

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL STEINHARDT, HERBERT	:	
CHEN, DEREK SHEELER,	:	
STEINHARDT OVERSEAS	:	
MANAGEMENT, L.P. and ILEX	:	
PARTNERS, L.L.C., individually	:	
and on behalf of all others	:	
similarly situated,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Civil Action
	:	No. 5878-VCL
ROBERT HOWARD-ANDERSON,	:	
STEVEN KRAUSZ, ROBERT ABBOTT,	:	
ROBERT BYLIN, THOMAS PARDUN,	:	
BRIAN STROM, ALBERT MOYER and	:	
OCCAM NETWORKS, INC.,	:	
	:	
Defendants.	:	

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Chancery Courtroom 12B  
New Castle County Courthouse  
Wilmington, Delaware  
Monday, January 24, 2011  
10:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, VICE CHANCELLOR.

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RULING OF THE COURT  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

- - -

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CHANCERY COURT REPORTERS  
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1 APPEARANCES:

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ROBERT J. KATZENSTEIN, ESQ.  
DAVID A. JENKINS, ESQ.  
STEPHANIE S. HABELOW, ESQ.  
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-and-  
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for Defendants

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2 (At this time a recess was taken until  
3 12:00 noon)

4 THE COURT: Thank you all for giving  
5 me a chance to collect my thoughts. I have thought  
6 about writing on this; in particular the enhanced  
7 scrutiny trigger, as something that I think somebody,  
8 at some point, probably several of us at some point,  
9 are going to have to do more work on.

10 But in honor of the name of the target  
11 company, I thought the simplest thing to do was to  
12 give you an answer right away. So here is what I am  
13 going to do.

14 There are two theories on which the  
15 injunctions have been sought: Process and disclosure.  
16 I am going to deny the injunction based on process. I  
17 am going to grant a limited injunction based on  
18 disclosure.

19 First, on process. There was a lot of  
20 debate in the briefing over whether this was an  
21 enhanced scrutiny transaction or business judgment  
22 rule analysis. This is a deal where the consideration  
23 was approximately 50 percent cash floating based on  
24 the market price. It was priced as up to 19.9 percent

1 of the acquirer's share plus enough cash to make the  
2 total value number.

3 But the problem is it actually doesn't  
4 receive the 19.9 because of their employee options and  
5 awards that are rolling, and so the public will end up  
6 holding approximately 15 percent of the post-  
7 transaction entity after the fact.

8 We tend to focus, in our juris  
9 prudence, on change of control and the change of  
10 control test. So there was a lot of debate over  
11 whether this, in fact, was sufficient cash to merit a  
12 change of control. I think what people need to  
13 remember is that the change of control test is  
14 ultimately a derivative test.

15 The point is that when enhanced  
16 scrutiny applies is when you have a final stage  
17 transaction. The reason enhanced scrutiny applies to  
18 a change of control is because it's a constructive  
19 final stage transaction. You're giving up control to  
20 a person who could then cash you out because he's the  
21 new controller.

22 This is a situation where the target  
23 stockholders are in the end stage in terms of their  
24 interest in Occam. This is the only chance they have

1 to have their fiduciaries bargain for a premium for  
2 their shares as the holders of equity interests in  
3 that entity.

4           It's easy to see here in two ways.  
5 First, it's easy to see in terms of the amount of  
6 cash. If you want more cash for your shares, this is  
7 the only time you have to get it. But it's also easy  
8 to see in terms of the amount of interest you're going  
9 to have in the post-transaction entity.

10           We often talk about, oh, well, but the  
11 stockholders can get a future control premium. That's  
12 all well and good for the future entity, but what  
13 you're bargaining over now is how much of that future  
14 premium you're going to get.

15           So let's say that Calix is some day  
16 sold, and let's all hope that it does very well and  
17 becomes an attractive acquisition target, and that one  
18 of the big boys picks it up at some point for a  
19 healthy premium.

20           The target stockholders today are  
21 bargaining for what their share of that premium will  
22 be. They're going to only get 15 percent, and  
23 obviously there could be more acquisitions that dilute  
24 everybody, et cetera. I get that.

1           But as between the Calix stockholders  
2 and the Occam stockholders, now is the time; when the  
3 target fiduciaries are bargaining for how much of that  
4 future control premium their folks will get. This is  
5 it. This is the end. This is the only opportunity  
6 where you can depend upon your fiduciaries to maximize  
7 your share of that value.

8           I think back in 1989, it made sense  
9 for people to be worried over the line between Revlon  
10 and non-Revlon. It was three years after that  
11 landmark case. That case was a Cunian paradigm shift  
12 if there ever was one. We had language in there like  
13 "auction duty, radically altered state," really  
14 seemingly heavy duty stuff.

15           We now know it's a reasonableness  
16 standard. There's no single blueprint. A target  
17 board doesn't have to take the facially higher cash  
18 price. It can consider the strength of the currency.  
19 It can take a stock deal if it believes that the stock  
20 offers better long-term appreciation and more  
21 potential synergies.

22           That's why I said at the outset in  
23 this case it's just not worth having the dance on the  
24 head of a pin as to whether it's 49 percent cash or

1 51 percent cash or where the line is. This is the  
2 only chance that Occam stockholders have to extract a  
3 premium, both in the sense of maximizing cash now, and  
4 in the sense of maximizing their relative share of the  
5 future entity's control premium. This is it.

6 So I think it makes complete sense  
7 that you would apply a reasonableness review, enhanced  
8 scrutiny to this type of transaction.

9 Now, there are some decisions during  
10 the process where one could debate reasonableness;  
11 particularly how Adtran was handled and how the July  
12 limited market check was conducted.

13 If Adtran, Juniper or a topping bidder  
14 were here, you could well think about an injunction,  
15 assuming they came in with a materially higher bid and  
16 there was a proven reason to show why, or sufficient  
17 reason to show why they hadn't shown up earlier or had  
18 been shut out of the process.

19 I think it's debatable. I'm not  
20 saying that there is a clear reasonableness problem  
21 here. The point was made that Adtran is subject to a  
22 standstill, but I don't think that's absolute. I  
23 think they could have asked to come in. They could  
24 now be sent a copy of this ruling, or if they are

1 sufficiently interested in this target to be  
2 monitoring things, they will have heard my statement.

3           Frankly, my impression is that they  
4 were a cautious acquirer, that they couldn't commit,  
5 that they went looking elsewhere, and if I was forced  
6 to make a decision today as to that aspect of the  
7 process, I think this board acted reasonably and was  
8 within the range of reasonableness in preferring to  
9 pursue Calix rather than Adtran, both because of  
10 Adtran's historic coquettishness in the process, and  
11 because this board reasonably could look at Calix and  
12 say, "This is the best fit for us, and if we can get a  
13 deal that is stock or largely stock, that is a  
14 superior currency to cash. We have the two largest  
15 players in this market, yes, that creates anti-trust  
16 risks we have to bargain over, but this is a  
17 transaction that creates a company that then can be a  
18 really good player and an attractive acquisition  
19 target for one of the big boys on down the road."

20           Frankly, I think that's what the VCs  
21 were thinking. I don't know for sure, but I wouldn't  
22 be surprised if that was what was on their mind.

23           The only reason that I could think of  
24 and that has been argued for why the VCs might have



1 some issue that would not align their interests with  
2 those of the stockholders as a whole is if there was  
3 some timing problem that they faced; in other words,  
4 they had a unique and personal interest that required  
5 them to sell now when stockholders, as a whole, in  
6 Occam, would have preferred a year later or two years  
7 later after some things came to fruition, perhaps  
8 after Mercury was in the works, perhaps after the  
9 performance of the federal spending was better known.

10           It's really not borne out by the  
11 record. You can speculate based on some decisions  
12 that were made that maybe there was some personal  
13 interest going on here, but it isn't there to a degree  
14 that an injunction could be based on, and I think  
15 Mr. Jenkins was quite responsible in candidly  
16 admitting that fact.

17           Given where we are, therefore, under  
18 the present circumstances, with no topping bidder, I  
19 think it's up to the stockholders to decide whether  
20 this is the price and the mix of consideration that  
21 they want for their shares. But they have to be able  
22 to do that on a fully informed basis, and that brings  
23 me to the disclosure issues.

24           A number of them have been raised. I

1 am going to deal with the ones that I think are most  
2 pertinent and in several cases warrant relief. The  
3 first is the discussion of the road show and Jefferies  
4 analyst's involvement on that. There isn't any  
5 evidence of banker conflict at this stage of the  
6 proceeding. There isn't any evidence that the wall  
7 between the analyst's side and the investment house  
8 side was breached at this stage of the proceeding.

9           So I don't think disclosure is  
10 required based on a perception or a concern about  
11 banker conflict.

12           I also don't think disclosure is  
13 required because of any problem at the Occam director  
14 level. They appeared to have acted quite responsibly.  
15 They were presented with an unforeseen situation. It  
16 was certainly something that they didn't like. The  
17 VCs had just as much economic interest not to like it  
18 as anyone else. And they tried to deal with it. But  
19 Calix said no.

20           The only problem I see here is that  
21 the impact of the road show did change the mix of the  
22 consideration. I do think that right now the proxy  
23 has a partial disclosure issue, because while it  
24 explains the events, it doesn't explain the impact

1 which the record seems to suggest was a reduction in  
2 the cash value of approximately 25 million.

3           Some stockholders might be cash  
4 players, and it would be material to them that that  
5 happened, and they are now getting less cash than they  
6 otherwise would have been.

7           So because there has been partial  
8 disclosure of the road show and the road show issue, I  
9 will also require the defendants to disclose how it  
10 changed the price mix.

11           Now, you don't have to be exact in  
12 that. You just have to say what the board knew and  
13 describe it in the same manner that it's described in  
14 the board presentations. Nobody is expecting you to  
15 reach a level of scientific exactitude about the  
16 precise impact that this had, but it was presented to  
17 the board, it was comprehended at the board level.  
18 The order of magnitude I've already mentioned, or at  
19 least that's what the record seems to indicate, and so  
20 I will require that.

21           The second issue that wasn't discussed  
22 this morning, but I think it's another pretty clean  
23 partial disclosure, is the accretion/dilution  
24 analysis. It's an analysis that was in the final

1 book. It's summarized incompletely and partially in  
2 the proxy.

3           You need to give the range. You gave  
4 the ranges for all the others, but for some reason, on  
5 accretion/dilution, you just said accretive or not  
6 accretive. So that's an incomplete summary.  
7 Stockholders are entitled to a fair summary.

8           The accretion/dilution analysis was  
9 one of the analyses that Jefferies performed in its  
10 final book. You need to summarize it accurately and  
11 give the same type of range that you have  
12 appropriately given in terms of your other analyses.

13           Third, Mr. Pardun. The record  
14 reflects that there is an agreement in principle that  
15 he will be the director on the surviving company  
16 board. I understand that there hasn't been yet any  
17 vote to make him that director and that the deal  
18 hasn't closed. But what was established in discovery  
19 is that he's going to be the guy.

20           It is, therefore, incorrect for the  
21 proxy to say that nobody has any clue who the guy is  
22 going to be. So the defendants need to disclose that  
23 it is currently anticipated, or there is an agreement  
24 in principle, or whatever the apt view of it is, and

1 is consistent with the deposition testimony that  
2 Pardun will be the director. That could be material  
3 to the stockholders' view of his interest in  
4 supporting the merger.

5           It doesn't make him interested in an  
6 entire fairness context, and that's in an entire  
7 fairness sense, and that's what our cases have  
8 repeatedly said. But it does potentially weigh in on  
9 the reasonableness analysis, and it's something that I  
10 think is material to stockholders.

11           Fourth, the July 2nd contacts. I  
12 think these are misleadingly described. The  
13 information was clearly material in terms of how much  
14 of a shopping process was done and how the calls were  
15 made. It was relied on by both ISS and Glass-Lewis.  
16 It's mentioned repeatedly in the proxy.

17           Based on my review of the record, I  
18 think the proposed disclosure that the plaintiffs have  
19 offered on pages 27 through 28 of their reply brief is  
20 accurate. That needs to be disclosed.

21           You also need to fix the references to  
22 the July 2nd contacts that appear elsewhere in the  
23 proxy that are framed off what I think is a misleading  
24 description that currently exists in there. I may not

1 have found them all, but pages 86, 88 and 91 all cross  
2 reference this concept of there being no interest on  
3 July 2nd.

4           As I say, I think the plaintiffs have  
5 correctly pointed out there was interest. There was  
6 an interest on the immediate time frame that was  
7 discussed, and as I say, I think the plaintiffs have  
8 framed an accurate disclosure that correctly describes  
9 that issue.

10           This brings me to the last disclosure  
11 claim that I plan to dwell on this morning, and that's  
12 the disagreements over the fairness opinion. I think  
13 most of these -- I don't know whether they're quibbles  
14 or not. They actually seem to me to be serious  
15 debates.

16           But nevertheless, I think most of  
17 Mr. Chen's and counsel's disagreements with the  
18 Jefferies' fairness opinion are great arguments to put  
19 in front of stockholders to convince them that this  
20 deal really isn't the right deal, or in front of ISS  
21 or Glass-Lewis to tell them to recommend against.

22           If Jefferies did the analysis that is  
23 accurately disclosed in the proxy, that's what they  
24 did, and I have compared the Jefferies book, the final

1 book, with the proxy summary, and I think it is  
2 accurate. There is the one issue of the  
3 accretion/dilution issue that I've already discussed.

4           So I am not concerned, and I won't  
5 require any disclosure as to those issues.

6           Now, I am concerned about what appear  
7 to be longitudinal changes from previous Jefferies'  
8 books that resulted in the final book making the deal  
9 look better than it would have had the same metrics  
10 been used that were used in prior books.

11           This is an issue that comes up with  
12 some regularity. You often have a pitch book or a  
13 third party negotiating book that goes over the  
14 transom to the other side. But then you have the real  
15 internal books.

16           Our courts have understandably said we  
17 understand that when you're negotiating, you're going  
18 to push for a higher value, so we're not going to  
19 require some type of longitudinal disclosure to  
20 contrast your negotiation book with your real internal  
21 book. These are all internal books.

22           And this links to the discovery  
23 problems with the Jefferies Rule 30(b)6 witness where  
24 a witness was not presented who was knowledgeable,

1 sufficiently knowledgeable about what Jefferies did in  
2 this deal.

3 I don't know, and I don't have to  
4 decide whether I would hold up a deal because of this  
5 independently. But because I am already granting a  
6 limited disclosure-based injunction, this provides  
7 time for a remedial deposition.

8 Therefore, I am ruling as follows.  
9 This transaction is enjoined until ten business days  
10 following, first, curative disclosures on the issues I  
11 have listed, and second, the lodging with the Court of  
12 a deposition of Mr. Jackman or Mr. Berkowitz.

13 Now, that deposition can happen before  
14 the curative disclosures go out. That's not a  
15 sequencing thing, but this is an "and." Both of these  
16 things have to happen for the injunction to lift.

17 The defense of that deposition has to  
18 be handled by someone other than the lawyer who  
19 defended Mr. Snyder's deposition. Delaware counsel  
20 from both sides will be present to provide adult  
21 supervision.

22 With the deposition transcript, the  
23 plaintiffs can submit a three-page letter to me as to  
24 any additional disclosure relief that is truly



1 warranted based on the deposition.

2           I want you all to be responsible about  
3 this. If you take this deposition, and there are good  
4 explanations as to why the longitudinal changes were  
5 made, I will not criticize you at all. I will praise  
6 you if you write me a letter saying, "Vice Chancellor  
7 Laster, we took this deposition and it didn't play  
8 out. We're satisfied that there are no additional  
9 disclosures that are required." I'm going to read it  
10 regardless. But I will be happy if you tell me that.

11           If you tell me that actually it has  
12 turned out that they lowered the ranges because of X,  
13 Y or Z, then perhaps some additional relief will be  
14 warranted.

15           The defendants can respond 24 hours  
16 later with a three-page letter of their own. I will  
17 let you know promptly whether, having reviewed the  
18 deposition, I intend to grant any more relief.

19           I do think, in an ideal world, that  
20 will happen very quickly, and that between that and  
21 the other, between the short time frames, that that  
22 should be able to be accomplished in, and the time I  
23 have allowed for the disclosures to be made and hit  
24 the market, I think there is ample time to get all

1 this done.

2                   Frankly, if it turns out it is  
3 prolonging the length of the injunction, blame your  
4 bankers. The managing directors who quarterbacked the  
5 process need to do so with the expectation that when  
6 there is expedited litigation challenging the deal,  
7 that they will respond and be available for a  
8 deposition and testimony if warranted about what  
9 happened in the deal.

10                   It is not acceptable to send a fifth  
11 year junior banker who has only done six fairness  
12 opinions, and who came into the process late in the  
13 game with only three months left, as your 30(b)(6)  
14 witness.

15                   This Court has to decide these things  
16 on an expedited basis. I have said a lot of times  
17 that that requires cooperation from the parties.  
18 That's why we don't expect parties to fight about  
19 things like, oh, we insist on a formal commission  
20 process to get the banker. They're your banker. You  
21 hired them for the deal. You may not control them in  
22 the literal sense, but you have substantial influence  
23 over them.

24                   That's why we, as a Court, have long

1 expected people to make their bankers available and to  
2 facilitate document production from their bankers.

3           It would not allow these cases to be  
4 adjudicated responsibly if managing directors could  
5 decide that they are simply too busy to play a role in  
6 terms of the actual adjudication of the deals for  
7 which their investment banks are making seven-figure  
8 fees, and that they instead have better things to do,  
9 and therefore, they will send one of their junior  
10 members instead to answer non-responsively the  
11 questions that are put to them in deposition, and to  
12 have a defense lawyer be obstructionist and, indeed,  
13 to insult the questioner on, I think I counted three  
14 occasions.

15           If this is a problem for the deal,  
16 blame your bankers.

17           I will not require any bond to be  
18 posted.

19           The plaintiffs have sued in a  
20 fiduciary capacity. It's a disclosure-based  
21 injunction. While there is certainly some risk of  
22 some negative impact that might occur to the deal  
23 because of the delay that I have imposed, that is more  
24 than counter-balanced by the benefit to the

1 stockholders of this additional information, and I  
2 don't think, regardless, that it would be priced off  
3 the total deal value or premium. I think it would be,  
4 in any event, priced off some type of time value of  
5 money concept which here, as I say, I think would be  
6 relatively minimal, and because the plaintiffs have  
7 sued in a fiduciary capacity, I don't impose a bond on  
8 them.

9 Any questions from anyone?

10 MR. JENKINS: None from plaintiffs,  
11 Your Honor.

12 THE COURT: Defendants, any questions?

13 MR. BIRN: No, Your Honor.

14 I think just thinking logistically it  
15 probably will make sense that we do one disclosure  
16 following the deposition rather than seriatim, but  
17 we'll think about that.

18 THE COURT: That makes a lot of sense  
19 to me too, but I leave that up to you all. And you  
20 obviously have securities gurus at your firm who will  
21 know, certainly from Delaware's standpoint, and I  
22 think that makes a lot of sense.

23 I will not speak to, and I would defer  
24 to the securities laws jocks as to what, if anything,

1 is required of the federal law matter.

2 Thank you, everyone, for your time  
3 today.

4 We stand in recess.

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6 (The Court adjourned at 12:30 p.m.)

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## CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 21 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 Dover, this 25th day of January, 2011.

/s/Maureen M. McCaffery

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Maureen M. McCaffery  
Official Court Reporter  
of the Chancery Court  
State of Delaware

Certification Number: 201-RPR  
Expiration: 1/31/11