

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOEL KRIEGER, individually and on :  
behalf of all others similarly situated:

Plaintiff,

v

: Civil Action  
: No. 6176-VCL

WESCO FINANCIAL CORPORATION, CHARLES T. :  
MUNGER, ELIZABETH CASPERS PETERS, :  
CAROLYN H. CARLBURG, ROBERT E. DENHAM, :  
ROBERT T. FLAHERTY, PETER D. KAUFMAN, :  
BERKSHIRE HATHAWAY, INC., and :  
MONTANA ACQUISITIONS, LLC, :

Defendants. :

- - -

Chancery Courtroom No. 12C  
New Castle County Courthouse  
500 North King Street  
Wilmington, Delaware  
Tuesday, May 10, 2011  
10:32 a.m.

- - -

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

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ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION AND RULINGS OF THE COURT

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

1 APPEARANCES:

2 JAMES C. STRUM, ESQ.  
Faruqi & Faruqi, LLP

3 -and-

4 JUAN E. MONTEVERDE, ESQ.  
of the New York Bar  
Faruqi & Faruqi, LLP  
5 for Plaintiff

6 DANIELLE GIBBS, ESQ.  
Young, Conaway, Stargatt & Taylor LLP  
7 for Defendants Wesco Financial Corporation and  
Peter D. Kaufman

8 WILLIAM M. LAFFERTY, ESQ.  
Morris, Nichols, Arsht & Tunnell LLP  
9 -and-

10 GEORGE M. GARVEY, ESQ.  
of the California Bar  
11 Munger, Tolles & Olson LLP  
for Defendants Charles T. Munger, Robert E.  
12 Denham, Berkshire Hathaway, Inc., and Montana  
Acquisitions, LLC

13 EDWARD P. WELCH, ESQ.  
14 JOSEPH O. LARKIN, ESQ.  
SARAH RUNNELLS MARTIN, ESQ.  
15 Skadden, Arps, Slate, Meagher & Flom LLP  
-and-

16 ERIC S. WAXMAN, ESQ.  
of the California Bar  
17 Skadden, Arps, Slate, Meagher & Flom LLP  
for Defendants Elizabeth Caspers Peters,  
18 Carolyn H. Carlburg, and Robert T. Flaherty

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1 THE COURT: Good morning, everyone.  
2 Welcome.

3 ALL COUNSEL: Good morning, Your  
4 Honor.

5 THE COURT: Mr. Welch, how are you?

6 MR. WELCH: Good morning, Your Honor.

7 I wonder if I might just take a moment to introduce to  
8 the Court my partner and friend, Eric Waxman, from our  
9 LA office.

10 THE COURT: Good to see you again.

11 MR. GARVEY: Thank you.

12 THE COURT: Mr. Lafferty, how are you  
13 doing?

14 MR. LAFFERTY: I wonder if I can get  
15 to the podium. I wanted to reintroduce to Your Honor  
16 George Garvey from Munger Tolles. You may remember  
17 Mr. Garvey from a hearing we had last year.

18 THE COURT: I do. Good to see you  
19 again.

20 MR. GARVEY: Good morning, Your Honor.

21 THE COURT: Yep.

22 Mr. Monteverde, I think it's your  
23 show.

24 MR. STRUM: Good morning, Your Honor.

1 THE COURT: Mr. Strum, how are you?  
2 Sorry.

3 MR. MONTEVERDE: Thank you.

4 THE COURT: We're going to get  
5 Mr. Monteverde down to the Montchanin office yet,  
6 although our technology, man, you were one of the guys  
7 that filed up in Connecticut. And I wanted -- and I  
8 invited you to come down and everything. So --

9 MR. MONTEVERDE: Which -- which case  
10 was that?

11 THE COURT: Oh, we're not going to  
12 talk about it today. That's another case.

13 MR. MONTEVERDE: Oh, I think I  
14 remember now.

15 THE COURT: That's another case.

16 MR. MONTEVERDE: For another day.

17 THE COURT: Exactly. You're all over  
18 the place.

19 MR. MONTEVERDE: Well --

20 THE COURT: But you're here today, and  
21 that's what we like.

22 MR. MONTEVERDE: Thank you, Your  
23 Honor. I'm happy to be here this morning.

24 This morning we're seeking to enjoy

1 the transaction between Wesco and Berkshire. It's a  
2 transaction where shareholders are being offered book  
3 value, approximately \$390. And the interesting part  
4 is their offer to either accept in Berkshire Hathaway  
5 shares or cash.

6 Now, if they don't make an election,  
7 they will receive cash. Certainly that's an issue I'm  
8 going to be circling back today many times because I  
9 think that's where the parties don't see eye to eye.  
10 And our concern is the way the structure of this  
11 transaction is put to the shareholders does not  
12 provide for appraisal rights. We think that's  
13 violative of Delaware law, and we think that needs to  
14 be corrected this morning.

15 THE COURT: Is your 10-share holder  
16 going to seek them?

17 MR. MONTEVERDE: I'm sorry?

18 THE COURT: Is your 10-share holder  
19 going to seek them?

20 THE COURT: Well, I -- my client, we  
21 haven't even advised him. So we haven't had the  
22 discussion because it's not on the table. But it's  
23 important that shareholders, not just my client,  
24 receive that right, which is one that I believe

1 they're entitled to.

2                   And also what we're going to be  
3 discussing this morning is how the transaction came  
4 about and whether the special committee was interested  
5 or disinterested and whether it was also violative of  
6 Delaware law for not following a proper process.

7                   Before we get into the -- into the  
8 argument, I want to sort of -- and I know the briefing  
9 has been lengthy and very ... it provides more  
10 information than I think necessary; but I want to sort  
11 of take a minute and sort of go over who the board  
12 members are. I think it's important for perspective  
13 here.

14                   The board of Wesco is comprised by six  
15 members: Charles Munger, being the chairman and CEO  
16 for Wesco. He is also the vice chairman for Berkshire  
17 Hathaway as part of the -- he's part of the Wesco  
18 board.

19                   We also have Elizabeth Caspers Peters,  
20 who is probably the largest shareholder for Wesco  
21 besides Mr. Buffett or Berkshire Hathaway, who holds  
22 approximately 5 percent of the shares.

23                   We also have Carolyn Carlburg, who  
24 holds the title as director since '91. And she also

1 has shares in Berkshire Hathaway but for Class B, the  
2 ones that are less valuable than the Class A; and she  
3 has 550 shares, which is approximately \$45,000. I'm  
4 approximating here.

5                   We lead to Mr. Flaherty, Robert  
6 Flaherty, who is a director of the company since 2003.  
7 He actually has a great interest in Berkshire Hathaway  
8 Class A shares. He has 147 shares, which approximate  
9 \$18 million. It's also worth noting that that  
10 \$18 million represents up to 50 percent his overall  
11 asset portfolio.

12                   And we also have Mr. Denham is the  
13 director of the company since 2000. He's also a  
14 partner at Munger Tolles, and he has served as counsel  
15 in various matters for Berkshire Hathaway in the past.

16                   And lastly, we have Peter Kaufman, who  
17 has also been a director, like Mr. Flaherty, since  
18 2003. And he has ventures outside of Wesco or  
19 Berkshire business with Mr. Munger. In particular  
20 they -- they -- they share philanthropic interests  
21 with the Huntington Library. And he also received a  
22 loan of a million dollars from Mr. Munger, which still  
23 unpaid. I think half of it has been paid. And he  
24 also has shares, both -- in Wesco he has a thousand

1 shares and 2,300 shares in Berkshire Hathaway Class B.

2           These are the six members. Our  
3 position is that out of the six members, there is no  
4 majority of disinterested directors; hence, the reason  
5 why defendants created a special committee with three  
6 members. Now, the issue is whether those three  
7 members were, indeed, disinterested. Ms. Peters,  
8 Ms. Carlburg, and Mr. Flaherty were the three members.

9           We believe -- plaintiff's position is  
10 that Mr. Flaherty had trouble or -- it should be  
11 troubling to have appointed him as the special  
12 committee member because of his interest in Berkshire  
13 Hathaway. And there's a dispute here as to whether  
14 that is significant or not. And they did put an  
15 expert, Mr. Lehn, informing that because the share  
16 price would not increase most -- mostly by decreasing  
17 the price offer to Berkshire Hathaway, that it really  
18 doesn't matter; but I think our perspective is a  
19 little different, is that he had \$18 million. And  
20 it's not just a number, which is significant, but it's  
21 up to 50 percent of his portfolio. We think that's  
22 significant.

23           We also think -- and we noted that in  
24 our brief -- that Mr. Lehn's report should be stricken



1 from the record. We believe it's violative of  
2 evidentiary rules, but we can discuss that later this  
3 morning.

4 I don't want to spend too much time  
5 with the transaction because I want to first address  
6 the issue of appraisal rights because I think that's a  
7 little bit separate and distinct, though we believe  
8 the failure to put appraisal rights is further  
9 evidence that the board has violated their breach of  
10 fiduciary duty and that that's further evidence that  
11 there was unfair dealing and there was improperly  
12 structure the transaction.

13 So if I may, I'm going to go to that  
14 argument, which I think will move us efficiently this  
15 morning and expeditiously.

16 Our position is appraisal rights are  
17 required. And -- and I think the main argument is we  
18 look first at the statute, statute 262, which provides  
19 that appraisal rights will be given unless a  
20 transaction falls under four of the exceptions. And  
21 I'm looking at 262(b) -- 262(a), (b), (c), and (d).  
22 In essence, if one is to receive stock or cash in lieu  
23 of fractional stock or a combination thereof, you will  
24 not receive appraisal rights.

1 THE COURT: Uh-huh.

2 MR. MONTEVERDE: That's not the case  
3 here. The case here is what they're offering is stock  
4 or cash at the election of the shareholder. And if  
5 they don't obtain or don't make an election, they will  
6 receive cash. At the end of the day, we think it's a  
7 very important distinction, because in my mind this  
8 really means it's a cash deal and stock is just an  
9 option that's available to them.

10 THE COURT: What's your view of the  
11 purpose of the market-out exception?

12 MR. MONTEVERDE: Well, my view is --  
13 and I think we can certainly discuss that -- is that  
14 even if a -- even if a company is publicly traded,  
15 will follow the four exceptions, that would still  
16 provide appraisal right to the shareholders. So I  
17 don't think --

18 THE COURT: Right. Well, I'm asking  
19 you a statutory interpretation question. Why do we  
20 have the market-out exception?

21 MR. MONTEVERDE: Well, that's so  
22 shareholders can determine what fair value is.

23 THE COURT: That's a -- I'm trying to  
24 parse that. What does that mean?

1 MR. MONTEVERDE: Well, that's so  
2 shareholders can determine if they are not satisfied  
3 with their share price --

4 THE COURT: Uh-huh.

5 MR. MONTEVERDE: -- they can go and  
6 provide -- proceed before Your Honor and introduce  
7 evidence whether they think the price should be higher  
8 or lower.

9 THE COURT: But specifically the  
10 market-out. When you say the shareholders aren't  
11 satisfied with their share price, it sounds like  
12 you're saying that the market-out is premised on the  
13 market providing a reliable price for a publicly  
14 traded entity.

15 MR. MONTEVERDE: Right.

16 THE COURT: Is that what you're  
17 saying?

18 MR. MONTEVERDE: No. And I think  
19 there's two interesting things here. One is an  
20 article which actually defendants introduced --

21 THE COURT: You know, "'Market-Out' of  
22 Luck."

23 MR. MONTEVERDE: That's correct.

24 THE COURT: An oldie but a goody.

1                   MR. MONTEVERDE: Very interesting  
2 story with the old wise man. We -- we -- we look in  
3 that article, and I think that we would have to agree  
4 that we were in an efficient market. I don't think we  
5 can. I think we -- we try to work in efficient  
6 markets, but I think that's utopic; and that's why I  
7 think the market-out exception was created, is to  
8 provide for precisely that. When we're not in an  
9 efficient market, the stock price may not be, even as  
10 publicly traded, reflecting the fair value.

11                   THE COURT: Uh-huh.

12                   MR. MONTEVERDE: And a shareholder, if  
13 it disagrees with what the public stock market is  
14 trading whatever stock he or she has, can then resort  
15 to appraisal rights under Delaware law, if it's a  
16 Delaware company. I think that's how the market-out  
17 exception comes about, but I don't think it's relevant  
18 to this morning because I think what --

19                   THE COURT: Well, it's relevant  
20 because, you know, you're -- you're resting on this  
21 idea that the market-out should be construed more  
22 narrowly than, you know, "required" would imply. And  
23 so that's why I'm interested in this question.

24                   MR. MONTEVERDE: Sure.

1           THE COURT: I mean, if -- if -- if a  
2 publicly traded -- if a public market can accurately  
3 value stock for purposes of a stock deal, why can't a  
4 public market accurately value stock for purposes of a  
5 cash deal?

6           MR. MONTEVERDE: My -- my answer would  
7 be that presupposes we are operating in an efficient  
8 market. And precisely that's why we do have appraisal  
9 rights. So people that don't agree with that --

10          THE COURT: But it's not, because the  
11 statute isn't framed in terms of is the market  
12 efficient.

13          MR. MONTEVERDE: Correct. But the  
14 statute precisely provides, notwithstanding that the  
15 public -- the company may be publicly traded, you  
16 obtain stock on a publicly traded company, you're  
17 going to have the ability to seek appraisal rights  
18 under the four exceptions. And that's where we go  
19 next, why that's not the issue here, that defendants  
20 can rely on those four exceptions.

21          THE COURT: Yeah. I want to know why  
22 I would interpret those exceptions the way you want.  
23 And presumably there's some coherent policy rationale  
24 is to why one would do that.

1                   MR. MONTEVERDE: Well, I think  
2 rationale behind it, Your Honor, is that we think  
3 Wesco, it's a very particular special company which  
4 makes it more necessary to have appraisal rights,  
5 because it's very hard to really know if it's  
6 efficiently traded and if the value's reflective.  
7 It's not a company where you can pull and say you have  
8 hundreds of different company that are similar to  
9 Wesco. Wesco used to be a loan savings bank. Then  
10 after Mr. Buffett acquired a significant interest in  
11 the company, it was diversified. It has CORT  
12 Furniture, a rental furniture place. It has Precision  
13 Steel. It has reinsurance business, and it holds  
14 warrants in Goldman Sachs and -- and -- and real  
15 estate. In fact, one of the concerns is the real  
16 estate itself may not be properly valued. More reason  
17 why we think the stock price may not be reflecting  
18 its -- its proper value.

19                   Now, let's take -- what are they  
20 getting if they opt for -- for Berkshire stock? It's  
21 also, Berkshire, a very unique corporation, where it's  
22 hard to really value it. So I think -- from a policy  
23 standpoint, I think Wesco would be one of the examples  
24 why the market-out should be given. And -- and I

1 think -- we're not asking for a narrow interpretation  
2 of market-out. We're saying the way the statute's  
3 written, it's been violated. That's what we're  
4 saying. We're saying that --

5 THE COURT: Wouldn't it suddenly --  
6 wouldn't it suddenly be easier to value Wesco or  
7 Berkshire if this were an all-stock deal?

8 MR. MONTEVERDE: I think because you  
9 would be narrowing the options to some degree, it may  
10 be easier to value because now you -- you really know  
11 my only option is A.

12 THE COURT: That's -- that's the part  
13 I've never gotten, because I actually then have to do  
14 math. I then actually have to take the exchange ratio  
15 and multiply it by a trading price, and I've got to  
16 figure out -- you know, I've got to predict what the  
17 volume-weighted price is going to be from my  
18 multiplication; whereas if I have cash, I just have to  
19 compare that. I get to compare a closing price with a  
20 cash number.

21 So why -- why is it harder? Why is it  
22 harder when I actually just have to look at two  
23 numbers versus when it's a stock deal?

24 MR. MONTEVERDE: Because you're

1 choosing. Anytime you -- this is just a simple  
2 mathematical statistical branch. The more  
3 alternatives you provide, the more options you have,  
4 the more --

5 THE COURT: That's empowering. That's  
6 a good thing; right?

7 MR. MONTEVERDE: It may be a good  
8 thing; but what's even better is Option C, appraisal  
9 rights, which is what they're entitled to, Your Honor.  
10 And, in fact, if --

11 THE COURT: But -- but now -- like, if  
12 we're going to spin out that argument, you told me it  
13 was -- it was a bad thing and worse thing for me to  
14 choose, and now you want me to choose a third thing.  
15 I mean, this is -- so this is actually detrimental.

16 MR. MONTEVERDE: Well, it -- it's not  
17 detrimental, because options are good. What I'm  
18 saying, you don't limit options; but at the same time  
19 having options requires more thought. But we don't  
20 think it's detrimental to think.

21 THE COURT: But you agree that there's  
22 no real rational reason why it would become suddenly  
23 easier to value Berkshire or Wesco if this were an  
24 all-stock deal.



1                   MR. MONTEVERDE:  It's -- it -- Your  
2 Honor is posing a hypothetical that I had not --

3                   THE COURT:  No, no.  Look, you made --  
4 you made an argument that appraisal is needed because  
5 these companies are difficult to value.  And under our  
6 statute, if it is a cash deal, they get appraisal.  If  
7 it is a stock deal, they don't get appraisal.  We have  
8 a hybrid where stockholders can pick.  So what you are  
9 arguing is that appraisal exists in the cash deal  
10 because it's hard to value these companies.  And so  
11 I'm asking you okay.  Well, does it suddenly get  
12 easier to value them when it's a stock deal?

13                   MR. MONTEVERDE:  Well, two things.  
14 I -- first, I would think that what I said earlier,  
15 giving choices, makes it harder for a shareholder to  
16 make sure that they do what they think is the right  
17 decision.  That's why appraisal rights are to be  
18 provided.

19                   But, secondly --

20                   THE COURT:  Right.  And I got that  
21 one.  I got the idea that we want the full value.

22                   MR. MONTEVERDE:  I think I'm really  
23 following to a more statutory issue, which is by a  
24 simple reading of the statute, we believe this

1 transaction should provide for appraisal rights. And  
2 I think there is no argument against that. In fact,  
3 the case law is not there, but what there is is some  
4 law -- there's one Law Review article and there's a  
5 statute. And that statute -- not statute; a -- a  
6 commentary on corporate practice on law in Delaware, I  
7 should say, 36.02. And if one reads that definition  
8 that defendants are relying on, which I have copies --  
9 and if I may, Your Honor, I can hand up to you.

10 THE COURT: Sure. That'd be great.

11 MR. MONTEVERDE: The -- the section I  
12 would like to point the Court to is the -- the last  
13 full paragraph, the third paragraph. Towards the  
14 bottom after Note 7, there is a sentence that reads,  
15 "Thus, even if cash other than for fractional shares  
16 is only portion of the consideration prescribed for a  
17 particular class of stock in a merger, the shares of  
18 that class have appraisal rights. On the other  
19 hand" -- and this is where defendants rely on this --  
20 "in a merger in which holders of listed shares can  
21 receive cash for their shares if they properly elect  
22 to do so but receive surviving corporation stock if  
23 they do not, [they're] not required to accept cash in  
24 the merger and do not have appraisal rights."

1           The main difference here, Your Honor,  
2 is, as this example indicates, the hypothetical here  
3 is that if you have stock or cash but the default is  
4 stock, no appraisal rights. Here, quite the opposite.  
5 Option is stock or cash; default, cash. And we can  
6 find that confirmation in the proxy at page 83 where  
7 it says if you fail to make an election, you're going  
8 to receive a cash. So it's a cash deal. If you think  
9 about it --

10           THE COURT: And I understand. Look --

11           MR. MONTEVERDE: But let's think. Who  
12 is not going to make an election?

13           THE COURT: Right.

14           MR. MONTEVERDE: Who is not satisfied?

15           THE COURT: No. It's going to be your  
16 dead shares or -- right. Look, I hear you.

17           MR. MONTEVERDE: You're forcing folks  
18 to essentially say "You don't appraisal rights and you  
19 need to make a decision."

20           THE COURT: So -- so in your view of  
21 the world, then, are you willing to accept that if the  
22 baseline were stock, that this would be a no-appraisal  
23 transaction?

24           MR. MONTEVERDE: I don't think I would

1 have an argument in that regard. I would have --

2 THE COURT: Because then nobody's  
3 required because the default is --

4 MR. MONTEVERDE: Correct. I would  
5 have a different argument, however, even on a stock  
6 scenario as to the issue with the proxy itself. The  
7 proxy itself, it's very, very -- it's the definition  
8 of confusion. It begins by saying "Shareholders do  
9 not, we believe" -- that's what defendants say -- "we  
10 believe they do not have appraisal rights. However,"  
11 it goes on, "if they think they do, this is what they  
12 should do." An average shareholder, not corporate  
13 lawyers, not the judiciary, an average shareholder  
14 reads no, yes. That's I don't know. That's the clear  
15 definition. That needs to be corrected.

16 THE COURT: Look, an average  
17 shareholder reads appraisal rights and thinks that if  
18 you send in a demand, you automatically get the Court  
19 to adjudicate your -- to determine fair value without  
20 any type of judicial proceeding. I mean, that's why  
21 we amended the statute.

22 So -- but -- I mean, you deposed some  
23 of these guys. I saw that you asked one fellow about  
24 this.

1 MR. MONTEVERDE: Yep.

2 THE COURT: Couple fellows about this.  
3 I mean, do they not believe that?

4 MR. MONTEVERDE: Well, it was very  
5 interesting the response. In fact, Mr. Flaherty, one  
6 of the special committee members, I asked him that  
7 question. And his response to me was -- I'm  
8 paraphrasing, but I'll give you the cite. It's page  
9 177 of the Flaherty deposition, 177. Again, I'm  
10 paraphrasing; but what he essentially said was  
11 "There's no appraisal rights, we don't think so; but  
12 if they determine they do" -- I assume they're talking  
13 about a court -- "they will get them."

14 So you're saying "We don't think they  
15 get them, but we'll give it to them if they really  
16 kick and scream." And that's what the proxy  
17 essentially says. That's -- that's convoluted.  
18 That's confusing. That's misleading.

19 So I'm asking, essentially, for two  
20 things this morning. One is that the proxy is  
21 corrected to state an unequivocal position on whether  
22 they have shareholder -- the shareholders have  
23 appraisal rights or not. And I advance to this Court  
24 this morning that we believe they do have appraisal

1 rights, because even the example that they themselves  
2 cite, defendants, under 36.02, which state that only  
3 stock was the default, they would not have appraisal  
4 rights; but because it's cash, they do have it.

5 I have an exhibit that I also want to  
6 provide Your Honor, if I may, from a different  
7 transaction but that Berkshire Hathaway did last year,  
8 the Burlington transaction. And the exhibit -- I'm  
9 sorry. The exhibit itself is Amendment No. 2, Form  
10 S-4 from Berkshire Hathaway related to the Burlington  
11 Northern Santa Fe. If I may approach, Your Honor.

12 THE COURT: Sure.

13 MR. WELCH: Your Honor, perhaps I  
14 should note that this is the first time we've seen  
15 this. It would have been perhaps nice to have seen it  
16 in advance and -- and haven't had a chance -- it's  
17 probably half an inch thick, and I've not had an  
18 opportunity to look at it.

19 THE COURT: I appreciate your  
20 objection, Mr. Welch. We'll all muddle through  
21 together.

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

23 MR. MONTEVERDE: I apologize. It  
24 wasn't intentional. I'll be very candid with the

1 Court. This was an idea I had at 5:00 in the morning  
2 today.

3 THE COURT: I hope you --

4 MR. MONTEVERDE: There's no reason to  
5 not be up-front about things.

6 THE COURT: No worries. So where am I  
7 looking in here?

8 MR. MONTEVERDE: So where we're going  
9 to look, Your Honor, is, we're going to look at page  
10 71 and 78 which relates to the appraisal and the  
11 election.

12 Before we get there, it may be worth  
13 pointing -- and we can do that by looking at -- I've  
14 got to find the page. I'm sorry. The first page.  
15 Maybe we start there. I apologize. Page 1, the Q and  
16 A. At the bottom it says, "What will BNSF  
17 stockholders receive in the merger?" There it  
18 describes they will either receive \$100 in cash or  
19 Berkshire Class A shares --

20 THE COURT: Uh-huh.

21 MR. MONTEVERDE: -- for the equivalent  
22 of a hundred dollars.

23 What I would like to do now is take  
24 Your Honor, as well as those following the document,

1 to page 78 and paragraph 3 at the bottom or towards  
2 the end of that paragraph. It reads, "The merger  
3 agreement also provides for the allocation of BNSF  
4 shares owned by stockholders who fail to make an  
5 election. If ... Class A average trading value is  
6 within the collar, then any BNSF stockholder who has  
7 not made an election will be treated as having elected  
8 to receive cash or stock as necessary in order to  
9 achieve as closely as practical the 60/40 cash-stock  
10 split. If the Class A average trading value is less  
11 than the lower end of the collar, then any [average  
12 trading value is above the upper end of the collar],  
13 then any BNSF stockholder" -- I apologize. I skipped  
14 a line. I'm sorry.

15                   It's talking about if you -- if -- if  
16 after 60/40, if the Class A average trading value is  
17 less than the lower end of the collar, then you will  
18 be deemed to receive cash. And I'm going to  
19 paraphrase. If it's the opposite, if Class A average  
20 trading value is above the upper end of the collar,  
21 then you will receive stock.

22                   THE COURT: Right.

23                   MR. MONTEVERDE: So here you have a  
24 hybrid of default being stock-cash, stock, or cash.



1 Three different defaults.

2           If we go to page 71, Your Honor will  
3 maybe be interested to find out they did provide  
4 appraisal rights.

5           THE COURT: This is a proration deal.

6           MR. MONTEVERDE: It is, indeed. It is  
7 a proration deal, but I think it is -- it is worth  
8 noting that in this -- in this transaction Berkshire  
9 Hathaway provided appraisal rights. And I think the  
10 similar -- the similar -- it's more analogous -- I  
11 guess that's the word. It's more analogous to our  
12 deal, Wesco, them not providing appraisal rights.

13           THE COURT: But in this deal you have  
14 to take some cash.

15           MR. MONTEVERDE: Well, in -- indeed.  
16 And so do you do in Wesco if you don't make an  
17 election.

18           THE COURT: If you don't make an  
19 election; right?

20           MR. MONTEVERDE: Right.

21           THE COURT: But you're not, quote  
22 unquote, "required to."

23           MR. MONTEVERDE: Well, I guess  
24 we're -- we're working for what does the word

1 "require" mean?

2 THE COURT: We are, and that's why I  
3 asked you about the policy or statute.

4 MR. MONTEVERDE: And if we look at  
5 synonyms in the thesaurus, one would find the word  
6 "required" to also be "acquired." So if one acquired  
7 shares, that will be a synonym.

8 THE COURT: A synonym for "required"  
9 is "acquired"?

10 MR. MONTEVERDE: Yeah. I have --

11 THE COURT: Ah-hah. I mean, a close  
12 homonym perhaps, a -- you know ...

13 MR. MONTEVERDE: Well ...

14 THE COURT: ... a cognate --

15 MR. MONTEVERDE: Maybe --

16 THE COURT: -- similar -- similar  
17 root.

18 MR. MONTEVERDE: Maybe -- maybe it's  
19 about thinking about it. If you don't make an  
20 election, right, you're going to receive cash. So you  
21 are required to take the cash. So maybe that's the  
22 point, and that's what I meant --

23 THE COURT: No; I hear you. I hear  
24 you. Your point is if you don't do anything, you're

1 stuck with cash and, therefore, that should trigger  
2 appraisal rights.

3 MR. MONTEVERDE: And I think -- it is  
4 a confusing transaction because, also, the S-4  
5 amendment, which is Exhibit 24 to plaintiff's -- to  
6 plaintiff's affidavit, which was part of the reply --  
7 and I'm sorry to be going through different exhibits.  
8 I don't know if Your Honor has got --

9 THE COURT: Yeah, I've got it.

10 MR. MONTEVERDE: It's actually a  
11 redline.

12 THE COURT: Uh-huh.

13 MR. MONTEVERDE: And we provided a  
14 redline because there were other things we were asking  
15 for in the litigation, and they have been addressed by  
16 defendants in this filing. But what's not addressed  
17 is some further confusion.

18 Not only the appraisal right issue of  
19 whether you get it or not -- or don't get it, we think  
20 it's confusing and we think it's misleading; but also  
21 page 9 of the proxy. It reads, "Please note" -- and  
22 I'm looking at the Q and A. I'm sorry.

23 THE COURT: Uh-huh.

24 MR. MONTEVERDE: "What vote is

1 required to adopt the merger agreement?"

2                   At the bottom it says, "Please note  
3 that ... failure to vote your shares of common stock,  
4 abstention from the vote or a 'broker non-vote' will  
5 have the same effect as voting 'AGAINST' the adoption  
6 of the merger agreement."

7                   So what they're telling you is if you  
8 do nothing, you're voting against, but you're not  
9 going to have really any recourse. And then --

10                   THE COURT: What do you mean  
11 "recourse"?

12                   MR. MONTEVERDE: Well, no appraisal  
13 rights.

14                   And then if we look actually at the  
15 proxy form card, the formal Wesco proxy card --

16                   THE COURT: Uh-huh.

17                   MR. MONTEVERDE: -- which was attached  
18 previously with the March 7th S-4, I'm a little bit  
19 confused, quite frankly. And I may approach. If I  
20 may approach. I'm sorry.

21                   THE COURT: Sure.

22                   MR. MONTEVERDE: Because the --  
23 beneath the title "THIS PROXY WILL BE VOTED AS  
24 DIRECTED, OR IF NO DIRECTION IS INDICATED, WILL BE

1 VOTED 'FOR' THE PROPOSAL," I think that means if you  
2 don't vote, they're going to count the vote towards  
3 the merger agreement, which I know it's not true.  
4 That's not what the proxy says, and I know that's the  
5 intention of the parties, because we got that out from  
6 the deposition. So that's further confusion.

7 I really think shareholders are being  
8 put in a very, very tough spot here, Your Honor, where  
9 confusion is the only thing given to them. So we  
10 think that needs to be corrected.

11 THE COURT: No, no, no. I mean,  
12 you're -- you're confusing the situation where someone  
13 doesn't vote --

14 MR. MONTEVERDE: Correct.

15 THE COURT: -- or where there's a  
16 broker nonvote but the situation where someone returns  
17 a blank card.

18 MR. MONTEVERDE: Well --

19 THE COURT: I mean --

20 MR. MONTEVERDE: -- you know, I see  
21 that, Your Honor. I do think -- let's step -- the  
22 issue is not the proxy card. The point of the proxy  
23 card, I think, makes things even more confusing.

24 THE COURT: Look, I got to tell you

1 that there's, like, an ancient case on it. It's,  
2 like, 20 or 30 years ago where it said blank card, you  
3 can do this. Now, I mean, if -- if someone wanted to  
4 relitigate that, someone could relitigate that, but it  
5 wasn't briefed. I'm not getting into the card. I'm  
6 not getting into the rule on returning a blank card.

7 MR. MONTEVERDE: And so I'm clear,  
8 that's not the issue.

9 THE COURT: Okay.

10 MR. MONTEVERDE: I guess the issue I  
11 was trying to make is that I think when you start  
12 reading, as a shareholder, I think confusion will  
13 arise. Maybe the proxy card, Your Honor doesn't think  
14 adds to it. I thought it was worth pointing it out;  
15 but I fall back on the earlier statement, which is the  
16 appraisal right. The way is described on page 55 of  
17 the proxy, it's very confusing. And why don't we take  
18 a look at it.

19 THE COURT: Well, I got to tell you, I  
20 wondered about it because, you know, one of these  
21 sections that I, frankly, always flip over and never  
22 read -- it's probably bad of me to admit that, you  
23 know, but there's always a bunch of pages in here on  
24 tax consequences of the merger. I mean, have you read

1 that? Are there legal assertions in the tax  
2 consequences of the merger that you guys think are  
3 incorrect and, therefore, create disclosure  
4 violations?

5 MR. MONTEVERDE: I'm -- I'm not going  
6 to --

7 THE COURT: You haven't. I mean,  
8 that's my point. Like, this -- this -- this --  
9 they -- they've said, just like they say in the tax  
10 consequences section, "This is what we think it is,  
11 but you got to tax" -- "you got to talk to your own  
12 law advisor." Why isn't it the same deal on  
13 appraisal? They said, "This is what we think it is.  
14 Go talk to Mr. Monteverde. He's" -- "He's ready to  
15 represent you on an appraisal case, and he can come in  
16 and litigate this and establish that you've got it."

17 MR. MONTEVERDE: I think it's a little  
18 bit different, Your Honor, because I do think the tax  
19 consequence may not have the same effect on your  
20 decision-making to the same degree that appraisal  
21 right does. In fact, Your Honor --

22 THE COURT: It's tax-free if you take  
23 stock. It's taxable if you take cash. Wouldn't you  
24 care?

1                   MR. MONTEVERDE: Well, I might care,  
2 but I think shareholders care more about is it fair,  
3 is it what I think is fair. I think that trumps what  
4 my peculiar interest or my tax consequence would be,  
5 but that's my opinion. That's my opinion.

6                   And I go back to what I said even  
7 earlier, which is leaving -- leaving aside whether the  
8 proxy is sufficient the way it's described saying "No,  
9 you don't have it, but maybe you do have it" and  
10 confusing shareholders, we think they do have it. And  
11 we do think that's clear, for the reasons I said  
12 earlier. I don't want to keep repeating them, but  
13 you're going to get cash if you make no election. And  
14 supposedly those making no election are the ones not  
15 happy with the deal.

16                   I think it's imperative that they be  
17 given appraisal rights. And I don't think it's going  
18 to be that -- talking about irreparable harm for --  
19 for -- or the balance of the equities, I should say,  
20 there's no vote, there's no final proxy. Defendants  
21 concede that they've already made the disclosure of  
22 the statute. They need to clarify you do have it, and  
23 they can do that on the final definitive proxy which  
24 will be mailed to shareholders.



1                   We're not asking for delaying the  
2 vote. We're not asking for doing a new mail-out.  
3 We're asking this morning that Your Honor agree that  
4 the appraisal rights exist because they're getting  
5 cash, and order defendants to make that clear. That's  
6 the topic of discussion.

7                   And I think it makes sense. I mean, I  
8 don't want to keep repeating this; but how can you  
9 deprive someone of appraisal rights, which is the law  
10 in Delaware, when you're going to be forced,  
11 essentially, to be cashed out and take cash? If -- if  
12 you don't like the deal, you're not going to elect  
13 anything. You don't have -- I mean, the issue of  
14 consent and required and the meaning of the word  
15 "required," well, you are required to take cash if you  
16 don't make an election. And that's the individual who  
17 won't be happy is the one who makes no election, the  
18 individual that may want to seek appraisal right; and  
19 he, she, or it should have that right. The statute  
20 says that.

21                   And I do think not providing that  
22 specifically and, in fact, telling the shareholder "We  
23 don't think you have it. If you think you have it, go  
24 ahead, give it a shot. We're going to fight you,"

1 that's really what that does.

2 THE COURT: But --

3 MR. MONTEVERDE: I don't think it  
4 promotes -- I don't think it promotes fairness. It  
5 doesn't promote justice. I don't think it promotes or  
6 advances what the law is today.

7 THE COURT: Let's break this up. I  
8 mean, we're here today, though, on the theory that  
9 what they've said is a disclosure violation; right?

10 MR. MONTEVERDE: Indeed.

11 THE COURT: I mean, it -- it's a  
12 separate question as to whether, in fact, they have  
13 appraisal rights.

14 MR. MONTEVERDE: Well, I think we're  
15 here today on both issues, Your Honor. I think the  
16 briefing was on both issues. I think, if I --

17 THE COURT: Well, if they have  
18 appraisal rights, isn't there a monetary remedy for  
19 that?

20 MR. MONTEVERDE: If they have  
21 appraisal rights, they will seek appraisal rights. I  
22 mean ...

23 THE COURT: That's Berger versus  
24 Pubco; right? You get a monetary remedy in the form

1 of quasi-appraisal.

2 MR. MONTEVERDE: However, I guess then  
3 we fall back under disclosure. If you don't tell  
4 folks whether you have it or not, the shareholder may  
5 make a different decision, a decision he or she or it  
6 would not have made if they thought they had appraisal  
7 rights.

8 So I think we go back to the  
9 disclosure claim. I think they're intertwined. I  
10 guess that's the better way to put it, Your Honor,  
11 this morning. And that is, if you don't tell them  
12 they have appraisal rights, they may not exercise  
13 them. And maybe that's what they -- maybe that's what  
14 they want. If they think the deal is so fair, who  
15 cares? Let them have it. If someone doesn't think  
16 the deal is fair, let them exercise their rights, tell  
17 them they actually have them. Don't -- I mean, leave  
18 them, which is what our position is, and give them  
19 appraisal rights and let's do it in the next  
20 definitive -- in the definitive proxy, which has not  
21 been issued. And it's a one-liner. We're not asking  
22 for the moon, Your Honor. We're asking for one line,  
23 "You have appraisal rights."

24 THE COURT: One line with big

1 consequences; right? I mean, it shouldn't change  
2 their legal position. All of a sudden they ought to  
3 be able to come in under 262.

4 All right. Well, I understand what  
5 you're asking for.

6 MR. MONTEVERDE: Now, I think the --  
7 the second issue, which is the -- the issue of the  
8 process and -- what was -- what we had here. I'm  
9 going to be very candid this morning and tell Your  
10 Honor I think a lot of the process issues that we  
11 have, I think that's a price claim, one that we can  
12 deal with postclose. And that's why the defendants  
13 make a deal of it. We don't have price affidavits  
14 because, the same in CNX, there was no affidavit of an  
15 expert of the price. It would be not appropriate for  
16 me to be asking for the increase in consideration  
17 today. However, what is appropriate for me to ask  
18 this morning is that we modify the  
19 majority-of-the-minority a little bit. And we asked  
20 for that originally in our -- in our opening brief,  
21 which, as a result, defendants did modify it to some  
22 degree, which can be tracked in Exhibit 24 of the  
23 amended proxy. They excluded an officer, Sham, as  
24 well as Mr. Kaufman, from the

1 majority-of-the-minority. But we think Ms. Peters  
2 should also be excluded.

3           Now, it's a little bit -- it's a  
4 little bit of a -- of a particular circumstance here.  
5 And if we look at some of the -- the case law, such as  
6 Pure Resource or even CNX, in Pure Resource they just  
7 had the unaffiliated Pure shareholder vote. In CNX,  
8 when Your Honor was confronted whether T. Rowe should  
9 be excluded or not, Your Honor determined it wasn't  
10 appropriate there, and the reason being the new -- or  
11 the articulated standard, the unified standard, that  
12 there was a majority-of-the-minority as well as a  
13 special committee.

14           Here, our -- our concern is that  
15 Ms. Peters, even though she doesn't have shares in  
16 Berkshire, she has so many shares in Wesco, 5 percent,  
17 which leaves essentially only another 4 1/2 percent of  
18 Wesco shareholders to have to vote so the transaction  
19 gets approved. We think the -- the real unaffiliated  
20 Wesco shareholders should be voting for this  
21 transaction. And we do think the -- the record  
22 supports that, because we think the special committee,  
23 we're arguing, was not fully disinterested. We're  
24 arguing that Mr. Flaherty had a significant interest

1 of shares in Berkshire, which is a big portion of his  
2 personal portfolio, which might have made him biased  
3 to the transaction. I think that's very hard to say  
4 that he was not caring, that he has so many shares in  
5 Berkshire, to actually approve the transaction with  
6 the company where he holds stock. I don't think  
7 that's -- I don't think that's credible, that a person  
8 can be unaffected by that. I think a person is  
9 affected by that.

10                   And I do think that -- going back to  
11 the issue on appraisal, that because we do not have a  
12 -- as it stands, what's going to be a -- an informed  
13 vote, you're not going to have a true majority of the  
14 minority voting on the transaction and that that, in  
15 tandem, justifies extricating or taking Ms. Peters out  
16 of the -- out of the run to be able to vote.

17                   THE COURT: I'm sorry. Tell me the  
18 rationale again for why we're excluding her?

19                   MR. MONTEVERDE: Sure.

20                   THE COURT: Just because she's got a  
21 lot?

22                   MR. MONTEVERDE: No. No.

23                   THE COURT: It sounded like just  
24 because she's got a lot.

1                   MR. MONTEVERDE: Well, maybe we got --  
2 first, I -- first we need to say one thing, which is I  
3 don't think the rule -- if Your Honor were to enjoin  
4 this on the issue of excluding Ms. Peters, I don't  
5 think that would be a rule that would apply to every  
6 case. I think it's a very particular set of  
7 circumstances, which mean that it is because she has,  
8 yes, a lot of shares but that she's also a board  
9 member for Wesco and that the intertwined special  
10 committee of relationships with Berkshire and  
11 Mr. Flaherty's interest under this set of  
12 circumstances justify saying let's have the Wesco  
13 shareholders who are really uninterested, unaffiliated  
14 with Berkshire -- and they're just the public, the  
15 true public -- let's ask them to approve this  
16 transaction. I think that's what I'm saying, Your  
17 Honor.

18                   And I know it's -- if we look at Pure  
19 Resource, that's not the case. And if we look at CNX,  
20 under the analysis, was not the case, either, because  
21 T. Rowe also had shares in CONSOL. I recognize that.  
22 And I'm not asking Your Honor to deviate from that  
23 standard. I'm asking that in this case, under this  
24 particular set of circumstance we do create an

1 exception to that, to the general rule maybe, if we  
2 can call it, if we can call it that, that Ms. Peters  
3 should not be able to vote her shares.

4 THE COURT: What are her -- her  
5 conflicts and intertwined relationships that  
6 sufficiently merit this, you know, sort of vote  
7 sterilization effort?

8 MR. MONTEVERDE: Well, I think  
9 history, quite frankly. She was helped and assisted  
10 by Berkshire Hathaway. I want to say was late '60s,  
11 early '70s when she was being threatened with a  
12 takeover by another company. I think there's  
13 sufficient information in the record that Mr. Buffett  
14 does admire Ms. Peters, and there is also an article  
15 in the Wall Street Journal Ms. Peters says the same  
16 thing about Mr. Buffett. I think she's in a different  
17 stage at this point of her life that her interest may  
18 be -- or may deviate from the shareholder; that is,  
19 she may no longer want to keep those shares. She may  
20 just want to liquidate them. And I think she was part  
21 of the special committee. She was deciding, making  
22 decisions directing the process towards a sale of  
23 Berkshire Hathaway. I think --

24 THE COURT: What do you know about the



1 other 15 percent? Who's the next largest holder?

2 MR. MONTEVERDE: I'm sorry?

3 THE COURT: Who's the next largest  
4 holder?

5 MR. MONTEVERDE: I don't know.

6 THE COURT: I mean, is there somebody  
7 else? Is there a hedge fund that's bought up who  
8 could have a larger percentage of the remaining 15  
9 than Ms. Peters has of the original 19.9?

10 MR. MONTEVERDE: And I think -- I can  
11 see where Your Honor is going down that line of  
12 questioning; but I think what I'm indicating is I  
13 don't think just having a lot of shares is the --  
14 again, that's not the law, and I'm not asking she be  
15 excluded because she has a large block of shares. I'm  
16 asking she be excluded because she was on the special  
17 committee, she has a large block of shares, and we  
18 believe she was biased in the transaction. And if you  
19 really want the unaffiliated Wesco shareholders to  
20 vote, her vote should not count.

21 THE COURT: All right. You're -- what  
22 you're making the pitch is, that she had unique  
23 idiosyncratic interests that don't represent the  
24 interests of the stockholders as a whole in the deal.

1 And one could quite readily make that argument about  
2 some short-termer who came in purely as a holdout  
3 player. So assume that I follow your line of  
4 reasoning and take out the largest long-term holder.  
5 Just as an aside, generally we like long-term holders.  
6 So it's an odd thing. What is going to be the  
7 response when a short-termer then takes a position  
8 proportionately equivalent or even larger than  
9 Ms. Peters and, you know, you come in, quite rightly,  
10 and say "Look, they're just interested in the quick  
11 flip profit. They're not representing the interests  
12 of the long holders"? Will I carve it down again?

13 MR. MONTEVERDE: Well, that's not the  
14 issue before this Court this morning, but I would  
15 say -- and, again, I don't think it would be a rule  
16 that can be -- I don't -- apply -- unless it was  
17 specifically the same circumstances.

18 The circumstances here is the special  
19 committee was created upon receipt of Mr. Buffett's  
20 proposal on September 1st, 2010. And we don't  
21 think -- we think the failure to really perform  
22 diligence on Berkshire nonpublic information -- they  
23 relied on public information -- was a mistake. We  
24 think knowing that they have this very unique

1 opportunity with Swiss Re, which is about to expire in  
2 2012 and not having found a replacement, knowing that  
3 Berkshire wasn't looking for a replacement, letting  
4 that go, I think that was an issue.

5 THE COURT: What should they have  
6 done?

7 MR. MONTEVERDE: Well, I think they  
8 should have pushed Berkshire to find a replacement. I  
9 think they should have pushed the advisors. Even  
10 though Mr. Buffett may not have been interested in  
11 selling his 80.1 interest to a third party, let's see  
12 if we can find someone interested. In fact, in -- in  
13 Your Honor's last year's case, CNX, that was precisely  
14 one of the issues that -- that was raised, is that --  
15 I don't want to mispronounce, but I think Mr. Pipski  
16 should have made the decision whether to explore  
17 alternatives, and it's his decision to make.

18 Here, while they make the decision not  
19 to explore, I think they're at fault for that. I  
20 think they should have attempted to explore it. I  
21 don't think letting a special committee proceed  
22 without direct contact, once -- one single time they  
23 didn't call Mr. Buffett -- I think that was a mistake.  
24 Not trying to utilize the particular and unique

1 opportunity to have Mr. Munger part of the transaction  
2 and say to Mr. Munger "Well, then, why don't you go  
3 talk to Mr. Buffett. See if you can maybe persuade  
4 him to increase the price a bit."

5 THE COURT: I mean, they did talk to  
6 Mr. Munger. They called him up and said, essentially,  
7 "How's Warren going to take all this?" They previewed  
8 him. The whole idea was to -- you know, "Let's not  
9 call Warren directly and jeopardize this deal." I  
10 shouldn't use his first name. Everybody in America  
11 refers to him as their favorite uncle. But  
12 "Mr. Buffett, let's not call him directly and risk him  
13 pulling the deal. Let's talk to Mr. Munger first."

14 I mean, that was not a good thing to  
15 do? Or what -- what should they have done beyond  
16 that?

17 MR. MONTEVERDE: I think when  
18 Mr. Munger -- and he expressed that to their advisor,  
19 Greenhill, that he didn't think Mr. Buffett would  
20 react in a positive -- in a positive manner, I think  
21 they should have then given it another thought.  
22 "Let's see. Maybe we talk to him directly." And they  
23 tried that, I think, once. That's the discussion they  
24 had with Mr. Munger about, called Mr. Buffett.

1           And that was, I think -- if memory is  
2 working properly this morning, I think that was late  
3 December. And -- and that was not late January when  
4 they essentially engaged in the -- or agreed to really  
5 enter into the transaction with respect to it or -- or  
6 signed on February 4th.

7           I don't know what they should have  
8 done, Your Honor. I think what they did wasn't in the  
9 best interests of shareholders. But I think -- that's  
10 why I go back to what I said earlier. I think that's  
11 something we can explore. And we can explore this  
12 standard, whether that should be under entire fairness  
13 or whether it's business judgment. I think that's an  
14 issue for postclose, and I --

15           THE COURT: Yeah. But the way -- the  
16 way we got on this line of discussion was I had asked  
17 you what the, you know, intertwined connections and  
18 conflicts were that Ms. Peters had that merited,  
19 effectively, sterilizing her vote from part of the  
20 majority-of-the-minority. And, you know, you were  
21 going to run through those. And, you know,  
22 essentially what you just told me is you don't know.

23           MR. MONTEVERDE: Well, I don't think I  
24 said -- what I'm saying is I think the way the process

1 unfolded, the way the members of the special committee  
2 were selected and the behavior they demonstrated, I  
3 think that, in the aggregate, supports excluding  
4 Ms. Peters, who was part of the special committee, who  
5 directed the process with Mr. Flaherty, who has a  
6 great interest in Berkshire stock with Ms. Carlburg,  
7 who also has some interest in Berkshire Class B stock.  
8 And that's kind of the unique circumstance why we're  
9 asking for that. And, in fact -- I want to make sure  
10 we're -- they did exclude already two members who  
11 originally were included as part of the  
12 majority-of-the-minority. And I -- they excluded  
13 Peter D. Kaufman and also Robert Sham, S-h-a-m. And  
14 originally they had those individuals -- I'm sorry,  
15 Your Honor. That's on the first page --

16 THE COURT: Uh-huh.

17 MR. MONTEVERDE: -- of the proxy.

18 THE COURT: I remember seeing that.

19 MR. MONTEVERDE: I'm sorry?

20 THE COURT: I do remember seeing that.

21 MR. MONTEVERDE: Okay. So we're  
22 happy, to some degree, that they actually did listen  
23 to what we had to say in our brief. And they went  
24 back and they looked at it, and they did eliminate two

1 additional interested individuals who actually do have  
2 shares, it's fair to note, in both Wesco and  
3 Berkshire. And Ms. Peters doesn't. It's a unique  
4 circumstance. And I think it's a common-sense -- in  
5 my mind, I think it's more of a logical -- if you  
6 really want to know if the minority wants to approve  
7 this deal, then take Ms. Peters out. I don't think  
8 she's your typical shareholder. She has a great  
9 interest. She was involved in the process. She  
10 decided how to direct the process. She was part of  
11 the decision whether to contact Mr. Buffett or not. I  
12 think she has too much at stake that requires to  
13 exclude her.

14 THE COURT: I was about to ask you if  
15 she got any side payments. She got the 25,000 for  
16 serving on the committee; yeah? Other than that --

17 MR. MONTEVERDE: Other than that --

18 THE COURT: -- does she --

19 MR. MONTEVERDE: -- I think that's --  
20 I think she's going to make \$2500 with this  
21 transaction. So I don't think \$25,000 really is --

22 THE COURT: No, I don't, either; but  
23 that was my point. She doesn't have any misaligning  
24 interests. I mean, she is actually -- you know, we

1 worry about small stockholders being rationally  
2 passive and rationally apathetic and, therefore, not  
3 taking the time to inform themselves about what is  
4 best for the company, because it just doesn't make  
5 sense, when you only own 10 shares, to spend the time  
6 or the money to read, you know, these lengthy  
7 documents and really think through everything and, you  
8 know, weigh the economics. When you got a big  
9 holder -- we like holders because they do have those  
10 incentives. I mean, they're the ones whose interests  
11 are aligned.

12                   So I would need to hear some thing  
13 that misaligned her interests. And, you know, what  
14 I've heard from you is she and Mr. Buffett go back a  
15 long way. And, you know, to tally the circumstance,  
16 you got to be a little bit worried about that. That's  
17 what I hear you coming back with.

18                   MR. MONTEVERDE: And she was part of a  
19 process. She was an integral part of it and that she  
20 made decisions. She was --

21                   THE COURT: Integral part of the  
22 process, again, honestly, that strikes me as a good  
23 thing. Like, if I wanted somebody who would -- let's  
24 say I'm a small holder and I want to know that this



1 deal is actually a good deal for the stockholders.  
2 What I want is to know that there is somebody who is a  
3 big holder that was in the game, that was supervising  
4 things and that they're getting the same stuff I am.  
5 So that -- that makes me think, wow. This person  
6 who's got a lot on the line and was involved and had  
7 the ability to actually influence the process, they  
8 are happy and I am free-riding on their efforts, I am  
9 getting the same stuff that they're getting, that is  
10 reassuring to me.

11           So, you know, again, you would need --  
12 you would need to point me to some reason that would  
13 cause this woman's interests to depart. I mean, if  
14 anything, being -- being a long-term founder, a --  
15 somebody who's associated with a company for a long  
16 time, you know, those are big and  
17 transaction-resisting incentives. People who get  
18 their -- their psychic wherewithal wrapped up in a  
19 company, you know, they normally want to say "No, no.  
20 I actually don't want to take that offer because I get  
21 psychic satisfaction from the Wesco name being out  
22 there. Wesco, you know, is a firm my dad did. I've  
23 been" -- "There's been a Wesco for 30 years," however  
24 long it is. "I want that Wesco out there. No, no,

1 Mr. Buffett. We're not taking this deal." I mean,  
2 that's what you'd expect. You'd actually be worried  
3 she wasn't on board, that maybe she had  
4 differentiating interests --

5 MR. MONTEVERDE: Well --

6 THE COURT: -- but she is on board

7 MR. MONTEVERDE: And we're not  
8 saying -- denying the public had knowledge. They have  
9 that. What I'm saying is let the folks who are --

10 THE COURT: Rationally apathetic.

11 MR. MONTEVERDE: Let the minority  
12 with -- exclude her from the vote. I'm not saying  
13 exclude her ideas, exclude -- she can put in the proxy  
14 "I believe this is a good deal. I'm a long-time  
15 holder." It does say that. Shareholders get that.  
16 I'm saying if you so trust that shareholders will  
17 follow the lead of big-time long holder, let them know  
18 that. But here, this long-time holder was involved in  
19 the process, goes back with Mr. Buffett. I don't  
20 think it's that unreasonable for us -- for Your Honor  
21 this morning to say exclude her from the vote.

22 THE COURT: That's --

23 MR. MONTEVERDE: That's what we're  
24 asking.

1 THE COURT: I hear your argument.

2 And, you know, there could be times when you would be  
3 worried about divergent interests, but, you know, what  
4 you're putting forward isn't moving me.

5 MR. MONTEVERDE: Well, it is what it  
6 is, Your Honor. And I don't think today there's much  
7 more on that issue. But --

8 THE COURT: Okay. Why don't you wrap  
9 up, then, and I'll hear from your friends.

10 MR. MONTEVERDE: I don't really want  
11 to spend much time on the bond issue on this point,  
12 unless Your Honor wants me to.

13 THE COURT: No.

14 MR. MONTEVERDE: At a minimum, we need  
15 to fix the proxy with the appraisal issue.

16 THE COURT: Okay.

17 MR. MONTEVERDE: That's my only --

18 THE COURT: Thank you.

19 MR. MONTEVERDE: Thank you.

20 THE COURT: Good morning, Mr. Welch.

21 MR. WELCH: Good morning, Your Honor.

22 May it -- may it please the Court.

23 Your Honor, there have been an awful  
24 lot of issues. Now, I should say at the outset, Your

1 Honor's aware we represent Ms. Peters, Mr. Carlburg  
2 [sic], and Mr. Flaherty. That's the special  
3 committee.

4           There have been a lot of issues raised  
5 in the briefing and a lot of -- a lot of issues  
6 addressed across-the-board. I think it may be  
7 appropriate to keep things relatively brief.

8           Plaintiffs in their opening brief came  
9 out and said "Well, we want an injunction until  
10 Berkshire Hathaway pays more." What I heard this  
11 morning really was considerably different. And I'll  
12 accept them at their word. Now they're saying they  
13 want a disclosure on appraisal rights, which was the  
14 subject of some discussion with Your Honor, as well as  
15 excluding Ms. Peters.

16           I think there really are -- are three  
17 points which, at least in my view, Your Honor, are  
18 dispositive of -- of today's motion. No. 1, there has  
19 been full disclosure. And I'll speak to that in a  
20 moment. No. 2, there is a -- a -- a  
21 majority-of-the-minority vote provision, which is  
22 powerful indicia of fairness. And beyond that, the  
23 special committee was mindful and we are mindful  
24 that -- that Berkshire Hathaway's indicated there's

1 some possibility that they may walk if something else  
2 happens. Is there a possibility of irreparable harm?  
3 Yeah, there is, to the stockholders if anything  
4 negative happens. I think I would say that.

5           The standard for review at a  
6 preliminary injunction, I think, has been set out  
7 years ago and consistently applied, and that's in  
8 *Cascella versus GDV*. Even if entire fairness applied  
9 to the ultimate review of the transaction, even if the  
10 unified standard didn't apply, even if the Kahn  
11 against Lynch shifting-burden standard didn't apply --  
12 did apply, rather -- I'm sorry. Even if those  
13 standards all applied to a final review, no doubt  
14 about it, for purposes of this hearing, the burden of  
15 proof of probability of success on the merits and  
16 irreparable harm is on the plaintiffs. *Cascella* is  
17 very clear about that. I went back and read *Cascella*.  
18 And it was interesting. The Court in that case said  
19 "Look, there's majority-of-minority vote here. We're  
20 letting this thing go through. There is no  
21 possibility of irreparable harm." And I think that's  
22 powerful.

23           Initially there was discussions about  
24 disclosures concerning valuation issues. I think I'll

1 pass on those, Your Honor; we didn't hear a thing  
2 about them this morning.

3           With respect to appraisal rights,  
4 Wesco stockholders are not being required to accept  
5 anything other than stock. Now, no doubt about it,  
6 stockholders could choose not to elect anything. They  
7 have that right. They have every right to do that if  
8 they want. Now, does that mean they're being required  
9 to accept cash? No. They're entitled to be  
10 indifferent. They have every right to make the choice  
11 they want to make, but they're not being forced to --  
12 to -- to take cash. I think that's, as well as Your  
13 Honor's questions and dialogue with counsel, pretty  
14 much dispositive of that issue. And I'm not going to  
15 go on with it further unless Your Honor has questions  
16 --

17           THE COURT: No; that's fine.

18           MR. WELCH: -- you would like me to  
19 explore further.

20           As to the majority-of-minority vote  
21 provision, Your Honor, it's nonwaivable. It's a  
22 majority of the total number of shares outstanding.  
23 As Mr. Flaherty said in his deposition, we won those  
24 in -- in the discussions with Berkshire Hathaway.

1 It's -- it's a powerful incentive -- indicia, evidence  
2 of -- of fairness. The Cysive case says that.

3 CNX, Pure Resources, we heard it from  
4 Mr. Monteverde this morning. It focuses upon the  
5 economic incentives of members of the minority. Your  
6 Honor focused on that as well.

7 Ms. Peters' shares should not be  
8 excluded from -- from the minority. She's the largest  
9 minority shareholder. She has the motive to -- to get  
10 the highest price. Her interests are aligned with the  
11 minority. She -- as to personal interest, I think she  
12 testified that she spoke with Mr. Munger or  
13 Mr. Buffett once every three or four years.

14 THE COURT: Uh-huh.

15 MR. WELCH: This is not a Beam versus  
16 Martha Stewart situation in any way, shape, or form.  
17 Indeed, she twice rejected other offers from the -- to  
18 buy her stock, and I think one of them came from  
19 Berkshire Hathaway itself. So I think -- I think that  
20 issue falls by the wayside.

21 Again, as to balance of the equities,  
22 from the special committee standpoint, did they worry  
23 that if they pressed beyond a certain level that they  
24 might risk jeopardizing this for the minority? Sure,

1 they did. Was that a subject of concern? Yes.  
2 Should it be a subject of concern to the Court? Yes,  
3 sir, I believe it should be.

4 Your Honor, we could -- we could talk  
5 at -- at some length about, you know, the merger  
6 itself. There is no evidence that this is unfair.  
7 There are no attractive alternatives. The offer is  
8 one that presents a unique opportunity to stockholders  
9 to accept Berkshire stock.

10 THE COURT: Why is it that they can do  
11 full election in this? There's some reference in the  
12 record to, you know, some weird exception to the tax  
13 code. Do you know what the -- I'm just curious. It's  
14 not, you know, going to affect my substantive  
15 analysis; but there -- when I was reading through the  
16 record at some point somebody said -- there was a  
17 reference -- I think it was in Munger's testimony  
18 where he said they thought they were going to have to  
19 prorate, but then the lawyers told them "No, no.  
20 There's some weird historical exemption. We can go  
21 the Burger King option in this deal." What -- do you  
22 know what that is?

23 MR. WELCH: The answer is I read that  
24 as well, Your Honor. It really wasn't fleshed out. I



1 don't know the answer.

2                   What I do know is that when  
3 Mr. Buffett presented this opportunity, he was very  
4 clear that he wanted it done this way. I mean, he  
5 also went on to say "I think you should have a special  
6 committee," and he also went on to say "I think you  
7 should have a majority-of-the-minority vote."

8                   THE COURT: Uh-huh.

9                   MR. WELCH: Now, where those -- all  
10 those different things -- how they factored into the  
11 thinking of Berkshire Hathaway, I don't know. But  
12 from the standpoint of -- of -- of our clients and of  
13 the public minority, that's a pretty good thing.

14                   THE COURT: Uh-huh.

15                   MR. WELCH: So as I say, there's --  
16 there's really nothing about this merger. There's no  
17 expert testimony that -- that contradicts the  
18 positions that have been taken by the committee,  
19 contradicts the positions taken by Greenhill,  
20 contradicts the positions taken by Kevin Dages, who  
21 backs up everything Greenhill says and provides an  
22 additional indicia of -- of -- of fairness to the  
23 stockholders.

24                   Your Honor, with that in mind, I'm not

1 inclined to -- to spend any additional time, unless  
2 Your Honor has questions, which I'll take my best shot  
3 at. But subject to that --

4 THE COURT: No, I have no questions.  
5 Thank you, Mr. Welch.

6 MR. WELCH: Yes, sir.

7 MR. GARVEY: Your Honor, George Garvey  
8 on behalf of Berkshire Hathaway and the defendants  
9 affiliated with it.

10 THE COURT: Uh-huh.

11 MR. GARVEY: I have nothing to add,  
12 unless the Court has questions.

13 THE COURT: Not unless you can shed  
14 light on that historical oddity. But it's purely my  
15 own curiosity, and it -- you know, I guess at one of  
16 these conferences or something I'll have to ask one of  
17 the securities law/tax law gurus why you can't do sort  
18 of full nonproration. I'm sure there's some weird IRC  
19 code that makes it not a -- not a reorganization or  
20 something. But --

21 MR. GARVEY: It's an awfully good  
22 question, but I don't know the answer, either. I  
23 think you've probably sent us all back to talk with  
24 our --

1 THE COURT: As I say, it's purely my  
2 own curiosity. It doesn't affect my -- the merits of  
3 the case.

4 But thank you, sir.

5 MR. GARVEY: Thank you.

6 THE COURT: I appreciate you coming  
7 out to the East Coast.

8 MR. MONTEVERDE: Your Honor, one quick  
9 minute?

10 THE COURT: Yes, absolutely.

11 MR. MONTEVERDE: Thank you.

12 I think it would be wrong not to  
13 modify the appraisal rights section.

14 THE COURT: Uh-huh.

15 MR. MONTEVERDE: I --

16 THE COURT: Look, talk to the counsel.  
17 I mean, I -- I'm -- that ain't my job. I mean, I have  
18 to interpret the appraisal rights statute. So I have  
19 to interpret what "required" means, and today I have  
20 to determine the disclosure issue.

21 MR. MONTEVERDE: Correct. And -- and  
22 I think what I'm asking is that the Court determine in  
23 favor of plaintiff that they are entitled to appraisal  
24 rights because they're going to get cash, those who do

1 not elect it; and that the market-out exception we  
2 talked about earlier, the reason why appraisal rights  
3 were enacted is what I said earlier about efficient  
4 market. Market price and fair value, not the same  
5 thing necessarily. There's been lots written about  
6 that.

7 THE COURT: Yes. Let's get rid of the  
8 market-out. And that's not a life-sustaining  
9 under-the-policy suggestion. What I'm saying, if one  
10 spins out that theory, then what would follow is to  
11 get rid of the market-out, that if -- if market-out  
12 does not equal to fair value; right?

13 MR. MONTEVERDE: But what we're asking  
14 today is that we follow what we've done in other  
15 transaction, which is you provide appraisal rights if  
16 cash is what they're going to get at the end of the  
17 day, and if you don't elect, you get cash. I think it  
18 would be wrong not to, but I'm not the deciding person  
19 here today. If I were, I think we know where my  
20 decision would go. And --

21 THE COURT: I don't know. I got to  
22 tell you, there's a -- there's a clarity with having a  
23 client. There's things that -- you know, that when I  
24 was representing somebody and, you know, I knew the

1 way the case ought to come out, it ought to come out  
2 my client's way. It's different when you don't have  
3 that type of polestar.

4 But, anyway, I hear what you're  
5 saying.

6 MR. MONTEVERDE: I appreciate that.  
7 And -- and -- and at a minimum, if Your Honor decides  
8 they don't get appraisal rights, then the proxy needs  
9 to be clear about that. It's confusing right now.

10 Thank you.

11 THE COURT: Okay. Thank you.

12 Well, I appreciate everyone coming in  
13 today.

14 I'm going to deny the application for  
15 preliminary injunction.

16 In terms of the economics, I do think  
17 this is a unified standard transaction where they put  
18 both prongs into place. So I don't see any basis to  
19 second-guess or enjoin on that basis.

20 In terms of the  
21 majority-of-the-minority vote that was discussed this  
22 morning, the idea of excluding the largest holder's  
23 shares, I don't see any colorable argument for doing  
24 that, at least the record as of today.

1           And lastly, I don't see any colorable  
2 disclosure issues. The -- what our law allows people  
3 to do when there is an unsettled question is to state  
4 their beliefs as to what the law is. That's what Vice  
5 Chancellor Strine said in the General DataComm case.  
6 That is all you can expect people to do. That's what  
7 the Berkshire and Wesco folks have done here as to  
8 their view as to whether stockholders are entitled to  
9 appraisal.

10           I don't think I need to go any further  
11 than that in terms of speaking to the 262 issue. As a  
12 separate and independent basis for denying the  
13 injunction, however, in terms of the threat of  
14 irreparable harm, to the extent that the 262  
15 disclosure is wrong or to the extent that stockholders  
16 actually have appraisal rights, that can be remedied  
17 at a later time through some type of quasi-appraisal  
18 proceeding. That's been done by this Court before.  
19 It could, if necessary, be done again.

20           So for all those reasons, the  
21 injunction application is denied.

22           I appreciate everyone coming in this  
23 morning. It was great to see everybody. This was one  
24 of those well-handled cases. I think this may be the

1 first time I've -- I've talked to you-all. Lawyers  
2 all did a great job handling things, and that's what  
3 we expect from Chancery folks. It's nice to see. I  
4 read all the depositions. It seemed like people are  
5 doing the right thing and not being too obstreperous  
6 or anything like that.

7                   So let me just leave those final  
8 compliments for counsel. And, again, particularly for  
9 the West Coasters, I appreciate you coming in.

10                   We stand in recess.

11                   ALL COUNSEL: Thank you, Your Honor.

12                   (Court adjourned at 11:38 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 63 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 11th day of May 2011.

/s/ Neith D. Ecker

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Official Court Reporter  
of the Chancery Court  
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