



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CHENIERE ENERGY, INC. : CONSOLIDATED
STOCKHOLDERS LITIGATION : C.A. 9710-VCL

IN RE CHENIERE ENERGY, INC. : C.A. 9766-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, June 25, 2014
1:35 p.m.

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

- - -

IN-COURT SCHEDULING CONFERENCE and
RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

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3 -and-

4 CYNTHIA A. CALDER, ESQ.
Grant & Eisenhofer, P.A.

5 -and-

6 JEFFREY W. GOLAN, ESQ.
JULIE B. PALLEY, ESQ.
MICHAEL A. TOOMEY, ESQ.
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Barrack, Rodos & Bacine

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John M. Deutch, David I. Foley, Randy A.
24 Foutch, Paul J. Hoenmans, David B. Kilpatrick,
and Walter L. Williams

1 THE COURT: Welcome, everyone.

2 MR. WELCH: Good afternoon, Your
3 Honor.

4 THE COURT: So first of all let's
5 thank the court staff for the quick switcheroo. We
6 were supposed to be downstairs, so none of the
7 ordinary mechanics of courtroom setup were dealt with.
8 So thanks to Donna and the court reporter and
9 everybody else for doing that so quickly, and you-all
10 for moving up here. But we will still try to maintain
11 the comfortable, relaxed environment of the conference
12 room, even though we're all here.

13 MR. WELCH: Understood, Your Honor.
14 With permission, may I make an introduction to the
15 Court, too?

16 THE COURT: You may, sure.

17 MR. WELCH: Your Honor, to my right is
18 my partner and friend, Susan Saltzstein, from our New
19 York office.

20 MS. SALTZSTEIN: Good afternoon, Your
21 Honor.

22 MR. WELCH: Your Honor has admitted
23 her pro hac vice. And also, at the end of the table,
24 is my partner and friend Joe Sacca, and we'll be

1 submitting his pro hac papers shortly. And Jeff Geier
2 is with us, he is in the back of the courtroom, and
3 Your Honor, I'll be submitting pro hac papers for Jeff
4 as well.

5 THE COURT: Okay. Welcome.

6 MR. WELCH: Thank you, Your Honor.

7 MR. ANDREWS: Good afternoon, Your
8 Honor. Peter Andrews, Andrews & Springer. To my left
9 is Mr. Jeffrey Golan from Barrack, Rodos & Bacine.

10 MR. GOLAN: Good afternoon, Your
11 Honor.

12 MR. ANDREWS: Obviously, you're aware
13 of Ms. Calder from Grant & Eisenhofer.

14 MS. CALDER: Good afternoon, Your
15 Honor.

16 MR. ANDREWS: Mr. Lebovitch from BLBG.
17 In the back row, Julie Palley from Barrack Rodos, and
18 Mike Toomey, also.

19 THE COURT: Great. Good to see
20 everyone.

21 MR. ANDREWS: And also, with Your
22 Honor's permission, we have admitted Mr. Golan pro hac
23 vice, and I believe he will take the lead today.

24 THE COURT: All right. Well, there's

1 three things on my agenda to talk about. The first
2 thing is finding out if the plaintiffs are organized
3 for purposes of the 205 proceeding, and what, if
4 anything, we need to do on that. The second thing is
5 which case should go forward, and third thing is
6 schedule.

7 So let me first look to the right-hand
8 side from my perspective, the left-hand side from your
9 perspective, and ask you-all. I have, in the 205
10 case, I have the Grant & Eisenhofer folks. In the
11 derivative case I have you-all working as a team. Is
12 there any reason why that same harmony and team spirit
13 shouldn't be employed in the 205 case, as well?

14 MR. GOLAN: Your Honor, Jeffrey Golan.

15 THE COURT CLERK: I'm sorry. Please
16 come to the podium.

17 MR. GOLAN: The four co-lead firms in
18 the consolidated action also intend, with Your Honor's
19 permission, to jointly participate in the 205 action.
20 And we had submitted a motion to intervene on behalf
21 of plaintiffs Jones and Maguire, in addition to the
22 Shenker group.

23 THE COURT: Yeah. I saw the motion to
24 intervene. That's actually what worried me a little

1 bit, because it suggested to me that there wasn't a
2 common front, and that there were actually separate
3 desires. And what I would prefer not to have is
4 similarly situated people giving me multiple
5 submissions.

6 MR. GOLAN: No, Your Honor. The three
7 plaintiffs and the four co-lead firms are a group for
8 purposes of that action, as well.

9 THE COURT: So I will grant your-all's
10 motion to intervene. And then why don't you-all
11 submit some little stipulation to the effect that, you
12 know, you'll be submitting single briefs. Something
13 that reflects that I'm not expecting three parties to
14 be litigating separately in the 205 action.

15 MR. GOLAN: Yes, sir.

16 THE COURT: All right. Great. So
17 second thing, let's talk about which cases go first.
18 And here I am limiting myself to the concept of the
19 stay. So, Mr. Welch, do you want to raise that first,
20 since I think you have a definite preference?

21 MR. WELCH: We do, Your Honor. I
22 think, from our perspective, we think the 205 case
23 ought to go forward. It's the case in which the
24 broadest relief, in terms of opportunities, is

1 available to the Court. Certainly we believe that
2 under Count I, that Cheniere did it right. No doubt
3 about it from our perspective. We're prepared to
4 brief that on a very prompt basis, Your Honor.

5 With respect to Count II, obviously
6 that's a fallback count to be available to the parties
7 and to the Court should the Court disagree with Count
8 I but, at the same time, that's not available in the
9 stockholder action. So we would suggest and submit
10 that the right thing to do here is to stay the
11 stockholder action. And we've obviously put in a
12 brief on that, which Your Honor is aware of. So we
13 would submit staying that and moving forward on the
14 205 action really involves the best use of judicial
15 economy and the parties' -- you know, parties'
16 opportunities to deal with the issues as they've been
17 raised.

18 I'm comfortable pressing Your Honor,
19 should Your Honor want to hear it, our view as to why
20 we think that -- and perhaps that comes in with the
21 third issue on scheduling -- but why we think that the
22 bringing on a Count I motion makes a lot of sense.
23 But I'll defer to Your Honor.

24 THE COURT: You've talked a couple

1 times about motions, so that's one of the things I
2 want to know, is what do you believe that the 205
3 action will look like?

4 MR. WELCH: Well, I mean to start
5 with, Your Honor, it's our view that this was not a
6 vote controlled by the bylaw, and obviously,
7 plaintiffs' focus is not only on the bylaw, but also
8 on Proposals 3 and 4. And as I'm sure Your Honor is
9 aware, Proposals 3 and 4 have now been withdrawn.

10 This was a vote that was controlled by
11 NYSE Market. The certificate of incorporation didn't
12 require anything in terms of a vote, the bylaws
13 didn't. Certainly none of the organizational
14 structural documents of Cheniere required a vote.
15 Rather, the vote was required by the rules we've
16 identified in our brief, by the NYSE market.

17 THE COURT: There is this concept --

18 MR. WELCH: Yes, sir.

19 THE COURT: -- in, I guess it's
20 paragraph 23 of your brief, that it may have been
21 controlled by the plan. So in the section you quote
22 in paragraph 23, "the 211 Plan further provided that
23 ..." and you say in its discretion the board may do
24 blah, blah, blah. Then you say "... provided,

1 however, to the extent necessary to comply with the
2 Code, including 162(m) and 422 of the Code ..." and
3 I'm going to leave out some text "... the Company
4 shall obtain Stockholder approval of any plan
5 amendment in such manner and to such degree as
6 required."

7 MR. WELCH: Yes, sir.

8 THE COURT: So I wasn't sure whether
9 that plus footnote 1 created an obligation to seek
10 this standard that included abstentions.

11 MR. WELCH: Well, Your Honor, I'll go
12 a couple of ways on that. Number one, I think that
13 with respect to the plan, the plan did, in fact,
14 direct -- and I think that's the language that you're
15 quoting. The plan did, in fact, direct that a vote
16 take place. I think Rule 7.10 and 7.11 of the NYSE
17 market rules did the same thing. Of course, Rule 7.11
18 also -- pardon me, 7.10 specifically specified the
19 votes-cast approach, which was used by Cheniere. And
20 our position is that, again, without a doubt -- from
21 our perspective, in any event -- Cheniere got it
22 right.

23 Not only did it tell stockholders, you
24 know, what was going to happen with -- with

1 abstentions -- a point that was, I think, underscored
2 in the Licht case, which is cited by plaintiffs in
3 their brief, the fact that that was disclosed to
4 stockholders was critical. If a stockholder wanted to
5 vote yes, stockholder could vote yes. If a
6 stockholder wanted to vote no, they could do that and
7 if a stockholder wanted to abstain, they were
8 specifically told that that abstention would not count
9 with respect to the vote, consistent with the concept
10 of votes cast under the Licht case, and I think that's
11 important. So not only were stockholders told, Your
12 Honor, but beyond that, the Exchange was told, as
13 well, what had transpired.

14 THE COURT: Look, the Exchange
15 requirement, I get.

16 MR. WELCH: Yes, sir.

17 THE COURT: As I say -- and this is
18 what's odd about 205. I mean, we don't really know
19 how it works, but it seems to me that if a company is
20 going to come forward and say, "Court, bless this,"
21 you have something of an obligation to come forward
22 and inform the Court about everything that one is
23 blessing. And I thought you did a nice job of that
24 by, you know, giving me this plan language, and then

1 you got a couple footnotes in here that suggest that
2 there are a couple of warts on this. And so one of
3 the warts that I thought you might be adverting to was
4 this idea that there perhaps was a tax code vote that,
5 while otherwise optional, was in fact made mandatory
6 by the plan. But what I hear you saying now is, no,
7 that's not one of the things that you are
8 articulating. You think it's purely a New York stock
9 market thing?

10 MR. WELCH: No, sir. I don't believe
11 it was required by the plan. There were some tax
12 advantages to doing it. 162(m) also, Your Honor,
13 references the votes cast standard, and obviously
14 alludes to state law as appropriate. But there's
15 nothing about Delaware law that would suggest that on
16 a votes-cast standard that you count abstentions.
17 Indeed, the emphasis in the Licht case, Your Honor,
18 couldn't be more clearly to the contrary. They
19 identify -- I think Vice Chancellor Noble, if I'm
20 remembering correctly, identifies a whole host of
21 circumstances where that votes-cast standard is
22 applied and does not involve counting abstentions.

23 So again, as I said, Your Honor, not
24 only did we tell stockholders about what the effect of

1 abstention would be, we also forwarded the Inspectors
2 of Election report to NYSE Market, told them what the
3 for votes were, the against votes were, and what the
4 abstention votes were. And at that point NYSE Market
5 decided to list the shares.

6 So, I mean, in that sense I think --
7 to turn just briefly to the scheduling issue, Your
8 Honor -- and there's a lot more we can say, and I'm
9 happy to address any issues that the Court has about
10 this. But, you know, I think, from our perspective,
11 the right thing to do is to move forward with the 205
12 action. It's the one with the broadest potential
13 sources of remedies available to the Court.

14 We don't think we're going to need
15 Count II, we think Count I will do it. I would
16 suggest, Your Honor, that the right thing to do would
17 be first to bring on, you know, our brief on Count I.
18 I think we could file that in -- in two weeks, Your
19 Honor. We can do that. And then as quickly as the
20 plaintiffs want to respond, we will respond equally
21 quickly with a reply. We can cue that up for decision
22 by Your Honor. Again, it's a powerful --

23 THE COURT: Let me understand.

24 MR. WELCH: Yes, sir.

1 THE COURT: You've used the term
2 "motion," you've used the term "brief." Is this
3 summary judgment? Is this judgment on the pleadings?
4 What is it?

5 MR. WELCH: Your Honor, I would say --

6 THE COURT: You need to make a
7 decision.

8 MR. WELCH: I understand. 205 seems
9 to me, at least in some circumstances, to not
10 contemplate even an adversarial proceeding. It seems
11 to say -- and I think there's a very limited Chancery
12 precedent to this effect -- that a corporation can
13 come in, can present its arguments and views, and the
14 Court can make a decision based upon whatever
15 presentation the Court feels is appropriate.

16 Now, here, I'm mindful that Your
17 Honor's already admitted our friends at Grant &
18 Eisenhofer and have indicated that you'll do the same
19 with respect to our other colleagues. So there's
20 nothing that tells us 12(b)(6) applies, 23.1 applies,
21 or how it goes, but it seems to me that that's the
22 typical approach that's used, and I don't know why we
23 couldn't brief that up.

24 It's a question of law, we think, Your

1 Honor. We think that -- we think we got it right.
2 Cheniere got it right. We think it's a question of
3 law. We think it's something that can be laid out
4 very quickly, very promptly, efficiently, for Your
5 Honor's decision on the question of law.

6 THE COURT: Let me ask you something
7 about that. Because -- and one of the things that
8 205(d) contemplates is this list of factors --

9 MR. WELCH: Yes, sir.

10 THE COURT: -- that the Court is
11 empowered to consider.

12 MR. WELCH: Yes.

13 THE COURT: "May." It's permissive.
14 One of which is the expansively phrased "any other
15 factors or considerations the court deems just and
16 equitable." So what happens with those five factors?
17 Is that a discovery issue? So if you have a situation
18 where -- and I think it's safe to say that Mr. Golan
19 is going to oppose your claims that this is validly
20 done.

21 MR. WELCH: I think Your Honor is not
22 going out on a limb on that one.

23 THE COURT: Yeah. So --

24 MR. WELCH: We so anticipate, Your

1 Honor.

2 THE COURT: So when he does that, does
3 he get to take discovery to try to develop a record to
4 show me things that I should take into account under
5 these five factors?

6 MR. WELCH: Well, Your Honor, it seems
7 to me that if we present the legal question in Count
8 I, I don't think it's a whole lot different than it
9 would be if we were moving to dismiss from a
10 procedural standpoint. Often times we seek to stay
11 discovery, as Your Honor well knows. In a 23.1 motion
12 the Court will sometimes routinely stay discovery and
13 consider the question of law.

14 So I think in the first instance there
15 is a question of law here. I think Your Honor can
16 address it readily and quickly. And I think Your
17 Honor will find as -- I don't mean to be repetitive,
18 but I think you will find that Cheniere called it
19 right. Cheniere called it dead right with respect to
20 the application of the NYSE rules, with respect to
21 Rule 7.10, 7.11, with respect to what they told
22 stockholders about the effect on abstentions. As I
23 said, the Licht case -- I think it's footnote 35, if
24 my recollection is right -- really bears down on that

1 and makes the case that, you know, stockholders were
2 told. And that's really an important factor here.

3 And when you add to that that they
4 also went to the Exchange and told the Exchange what
5 happened, told the Exchange about abstentions and the
6 Exchange listed the shares, I think that's pretty good
7 corroborative evidence and support for the proposition
8 that, as I said, Cheniere called it right.

9 Now, if we get beyond that, Your
10 Honor, again, I'm -- you're not going out on a limb in
11 saying they're going to be looking for discovery.
12 They will. If I had to guess, I would say Your Honor
13 is going to award some discovery if we get to the
14 Count II proceedings.

15 I don't think we need to rush into
16 that now. Points 3 and 4 were taken off the table.
17 We moved the meeting off. I think what we did was the
18 kind of things that a responsible corporate citizen,
19 in the face of these arguments, should do. So that's
20 been done. I don't think there's a crisis here. I
21 think they may say that there is, but we'll respond to
22 that if and when they do.

23 But I think the right thing is to --
24 perhaps Your Honor could consider cueing up the

1 question of law, presenting that. We'll get our brief
2 filed in two weeks. We'll get it filed sooner if Your
3 Honor wants, but I think we can easily get it done in
4 two weeks, and let's bring it on and let's decide that
5 issue. Much as you would, I think, in class or
6 derivative litigation. This is a question of law.
7 So --

8 THE COURT: I see. And I hadn't
9 focused as closely on the distinction that you're
10 drawing, but in your view count I is the one where
11 you've teed it up as a matter of law?

12 MR. WELCH: Yes, sir. And I --

13 THE COURT: And Count II is the one
14 where you say hey, look, we don't know what the
15 problem conceivably could be, but if for some reason
16 there is some need -- notwithstanding Count I -- Count
17 II is the one where we'll get into these factors and
18 do validation notwithstanding.

19 MR. WELCH: Your Honor, having looked
20 at the statute, that's what I would suggest is the
21 right approach. I think plaintiffs' claims, by and
22 large, all rise and fall with the allegation that we
23 got the vote wrong. I mean, if you look at their
24 disclosure claims, for example, in the Shenker case,

1 they say we falsely told stockholders that abstentions
2 wouldn't be counted. We think that's wrong. Cheniere
3 got it right. They say -- and I think that would be
4 solved by a decision by Your Honor with respect to the
5 narrow legal issue.

6 They say the 8-K falsely said that
7 Cheniere got majority stockholder approval when in
8 fact it didn't. Well, again, I think that can be
9 readily resolved by addressing the legal question.

10 I think their fiduciary duty claims
11 suggest that -- in a very conclusory and nonspecific
12 way, I would emphasize -- but they suggest that, you
13 know, this was somehow driven by some desire to pick
14 the wrong standard or something. And I think -- I
15 think the record, to a limited extent in our stay
16 brief, but to a broader extent in our brief that we
17 will file in support of Count I, I think will make the
18 point very clearly that when you look at what happened
19 here, and when we look at what was done and you look
20 at the NYSE Market rules and you look at the factor
21 that none of this is driven by either the charter, the
22 bylaws, or the operative corporate governance
23 documents of Cheniere but, rather, was driven by the
24 rules of the Exchange on which this company trades and

1 with which it has to comply, I think Your Honor will
2 find that that question of law only goes one way.

3 THE COURT: Yeah. What I'm hearing
4 you saying -- and I had come into this thinking that
5 we were going to talk about essentially one
6 culminating merits event.

7 MR. WELCH: Yes, sir. I understand.

8 THE COURT: And that would be
9 essentially both counts. Maybe you'd win as a matter
10 of law, maybe you'd win as a matter of validation.
11 But what I hear you saying -- and what I'll now ask
12 Mr. Golan to respond to -- is this idea that we'll do
13 first a motion-based as-a-matter-of-law phase, and
14 then if it turns out that as a matter of law you are
15 not correct, then we'll do some discretionary
16 205-based validation phase?

17 MR. WELCH: Your Honor, I would think
18 that's --

19 THE COURT: That's what I'm hearing
20 you suggest.

21 MR. WELCH: I have ever confidence
22 that my friends on the other side will not want to
23 have that question of law presented in isolation.
24 It's too easy to focus on, it's too easy to rule on.

1 I don't think they'll want that. I'll respect their
2 views, however asserted and whatever asserted. But
3 that said, I have little doubt about the response to
4 that. But I think it's a powerful argument.

5 THE COURT: How imminent, at all --
6 and I know you've taken it off for this annual
7 meeting -- is a return of Proposals 3 and 4?

8 MR. WELCH: Your Honor, I have no
9 basis to believe it's imminent at all.

10 THE COURT: But I mean in terms of --

11 MR. WELCH: There's no -- pardon me,
12 Your Honor.

13 THE COURT: In terms of thinking this
14 whole thing through, is it something that is in the
15 earliest -- like a 2015 event?

16 MR. WELCH: I can't say that, Your
17 Honor. I can't say that with it having come off the
18 table -- I just am not aware of any consideration
19 that's been given to that by the board. I would not
20 suggest that there's anything imminent about that
21 happening. So I don't think Your Honor ought to feel
22 any urgency or pressure related to that. And, indeed,
23 that was not our intention in taking it off the table.
24 Our goal here really was --

1 THE COURT: Yeah. You were removing
2 the urgency.

3 MR. WELCH: We were trying to remove
4 the urgency and trying to simplify --

5 THE COURT: I get it. In terms of the
6 schedule, obviously we don't want to make this a
7 manana thing, where it goes on for a year.

8 MR. WELCH: No. It --

9 THE COURT: We could take -- let's say
10 you take two weeks, they come back and say
11 something -- however many. We could take 60 to 90
12 days, 60 days on the as-a-matter-of-law portion, and
13 it wouldn't cause you --

14 MR. WELCH: No, sir.

15 THE COURT: -- discomfort.

16 MR. WELCH: No, sir. Not at all. And
17 there's no intention whatever to bring that back at
18 the scheduled September 11 meeting and, as far as I
19 know, no intention at all with respect to scheduling
20 at all at this point. I'm not saying it could never
21 come up, I couldn't do that, but at the same time,
22 Your Honor may well reach conclusions that at some
23 point might make it appropriate. But we're not trying
24 to pressure the Court. We do think -- however, I am

1 mindful of Your Honor's admonition just a moment ago
2 that could we bring on a prompt legal presentation
3 about the question of law? We absolutely can. And
4 with Your Honor's permission, we absolutely will.

5 THE COURT: All right. Well, let me
6 hear from Mr. Golan.

7 MR. WELCH: Yes, sir.

8 MR. GOLAN: Your Honor, I think we
9 have to look a little bit at --

10 THE COURT: Remind me what you were --
11 we had like another long case where we saw each other
12 a lot, and I'm blanking on now what it was.

13 MR. GOLAN: We had the Allergan case.

14 THE COURT: That's what it was. You
15 were in that. Okay. I knew you looked tremendously
16 familiar to me. I remembered you and I remembered us
17 interacting before, but I couldn't remember which
18 exact case it was.

19 MR. GOLAN: Yes, Your Honor. And
20 unfortunately, the --

21 THE COURT: That's one I got wrong.
22 I --

23 MR. GOLAN: Well, not in our view,
24 Your Honor.

1 THE COURT: I get a lot of these
2 things wrong.

3 MR. GOLAN: Not in our view, Your
4 Honor.

5 THE COURT: I can tell you, all I do
6 is try.

7 MR. GOLAN: I think we have to look at
8 how we got here, because I don't think that this 205
9 action is really what this statute was intended for.
10 205 was intended to cure technical defects so that the
11 whole capital structure or stock issuances were not
12 upset when, for example, one out of twelve directors
13 didn't get their unanimous consent form back in time.

14 Here, Your Honor, in February, 2013
15 there was a vote taken on an amendment to increase the
16 shares by 25 million in the 2011 plan. I can go into
17 all the reasons why the bylaws and this -- the bylaws
18 required that abstentions count as "no" votes.
19 Delaware law, the default rule required it, Section
20 162(m) of the tax code required it. Even the New York
21 Stock Exchange Market rules themselves only show them
22 as minimum votes, and specifically allow that
23 states -- state law or bylaws can require more
24 stringent voting requirements.

1 But what happened was that in this
2 case, 45 percent of the shareholders said yes and the
3 rest either abstained or said no. And under Delaware
4 law, that would -- and under the bylaws at the time,
5 that was not sufficient to allow this company to issue
6 25 million shares. So we have that.

7 Then, come April of 2014, this
8 company's board wants to add another 30 million shares
9 into the 2011 plan, which they are planning to do
10 under these Proposals 3 and 4. They change the
11 bylaws. If my friend Mr. Welch was right, they
12 wouldn't have needed to change the bylaws. But they
13 do. They change it to try to sweep under the rug that
14 the prior vote really didn't pass, and to make it much
15 easier this time to get the votes that they need to
16 get another 30 million shares into the plan. And,
17 Your Honor, just for a little comparison's sake, if
18 that had occurred, over 20 percent of this company's
19 stock, by the end of the awards of those shares, would
20 have been in the hands of insiders, which is an
21 enormous percentage unless you have a company like
22 a -- you know, a founding partner.

23 So you have that. You have in April
24 they also announce the compensation to be paid, that

1 was paid in 2013 to their chief executive officer,
2 which is \$140 million, which is \$60 million more than
3 any other CEO in this country gained in compensation
4 last year. And you have another -- in fact, they
5 award 6 million shares out of this 2011 plan to the
6 CEO, and that's not enough. They have to go back and
7 add another 300,000 shares from a 2003 plan, so that
8 he gets 6.3 million shares last year.

9 The five next-senior officials,
10 including the general counsel, get stock awards
11 equaled to something over \$130 million worth of stock.
12 And that's the context of this case. Looking at the
13 compensation that was awarded, when it was disclosed
14 at the end of April, and looking at the bylaws and
15 looking at the vote totals and looking at how they
16 wanted to change the bylaws, we recognized that the
17 prior vote had not passed based on Delaware law and
18 based on the then-existing bylaws. We caught them.
19 And it was through a lot of analysis that a -- I mean,
20 they raised in their brief this laches or
21 acquiescence. No shareholder could have figured this
22 out at the time, because shareholders are entitled to
23 assume that a board is acting in compliance with its
24 bylaws. That's part of the contract.

1 So here we are. We filed this case at
2 the end of May. We filed a brief in support of our
3 motion for expedited proceedings, and the following
4 Monday I got a call from Mr. Welch and Ms. Saltzstein
5 giving me a head's up that the company is postponing
6 its vote, and they file a form 8-K that specifically
7 identifies the filing of the complaint and the motion
8 to expedite as a reason for postponing the shareholder
9 vote for three months.

10 And then we start to negotiate for
11 expedited discovery. We speak the next day. We had a
12 conference call with Your Honor that day to advise the
13 Court that there was no absolute immediate need for a
14 hearing on that motion.

15 THE COURT: Thank you again for
16 letting me know.

17 MR. GOLAN: You advised counsel that
18 they should try to work through a schedule if
19 possible. We had discussions on that next day. The
20 following Thursday I received a proposed case
21 management schedule from Cheniere's counsel. I
22 responded the next Monday, and the next Tuesday, which
23 was the 9th, I believe. And then the next day after
24 that we were told that there was some representation

1 issues. So I asked if Cheniere's counsel would make
2 sure that any other counsel coming into the case see
3 our proposed case scheduling order so that by the end
4 of that week we could have something jointly submitted
5 to Your Honor.

6 I don't know what happened after that.
7 Maybe they started going through documents, maybe they
8 started brainstorming other ideas, but the next thing
9 we saw -- having been told that there would be
10 significant movement the next Monday and that I should
11 not submit something to Your Honor -- we got hit with
12 the 205 petition, which now seeks to -- and a motion
13 to stay the consolidated action.

14 And clearly the 205 petition was not
15 brought because this company had recognized that they
16 had a defect, like a unanimous consent was missing.
17 What they did was that they filed the 205 action
18 hoping that it would take precedence and completely
19 undercut the need for discovery and expedited
20 proceedings in this matter.

21 But I don't think it does that, Your
22 Honor. Even with the postponement of the hearing
23 until September 11 and even with the abrupt withdrawal
24 of Proposals 3 and 4, there's still going to be a

1 shareholder vote, Your Honor. And there is still good
2 reason for this Court to allow the consolidated
3 stockholder actions to go forward so that we can seek
4 whatever appropriate injunctive relief is necessary
5 prior to that shareholder vote.

6 If the Cheniere corporate board
7 violated the bylaws, if the Cheniere corporate
8 board -- one of the factors Your Honor mentioned under
9 205 is that you look at other factors, but you can
10 also look at intent and belief at the time. And we
11 believe, especially based on the amendment to the
12 bylaws in April, 2014 -- which would have been
13 superfluous if Cheniere really believed at the time
14 that the vote could legitimately be based on New York
15 Stock Exchange Market rules rather than their own
16 bylaws -- we believe that discovery into those matters
17 should progress in the stockholder case and, really,
18 that this 205 petition should be viewed as a tag-along
19 case. At some point we can get back to briefing
20 whatever issues might be involved in that case that
21 may be different from the consolidated action, but the
22 defendants didn't file a -- instead, they're seeking
23 to stay the consolidated action, which we think is
24 very good reason to deny and to allow us to conduct

1 discovery at least on the same track as any other
2 briefing that the Court may wish to hold. And that --
3 and there's no reason not to do that. It's a --

4 THE COURT: So what is the pre-meeting
5 relief that you would envision?

6 MR. GOLAN: Your Honor, we may
7 envision further disclosures about the prior vote. We
8 may envision further disclosures about the
9 compensation committee members who approved these
10 stock awards. We may envision that -- I -- those are
11 the kinds of things, obviously, if the Proposal 3 and
12 4 -- we may envision --

13 THE COURT: You're talking --

14 MR. GOLAN: We may envision -- oh,
15 excuse me, Your Honor. Just one more thing. We may
16 envision seeking to invalidate the bylaw amendment if
17 it was done for an improper purpose, because one of
18 the things that that bylaw seems to allow the board to
19 do is decide on a vote-by-vote basis, depending
20 whether they have a shareholder proposal or a board
21 proposal, whether or not they're going to count
22 abstentions as "no" votes or whether they're going to
23 count abstentions as non-votes.

24 THE COURT: But is there anything on

1 the agenda for the annual meeting that would implicate
2 the bylaw? Is there anything where they have --

3 MR. GOLAN: Nothing has been filed
4 with the SEC. The last thing that's on the agenda is
5 Proposals 3 and 4. The revelation that Proposals 3
6 and 4 were going to come out from the September
7 meeting were done through the brief in support of a
8 stay and done through the separate letter that
9 Cheniere's counsel wrote to Your Honor.

10 THE COURT: And do you know off the
11 top of your head whether Cheniere's standard for
12 director elections was plurality or whether they have
13 something higher?

14 MR. GOLAN: I'm afraid I haven't
15 looked at that, Your Honor. But I do know in the old
16 bylaw, abstentions would not have been counted for
17 director elections, but they would have been counted
18 for every other vote that was -- that went to
19 shareholders. And, I mean, we're very comfortable
20 with our position that the bylaws held and that there
21 is no such exception. But we don't think that our
22 case -- which we started two weeks, three weeks before
23 this 205 petition that was filed only in reaction and,
24 really, is sort of a backtracking effort to avoid

1 discovery -- we don't think that Your Honor should
2 allow that to have precedence in favor of the
3 consolidated action.

4 THE COURT: All right. Thank you.

5 MR. GOLAN: Thank you, Your Honor.

6 THE COURT: Mr. Welch, anything else
7 you'd like to add?

8 MR. WELCH: Yes, sir, Your Honor,
9 there is. I guess I would start, Your Honor, simply
10 by noting that I think this case is exactly what
11 Section 205 contemplates. I mean, it makes very clear
12 in the statute that the Court can determine the
13 validity -- as we asked the Court to do in Count I --
14 of the vote tabulation, or that can validate any
15 defective corporate act. It seems to me this is
16 exactly what the legislature had in mind. It provided
17 huge flexibility to the Court.

18 They want to oppose the stay, Your
19 Honor, but there's really no basis that they've
20 spelled out for opposing the stay. There's no
21 disclosure that they're challenging. They say, "We
22 might come up with some disclosures," but there's no
23 disclosures that they've come up with so far that
24 would be applicable in this circumstance, where

1 Proposals 3 and 4 have been taken off the table.

2 They have the speculative claims about
3 the bylaw amendment, but all that's really left on the
4 table, Your Honor, is election of directors in
5 September. There's a selection of auditors, and
6 beyond that, a nonbinding say on pay. And that's it.
7 And there's nothing wrong with the content of Section
8 2.8 of the bylaws with respect to those issues.
9 Absolutely nothing. And they've identified nothing.
10 What they've tried to do is make some arguments about
11 Proposals 3 and 4. We think they're wrong about
12 those. Another reason, Your Honor, why we took them
13 off the table.

14 I would emphasize, Your Honor, that
15 this is not a breach of loyalty case. There's no
16 pleading, except on a conclusory basis, of knowing or
17 intentional wrongdoing. There's some conclusory
18 statements, but that's about it.

19 Again, the directors here get -- it's
20 an independent board, Your Honor. The directors get
21 about -- and plaintiffs plead these facts to a degree.
22 Particularly in the Shenker case there's a chart that
23 identifies how much directors get. And it's about
24 180,000 a year, and they have a right to take some of

1 that in stock. But the notion that this is some
2 clandestine conspiracy to use the wrong vote -- and
3 Cheniere did not use the wrong vote -- but to achieve
4 some benefit for stockholders just doesn't compute.
5 It doesn't make sense. There's no allegations that
6 cause it to make sense.

7 So again, this is not a loyalty case.
8 They criticize the loyalty -- the officers for making
9 too much money. The last time I checked, I don't
10 think that states any claims under Delaware law. But
11 that's the innuendo. That's the inference.

12 Beyond that, they did delay in
13 bringing on the case. I think, as we said before,
14 demand in their case was not futile. Had they made a
15 demand, Your Honor, we would have done -- I have to
16 presume -- just what Cheniere did, which is postpone
17 the meeting, drop certain proposals, and try to
18 accommodate the Court, and then, in an effort to try
19 to get this done and get it done right.

20 There are no disclosures that they've
21 identified that aren't tied to, Your Honor, the vote.
22 This case rises or falls with the tabulation of the
23 vote, which stockholders were told about, the NYSE
24 Market system was told about, NYSE Market listed the

1 shares. And I think that's why I think cueing this up
2 on the question-of-law basis, Your Honor, is the right
3 thing to do.

4 THE COURT: All right. Thank you.

5 MR. GOLAN: Your Honor, may I be heard
6 for two minutes?

7 THE COURT: Sure. Looks like
8 Mr. Manwaring is inspired to add something as well.
9 So why don't we hear from him first, and that way, if
10 you want to do cleanup all at once, you can.

11 MR. MANWARING: Good afternoon, Your
12 Honor. Albert Manwaring from Morris James for the
13 officer defendants excepts for Mr. Thames, who is
14 represented by Mr. Ross. I rise briefly just to make
15 one point on behalf of the officer defendants, that
16 regardless of whether Your Honor concurs and rules
17 that the 205 proceeding should go forward as a matter
18 of law -- and we certainly concur in that position as
19 well -- and view that something like an advancement
20 proceeding where the record is the bylaws and the
21 pleadings, if you will. So a judgment on the
22 pleadings, or cross motions for summary judgment, and
23 we're certainly in favor and concur with that position
24 here.

1 But regardless of whether you allow
2 discovery can proceed in the derivative or not, no
3 discovery should proceed against the officer
4 defendants. The plaintiffs here rely on four
5 predicate acts: Not counting abstentions in violation
6 of the bylaws, issuing shares, proxies, and amending
7 bylaws. All those facts, as alleged in the operative
8 complaint, the Jones complaint, are alleged as
9 director defendant acts and not officer acts. Nor
10 under the Delaware General Corporation Law is an
11 officer capable of performing those acts.

12 So accordingly, we believe that the
13 Grant & Eisenhofer firm, which is cocounsel here,
14 actually got it right. They did not allege contract
15 and fiduciary duty claims against the officer
16 defendants and, instead, have relegated those claims
17 against the director defendants, which leaves one last
18 claim against the officer defendants, and that's
19 unjust enrichment. And unjust enrichment is basically
20 an alternative theory to a contract claim. All their
21 claims are based on a breach of the bylaws, a contract
22 between the board, the stockholders, and the company,
23 not the officers.

24 It would only be in the absence of

1 that contract that you could assert an unjust
2 enrichment claim. So accordingly, there are no claims
3 against the officers, and so the default rule of a
4 customary stay in the face of a motion to dismiss
5 should be adhered to, at least with respect to the
6 officers.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. GOLAN: Thank you, Your Honor.

10 Regarding your earlier question, in the previous bylaw
11 it was unclear what was required for election of
12 directors. In the current amended April, 2014 bylaw,
13 it's a plurality of the votes cast.

14 In terms of the argument that we
15 should just allow this to go forward just with a legal
16 question first, first of all, there are issues, we
17 think, to be decided before the next shareholder vote,
18 even for the election of directors. But also, Your
19 Honor, as far as we know, if Your Honor is inclined to
20 allow the 205 action to proceed, as far as I know,
21 this is the first time that that new Delaware
22 corporate provision would be interpreted by a court.

23 THE COURT: The second time.

24 MR. GOLAN: Second?

1 THE COURT: Vice Chancellor Noble did
2 one, but it wasn't a challenged action.

3 MR. GOLAN: Okay. I stand corrected,
4 Your Honor.

5 THE COURT: No, that's fine.

6 MR. GOLAN: In --

7 THE COURT: I don't know everything
8 that goes on. There's no reason for you to know
9 everything that goes on. Except for Mr. Wagner.
10 Mr. Wagner is probably the only one that knows
11 everything that goes on.

12 MR. GOLAN: I'll have to consult with
13 him next time, Your Honor.

14 In Native American, Your Honor wrote
15 that "Courts should tread cautiously when asked to
16 validate shares." In the Starr case, the Supreme
17 Court said that "The law properly requires certainty
18 in such matters." And it emphasized that "A court
19 must act with caution and restraint when granting
20 equitable relief in derogation of established
21 principles of corporate law."

22 Your Honor, we believe that before
23 there is a ruling on this 205 petition, the Court
24 should have a full record. The Court should have

1 discovery. I'm happy to talk to Mr. Manwaring about
2 the discovery that we've issued to the officer
3 directors as part of the overall defendants, but we
4 think that there has to be discovery, especially
5 because the consolidated action presents colorable
6 claims. We demonstrated that in our motion brief, it
7 presents good cause, and there's no reason why the
8 consolidated action should not be allowed to go
9 forward, even with expedited discovery, whatever Your
10 Honor wants to do with the 205 action. So we would
11 urge the Court not to give the 205 action precedence
12 and not to stay discovery in the consolidated action.

13 THE COURT: All right. Thank you. I
14 understand where everyone's coming from. I appreciate
15 your thoughts, and I appreciate everyone coming in and
16 getting together so we could chat about this.

17 I am going to proceed essentially as
18 Mr. Welch suggests. My reasons are as follows: First
19 of all, I do think that in this case the Section 205
20 action logically takes precedence and is designed to
21 take precedence. The idea of fixing things through
22 ratification and the idea that you could moot
23 challenges by engaging in ratification is something
24 that is long-standing. When things can be ratified by

1 the board level, the board can come in and ratify
2 them. When things can be ratified by the
3 stockholders, the stockholders can come in and ratify
4 them.

5 There has, however, been this area of
6 our law, as Mr. Golan adverts, where, given Supreme
7 Court precedent -- including the eponymously named but
8 unrelated *Laster v. Waggoner* decision -- where you
9 just couldn't do it in this context for shares and
10 other things that were classically ultra vires. So we
11 have Section 205.

12 I think Section 205 should take
13 precedence, just like a board decision or a
14 stockholder vote that ratifies and potentially
15 eliminates an issue should take precedence. I also
16 think that equity acts when there isn't an otherwise
17 adequate remedy. Here, there is an adequate remedy in
18 the form of Section 205. I guess technically it is a
19 remedy at law because it's a statute, but it's a
20 remedy at law that 111 gives this Court jurisdiction
21 over.

22 Now, the outcome of the 205 case may
23 or may not moot the derivative case -- and I actually
24 should call it a breach of fiduciary duty case. I

1 think that it's not at all clear to me that, assuming
2 the plaintiffs are correct that the directors acted
3 contrary to the bylaws and/or contrary to a stock
4 option plan, that that is a derivative claim. I
5 rather think that is a claim for breach of a contract
6 obligation between the directors, the stockholders,
7 the corporation and, therefore, it is best viewed as a
8 direct claim. That's something that our Chief Justice
9 was adverting to in a case that I took over from him
10 involving another New York Stock Exchange vote on a
11 plan requirement. I think it really does make sense.
12 But I don't have to rule on that today. All I'm going
13 to say is I think that the nomenclature for the
14 derivative action may not be aptly chosen.

15 But, again, it may not moot that.
16 What is clear from 205 and what is clear from 204 is
17 that it addresses legal validity. So if you go back
18 to the Adolf Berle distinction between validity --
19 whether you can do something and have the power to do
20 it -- versus equity, what Section 204 and 205 address
21 is validity. Let's assume that these shares are
22 validated, but they're validated at great expense and
23 cost to the company. There is still a potential wrong
24 out there. It doesn't necessarily mean that that

1 wrong is moot. That wrong might be de minimis, such
2 that nobody feels that it's worth pursuing, but it may
3 or may not be that there is, nevertheless, a claim
4 against the humans who caused the corporation to
5 engage in particular behavior or who acted contrary,
6 it is alleged, to potential contract rights as part of
7 the constitutive agreement between the corporation and
8 stockholders. That would still remain live.

9 But what does make the most sense is
10 to take care of the validity claim first. Because if
11 it turns out that Cheniere got it right and all it
12 cost them was 100,000 bucks to come in and do a 205
13 proceeding -- and, granted, I'm sure Mr. Welch is far
14 more valuable than that.

15 I don't mean to insult you, Mr. Welch,
16 by positing that amount.

17 MR. WELCH: I make no such claim, Your
18 Honor.

19 THE COURT: All I'm saying is that if
20 that's what it ends up being, that's a de minimis
21 amount and there wouldn't be much to fix in terms of a
22 continuing harm to be addressed by the plenary action.

23 We ought to figure out first whether
24 these shares are, in fact, valid. I don't think there

1 is any reason proffered that persuades me to continue
2 with the plenary action on some path that would allow
3 disposition in advance of the annual meeting. Nothing
4 that I've heard about the annual meeting suggests that
5 there's anything on the agenda where that would be
6 required. The reason I asked about the director
7 vote -- and I think Mr. Golan may have misspoke. I
8 think the new bylaw does have it be the affirmative
9 vote of "... holders of a majority in voting power of
10 the shares entitled to vote, present or by proxy, with
11 abstentions counting as votes against."

12 Regardless, what I was wondering is
13 assuming a situation where these shares were invalid,
14 such that the vote on directors turns out to be called
15 into question because it took into account some
16 portion of these shares, the question I was toying
17 with was whether that was the type of thing such that
18 we ought to move to get this done in advance of the
19 meeting so as to avoid any problem with that.

20 I don't think that is a problem, and I
21 don't think that is a problem because one of the
22 things that 204 and 205 contemplate is chain reaction
23 validation. So, in other words, if you go back and
24 validate the cause of the fissure in the corporate

1 governance structure, it plays through and anything
2 that flows from that is validated. So assume there
3 was, in theory, some problem with the director
4 election as a result of these shares. If ones go back
5 and validates the shares, that plays through and
6 validates everything else. If for some reason we
7 otherwise find out that these shares really are
8 invalid, well, then we can take it into account as
9 part of the remedy, if we have to, either as part of
10 the 205 validation or as part of something else. So I
11 don't think there's any need to move on a rapid pace.
12 Certainly I haven't heard anything about any
13 disclosures that I think would be necessary or
14 anything like that.

15 For present purposes I am staying the
16 plenary action so that we can proceed with the 205
17 action. I would ask the parties to submit something
18 to that effect. The plaintiffs may seek to lift the
19 stay for good cause shown. If, for example, there is
20 a proxy statement that comes out that does contain
21 disclosure issues or something like that, I'm not
22 precluding you from seeking to take that step, but
23 think it over first.

24 In terms of the 205 action, I do think

1 it makes sense to proceed first with the
2 as-a-matter-of-law question. If Cheniere's right,
3 we're all done. The 205 action is over, people can go
4 home. If they're not right, then we have this
5 multi-factor discretionary validity analysis in
6 which I have to engage. And it does seem to me that
7 that will likely require some discovery. It certainly
8 might require some type of presentations and some type
9 of merits hearing. I just don't know. If we get
10 there, we'll get there.

11 I will take Mr. Welch up on his offer
12 to put in his opening brief in two weeks. From the
13 plaintiffs' side, what is a reasonable amount of time
14 for you-all to put in an answering brief?

15 MR. GOLAN: Your Honor, we're
16 satisfied with two weeks, as well.

17 THE COURT: Two weeks is fine?

18 MR. GOLAN: Yes.

19 THE COURT: All right. Two weeks it
20 is.

21 And then one week for the reply?

22 MR. WELCH: Yes, sir, Your Honor.

23 THE COURT: And then you-all can
24 contact my assistant. I actually don't know where

1 that puts us in terms of calendaring, but if you-all
2 can work that out with her, that would be great.

3 Mr. Welch, any questions from you or
4 your team?

5 MR. WELCH: Not from me, Your Honor.

6 THE COURT: Okay.

7 Mr. Golan, any questions from you or
8 anyone on your team?

9 MR. GOLAN: No questions, Your Honor.
10 Just given the stay, there has been a lot that has
11 happened. Under that stay, would the plaintiffs be
12 allowed to file a consolidated amended complaint?

13 THE COURT: Do you want to do that now
14 or do you want to wait? I mean --

15 Mr. Lebovitch, you can stand up. I
16 mean, I'm happy to hear from you. I mean, I can hear
17 from both of you. That's fine.

18 MR. LEBOVITCH: I'm sorry, Your Honor.

19 THE COURT: This is what would happen
20 if we were downstairs just sitting around the
21 conference table. Everyone would feel more
22 comfortable speaking up. So imagine that we're there
23 and that it is no slight to Mr. Golan and/or to me or
24 anyone else.

1 MR. LEBOVITCH: I appreciate that,
2 Your Honor. And I --

3 THE COURT: Why don't you come over to
4 the podium anyway.

5 MR. LEBOVITCH: Okay. Your Honor,
6 what I was hoping to communicate to Mr. Golan, but
7 I'll communicate straight to the Court, is there's
8 been a lot of statements made, a lot of changes of
9 facts since complaints were filed. The defendants
10 have made some comments about the differences between
11 complaints. If there's not going to be a ruling on
12 the substance before the election, we may -- whether
13 it's in a week or at some point before the election,
14 you know, we may conclude that it's part of our duty
15 or strategy to file an amended complaint that
16 challenges the current state of affairs, rather than
17 events that happened in the past.

18 And so I think all I wanted to clarify
19 is if, while the 205 action is being addressed, you
20 know, on whether the board can ratify what would be --

21 THE COURT: The Court. The Court is
22 validating. I'm engaging. They're petitioning me for
23 validation.

24 MR. LEBOVITCH: Yes, Your Honor.

1 THE COURT: It's a whole new
2 terminology. It's something we all got to get used
3 to, but --

4 MR. LEBOVITCH: Well, I guess we'll
5 brief it. It would be ironic that bylaws or contracts
6 could be used as weapons against shareholders, but
7 boards that violate them can go get ratification of
8 their own briefs. But we're not there yet.

9 THE COURT: They want to be --

10 MR. LEBOVITCH: Yeah.

11 THE COURT: You know, it's more than
12 just patted on the back. It's told like, hey, you did
13 it right.

14 MR. LEBOVITCH: Well, if they did it
15 right, I guess they did it right. We don't think they
16 did it right. We'll find out if 205 was meant to say
17 that Williston on Contracts applies to bylaws against
18 shareholders and it doesn't apply -- and you can
19 actually say, well, we just breached it. But, the
20 Court is going to say it's okay. It's validated to
21 breach the contract when it's the directors breaching
22 the contract. That, obviously, we'll brief out in the
23 future.

24 THE COURT: We'll talk about that, but

1 I don't think 205 posits that. I think what 205
2 says -- and this is the Count II concept. The Count
3 II concept contemplates that the grant of validation
4 can be, you know, conditioned on things. It's a very
5 open-ended equitable thing. So I don't think it
6 prevents you from -- first of all, I don't think, as I
7 said, I don't think it moots the idea of if there's
8 harm to the company, you could potentially still get a
9 remedy. But I also don't think it causes any
10 difficulty, like let's say that shares are invalid and
11 you want to say something like, well, Your Honor, we
12 understand that it's likely that the Court is going to
13 validate them because there are all these nasty
14 consequences for employees and things if you don't,
15 and it creates these deep fissures going to the heart
16 of the company's governance structure and it just
17 doesn't make sense to have nobody ever be able to
18 opine again on shares being duly authorized. But
19 there ought to be some condition on that, like X, Y,
20 and Z. Doesn't seem to me like it prevents you from
21 doing that. It's not just a free-wheeling license.

22 MR. LEBOVITCH: Well, I would hope
23 not, because that would be a very one-sided view of
24 what's supposed to be a contract. I don't think

1 that's the intent of 205.

2 But to get back to the amendment, for
3 example, Your Honor, we would be stunned if 205
4 doesn't contemplate some equitable overlay. The
5 statute seems to do that. And we may decide to amend
6 the complaint to include the facts -- very clearly the
7 facts of what we think is a cover-up and a board that
8 didn't avail itself of 205 because it said, hey, we
9 might have a problem. We may want to specifically
10 allege the numerous ways that the board tried to sweep
11 this under the rug, tried to engage in a cover-up, and
12 we may exclude the claims that the shares given to
13 employees -- I think just given to the executives
14 there's hundreds of -- I think Mr. Golan may have
15 understated it when he said \$140 million worth of
16 stock given to the top five employees. The CEO, the
17 richest there is. We may want to sue the board and
18 the people who really are the direct beneficiaries of
19 the board's largesse and its cover up.

20 THE COURT: Is he the richest there
21 is, or just in this past year he got the most
22 compensation?

23 MR. LEBOVITCH: I don't think he's the
24 richest CEO. That might be Warren Buffett, I guess.

1 But in this past year he is the most highly paid CEO
2 on the planet of a public company. I believe that's a
3 truthful statement.

4 THE COURT: I just wanted to be sure
5 we were being precise.

6 MR. LEBOVITCH: We'll try to be
7 precise. We hope Your Honor will make them be as
8 precise with the bylaws. In the end we may want to
9 amend the complaint because any consideration of the
10 validity of their actions should take into account in
11 a very clear way, we believe, even on the legality.
12 And that's why we would think that discovery is
13 appropriate even when they say this is legal, because
14 if they tried to cover it up, okay, and if they just
15 got caught red-handed and only then avail themselves
16 of 205, I think that the Court's equitable overlay
17 would warrant the Court saying, well, you know what?
18 You're not entitled to seek 205 unless you really did
19 bring it to the Court's attention first.

20 THE COURT: Yeah. And I hear where
21 you're coming from. My reaction is talk to Mr. Welch
22 first. If all you're doing is amending to put
23 something on file and they don't have to respond to
24 it, it's hard to see what the harm is and why that's a

1 big deal. But why don't you-all work it out first.
2 My point is that we're not going forward and
3 litigating --

4 MR. LEBOVITCH: Understood.

5 THE COURT: -- the plenary action. We
6 are going to hold off on the plenary action until
7 we're done with the 205 action.

8 MR. LEBOVITCH: Right. And just so
9 we're clear -- I think I understood this, but
10 notwithstanding what Mr. Golan said about our belief
11 that the way we got to 205 was only after it looked
12 like there was going to be expedited discovery, and
13 there wasn't a board that initiated the 205, we're not
14 going to have discovery on the initial briefing about
15 whether they can say they technically complied with
16 the bylaw? So we don't get discovery into whether
17 they tried to amend the bylaw to sweep under the rug
18 what they may have internally thought was a breach of
19 the bylaw?

20 THE COURT: That's correct. Because
21 if they got it right, they got it right. I mean,
22 let's assume that, you know, you actually thought --
23 it sort of like gets back to these criminal law ideas;
24 right? You thought you were engaging in conduct that

1 was illegal, and so you did clever things to try to
2 cover it up. And I'm not saying these guys did this.
3 I'm taking an extreme comparison. What that means is
4 you wasted a lot of time covering something up that's
5 not illegal.

6 MR. LEBOVITCH: True.

7 THE COURT: Now, what I'm sure that
8 Mr. -- even under what a sort of more neutral spin
9 would be, there's risk in everybody. So somebody
10 probably spotted this. Somebody was like, "Oh, I
11 don't know. That's a close call. I'm not really sure
12 what it requires. Why don't we amend the bylaw to
13 clean up any uncertainty." I mean, that's a less
14 pernicious interpretation of the facts.

15 If they got it right, though, they got
16 it right. If they were doing it all along and they
17 actually did get the vote they required, then the fact
18 that they did some things that you construe as less
19 than forthright, they still got it right.

20 MR. LEBOVITCH: Understood. It's just
21 if this wasn't 205, if they had some right to seek a
22 declaratory judgment of the validity of their act, I
23 think there would be a greater likelihood that those
24 internal e-mails that say "We may not have done this

1 right would at least be produced, so in the end no
2 harm no foul.

3 THE COURT: It doesn't matter. Again,
4 let's assume we went forward with the plenary action.
5 I mean, we could have -- assume we get past this
6 laches, mootness derivative action stuff. You could
7 still have some type of judgment-on-the-pleading claim
8 there as to whether they construed the bylaws
9 correctly. What you can't then get is in the event
10 that they got it wrong, you can't get the back-end
11 discretionary validation that 205 contemplates.

12 So I don't see you as any worse off.
13 I hear that you feel like you're worse off but,
14 personally, I don't see you as any worse off, and this
15 is what we're doing.

16 MR. LEOVITCH: I hope to feel the way
17 you see. Thank you, Your Honor.

18 THE COURT: All right. Anybody else?
19 Anything on your minds?

20 All right. Thank you, everyone, for
21 coming in today. I appreciate it. If we could get
22 the stipulation in the Cheniere action, the plenary
23 action on file, and then a stipulation in the 205
24 action dealing with scheduling and the united front of

1 the plaintiffs, that would be wonderful.

2 Thank you, everyone.

3 (Court adjourned at 2:38 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 54, 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 26th day of June, 2014.

/s/ Julianne LaBadia

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