were
16 given to us were only encompassing the three months
17 prior to the transaction. We wrote a letter or
18 e-mail -- please forgive -- I believe it was an
19 e-mail, asking for additional minutes. And we
20 negotiate with Mr. Berger that we would receive all
21 the minutes relevant to the transaction which went
22 back to April when the negotiations began.

23 THE COURT: So the original offer was
24 only three months or --

1 MR. MONTEVERDE: That's correct. And
2 we were outraged at that stage and we asked for more.

3 I got to maintain Your Honor to
4 understand that there is a reality when things are
5 developing, which is whether -- hindsight is always
6 20-20; but at the time we were considering what our
7 options are, and we're thinking we -- we have a
8 transaction moving forward. We have another case in
9 Arizona. The Arizona documents, I'll tell you, Your
10 Honor, are not available through our LexisNexis. It
11 was hard for us to monitor every day what was
12 happening. We were doing it by different means. So
13 our intel might not have been up-to-date, but we
14 really thought they were moving forward. We thought
15 they were going to be able to bring a PI in Arizona if
16 need be. We learned that they didn't need to have a
17 briefing schedule because the rules allows for a short
18 motion similar to California, or ex parte, or shortly
19 in time. All that was in our minds.

20 We did not sign off on a settlement
21 and then run to Arizona to present it. We -- that was
22 our only option.

23 THE COURT: No. Look, you guys were
24 in the suites. I mean, what -- and someone from the

1 defendants can respond to this if they'd like; but
2 what's gone on here is the classic reverse auction
3 that Jack Coffey talks about and is talked about in
4 Prezant v DeAngelis where defendants benefit and
5 utilize multiple forum to force plaintiffs essentially
6 to constructively reverse-bid for the lowest possible
7 settlement. And you do that by saying to the group,
8 "You guys, we're going to leave you behind. This case
9 will be settled to Arizona. You will be cut out. If
10 you want to get on board, get on board. Otherwise,
11 you're left behind."

12 Now, at least what Mr. Bennett has
13 told me is true and correct -- and I believe him
14 because I know this happens -- is that that's exactly
15 what was said to you, not only by Mr. Berger but by
16 another fiduciary for the class, Mr. Oddo. So I
17 understand your perspective. But the decision then
18 you have to make is, okay. Are we going to be
19 complicit.

20 MR. MONTEVERDE: And if I may respond,
21 Your Honor. The decision was a little bit different.
22 It was are we going to participate so we actually can
23 protect the class in the discovery that's going to go
24 on, which is going to be extensive. And otherwise we

1 have a very good likelihood that we won't get it
2 because -- and we do appreciate and I mean it from the
3 heart, that this Court would be involved and would be
4 willing to get involved possibly even if a settlement
5 was reached in Arizona; but we're not certain of that
6 at the time. And we were concerned if Your Honor was
7 facing a motion to stay in deference to Arizona
8 because there was a settlement, we don't know what's
9 happening and we have nothing to do.

10 And my client, Mr. Scully spoke to me.
11 We had phone calls. We had e-mails. I also owe him
12 an individual responsibility in addition to the class,
13 and I wanted to have the ability to protect the class
14 if they're not being protected adequately. And I felt
15 that signing of the MOU would allow me to participate
16 and go further into discovery.

17 THE COURT: But so -- just so I
18 understand --

19 MR. MONTEVERDE: Sure.

20 THE COURT: -- it's your view that you
21 are unconstrained in your ability to participate in
22 confirmatory discovery.

23 MR. MONTEVERDE: Oh, absolutely.

24 THE COURT: So you were not bound by

1 any prior limitation, either vis-a-vis Mr. Oddo or
2 Mr. Berger, not only express but implicit.

3 MR. MONTEVERDE: No. And, in fact, I
4 communicated with Mr. Oddo last night via e-mail
5 confirming that, asking we need to discuss the plan
6 for confirmatory. And the reason we're not getting
7 into too much detail is because defendants -- it would
8 not be fair for them to know what I specifically said.
9 But we said we would discuss this in early January.

10 I intend to do so, and Your Honor has
11 my word that we're going to participate. And if we
12 see something that is not appropriate or adequate,
13 we're not proceeding. This is just a memorandum of
14 understanding. This is not a settlement. We're not
15 presenting the settlement. We're brokering the
16 settlement.

17 THE COURT: As I say, what was
18 troubling to me was you all signing on and signing on
19 in the context of a situation where your letter, you
20 know, reflected that essentially the squeeze was on
21 you. But I understand what you're saying. And I
22 appreciate that.

23 MR. MONTEVERDE: Thank you.

24 THE COURT: All right. Who wants to

1 speak for the defendants? And is someone here from
2 Wilson Sonsini?

3 MR. NACHBAR: Yes. Luke Liss from
4 Wilson Sonsini is here. I'd be glad to speak or if --

5 THE COURT: I'd like to speak to
6 Mr. Liss.

7 MR. NACHBAR: Okay.

8 THE COURT: All right. Is the
9 characterization of the events in the plaintiff's
10 letter accurate?

11 MR. LISS: I believe it generally is,
12 yes, Your Honor.

13 THE COURT: And is the
14 characterization of Mr. Berger's role accurate?

15 MR. LISS: It is, to an extent. We
16 agree with the events in the letter. What I would say
17 is that the goal here wasn't to twist anybody's arm or
18 to run away from Delaware. The situation, as we saw
19 it, was that we were faced with seven actions in
20 Arizona, at one point three motions for expedited
21 discovery, two there, and that we opposed all of. And
22 so our goal was to get a global resolution.

23 THE COURT: Look, if you hadn't shown
24 up in Delaware, fully briefed the motion to expedite,

1 and been shot down in a way that signaled to you guys
2 you have problems with your case, that would be a
3 credible explanation. I understand the need to manage
4 multidistrict litigation. It makes sense to me. But
5 what you all came in and did and what Mr. Aronstam
6 folks came in and did is, said, "We're happy to be in
7 Delaware. We're thrilled to be in Delaware. We want
8 to be in Delaware." Mr. Berger, in fact, made the
9 pitch about how, you know, we shouldn't have
10 litigation over every case, every deal, which is
11 something that I firmly believe in. It was only
12 immediately after that that suddenly there was active
13 effort to get to Arizona.

14 You might -- look, we may well have an
15 evidentiary hearing on this, something I'm thinking
16 about. There -- at this point there is at least a
17 serious question of fact as to what went down. You
18 just gave me your spin, okay? I was here. I know how
19 these things play.

20 All right. That's all I have for you.

21 MR. LISS: Could I just add one thing?

22 THE COURT: Sure.

23 MR. LISS: And part of the -- part of
24 the factor was that with the multiple plaintiffs in

1 Arizona, they weren't going to come here.

2 THE COURT: Part of the factor was
3 that Mr. Oddo is a guy you deal with regularly. Part
4 of the factor is that he's a California guy.
5 Mr. Berger's a California guy. You've settled lots of
6 cases with him; right? It's easy to swap chips with
7 Mr. Oddo. There doesn't have to be any act of
8 collusion involved. You guys have a history.

9 Of course they weren't coming to
10 Delaware, okay? They had control of the case in
11 Arizona. That's how the game is played. When you're
12 a plaintiff, you try to get control of the case so
13 that defendants have to deal with you. That gives you
14 a piece of the pie for settlement leverage. That
15 gives you a piece of the pie for the ultimate fee
16 negotiation, all right? It's something that happens
17 all the time.

18 Now, normally when the plaintiffs file
19 worthless cases, which is what a lot of these
20 sue-on-every-deal cases are, they're worthless,
21 they're simply we see the announcement, then we file,
22 okay? When that happens, this is all a bunch of
23 movement for nothing.

24 I -- then at that point it makes sense

1 for you guys to say okay. Where's -- where is the
2 forum where most of this gets corralled or whatever.
3 Most of the time in those types of cases you guys
4 would want to be here. Why? Because Delaware, we --
5 we see these things all the time. So when I see a
6 case that is a suit against an independent majority
7 board after a meaningful shopping process and
8 plaintiffs roll in saying nothing but naked price and
9 adequacy because it's below its 52-week high, that's a
10 silly case. So most of the time you all want to be
11 here.

12 What happened here is the plaintiffs
13 filed a case that really had legs. And I told you
14 guys you had legs -- it had legs. And what do you
15 know. All of a sudden Mr. Berger and Mr. Oddo are
16 both working over the plaintiffs to get them to
17 Arizona. That's a problem. At least I think it's a
18 problem. I'm asking for briefing from all you folks
19 on whether it's a problem. I'm going to appoint
20 special counsel to help me figure out whether it's a
21 problem. Maybe it's not a problem. But we're going
22 to move forward deliberately. We're going to find out
23 whether it's a problem.

24 So -- you can sit down.

1 All right. Mr. Aronstam, is there
2 anything that your folks would like to add?

3 MR. SEITZ: C. J. Seitz, Your Honor.

4 THE COURT: Mr. Seitz, how are you?

5 MR. SEITZ: Given the Court's remarks
6 this morning, I'm not sure there's much to say that's
7 going to change Your Honor's mind about what happened
8 here. But I would say that representing the buyer in
9 this transaction, there wasn't a great deal of
10 involvement by our folks in the negotiations, although
11 we were kept apprised of them.

12 THE COURT: Thank you.

13 All right. As I say, we're going to
14 proceed deliberately with this. We all know that the
15 phenomenon of plaintiffs filing deal litigation in
16 multiple forums is a continuing problem. It's
17 increased dramatically to the point where there's now
18 a suit filed over virtually every case; not only that,
19 but over every deal. Effectively now, you also get
20 multiple suits over every deal.

21 It's also well-known that Delaware
22 courts have responded to the filing of poorer-quality
23 suits by cutting fees and criticizing the filing, the
24 rapid filing, of these poor-quality, nonmeritorious

1 suits. It's not surprising that plaintiffs' lawyers,
2 entrepreneurial plaintiffs' lawyers, rationally
3 responded to that by increasing the frequency with
4 which they file elsewhere.

5 Now, historically, plaintiffs' lawyers
6 have been subjected to criticism for the practice of
7 suing on the announcement of every deal, then agreeing
8 to global disclosure statements. I've criticized you
9 all for it. My colleagues have criticized you all for
10 it. But what needs to be understood is that defense
11 lawyers benefit from this game, too. They get to bill
12 hours without any meaningful reputational risk from a
13 loss. They then get to get a cheap settlement for
14 their client. Disclosures are cheap. And as I've
15 suggested, it is readily understood that defendants
16 can play multiple plaintiffs against each other to
17 create the reverse-auction effect.

18 We all know it matters who you
19 litigate against. There are some plaintiff's firms
20 who litigate hard and litigate meaningfully. There
21 are some people who are known as easy settlers. All
22 else equal, you'd like to deal with an easy settlor as
23 a defendant. All else equal, you'd like to deal with
24 an easy settlor with whom you had a past course of

1 dealings and, hence, a general modus vivendi.

2 Some degree of forum shopping
3 necessarily goes on on the defense side. You can help
4 promote one jurisdiction over another by giving
5 preferential access to documents, or trying to. You
6 can stipulate to consolidation and certification of a
7 class. You can do things to try to advance one action
8 over another, and ultimately you can settle with the
9 least-cost player.

10 Collusive forum shopping and collusive
11 settlements are not something that I'm suddenly saying
12 oh, my gosh, this is a problem. And this is something
13 that the Delaware Supreme Court says is a problem.
14 Let me quote to you from *Prezant v DeAngelis*.

15 "The principal criticism of the
16 temporary settlement class procedure is that it
17 facilitates premature, inadequate, and perhaps
18 collusive settlements because plaintiffs' counsel is
19 under strong measure to conform to the defendants'
20 wishes at the early stages of the litigation. This is
21 so because [the] defendant may seek to negotiate with
22 another class member in the event negotiations stall."
23 "When competition among different sets of plaintiffs'
24 counsel exists, [there's] the ever present danger that

1 unscrupulous counsel may 'sell out' the class in order
2 to receive a fee." Page 922 of that decision.

3 And as I've said, it doesn't require
4 an act of collusion. The people in this room, the
5 people who do this type of deal litigation work, it's
6 a community. You're repeat players, and repeat
7 players establish understandings as to how things work
8 and how the game is played. There are beneficial
9 aspects to that. A beneficial salutary community is
10 the Delaware bar. We have traditions of civility that
11 are in force because there are ways we do things; and
12 because we're all repeat players, we see each other
13 again and again. And somebody who deviates from those
14 traditions faces consequences, both reputationally and
15 in the way people deal with them in the future.

16 Likewise in terms of negotiating
17 settlements and getting these types of disclosure
18 deals done. People develop practices. You don't have
19 to have active, express collusion for people to know
20 that by helping Mr. Oddo get his case into Arizona and
21 get that firm in control of the settlement process,
22 that things are going to work out, that Mr. Oddo will
23 have a slightly easier time with his fee negotiation
24 and that everybody is going to be happy and content.

1 Now, many defense counsel historically
2 seem to have regarded this reverse-auction dynamic as
3 something wonderful to promote for the benefit of
4 their clients. But as I tried to remind people in the
5 Revlon case, you're dealing with fiduciaries for a
6 class. And when you knowingly induce a fiduciary
7 breach, you're an aider and abettor. You're not an
8 arm's-length negotiator. You're an aider and abettor.

9 And here's an equally important fact.
10 Defense counsel act as officers of the Court. In the
11 Infotechnology case, the Delaware Supreme Court made
12 clear that a trial court "... has full power to employ
13 the substantive and procedural remedies available to
14 properly control the parties and counsel before it,
15 and to ensure the fairness of the proceedings."
16 That's at page 211.

17 Focus on that language, "the fairness
18 of the proceedings." All right. Collusive forum
19 shopping and collusive settlement does more than
20 undercut the fairness of the proceedings. It takes
21 away the proceedings from the Court that has started
22 to oversee the case and is given a preliminary
23 assessment adverse to defense counsel, and it puts the
24 settlement before a different court that doesn't yet

1 have familiarity with the matter and may never learn
2 what went down. Again, that doesn't suggest any
3 criticism of the second court. They won't know.

4 Now, as I've said, this -- this
5 situation has all the hallmarks of collusive activity.
6 There were multiple forums with competing plaintiffs'
7 lawyers. Everyone originally wanted to be in
8 Delaware, including the defendants. Now, look, I've
9 said -- and I do think that the Delaware plaintiffs
10 initially were probably trying to set up an easy
11 disclosure settlement. But on the motion to expedite,
12 I made clear that there were problems, real problems
13 with the process; and I also held that the disclosure
14 claims were not colorable and, therefore, wouldn't
15 provide the basis for an easy settlement.

16 Now, this -- you know, whatever else
17 their desires might have been, this necessarily had
18 the effect of putting some additional backbone in the
19 plaintiff's Delaware counsel. They couldn't
20 legitimately settle at that point in front of me for
21 disclosures, for if they did, they better answer a lot
22 of questions.

23 Now, there's no question that
24 Mr. Berger and the defendants were dismayed by this.

1 And the record that's at this stage reflects that at
2 that point they turned to Robbins Geller. As I've
3 said, Mr. Oddo is a repeat player. That's not a bad
4 thing. That's a good thing, but he's a repeat player
5 in this business. He's based in California with
6 Mr. Berger. They go back a long way, I'm sure. I
7 have no doubt that they were not so unwise as to
8 discuss an explicit quid pro quo. But I'm also
9 confident that their interests were highly aligned in
10 shifting this case to Arizona, away from my
11 supervision and into a place where it could be
12 presented to the Arizona Court.

13 Now, the record reflects at this stage
14 that Mr. Berger placed affirmative pressure on
15 Delaware plaintiffs to shift everything to Arizona and
16 that Mr. Oddo placed pressure on Delaware plaintiffs
17 to shift everything to Arizona. And the next thing we
18 had is the MOU for the disclosure settlement. And
19 there are disclosure statements and there are
20 disclosure statements. These disclosures, while they
21 might support a settlement of a very weak, colossally
22 weak case, are not the type that this Court at least
23 would describe as strong.

24 So what to do. I've got serious

1 concerns about what happened here. At the same time I
2 think our federal system requires me to give respect
3 to the courts in other jurisdictions and to their
4 processes. So if this settlement is presented in
5 Arizona, that Court should absolutely rule in the
6 first instance on whether to approve the settlement.
7 And if that settlement is approved, again, there's no
8 question that I will give full faith and credit to
9 that order.

10 Now -- but to ensure that the Arizona
11 Court is informed, I will enter an order directing the
12 Register in Chancery to provide a copy of this
13 transcript and other materials from this case to the
14 Court. I will make myself available to speak with the
15 Arizona Court, should that be helpful to the judge.
16 And my order also will direct the parties -- and since
17 Mr. Oddo is not before me, that will be the defendants
18 here -- to provide an additional copy of the same
19 materials that the Register will provide to the
20 Arizona Court, to provide an additional copy to the
21 Arizona Court in connection with any settlement.

22 Now, in this jurisdiction I intend to
23 proceed deliberately to find out what went on to
24 determine if a wrong was committed and, if so, to

1 determine what an appropriate remedy would be. It may
2 be that after full briefing it turns out that you all
3 convince me that this type of -- I'm calling it
4 collusive, so I'll continue to call it collusive --
5 collusive forum shopping is a necessary part of the
6 practice that should not be condemned. I am willing
7 to be convinced on that. You have heard my deep
8 skepticism. I think there's real questions about why
9 this is in any way helpful to our federal system.

10 I have no problem if people want to
11 file deal litigation in another court. Frankly, a lot
12 of these cases that are -- are filed on the
13 announcement, no-merit claims, all else equal, I'd
14 rather not deal with them. But you can't have what
15 went on here, if what went on here is what I'm
16 suggesting may have gone on here. And it is not
17 helpful to have a lot of time and effort wasted
18 up-front dealing with competing fora.

19 So on February 11th, 2011 -- that's
20 several Fridays from now -- each set of counsel will
21 provide me with a submission detailing their roles in
22 the forum selection settlement process. By "each set
23 of counsel" I mean Delaware/out-of-state counsel
24 pairs. So essentially each table.

1 I expect the descriptions to be candid
2 and fulsome. You all know "fulsome" has an additional
3 meaning. Most people use it just to mean a lot of
4 stuff. It also means stinky. I expect people to be
5 candid even about things that might be dubious or have
6 an aroma to them.

7 I want each of your submissions to
8 address, as officers to the Court, the applicable law
9 in this area. I want each of your submissions to
10 address, as officers to the Court, whether there
11 should be a remedy at all. If you think there should
12 be a remedy, I want to know what the appropriate range
13 of remedies is and what your recommendation is.

14 Here are some things I am considering:
15 revocation of pro hac vice status. In National Union
16 Fire Insurance Company of Pittsburgh versus Stauffer
17 Chemical, 584 A. 2d 1229, the Delaware Supreme Court
18 decision from 1994, the Delaware Supreme Court
19 affirmed the revocation of pro hac vice status under
20 the trial court's discretionary power "... to invoke
21 appropriate sanctions where necessary to preserve the
22 integrity of judicial proceedings."

23 It wasn't based on a violation of
24 disciplinary rules or something like that. It was

1 based on integrity of proceedings.

2 Now, to the extent that there's
3 consideration of revocation of pro hac vice status, I
4 want to know whether it should be limited to this
5 action. Judge Ben Tennille of the North Carolina
6 Business Court recently barred several lawyers from
7 appearing there, I think for a year. So should I
8 consider that or do that.

9 This may be something that Office of
10 Disciplinary Counsel should be involved in. I'd like
11 to know if people think that it falls within their
12 purview.

13 Perhaps there are other approaches.
14 It strikes me that, you know, the Delaware -- the
15 State of Delaware invested resources in this. Should
16 there be some remedy for that.

17 Now, I'll tell you that I plan to
18 appoint special counsel to weigh in on these issues.
19 The role of special counsel to -- will be to represent
20 the interests of the State of Delaware and to provide
21 specific input on the interests of the State and
22 judicial system as a whole. I think it's particularly
23 important, because this is a situation where what is
24 individually rational is not collectively rational.

1 It is individually rational for plaintiffs to file in
2 whatever forum they think can get them control of the
3 action -- of a action -- an action and increase their
4 leverage in the settlement process. It is
5 individually rational for defendants to play
6 plaintiffs off against each other and to engage in
7 forum shopping of the reverse auction kind. None of
8 that strikes me as collectively rational, but it's
9 understandable that the interests of the system as a
10 whole aren't adequately represented, given the
11 individual interests of everyone involved.

12 So I'm going to appoint special
13 counsel to speak to those interests. And I haven't
14 talked to anyone about that yet, but I will do that by
15 order and let you know who that is.

16 Now, to the extent there are factual
17 disputes, I do intend to hold a hearing to receive
18 evidence and make factual findings. This is a
19 scenario that stinks; but a lot of times when you get
20 below the surface, the real facts are different. So I
21 am happy to be convinced otherwise.

22 Now, in terms of pro hac vice
23 revocation, there are cases, including Johnson v
24 Trueblood, that indicate that a lawyer should have

1 notice and the opportunity to be heard when revocation
2 is being considered. Mr. Berger should consider this
3 his notice. As I've said, I think there's a prima
4 facie case of collusion. And so I think that there
5 needs to be some factual showing to convince me
6 otherwise.

7 Now, I'll tell you, I don't do this
8 lightly. There's well-known lawyers in this case.
9 Mr. Berger, who is at the focus of this matter, is a
10 well-known practitioner. I've known him since the
11 mid-'90s. I've litigated with him. I've litigated
12 against him. I've eaten dinner with him. His firm is
13 respected, it's nationally known. I like Mr. Berger,
14 but that doesn't matter. I don't like what he's done
15 or what he seems to have done. And the judicial
16 system can't have people negotiating collusive
17 settlements. It undermines the legitimacy of the
18 entire representational litigation process.

19 Everyone, even people I like on a
20 personal level, has to follow the rules. And I
21 thought I put people on notice in Revlon that I well
22 understood the darker underside of settlement practice
23 and it was time to get back to the straight and
24 narrow.

1 I am not going to do anything until I
2 hear from you all on the 11th. As I say, at that
3 point I will proceed deliberately. To the extent the
4 Arizona Court does approve the settlement, I intend to
5 retain jurisdiction over this aspect of the matter.

6 Any questions?

7 MR. NACHBAR: Can I briefly be heard?
8 Very, very briefly.

9 Your Honor just talked about following
10 the rules. And I think that really gets to the heart
11 of the matter, because from the defendants' side of
12 these things -- we'll brief these issues, and we
13 understand, you know, where Your Honor is coming from.
14 But just a little bit of personal perspective.

15 There are no rules. That's the
16 problem. And so in case after case we get Delaware
17 litigation, we get litigation in other forums. And
18 there are no rules about who we speak to, who we deal
19 with, how the things get processed. And Your Honor
20 pointed out that sometimes, you know, defendants try
21 to cooperate with one set of plaintiffs and -- and
22 have litigation in one forum or another. That
23 happens, obviously, but -- but it really is a problem.

24 For instance, I recently had a case --

1 I can't say which case it is because what happened --
2 what was proposed didn't happen, and -- and I'm
3 certainly glad it didn't, based on today's
4 proceedings; but there was a proceeding in Delaware
5 and there was another proceeding in another state. A
6 motion to advance that case was denied. And one of my
7 cocounsel then actually reached an agreement in
8 principle with the out-of-state plaintiffs to settle
9 the case and wanted to enter into that settlement.
10 Now, we said we would not sign a settlement agreement
11 under those circumstances. And if they wanted to
12 settle, they could do it alone. And I was counsel for
13 the defendants in the DeAngelis v Prezant case. I am
14 well aware of the teachings of that case and the
15 lessons that we learned.

16 I would only submit -- and the case
17 that I just referred to, you know, not by name, was a
18 clear case. I mean, there was, you know -- there's
19 just no doubt that you couldn't do what was being
20 proposed there.

21 I would submit it might be a little
22 bit different when the first-filed cases are in
23 another forum. There are seven of them. A motion to
24 expedite was denied here. Now, I understand that

1 there's some other factors Your Honor's identified,
2 and we'll brief those issues. My only point is that
3 from a defendant's perspective, it's very, very
4 difficult. And there are no rules. And if there were
5 rules, we'd follow them.

6 THE COURT: And -- and, Mr. Nachbar, I
7 am sympathetic to that. And, look, one of, I think,
8 the very strong arguments in Mr. Berger's favor and
9 in -- is that some could say that, particularly in the
10 western areas of the country, this is quite common
11 practice. And so is there really fair notice that
12 this type of thing would result in revocation of your
13 pro hac. And I get that. And I am deeply
14 sympathetic, having been where you are, of what you're
15 talking about. And that's why what I'm trying to
16 communicate today is that I think that these are
17 serious issues. I don't think that they are perhaps
18 sufficiently understood outside some of the more
19 prestigious Delaware firms. That is also why I am
20 absolutely not acting precipitously today to enter any
21 order revoking Mr. Berger's pro hac or to, you know,
22 issue -- certify a class and join people from
23 proceeding. I think all of that would be
24 inappropriate.

1 That's why I want briefing. That's
2 why I want information. That's why I'm going to
3 appoint special counsel to give me additional input.
4 I want to make what is a reasoned, balanced decision
5 that takes into account everyone's interests,
6 including the State's interests and the interforum
7 interests.

8 What I -- what I don't want people to
9 think is that just because this perhaps is done from
10 time to time, that nobody has any concerns about it.

11 So I hope that clarifies where I'm
12 coming from.

13 MR. NACHBAR: It does. And we very
14 much appreciate Your Honor's having an open mind and
15 considering briefing. And we look forward to the
16 opportunity to brief the issue and -- and to, you
17 know, bring at least the defendants' perspective,
18 perhaps more eloquently than I did this morning.

19 THE COURT: You're always eloquent,
20 Mr. Nachbar. And I am sympathetic. I -- I am. But,
21 you know, I think that -- that some of the Wild West
22 stuff, people might want to think about where --
23 where -- how things actually should be done.

24 MR. NACHBAR: Yeah. No. And -- and,

1 look, this -- this is a problem, obviously, that goes
2 far beyond this case. And, you know, if Your Honor
3 can figure out a way to resolve the competing-fora
4 problem, you will have done a real service to
5 everyone.

6 THE COURT: Well, I'm hoping you all
7 can help me.

8 All right. I know this wasn't a
9 pleasant morning. Frankly, it wasn't pleasant for me,
10 either. And I'll look forward to having your
11 submissions on the 11th of February.

12 We stand in recess.

13 MR. MONTEVERDE: Thank you, Your
14 Honor.

15 MR. ROWLEY: Thank you, Your Honor.

16 (Court adjourned at 9:44 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 35 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 17th day of December 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent