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3 -and-

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1 THE COURT: Welcome, everyone.

2 ALL COUNSEL: Good morning, Your  
3 Honor.

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

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

8 THE COURT: Good.

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

13 MR. FICARÓ: Good morning, Your Honor.

14 THE COURT: Good to see you.

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

17 THE COURT: Mr. Weiser.

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

21 THE COURT: Thank you.

22 MS. SERRA: Thank you.

23 THE COURT: That's your cue.

24 MR. WEISER: Good morning, Your Honor.

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

5 THE COURT: Welcome.

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

8 THE COURT: Whatever that's worth.

9 MR. WEISER: Whatever that's worth.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. WEISER: I understand that.

24 THE COURT: What was the divergence of

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

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

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

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

12 MR. WEISER: Right.

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

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

24 THE COURT: So there turned out not to



1 be any problem with that.

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

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

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

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

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

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

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

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

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

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

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

14           MR. WEISER: Yes, sir.

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

17           MR. WEISER: That's right.

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

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

24           THE COURT: Again, that's perhaps part

1 of the problem.

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

4                   MR. WEISER: Okay.

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

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

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

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

20                   MR. WEISER: That's right.

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

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

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

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

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

17           MR. WEISER: Okay.

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

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

1 them by some incremental amount.

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

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

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

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

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

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

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

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

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

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

1 company's perspective that --

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

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

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

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

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

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

1 all?"

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

24           I do wonder if the Court's comments

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

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

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

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

13 MR. WEISER: Right.

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

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

21 MR. WEISER: Right.

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

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

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

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

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

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

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

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

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

1 with the idea that this is cosmetic.

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

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

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

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

23           THE COURT: No not --

24           MR. WEISER: -- an effect --

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

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

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

19           THE COURT: It was meritorious when  
20 filed.

21           MR. WEISER: I'm sorry?

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

24           MR. WEISER: In other words, if we



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

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

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

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

10 MR. WEISER: Okay.

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

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

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

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

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

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

12 MR. WEISER: No.

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

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

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

24 The point I was disagreeing with a

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

5 THE COURT: What was the problem?

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

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

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

24 That's why when we started this, my

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

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

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

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

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

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

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

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

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

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

1 MR. WEISER: And Mr. Welch --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

24 THE COURT: Show me the misalignment

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

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

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

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

17 MR. WEISER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. WEISER: That's right.

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

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

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

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

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

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

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

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

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

10          MR. WEISER: I'm sorry?

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

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

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



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

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

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

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

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

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

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

19 THE COURT: I apologize for that.

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

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

24 MR. WEISER: All right. Maybe after

1 today, somebody would.

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

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

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

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

23           THE COURT: Interco. '88.

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

1 '89.

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

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

12                   THE COURT: No.

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

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

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

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

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

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

9 MR. WEISER: Okay.

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

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

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

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

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

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

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

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

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

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

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

18 THE COURT: Really?

19 MR. WEISER: Yeah.

20 THE COURT: As anything else?

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

23 THE COURT: I was going to say --

24 MR. WEISER: No, no, no.

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

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

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

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



1 and you see which is better.

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

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

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

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

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

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

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

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

12           MR. WEISER: Sure.

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

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

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

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

24           THE COURT: Certainly.

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

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

6 MR. WEISER: Okay. Thank you.

7 (A recess was taken.)

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

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

16 THE COURT: Thanks for coming down.

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

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

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

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

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

22           THE COURT: They were justifiably  
23 discriminated against.

24           MR. VARALLO: Correct, Your Honor, but

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

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

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

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

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

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

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

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

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

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

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

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

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 Mr. Welch.

17 MR. WELCH: Good morning, Your Honor.

18 THE COURT: Good morning.

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

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

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



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

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

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

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

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

15 THE COURT: What is the solution?

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

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

21 MR. WELCH: No, sir.

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

24 MR. WELCH: Absolutely, Your Honor. I

1 agree.

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

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

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

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

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

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

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

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

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

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

14 THE COURT: All right. Thank you.

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

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

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

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

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

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

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

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

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

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

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

1 it usually goes on much further than that.

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

24           So what all that tells me is that the

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

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

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

1 maximize value on the part of the defendants.

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

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

1 particular bidder.

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

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

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

24           And part of what I looked at, at

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 this full historical amount.

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

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

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

24           I've looked at these disclosures. I

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

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

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

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

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

6 (Court adjourned at 11:45 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 79 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 9th day of July, 2015.

/s/ Jeanne Cahill  
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Jeanne Cahill, RDR, CRR  
Official Chancery Court Reporter  
Registered Diplomate Reporter  
Certified Realtime Reporter