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Case No. 5955-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ART TECHNOLOGY GROUP, INC. : Consolidated
SHAREHOLDERS LITIGATION : Civil Action
: No. 5955-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 20, 2010
2:30 p.m.

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

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ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION and RULINGS OF THE COURT

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THE COURT: Good afternoon, everyone.

ALL COUNSEL: Good afternoon, Your Honor.

THE COURT: Mr. Saunders, how are you, sir?

MR. SAUNDERS: Excellent, Your Honor. Good afternoon.

If I could just rise for a minute before the plaintiffs start and introduce my colleagues, Steve Dargitz and Elisa Cannizzaro, from Skadden.

THE COURT: Okay. Welcome to both of you.

Mr. Nachbar, hello.

MR. NACHBAR: Good -- good afternoon, Your Honor. I just briefly rise to introduce Jim Maroulis, who's in-house counsel at Oracle.

THE COURT: Okay. Who is this?

MR. NACHBAR: Please stand.

THE COURT: Oh, hi, Mr. Maroulis. How are you?

MR. NACHBAR: And Your Honor, of course, knows John DiTomo of my office --

MR. DiTOMO: Good afternoon, Your

Honor.

MR. NACHBAR: -- and Michael Sirkin.

THE COURT: Welcome. Mr. Sirkin, it's good to see you. As a former clerk, it's always nice to have you back.

THE COURT: Good morning -- good afternoon, Ms. Keener.

MS. KEENER: Good afternoon, Your Honor. I'd like to introduce plaintiffs' counsel. At the front table is Kira German of Gardy & Notis; Mark Reich and Joseph Russello, both of Robbins Geller Rudman & Dowd.

MR. RUSSELLO: Good afternoon, Your Honor.

THE COURT: Hello.

MS. KEENER: At the back table, Loren Ungar of The Weiser Law Firm and Gina Serra of Rigrodsky & Long.

MS. SERRA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. KEENER: Your Honor, Mr. Russello has been admitted pro hac vice and will make the presentation on behalf of plaintiffs this afternoon.

THE COURT: Please proceed.

MR. RUSSELLO: Thank you, Your Honor.

Your Honor, I want to start off just by pointing out some of the Court's observations at the telephonic hearing that we had in connection with the scheduling of the hearing on this particular motion. Of course, this motion concerns a request to preliminarily enjoin the December 21st shareholder vote in the proposed acquisition of ATG, Art Technology Group, by Oracle for $6 per share in cash in transaction value, an aggregate of approximately $1 billion. But what Your Honor so presciently observed during the telephone conference was that, you know, the process resulting in the proposed transaction was a discombobulated and reactive process. And the facts bear that out, Your Honor.

Beginning in 2007, when ATG received two unsolicited expressions of interest, of course, the board immediately hired Morgan Stanley as its financial advisor. At that point, in connection with the retention of Morgan Stanley, a fee arrangement was negotiated which set $6 per share as the target for any proposed transaction in which Art would be acquired. As Your Honor is aware, the specific way the compensation arrangement worked way back then in December of 2007 -- I believe the letter -- the engagement letter was dated December 6th. It was signed on December 12th by Mr. Burke, who was the president, chief executive officer, and the director of Art Technology. (Continuing) -- was that for any transaction which offered shareholders the price of $6 per share or higher, Morgan Stanley would receive a success fee of 1.3 percent of the aggregate value of the transaction. With any proposal that offered less than $6, Morgan Stanley would receive 1.1 percent.

Now, that is undisputed. Defendants have now come back and said that that's not an accurate characterization of what had taken place way back in December of 2007. The proxy, unfortunately, does not make that clear, but I will return to that point in a minute, Your Honor.

Moving on from there and with that notion that this $6 target colors the rest of the process, the board moved on with Morgan Stanley and no less than three times attempted to contact Oracle concerning a potential acquisition: once in late 2007, early 2008. Oracle wasn't interested; again in mid-April 2009. Oracle conducted due diligence and advised in late June 2009 it wasn't interested; and the last time in early October 2010 Oracle offered $6 per share and, lo and behold, a proposed transaction emerged.

But the problem is that this process suffered from a lot of false starts. At one point in the process, in fact, the board determined to completely abandon the process and remain stand-alone, to pursue its stand-alone business plan. And the board continued to do that. However, occasionally the board would receive unsolicited expressions of interest.

Now, the issue that keeps popping up and the recurrent theme throughout the whole process is that Oracle is always identified as the acquirer who will be ready to move forward with a transaction. That's the common theme. The board -- unfortunately, fast-forwarding to 2010, which is really what we're talking about, the process wasn't a three-year-long arduous process. The company, in fact -- the board, I believe, until October didn't believe the company was even for sale. Throughout this whole entire time, as far as I understand, the board also had a poison pill in place. So it's not like the Health Grades situation where Vice Chancellor Strine kept opining that a company is not necessarily not for sale unless it has something like a poison pill, something that the public would identify with not wanting to engage in a transaction unless that buyer came directly to the board with a real value-maximizing transaction. That's not what happened here. The poison pill remains in place the entire time. And then at some point the board elects to pursue a proposal involving Oracle.

Now, of course, during this time Company H, which we identified as Autonomy, was a company which was interested also in acquiring Art Technology. Company H's proposal was unsolicited, as were a few other potential buyers. The process was never actually open. The defendants say we're actually seeking to have the Court order ATG to conduct a market check of a market check. Nothing could be farther from the truth. There was no market check here at all. But that's besides the point. When Company H expressed the interest, Company H was told "No. Our valuations, our stand-alone plan supports a far higher valuation than even $6 a share. We need in excess of $6." Company H offers 5.75. It was an oral proposal. It wasn't written, but Company H was still interested. Nevertheless, throughout the entire process, Company H was not told of Oracle's expression of interest. It is not told that Oracle, in fact, offered $6 per share, which was the exact target set in December 2007. Company H had no way of knowing this. And so Company H, of course, was not, we believe, willing to pay against itself.

Well, while that's occurring, ATG also considers acquiring another company. Company G it's known as and referenced in the proxy. Company G was a smaller company. A transaction involving an acquisition of Company G would have cost approximately 100 to $135 million. Of course, ATG in February 2010 had conducted a very successful secondary offer, which netted the company $95 million. It was going to use the cash from that offering to finance the acquisition of Company G. But for some reason the board believed that there was no way to do an acquisition of Company G and move forward with a potential sale of the company. In fact, there wouldn't have been any reason to sell the company. It's clear from the record that there was no rush, in fact, to sell this company. The -- the company had anticipated announcing better-than-expected financial results on November 2nd, and yet that became the target date for any potential transaction. That's, of course, in 2010.

THE COURT: Was there any public disclosure that something was going to be set on that date? I mean, there's a lot of talk in the depos and in the briefing about the idea that that was when management wanted to let the market know about what it was doing or what it was going to be using the cash for. But had there been any prior conditioning of the market to expect that as the date on which those plans would be announced?

MR. RUSSELLO: As far as I know, Your Honor, there was not any sort of established expectation, from what I understand. There wasn't a public announcement that, you know, "We're going to use the $95 million from the February 2010 offer, but we're not going to tell you until we announce our third-quarter results on November 2nd, 2010." I don't believe that -- that urgency ever existed. In fact, there wasn't, as far as I know, public, you know, instruction to that -- to that extent; yet that's still the recurring point that we constantly hear as for why the company was rushing to sell itself.

Now, interestingly, of course, the company had developed these five-year financial, what defense would like to call targets. They were projections. They were an estimate of management's best estimate, in any event, of the company's future financial performance going out five years. It -- those projections, I think as Mr. Burke testified, were the subject and the product of a rigorous process that occurred annually and were presented to the board on September 16th, 2010.

Having those projections and doing various financial analyses, the board believed that the stand-alone plan, the company stand-alone plan supported a valuation, again, in excess of $6 per share. As it turns out, once Oracle made its $6 offer, it didn't matter anymore. That was deemed unfair by the board; yet Company H is still out there with the possibility of perhaps coming in with a superior proposal. It's never gone back to.

But to go back to the Company G transaction, that was a totally separate transaction that the board had considered. According to Burke, once again, Oracle wouldn't have wanted to acquire ATG had it gone through the Company G acquisition. It sort of makes no sense to us, however, because if you take the $95 million that the company had on its balance sheet and it puts that toward an acquisition of Company G, which management believed would extend the breadth of ATG services and its footprint, it appears that perhaps the company would have been worth an extra $100 million. Sure, it had the cash on its balance sheet, but that cash is going to be used to finance the acquisition, presumably. So it would have been nice to see the company actually think about moving forward with its stand-alone plan; and then at some point, if it wanted to go forward with the sale, which there was no rush to do so, it could have considered those -- those things in kind. But, still, you have this rushed process.

Of course, Morgan Stanley has been doing work since 2007. And, as Mr. Wyatt had testified, the managing director on this particular engagement for ATG, Morgan Stanley wouldn't have been paid had the board pursued an acquisition of Company G or a like transaction. It would have never happened. The fact of the matter was, Morgan Stanley was now forced into this window of opportunity, if you will, beginning in -- at some point in 2010, ending obviously by November 2nd, 2010, where it had to move forward with a sale of the company or it wouldn't be paid. That's just the fact. Of course, Morgan Stanley has performed extensive services for Oracle dating back, as far as we could find, to 2005. None of those connections are disclosed in the proxy, but I would like ultimately to come back to that point. I still want to make a few additional points on the process, Your Honor.

Of course, when discussions were taking place with Oracle now in October 2010, the company had a valuation prepared by Morgan Stanley. The record is somewhat unclear on what Morgan Stanley was actually doing. And the proxy to that extent, as far as we're concerned, was also somewhat unclear. But what is clear is that when Morgan Stanley did its discounted equity analysis in the October 13th presentation, when it had -- when ATG had received interest from Oracle and Company H was theoretically still out there, the higher end of the valuation range ended at 6.53 per share. That was based on management's projections at the time. Now, Wyatt testifies he didn't have the five-year projections or he would have done a DCF analysis. Either way, it's unclear what projections Morgan Stanley used; but one thing is certain, that when the November 1st, 2010, fairness presentation was made and an updated discounted equity value analysis was proposed to the board, the higher end of the valuation range all of a sudden dropped by 20 cents to 6.33 per share, leading the board perhaps to believe that the stand-alone value of the company was no longer as high as it could have been.

These are some of the issues that have permeated the entire process. Where the board is claiming that it did an arduous market check beginning in 2007 and ending in 2010, that's not the case. It's not the fact. There was no requirement that a deal be announced by November 2nd; no urgency, despite what internal deadlines the company was setting for itself; and no reason to do that, particularly when the company was serious about acquiring Company G. It would have made a material impact on the company, as I think Burke testified and we just confirmed as well.

THE COURT: I mean, I always wonder about when people dial down projections or internal forecasts or targets, whatever you want to call it.

But here at least, talk to me about the materiality of this change. The -- the 6 bucks is in the middle of that range, both before and after the shift. Why is it a big deal?

MR. RUSSELLO: That's correct, Your Honor. The $6 always was in the sort of middle of -- of the range or the higher end even of the range I would -- I would give you. The reason why we think it's interesting is that prior to November 1st, of course, and even, I believe, perhaps somewhat prior to that, the board believed that the stand-alone business plan would have supported a valuation in excess of $6 per share.

THE COURT: I tend to view the in excess -- the in excess is messaging to another bidder. So, you know, that's the type of statement that you could see as a -- as a bargaining posture. So I'm not sure if you can draw an actual firm determination as to the -- the view of the board at that point that, you know, we were clearly north of 6.

MR. RUSSELLO: Well, the interesting thing about what took place regardless, I suppose, of where the price falls is that it appears that management updated its projections at some point between October 13th and November 1st. Of course, Mr. Burke testified that he knew as of October 5th the company would be doing exceedingly well, would be beating its estimates most likely. Somehow there's this manipulation or change -- perhaps it wasn't a manipulation, but a change in updating the projections to reflect a good third quarter and perhaps what they thought was going to be a lackluster fourth quarter. Defendants say that it changed projections by one cent on earnings per share. However, the October 13th presentation indicates that acquired revenue was included in the revenue figure. It was $30 million. It was backed out. Defendants' response, of course, is that revenue had no impact on earnings per share because it was sort of earnings neutral, I suppose. But be that as it may, it still contributed to perhaps the stand-alone value of the company.

I'd like to get back into the acquired revenue issue as I touch on some of the disclosures because we still think it's a material issue. But, in essence, Your Honor correctly points out the number was still within that range. However, we think that those changes, which do not appear to have been adequately disclosed or explained to the board, that those changes are something that sort of add to the totality of this rushed process to just get something done which would justify our need for a lower price. That's kind of where we think that's a material issue and why it's important to us.

The proxy, of course, doesn't make it clear necessarily. There is a disclosure that there's an updated analysis, but nobody knows what that means and nobody knows, for instance, that the company in October -- on October 13th was valued somewhat higher than on November 1st. We don't have something like a discounted cash flow analysis which would have been a better indicator of the future value of the company, notwithstanding the fact that there were these five-year projections out there.

Now, Your Honor, I think that that -- that essentially sums up our -- our discussion of the proxy, although there are certain cases that I wanted to address up-front because I know that they must be on Your Honor's mind and I'm sure defendants are going to bring them up at some point.

But in particular, the Lyondell case, that was a case, of course, that the Delaware Supreme Court held that the board, even assuming that it hadn't done anything, did a good enough job, in essence. And I might be mischaracterizing that a bit. But the -- the point of that case, I think, was that there was a price that was regarded as not only a home run but a blowout price. And what ultimately happened there was that the board actually was able to negotiate the price upward from $40 to $48 a share.

Here, instead, what the board did was, Burke instructed a -- its -- his counsel, essentially, ATG's counsel to take Oracle's offer letter, to cross out the number 6, to write in 6.25 and fax it back without any follow-up, no response, no discussion, no nothing. That's what sets this case apart from ones like Lyondell and the others that will be raised today. It's because the board actually didn't do anything. It didn't do anything to get a higher price. It set the $6 target three years ago, and ultimately it was sort of a self-fulfilling prophesy. It was $6 a share. It was accepted. No -- no further negotiation, and that was the end of it.

But what I think is also interesting here -- and this ties into our disclosure issues -- is that, as I had mentioned previously, there's no mention that in December 2007 the $6 per-share price was actually set in Morgan Stanley's engagement letter. Now, there is a disclosure that says the engagement letter provides for X, Y, and Z concerning compensation. But what -- what the disclosures requiring shareholders to do is to assume that in 2007 the $6 per-share price was set and that, indeed, the price never moved from there. However, the first mention, I believe, of $6 per share in the proxy is in the September-October time frame. There's absolutely no reason why a reasonable shareholder would make that assumption, that leap of faith three years ago.

So that's one material fact we believe needs to be disclosed.

THE COURT: Before you get to the full disclosure barrage, what can you tell me about negotiation of the termination fee?

MR. RUSSELLO: Negotiation of the termination fee, Your Honor, you know, I don't recall whether in fact there were any real material discussions concerning the termination fee. I do know that we view the totality of the protections to be sort of the issue here. The termination fee, standing alone, doesn't necessarily pose as much of a problem if you view it in isolation; but in connection with a matching rights provision, a nonsolicitation provision, a voting agreement, poison pill, and staggered terms of office for the board, that's what poses an issue for us.

THE COURT: The thing that seemed to be tied to price was exclusivity. It didn't seem like the termination fee, at least in terms of discovery you all took, had any link to price or other material terms; is that correct?

MR. RUSSELLO: As far as I understand, that is correct, Your Honor.

Moving on from there, Your Honor, really, what we view as perhaps the most material deficiency in the proxy is its implication that Morgan Stanley has performed the same magnitude and amount of services for each of ATG and Oracle over the past two years. It's simply not true. The facts that we've uncovered in fact indicate that Morgan Stanley has had quite a long-standing and extensive relationship with Oracle, dating back at least to 2005.

THE COURT: Yeah. What is Exhibit U? I mean, it's a summary prepared for somebody.

MR. RUSSELLO: Yes, Your Honor. Exhibit U actually was prepared for our benefit and was prepared by counsel for Oracle concerning the engagements that Morgan Stanley has performed and the other work that Morgan Stanley has performed, as well as a statement and itemization of the fees that Morgan Stanley has received for that work only over a four-year period, however.

THE COURT: Oracle prepared this as part of the discovery process?

MR. RUSSELLO: Yes, Your Honor, that's correct. And, in fact, Morgan Stanley prepared a like document which we submitted in connection with our reply. We hadn't received that document prior to the end of depositions.

THE COURT: Okay.

MR. RUSSELLO: And so that's what this document is, Your Honor. But that doesn't even tell the full story necessarily, because as you can see, Your Honor, in Exhibit U, the -- the emphasis is more on the fact that Morgan Stanley's but one of 17 banking houses, as if to say that the business that Morgan Stanley generates from Oracle is not material as a result of the small contribution it might make to Morgan Stanley on the whole.

Of course, the materiality

determination does not rise or fall on what perhaps Morgan Stanley believed or even what the board believed, the subjective views of the board. I think that's a statement from Zirn. But, in fact, it all hinges on what a reasonable shareholder would believe. And given the information that's in the proxy, a reasonable shareholder could never discern, No. 1, that Oracle had all these engagements with Morgan Stanley and continues to to this day, including 2007, as I think the Morgan Stanley statement of services confirms, but that by contrast, Morgan Stanley performed only one item, really, of work for ATG which, incidentally, happened to be the February 2010 offering for which Morgan Stanley served as an underwriter and received a fee commensurate with its role there.

In total, we estimate the value of the services that Morgan Stanley has performed for Oracle in the past four years to be approximately $24 million, if not higher. Morgan Stanley actually received $8 million for its work as Oracle's financial advisor on the -- on the Siebel acquisition, Your Honor, and that was paid in 2006 for an engagement that occurred in 2005.

THE COURT: What generates the negatives? --these guys were holding some of it for themselves?

MR. RUSSELLO: Well, your Honor, I believe that -- we -- we don't necessarily have it in the record, Your Honor, but I believe that that reflects a counterparty relationship, perhaps for swaps, something of that nature. Unfortunately, it's not in the record. But what we do know is that Morgan Stanley has lent hundreds of millions of dollars to Oracle -- it was a Morgan Stanley bank, a Morgan Stanley affiliate -- pursuant to revolving credit agreements. In addition, Morgan Stanley actually served as an underwriter on billions of dollars of debt offerings, some of which were used to finance Oracle's acquisition of Sun. So there is this very, very detailed, long-standing extended relationship here.

Of course, to add insult to injury in this particular case, and contrary to what Mr. Wyatt implies, which is that, of course, he didn't work for any -- for Oracle in connection with any engagements, Mr. Kwan and Mr. O'Keefe did in fact work for Oracle. They worked for Oracle in connection with the three investment banking engagements we've identified in 2005, and Kwan additionally worked on a financing job for Oracle. So there is some overlap there to the extent that the Court would find that to be a material factor in its decision.

Those facts, we think, need to be disclosed, the extent of the relationship so that shareholders can determine for themselves the level of credibility to assign to the fairness opinion. Surely it would be important for a shareholder to know -- and it might even change a shareholder's vote -- if it knew that Morgan Stanley at the same time it was representing ATG had Oracle's interests at heart and the prospect of earning even higher fees from Oracle going out in the future. These are material facts, and we think that the case law establishes that.

THE COURT: Have you all compared Exhibit U to your reply Exhibit 3? And do they all match up?

MR. RUSSELLO: There are some differences. I think the counterparty arrangements are not necessarily reflected on the information we received from Oracle's counsel, but there -- there could be an explanation for that. I mean, we had sought information concerning debt offerings, investment banking services, other financing activities. And then you'll see that there's a miscellaneous category on the Oracle statement of services. So perhaps those fees are reflected there.

But I think, for the most part, the benefits that Morgan Stanley has received, at least going back four years, totals to at least 24 to $27 million, not including the investment banking services Morgan Stanley performed in 2005 other than the Siebel acquisition.

THE COURT: Now -- and the four-year thing, is this just semantics? Because it says "Over the last four years," but then it discloses, at least in U, going back to 2006. I mean, you count '6, '7, '8, '9, '10, that's actually covering five years.

MR. RUSSELLO: It actually is, Your Honor. And what's interesting is that if you take the estimate for miscellaneous services I think is $1.5 million a year and you add that on top, that will only makes the fees higher. So it conceivably could be. We -- we had said in our complaint alleged claims going back, I suppose, to 2005 with regard to the connections to show how extensive those connections really are, because one factor we have considered is that Oracle does most of its investment banking in-house now in terms of financial advisory services, which is fine; but, of course, that's not the same thing as saying Morgan Stanley would not want this business and it makes no difference in the bottom line whatsoever. Nothing could be further from the truth. That makes no sense to us. That's why we think the facts are material regardless of how Morgan Stanley might view them in the grand scheme of its revenue.

So that's a significant point for us.

THE COURT: What type of disclosure do you want on that?

MR. RUSSELLO: Well, initially we would want disclosure at the very least going back four or five years, indicating to shareholders what Morgan Stanley specifically has done for Oracle. Oracle makes disclosures like this, by the way, in its offering materials. It made a disclosure like that -- I think we pointed out in the brief -- in connection with one of its debt offerings, that the underwriters have performed these services in the past couple years and they know what services they are. We'd like a similar disclosure and perhaps also a disclosure concerning the amount of fees that Morgan Stanley has received, the totality of those fees, because that would then put in perspective the investment banking fee that Morgan Stanley is receiving on the deal, which was largely tied to the consummation of the deal.

THE COURT: I guess to be more specific, coming in here I was thinking that essentially what you wanted to disclose was Exhibit U. Now, Exhibit U has differences than Exhibit 3. So which one do you want and how would you structure this?

MR. RUSSELLO: I would say let's see which one is higher, Your Honor. In all seriousness, we would be satisfied with a disclosure of the counterparty relationship, Your Honor, because as you can see I think in the Morgan Stanley statement, money changes hands back and forth, you know, millions and millions of dollars because of those relationships. So we wouldn't necessarily need Morgan Stanley to quantify "Well, in 2007 we received $2 million and paid it right out pursuant to some counterparty relationship"; but certainly some sort of quantification is in order here and some indication of magnitude of these services. And that's really what we're getting at.

If you read the disclosure the way it is in the proxy statement, it suggests that Morgan Stanley, as I said before, has performed the same amount of services for each of ATG and Oracle, and it's just misleading.

THE COURT: And how do we determine how far back to go?

MR. RUSSELLO: Well, the investment banker relationship ended, I suppose, in 2005, but fees were still paid out in 2006. Perhaps we do go back to 2005 just so shareholders can see that. If Oracle would like to include a statement in the proxy that it now does most of its investment banking services or financial advisory services in-house, that's fine, but certainly some indication of magnitude.

But I think even if you go back two years, you still have a material relationship here and it's still probably significant enough to be disclosed to shareholders, just to give some idea of this relationship.

So quite honestly, Your Honor, some

reasonable parameter of disclosure here. We wouldn't want to necessarily open up the floodgates, although there are certainly enough engagements to fill up the floodgates. But, you know, we would like some disclosure of that just so shareholders can see, because everything rises or falls at the end of the day on this fairness opinion. And everything rises and falls at the end of the day on the $6 target; and everything rises and falls, of course, at the end of the day on the efforts the board exerted to extract a higher price, in this case nil.

So it's exceedingly important to get disclosure on those relationships out. And it was simple to do. This is information within Oracle's possession. ATG conceivably had access to it through Morgan Stanley or otherwise. It would have been easy to do. It would have been keeping in line perhaps with what Oracle has done. They didn't want to do it for some reason, and it makes no sense to us. And the only thing -- the only conclusion we can draw from that is that perhaps when those facts are disclosed, they're going to have some influence on what shareholders think about the fairness opinion. And that would perhaps allow shareholders to think about what they want to do.

But the disclosure of that information, along with perhaps a modified go-shop, which we could take care of at the same time here, wouldn't result in any harm, as far as we can see, to defendants. It would just simply delay the shareholder vote with the hopes that perhaps a higher bid would come out somewhere.

THE COURT: What do you mean by "modified go-shop"?

MR. RUSSELLO: A modified go-shop in the sense that we -- we essentially want a go-shop. Perhaps it was -- perhaps it was misspeaking with "a modified go-shop." But essentially a time period within which ATG actually shopped the company, could actually look at other buyers, perhaps even financial buyers, which, for some reason, Morgan Stanley thought would be interested.

THE COURT: How do I do that?

MR. RUSSELLO: Well, I think, Your Honor, the best way conceivably to do it would be to hold off the shareholder vote for perhaps approximately a month; allow there to be some -- some period of time for the company to actively go and solicit potential buyers or perhaps even to make an announcement that it is fielding offers from potential buyers, because, of course, we still have the poison pill in place, which Oracle's exempted from and nobody else is -- its Not for Sale sign, as I said earlier -- and you have these other protections, but allow the market to actually know that this company's for sale, not that it's tied up, not that the deal was tied up with Oracle, when the board never made an effort to go and see who was interested in purchasing the company; and perhaps also require the company to set this process up, with our input, to make sure that the shareholder base would be satisfied with the efforts that are being done and to allow that process to take place. If nothing emerges, there's no harm, there's no foul. The shareholder vote goes forward, hopefully with all material information disclosed, and everything proceeds apace.

There hasn't been an indication that Oracle's walking away if that happens. In fact, Oracle, it seems, went through great pains not to say that, it's not going to abandon the deal. So why not actually open the process up. That would ameliorate any harm that was occasioned by the board's failure to do so. And it would actually allow, I think, the market to understand that this company was for sale, which is a difference from some of the other cases, frankly, that are decided out there where an injunction just was not obtained for Revlon reasons because the market knew these companies were for sale and no one approached them. That's entirely different from here. There were some unsolicited bids, but it's unclear what would have happened had the process been open to allow that interest to come through.

Moving on to some additional issues, Your Honor, I'd like to now touch on the acquired revenue issue, which, for us, is a major point; to them it's not so important.

The acquired revenue -- of course, the proxy indicates that acquired revenue was revenue that -- that the company could anticipate sort of incorporating into its own revenue on a going-forward basis should the company remain stand-alone; but the proxy indicates that acquired revenue was not revenue from any specific transaction. It was not revenue from any identified transaction necessarily, and there could be no guarantee, in fact, of the acquired revenue at some point would be realized.

But what the proxy doesn't disclose -- because that acquired revenue, I should say, as an aside, obviously contributes to the -- to management's view of the stand-alone value of the company. But the acquired revenue does not include Company G's revenue, which the proxy indicates.

But why we thought it would be important to include Company G's revenue is because if this transaction did not materialize, if this transaction were not to close, ATG would seek to move forward with its acquisition of Company G. It would do that. But the acquired revenue figures, even without Company G, really reflect management's efforts to back into a revenue figure. There's no rhyme or reason.

And we have a document that we had cited, Your Honor, that confirms that, that, in fact, the acquired revenue figure was simply to match up growth rates for organic and inorganic revenue. So it really had no basis, completely hypothetical; yet defendants come back and say that Company G's revenue would have been a hypothetical; also, that it was speculative to disclose how that would impact the company's own revenue, when its own acquired revenue figures are completely pulled out of the air.

THE COURT: Have you seen any type of internal projections that had Company G revenue in them?

MR. RUSSELLO: Yes, Your Honor. We did actually -- defendants have indicated that the projections for Company G came from Company G, that they were not worked up for management. But there are figures in the hundreds of millions of dollars.

THE COURT: Where? I mean ...

MR. RUSSELLO: Excuse me, Your Honor?

THE COURT: Where?

MR. RUSSELLO: I will find a cite to that, Your Honor.

THE COURT: What's on page 34 of the proxy, that's what everybody agrees doesn't have Company G in it.

MR. RUSSELLO: That's right. Those are the backed-in acquired revenue figures, Your Honor. Those are the figures that management sort of just --

THE COURT: And, also, everybody agrees that these were the figures that were from September, basically. And if we look -- if we look at some hypothetical set of numbers that Morgan Stanley used in its updated figures, that line for acquired revenue would have had blanks all the way across. It wouldn't have changed the bottom line. It just would have blanks all the way across; is that right?

MR. RUSSELLO: Well, theoretically, Your Honor. Of course, we're still not clear on this record whether Morgan Stanley used the five-year projections or just the management case and the street case, which are on the next page, 35. It's unclear. I mean, why it says that they -- that Morgan Stanley wasn't in possession of these five-year projections or perhaps that they didn't think the projections were reliable enough even though they were the subject and product of rigorous analysis and it was par for the course for the company to develop them; and yet they supposedly weren't used. But the acquired revenue figure matches up to the October 13 presentation. So it's unclear which ones they used here. The proxy, we think, suggests that Morgan Stanley did not use the five-year projections; but, again it's -- it's simply unclear to us.

To go back to Your Honor's request for more detail on Company G projections, it was Exhibit

A -- X to the Brian Long affidavit. It was ATG 2117 to 2120 at 2119.

THE COURT: Okay.

MR. RUSSELLO: And so there, Your Honor, can see that there were revenue and EBITDA numbers going out through 2012. They must have been reliable enough for Company G to disclose them. We think that there's no reason why they at least shouldn't have been incorporated into the acquired revenue that the company itself was disclosing, if that's what, indeed, it was going to do, which it signed a nonbinding letter of intent to do so in the absence, of course, of this transaction.

THE COURT: There's no Morgan Stanley analysis that does that; right?

MR. RUSSELLO: As far as we understand, there's not, Your Honor.

And then finally, Your Honor, that brings me back to the Morgan Stanley valuation analysis, which I think we already just touched on with regard to the sort of updated projections that management at some point gave to Morgan Stanley, which were used in the -- in the November 1st presentation but not the October 13th presentation, notwithstanding the fact, of course, management expected to have a great year or great quarter as of October 5th. So that's something else that we think should be disclosed, Your Honor.

Finally, it brings me to the net operating loss carryforwards. That's our last issue, Your Honor. The net operating loss carryforwards, of course, were used as an advocacy point in a script that Morgan Stanley prepared in connection with the Company H proposal. That's at Exhibit L to the Long affidavit, ATG 328. And specifically, Morgan Stanley had essentially said that "Listen, the net operating losses that this company has are not incorporated, do not materialize, are not realized in our stock price. That's extra value to you." Of course, when Oracle came along, as far as we could find, there was no mention of these net operating losses anywhere to be found. But if they supported, indeed, a higher price for the company, why wouldn't they have been used in that context?

Either way, we think that it adds to the value of the company on a stand-alone basis; and there should have been, at the very least, some disclosure concerning it, notwithstanding the fact, of course, that there was a disclosure of net operating losses in the 10-K, in the company's 10-K. It should be disclosed in connection with the transaction.

That's our position on that issue, Your Honor.

THE COURT: But why isn't the 10-K enough?

MR. RUSSELLO: Excuse me, Your Honor?

THE COURT: Why isn't the 10-K disclosure enough?

MR. RUSSELLO: There's just -- there's just a disclosure in the 10-K concerning net operating losses the company has. There's no real reference to that as adding value to the company necessarily, but that those net operating losses could be used in the future at some undetermined time. And, of course, presumably there's some sort of expiration that's associated with those net operating losses. But if it was important enough to express to Company H, the company that the board never went back to, really, to tell that Oracle's offer existed, the figures were important enough to use in the context of negotiations, to the extent there were any, with Oracle.

That concludes my opening presentation, Your Honor, unless Your Honor has any questions.

THE COURT: No, I don't. Thank you.

MR. RUSSELLO: Thank you, Your Honor.

MR. SAUNDERS: Good afternoon again, Your Honor.

THE COURT: Good afternoon again.

MR. SAUNDERS: I feel like I've fallen down a rabbit hole a little bit. Let me try to bring us back to reality.

Your Honor, it's almost Christmas. So why don't we focus on the things that really matter, as people like to say this time of year.

This is an application for a preliminary injunction. So naturally the first thing I think we ought to focus on is where's the irreparable harm. Indeed, I think that question can be refined as where's the threat of irreparable injury that is so grave that it would justify taking away from the stockholders of this company the ability to accept or reject, as they see fit, this 43 percent premium that they're being offered the opportunity to accept tomorrow?

And, you know, lost in all the legal wrangling here, completely absent from the plaintiffs' presentation is the fact that, on its face, this is a terrific deal. And I say that because $6 is a 43 percent premium over the stock price the day before. And that's not a 43 percent premium over a stock price that suffered a decline. It's a 43 percent premium over a stock price that had already increased dramatically over the preceding quarter.

And it's not as though 2010 by itself was a tough year for the stock price. The stock had not traded as high as this price, $6, since the dot.com bubble burst. It had managed to get into the 4s in 2007 time frame, and then it dipped down again with the economy in '08 and '09; came back a little bit, bounced around but never was in the 4s until just recently again.

The company was able to raise stock in February, as the plaintiffs point out, raise a million dollars at a price of $3.50. So to be able to turn around less than a year later and sell the company at $6 is, on its face, a great deal.

And in recognition of those facts, as of noon today, two-thirds of the outstanding shares have been voted in favor of this transaction, representing 99.71 percent of all of the shares voted have been voted in favor. Only 0.29 percent have either been voted against or withheld. The stockholders clearly want this deal, Your Honor.

THE COURT: I'll give you credit for the two-thirds stats. On the majority of the outstanding, I don't understand the relevance of the 99 percent voting shares. I've never gotten it. I know they cited it in Lyondell. I don't get it, because, you know, people vote no by not voting. But I -- two-thirds is a good number. I give you credit for that.

MR. SAUNDERS: Okay. Well, thank you.

I think there are also some people who don't vote because they didn't hold on the record date and you don't know what exactly is in that nonvoting portion. It's not all people who don't like the deal.

But I would submit there's nothing that's even close to sufficient in this record to warrant preventing the ATG stockholders from deciding for themselves tomorrow whether they want to accept $6. Certainly, Your Honor, not the process claims, not the Revlon claims.

Time and again this Court has recognized that the potential harm to stockholders from enjoining a premium transaction when there's no higher, better offer on the table prohibits an injunction. Vice Chancellor Strine said just a few months ago in the Health Grades transcript that we attached to our briefs and described in the brief that the list of cases -- cases -- he wasn't happy to just say never. He had to say something a little bit more complicated. He said it was the null set, right, the list of cases in which this Court has ever enjoined a premium transaction in the end because of a higher and better offer. And consistent with that fact, the plaintiffs haven't pointed to one because there aren't any.

And so the legal reality is that as much as I'd like to and as much as I will talk about the process, Your Honor doesn't need to and no point will be served, no purpose will be served by trying to make a preliminary determination on this necessarily preliminary record about whether the plaintiffs have a reasonable likelihood of success on a Revlon claim or not, because whatever you determine preliminarily, okay, based on what you've read in the papers and what you've heard today cannot matter, because you cannot enjoin this transaction on Revlon -- on the basis of Revlon claims when there's no higher or better offer.

Now --

THE COURT: Let me ask you something. You know, look, I agree with you, going back to Solash, that's been the view as to the transaction as a whole. But what about a limited injunction based, for example, solely on the termination fee?

MR. SAUNDERS: Well, first of all, Your Honor -- I guess two things. First of all, the termination fee is entirely -- is 3.25 percent of the transaction value. It's entirely within the range of reasonable termination fees.

Secondly, you know, sometimes I get settlement demands from plaintiffs when I represent the target and they say "We want you to lower the termination fee. We want you to increase the price." I say "Great," you know. And so I would turn to Mr. Nachbar, but his obvious answer is going to be and, therefore, my answer's going to be "They're not bound to go forward with the deal at a lower termination fee. They don't have any obligation to accept any amendment to the merger agreement at all," right? And so that -- because of that, it affects my clients and the stockholders that they care about, because there's no sensible allegation here that Oracle has aided and abetted in any way, had some reason to know that agreeing to a 3.25 percent termination fee would be a breach of fiduciary duty. So they're not going to be bound by that at all. And, therefore, any injunction to try to enjoin consummation of the transaction pending different terms threatens $300 million, real value in -- to be destroyed for these stockholders. It just isn't justified.

So the only thing -- again, what matters. The only thing that could conceivably under our law be a basis for an injunction today would be disclosure issues, okay, because, you know, the law recognizes that material omission or misstatements, you know, can be the cause of irreparable harm.

But even then, Your Honor, you have to balance the threat of irreparable harm from a possibly material omission. And, again, all you could possibly do today will be to make a preliminary determination based on this necessarily preliminary record.

You've got to balance that threat against two things, okay. One, the threat of, I would say, similar magnitude, that during any period of delay something bad happens, right, the world changes, Oracle decides to call a MAC, and we've all lost $6 a share because of that delay. I'd say those threats of irreparable harm tend to balance out.

But there's another thing, Your Honor, on the scale against an injunction; and that is the absolute real, concrete, know-it's-going-to-happen loss of value from delay, time value of money, okay. This is a billion-dollar deal, okay, a billion dollars and change. Even if the only delay is a week -- and I heard Mr. Russello talk about a month. Let's say it's only a week to make a supplemental disclosure. And I don't know how long the plaintiffs think it would -- it's necessary to have supplemental disclosure out there, but let's say conservatively it's only a week. That's $2 million in lost value to the stockholders between getting $6 and getting $6 a year later on a billion-dollar transaction.

So as you go through each of these disclosure issues, the question you have to ask yourself is not simply "Gosh, would it be nice, might this be interesting to stockholders, but is it sufficiently important" -- "am I sufficiently confident that this will be sufficiently important to stockholders that they would give up $2 million to have that information." Do you think they're likely, when they get the supplemental disclosure and know that the meeting has been adjourned, to say "Gosh, I'm really glad I got that extra information. And if it cost me $2 million, that's worth it"? Or are they likely to say "What the heck just happened? How come I lost $2 million of value just to get this?" What do you think they're going to say?

I would suggest that for each of these claims, as we go through it, that the stockholders are likely to say "I want my money. I didn't really care about that."

Now, I'd suggest to you that there's an easy way to try to put a pin on that -- on that point and get it resolved, okay? Make people stand behind what their assertions are. The plaintiffs spent a lot of time complaining in their papers about skewed incentives that Morgan Stanley had, right? What about the incentives that the plaintiffs have here? And it's not their fault. It's the way the system sets it up, right? But if the plaintiffs were to look at this deal and say "Wow, that's a great deal and the proxy, well, it goes overboard. They disclose projections that weren't even relied upon by the investment banker. They've got four years of history there, that's a great proxy," and they wave their hand and say "Oh, great." They wouldn't earn a fee because they wouldn't have caused anything through litigation, okay? And yet if they're able to delay the transaction, okay, if they're able to hold it up in some way, then they can earn a fee. So obviously we can see what their incentives are.

And, Your Honor, I'd suggest, in order to try to even that up a little bit, to ask the plaintiffs to put their money where their mouth is, right? Are they willing to post an injunction bond, okay? I'm not even going to get to the $300 million potential loss if the deal goes away; just the loss that we know is going to happen if there is a delay, the time value of money. Are the plaintiffs going to post a $2 million injunction bond? If after trial, summary judgment, whatever happens, full record, Your Honor concludes that these were, in fact, material issues, then they suffer no loss and they're, in fact, going to get a fee based on that because they will have caused those disclosures. If Your Honor concludes on a full record that they weren't material, okay, then the stockholders would be protected because the bond would protect them for their loss of value.

THE COURT: I was thinking about -- I thought about roughly similar numbers to where you are in terms of time-value-of-money issues.

The thing that I wondered about, though, is, you know, the drop-dead date isn't for awhile yet.

MR. SAUNDERS: Correct.

THE COURT: So how do I know in terms of time value of money how quickly you'll close after the vote?

MR. SAUNDERS: Well, I think it's -- I think the plan's to close immediately. But I guess what I would say is that, in any event, whatever date that is, it's going to be an extra week. I don't think -- there's no regulatory approval or anything.

THE COURT: That's what I was wondering, but there's nothing -- everything is gotten as far as that goes.

MR. SAUNDERS: Correct. It plans to close immediately after the vote.

Your Honor, I want to say one other

thing about these disclosure issues, because it always struck me as a little bit odd the way we do this here and particularly in contrast with the federal system. There is -- there's a complete absence of proof from the plaintiffs here on the question of materiality, okay. Our cases say materiality is a mixed question of law and fact, okay? There's not a single piece of evidence that the plaintiffs have offered to try to show materiality. There's no affidavit from any of the plaintiffs saying "This would be really important to me. Here's the way I decide how to vote. This is a factor that would matter." They haven't attached any analyst report for any of the analysts that cover the company to show "Look, this analyst thinks this piece of data would be relevant." You know, there's ISS and Glass Lewis who are out there, who are the companies that do independent governance proxy analysis, right. They haven't -- plaintiffs haven't offered one of those reports to show any of those folks are looking at any of those issues and asking any questions, right. There's certainly no expert testimony, okay.

Now, I know that that's typically the way that it happens in this Court on injunction hearings, is that people just make arguments and they toss it out to the judge to try to decide "Gosh, do I think a reasonable stockholder would care." But you would never dream of going into federal court in a 10b-5 case where the standard is supposed to be the same, materiality, and going to trial in a securities fraud case without putting on evidence of materiality, right? You have your plaintiff testify about "Hey, I never would have bought the stock if I had known this."

You have -- on the defense side you have expert witnesses who do event studies and show that the information didn't move the market, right. And yet the plaintiffs, you know, seem to come in with absolutely no evidence and just toss it up to Your Honor and say -- you know, give you this. And -- and that can't be --

Another thing that's clear under our law is that the plaintiffs have the burden of proof on disclosure issues, and in the absence of evidence, they can't possibly have met that burden.

THE COURT: I mean, look, you know me. I'm always interested in better ways to do things. What do you think we ought to do? What's the right answer in this?

MR. SAUNDERS: Well, I think -- I don't think it's that complicated. I think it's simply require the plaintiffs to put on some proof that supports a determination of materiality. I mean, they're essentially asking Your Honor to be the expert, right? Not simply weigh the evidence and apply the law to the evidence but to be the expert on what stockholders care about, right? And I -- I don't know how you can do that. I think the easy solution is for the plaintiffs to, you know, offer some evidence, the same way people do in securities cases, to try to prove materiality, a statement from somebody that says "I would care."

THE COURT: Yeah. The -- along those lines, the one that is of most interest to me is the historic fees on the Oracle side for Morgan Stanley. And I think part of the reason I can overcome tentatively the issue that you're raising, Mr. Saunders, is that, you know, I have here an argument that a similarly-sized fee incentivizes Morgan Stanley to get a better deal. So it seems to me if that argument is being made, it's a reasonable inference to say that compensation on the other side would have some incentive and, therefore, you know, would be material to a stockholder.

MR. SAUNDERS: But I think the critical difference there, Your Honor, is, you know, future money versus past money, right? I mean, it's just like the debate we have in the country with respect to tax rates. The way to incentivize somebody's conduct in the future is by offering to pay them money in the future if something happens, right?

Having paid Morgan Stanley money in the past, right, doesn't make -- give Morgan Stanley an incentive to act in a particular way with this transaction, right; whereas having a retention agreement with Morgan Stanley that promises to pay them a fixed percentage of whatever the transaction is obviously gives them an incentive to have a transaction be as big as possible.

THE COURT: Uh-huh.

MR. SAUNDERS: Your Honor, I guess I'd just like to, with those sort of preambles, the lack of evidence and the request for, at a minimum, a bond on the -- if there's going to be a disclosure injunction, I want to start taking you through the issues.

There are three that seem to be put in the category of not really omissions but something that's misleading. The first is this -- the notion that the board targeted a price of $6 three years ago or at least that it's -- it entered into this agreement with Morgan Stanley in 2007 and should disclose that the terms of that agreement was established in 2007.

Your Honor, the proxy says -- as we pointed out in our brief, the proxy says that ATG engaged Morgan Stanley in December of 2007; and it says what the terms of the engagement are, including the fact that Morgan Stanley gets one percent if it's up to $6 and then a higher percentage if it's more than $6. I can't imagine that it would be worth $2 million to stockholders to now have an extra sentence that says "And, oh, by the way, we agreed upon the terms of the engagement at the time of the engagement."

The second issue is -- and -- and I'm sorry. I should make one more point there. The -- I think this is sort of a back-door-process kind of claim rather than disclosure claim; but the plaintiffs say in their reply brief, "Oh, and the company never revisited this compensation arrangement." But I don't think anybody would have wanted them to, for the reason I described. The stock price went down.

THE COURT: Right. No. This was a -- this was a pre -- it was antediluvian fee agreement, and we've actually come through the trough and we're back where the fee agreement actually makes sense again.

MR. SAUNDERS: Exactly.

The second point is the -- the price negotiations. And I thought -- I understand -- I don't think it has any merit, but I understand the process claim. "You didn't negotiate," okay. I do not understand the disclosure claim, okay. The proxy -- and, you know, I skimmed on this, but I want to make a point. The -- on page 11 of the reply brief the plaintiff -- the plaintiffs say, "The Proxy was deliberately drafted to be vague and to convey an impression of greater vigor in the parties' negotiations."

Your Honor, that is just an irresponsible statement. There is absolutely nothing in this record -- and I would have thought it was conceded in the rest of the reply brief -- to support the notion -- certainly the plaintiffs don't cite anything -- to support the notion that anybody here did anything deliberately wrong. Instead, their entire argument is, "Well, even a disinterested and independent board can make mistakes." That's just not an appropriate statement.

At worst, maybe the plaintiffs are going to be able to "Well, I gotcha" and persuade the Court that the proxy should include some other detail here or there. And that's the risk that you always take when you decide to fight a disclosure case, and we'll accept that risk. But there's absolutely no basis for the accusation that somebody deliberately drafted the proxy to be vague.

Okay. On the merits. The proxy says "We sent Oracle comments on their proposal letter, including a request to increase the price to 6.25." The proxy says Oracle responded the same day and rejected that price increase, right? And then it says "but agreed to a limitation on the time of exclusivity," and then it says we entered into an exclusivity agreement. There's no explanation from the plaintiffs at all how that is supposedly misleading and would suggest the existence of greater negotiations in that time frame.

The proxy is perfectly clear. What we did was, we sent them a markup. They said no on the price issue. That's precisely accurate. And our cases are very clear that you don't have to slap every paragraph of a proxy with "We didn't have a meeting, we didn't yell at them, we didn't try to persuade," whatever it is, the 10 things that we didn't do. You have to say what you did do, not what you didn't do.

The third in this category of allegedly misleading disclosures is the Morgan Stanley valuation. And I -- and I confess I'm not really sure what the claim is as it stands now after the reply brief and the argument. The original claim in the opening brief had been that Morgan Stanley had manipulated one of its valuation methodologies; that is, the discounted equity value method, by using lower revenue forecasts in the final fairness book than are used in October -- in September and October. And then we offered the affidavit of Mr. Wyatt because plaintiffs never bothered to ask Mr. Wyatt about this in his deposition. Never gave him an opportunity to explain. This was just a theory they came up with for their brief after the fact. So we asked Mr. Wyatt by an affidavit to explain that those revenue forecasts are completely irrelevant to the discounted equity value because it's all driven by EPS and because the company had not projected margins and expenses and costs associated with acquired revenue; it was -- it was earnings neutral.

After that what seems to be left is just sort of a generalized statement of "We want more stuff about how we got from the numbers that were used in September and October to the numbers that we used in the fairness book." And, Your Honor, I guess two things about that.

One, it makes me feel damned if you do and damned if you don't in the sense that, you know, I think it would have been completely consistent with the precedent of this Court for us not to disclose the numbers that were in the five-year plan because they were not the numbers that were relied upon by the investment banker in its final fairness opinion.

But because the board had them, because it was fairly recent, because let's just get it all out there, we included them in the proxy, okay. And if you look at those charts, I mean, you can see exactly the difference the plaintiffs have identified.

If you look at the five-year plan numbers and look at the estimated earnings for 2012 -- I'll point Your Honor to the page. If you take a look at page 34 --

THE COURT: Yep.

MR. SAUNDERS: -- this has the chart of the financial metrics from the five-year plan. Right in the middle of that under the 2012 estimated column, "Net income per share (non-GAAP)" is 30 cents, okay? There it is.

Then if you look to the next page, 35, okay, this is the management case that was relied upon by Morgan Stanley ultimately. Bottom right-hand corner, 29 cents, okay. Perfectly obvious, that from between September and November 1st there was a one penny per-share change in management's expectation, target, whatever, for 2012 earnings, okay, one penny a share at 0.29. And, in fact, the proxy says why. It says, "In October 2010" -- page 34 -- "based upon the previously described financial targets" -- the ones just above, right -- "and our results for the quarter ended September 30th, 2010, we provided Morgan Stanley with updated targets of our revenue," et cetera, et cetera.

They'd gotten to the end of the third

quarter. Management updated its forecast, provided the update to Morgan Stanley. And so the number changed, and it changed -- Your Honor made the point in response to the plaintiffs' presentation -- in a way that could hardly be called material. This is one metric of a dozen that Morgan Stanley used, right, that's presented on the football field, and it moves by 20 cents, as Your Honor pointed out.

And I think the last thing I'd point out as well is, this doesn't -- if you get the chronology right, okay, there's nothing about this that leads to any suggestion of nefariousness or manipulation, okay. If you -- because if you look at the September 16th workbook, okay, when the only offer that's on the table is the 4.30 to 4.85 one from Company H, okay -- Oracle's not on the scene, yet, okay -- that football field is, across the board, lower, okay, than the fairness book. Every single metric on that football field is lower or the same.

So there's absolutely no reason to conclude that Morgan Stanley thought "Okay, now we're talking about an Oracle deal. We got to tank the valuation so the board will be fooled into accepting that." Everything went up, from before it was on the scene until after.

All right. Now we have the three omissions that were Mr. Russello's three issues from the scheduling conference. And the first is the -- is the Morgan Stanley work for Oracle in the past. Your Honor, we touched on this -- we touched on this before a little bit.

I would submit that there's absolutely nothing remarkable about any of the additional information that the plaintiffs have. The proxy says -- the proxy discloses that Morgan Stanley has done work for Oracle, okay. If anybody cares about that -- and, again, there's absolutely no evidence that anybody does. But if anybody is interested enough to wonder about the quantification of that, they can do exactly the same work that the plaintiffs did before they filed their amended complaint of looking at the public records that -- in which Oracle discloses -- or it's obviously identified Morgan Stanley as somebody who represented them in some underwriting or something like that, okay. And there's no allegation that any of the fees that were earned on any of those publicly-disclosed things were disproportionate so that, you know, there's some inference to be drawn that Oracle has paid off Morgan Stanley in the past with above-market rates in order to get favorable treatment, right?

Also, just what are the numbers here? Oracle is a $150 billion company, does work with 17 different investment banks. Morgan Stanley is just one of them. And it's not as though from Morgan Stanley's perspective, which is what would matter, this is a material client. It's something like two-hundredths of one percent of their revenue throughout this period, right, from -- from Oracle. Not something that would cause this Court, if we were talking about a director or lawyer or some advisor, you know, like an investment bank being conflicted. We would not think under the precedence that 2/100ths of one percent of your revenue would amount to show conflict. I can't imagine the stockholders would, either.

This is not -- this is not Hammons, you know, the case that the plaintiffs rely on in making this argument. It was a very different case, both factually and procedurally, as we pointed out our brief, right. It was different factually because there the banker -- I think it was Lehman -- was- at the same time it was representing the target, was -- other people within Lehman but still Lehman -- having discussions with the buyer about providing postmerger financing. So, again, that was not just we got somebody in the past but the potential for money in the future. That is the kind of thing that affects people's incentives, okay?

And -- but beyond even that critical factual distinction, okay, there was the procedural distinction; that is, Chancellor Chandler in Hammons wasn't deciding is there a reasonable likelihood of success on this. He was simply deciding "I'm not convinced as a matter of law this is immaterial. So I'm not going to give the defendants summary judgment." Not a very powerful argument for concluding, Your Honor, that these things are reasonably likely to be -- that the plaintiffs are reasonably likely to succeed on this here.

No other case -- there's no case that I'm aware of that has ever required disclosure -- held that a disclosure like this is material. Plaintiffs are just making it up. And I -- I -- again, there's a complete absence of proof on the question of whether anybody would really care about this.

The next is the acquired revenue question. You know, I scribbled down the quibbling Mr. Russello said in the context of this point that, you know, "The facts were unclear to us." Exactly, Your Honor. And that's on them, okay. They didn't ask any questions at depositions to try to find out what is the fact here that they would like us to disclose. In fact, when -- when you -- I also wrote down "completely hypothetical," right. Plaintiffs' counsel says that the acquired -- the acquired revenue figures that were in the five-year plan were completely hypothetical. Yeah, that's right, and that's why there's no obligation to disclose them or make a big deal out of them, okay. What we're supposed to disclose is facts, okay. And what the plaintiffs are supposed to come forward with if they want to press a disclosure claim is a fact, not just an unanswered question. Even based on the plaintiffs' counsel own statements, it has to be misleading for us to include that.

Now, the -- Your Honor had some back-and-forth with counsel on this point. I want to be crystal-clear, because the record is crystal-clear. The document that counsel referred you to that has

Company G revenue numbers in it is exclusively from Company G. Mr. Burke testified very clearly that those numbers were not vetted by ATG management at all, didn't have any view on whether they were reasonable or reliable or not; just a Company G document. And there is no other document.

Now, the -- I think the last point I want to make on -- on the acquired revenue question is the Santa Fe case that we -- excuse me -- cited in our brief. Just really exactly on this. Santa Fe was a case where Santa Fe entered into an agreement to merge with Burlington Northern. And the plaintiffs, as one of their disclosure claims, argued that the proxy statement should include projections that had been prepared -- they don't actually exist in this case, but in Santa Fe there actually were projections for a combination between Santa Fe and Kansas City Southern, which was a railroad that Santa Fe was looking in buying. And the Court of Chancery, affirmed by the Supreme Court explicitly on this issue, said not material because that's not what the deal is, okay. That's not what was presented to stockholders, X or Y. It was X or not X, essentially. And the same thing is true here.

The -- the testimony is unrebutted from Chairman Dan Regis that Company G is gone, okay. Maybe if the stockholders vote it down, maybe if we call them up and say "Please, would you talk to us again?" But it's completely speculative that that opportunity is available. So if somebody wants to bring a derivative claim and say the board dropped the ball and let Company G go, then, fine. That's -- you can bring that claim. But the disclosure question here is not do you want Oracle or do you want Company G. It's do you want Oracle or do you want nothing, okay?

All right. Last -- last disclosure claim, Your Honor, is NOLs. Again, I had to write it down. "As far as we could find" counsel said. "As far as we could find, there was no discussion." They didn't ask a single question in any of the depositions about the NOLs.

So, again, Your Honor, those are the things I think are potentially important, okay, the things that might potentially warrant injunctive relief, which is the application that's here today.

I'm happy also to talk about the Revlon claims, because there's -- if Your Honor wants to reach the issue, I'd submit that there's absolutely no reason for Your Honor to conclude, albeit preliminarily, that the plaintiffs have any likelihood of success on these claims.

THE COURT: Yeah. And I'll tell you where I am on that. I think in terms of taking away the whole deal decision, that doesn't make any sense to me at all for the Solash v Telex reason. I -- I completely empathize with you on that. And, look, even assuming these guys -- I don't think they were, but even assuming they were total dunderheads, you could blunder backwards into a decent price that the shareholders ought to be able to get a chance to accept or reject.

What I'm not really clear on is, this is a case where the -- it was a single-bidder strategy. And while all of the deal protections are in customary forms and combinations, they're all at the aggressive side of the range. So you've got a two-day notice plus five-day match -- five-business day match. You've got 3.25 on the termination fee. You've got a no-shop that's framed in terms of, you know, "constitute a breach" as opposed to softer language. You know, all those things are things that seem more apropos of something that follows some type of canvass, even a private canvass as opposed to something where you go straight to your one bidder. That's -- that's the part that I'm having trouble with.

And in terms of the injunction risk, you know, it's not clear to me that the conditions to close would give Oracle a walk right for, you know, a 10- or 15-day or 20-day injunction against the termination fee. And so the irreparable harm calculus and the balancing is working differently in my mind than were I to issue some type of deal injunction where I am completely on board with what you're saying.

MR. SAUNDERS: Okay. Your Honor, let me -- let me try to address a few things. I mean, I think -- sort of starting at the top, I think, respectfully, that this is one of the -- the key strategy of the plaintiffs in presenting their case is to characterize this as a single-bidder strategy. And critically it's not. This is a -- this is a market check that worked. And, okay, it was a targeted market check, but it's, I think, fundamentally different from the situation where we had -- take

Pennaco, for instance, or -- or Dollar Thrifty, any of those cases that are single-bidder situations where the company engages in discussions with one person only from the very beginning, okay, and that's the only person they talk to, and then they rely on the postagreement market check, okay.

This is not what happened here. What happened here, we were approached by someone else, okay. We spent months in discussions with them, okay. Got -- from August and September, right; got them from an original proposal of 4.30 to 4.85 all the way up to soft and squooshy indication of interest of 5.75, right, a bigger increase, by the way -- Mr. Dargitz is useful -- a bigger increase than the increase that was negotiated in Lyondell, okay?

So having gotten the unsolicited bidder up from 4.30 to 4.85 up to potentially 5.75 and very attractive, "Gosh, that would be great if we can get it," the company then said "All right. Let's do a market check. Let's check that value and let's go first to the company that is most likely" -- I mean, we've always identified as -- not because there's anything nefarious, but because they're the obvious people to go to. They're the obvious people who are going to pay the most for this company, with the biggest -- the most synergies and see if they'll match or exceed 5.75; right?

So this is emphatically not a single-bidder situation. We negotiated with Company H, got them to dramatically improve, and then went to a market check to the obvious person to go to and they beat it. You know, this was not, for instance, the situation where we started at so much a lower number and worked them up. We went to them with a target. We're talking to someone else, right. "Are you interested in talking 6 or more," right, or "more than 6?," right? So very emphatically not a single-bidder strategy.

Secondly, you know, I appreciate the -- the questions that Your Honor's raising; but I -- it's a little bit unfair in the sense that the plaintiffs haven't, okay. There was not a single question, again, at any of the depositions, any of the three depositions about any of the deal protection measures, not a single question about "Why did you agree to this? Who asked for it and when? Did you think it was reasonable? Why did you think it was reasonable? What did you talk about in the boardroom about it?" Not a single question like that.

So if there's a -- if there's an absence of record, once again, on the deal protection measures and how, when they were negotiated and why, that is all on the plaintiffs.

THE COURT: Yeah. Look, I'm -- I agree with you wholeheartedly on that. I mean, I would like to know, for example, if the 3.7 -- I mean if the 3.25 was, you know, a Toys 'R' Us-style conversation versus -- at least as the picture is painted right now, I think it's the -- plaintiffs didn't develop this more -- it's that the initial trades were timing and price. And I don't even know when the term. fee gets cut. I don't know if it was a, you know, 4, 2, 3.25 pro forma back and forth or whether there's an actual tug over it.

MR. SAUNDERS: Right. You don't, because you haven't been presented with -- with any of those facts because the plaintiffs didn't ask.

Your Honor, I -- I -- I guess I have a few more things I wanted -- I want to say.

And I -- I appreciate that you're with me on -- on Solash versus Telex and -- so I won't give you the whole story; but I do want to say a couple things.

I -- I do want to say that the consistent threat on the board's process here throughout this time frame is open-mindedness, okay. And I can understand why sometimes open-mindedness might seem, I don't know, the opposite of single-mindedness but, frankly, that's a good thing. I think we want our boards in the state to be open to all alternatives.

And the fact that throughout this process the board executed on its business plan but was very willing to listen to anybody who had an interest in something that might be more valuable than that business plan was also interested in exploring how they might be able to execute on the business plan even better by acquiring some other company that would have a good fit. All that is very good and exactly what we want people to do. And the false dichotomy that plaintiffs want to set up, are you for sale or are you not for sale, really doesn't work for what this board did. They were always willing to consider whatever option is going to create the most value for stockholders.

Again, I guess two other things on the

process, just from the 30,000-foot view. The entire board's completely disinterested and independent. The argument that had been made in the opening about the CEO, one thing, you know, lucrative employment, fell away in the reply because it's perfectly clear there were absolutely no employment negotiations before the merger agreement was signed and what discussions they had afterwards. They had reached an agreement. Mr. Burke's last day of work is tomorrow. He is not going to work for Oracle. So that's done, okay. Absolutely no conflict on the part of any -- any member of the board.

Secondly -- and I think this is, you know, a very important fact to distinguish from Health Grades and many of the other cases where the Court's expressed concern, is, this was a board-directed process, okay. There's not a single decision, as you go through the chronology, where Mr. Burke or management or Morgan Stanley is off freelancing, okay. If you -- you track through the proxy, the minutes, the record that supports it, right, every single decision, okay, "What are we going to say," "Who are we going to say it to," "Who are we going to talk to?" is a board decision, exactly the way it should be.

THE COURT: Help me on the anchoring on November 2nd.

MR. SAUNDERS: Sure.

THE COURT: Because that does seem to me like where it was something that it was almost a quasilegacy focal point that maybe could have been reconsidered. But push back on me on that.

MR. SAUNDERS: Sure. Fair enough. And I do think -- it's not in the record, at least I don't think it is; but certainly my understanding about the way the world works generally is that people announce when they're going to announce.

THE COURT: Sure.

MR. SAUNDERS: And that's why I believe that that would -- that date had been out there. And we could find it for Your Honor if it matters, but it's not currently in the record.

But I -- I think this sort of -- the string of dominoes is the company had raised a hundred million dollars back in February. Mr. Regis testified, you know, unrebutted that it was the view of the board that if we get to that earnings announcement and we haven't explained in a reasonable and profitable way to the market what we're doing with that money, they will have a negative reaction to that, the cash is still just sitting there. So we feel very strong motivation of the board to announce something by November 2nd, okay. And clearly, until Company H came along and started the process, the thing that they were hoping to announce then was Company G, okay. So we're working down the path towards Company G, okay.

But it's also clear once Company H comes in and Oracle comes in that the advice that the board is getting from Morgan Stanley is, those are inconsistent paths. And that's clearly what Mr. Regis testified about, that from the perspective of Company G, right, you know, we're talking to them; but if we get acquired by somebody else, you know, there's really no reason to believe they're going to hang around, okay. They don't know if they want to be acquired by Oracle or whether a totally different deal. And from the perspective of Oracle and Company H, nobody's going to believe that they would be interested in an ATG-Company G combination, okay? Plaintiffs' counsel says liberally, "Well, if it increases value, why wouldn't anybody want it?" But it's a very different company to acquire. At a minimum, you'd be back to restarting your due diligence. And to -- you know, then beyond that, trying to understand Company G, what are these companies going to be like together? Are they going to generate synergies together? Are they going to work out together? All those are reasons why the board felt that -- the board got advised and thought it made sense that these were mutually exclusive trackings. So they go down those tracks trying to keep both balls in the air as long as possible until they can make a decision on which one is better and have confidence that the one they're choosing is better is going to happen. And that doesn't happen until October 22nd, right. But, still, because there was that deadline out there of November 2nd and the earnings release, we need to tell the market something or we're going to suffer. That's what started that train -- this train of dominoes.

THE COURT: Yeah. I think the -- the part that makes it a little odd is the -- is the trade-price-for-time issue. If you think you've got Oracle at 6, then, you know, short term, if the market questions you on November 2nd, I mean, I guess Oracle would recut at that point. That would be the fear.

MR. SAUNDERS: Yeah. I mean, if you look at -- I encourage you to take a look at -- I think it's Exhibit O to Mr. Long's affidavit that was submitted with the opening brief. It's the Morgan Stanley presentation from October 13th, okay.

THE COURT: Yep.

MR. SAUNDERS: And that presentation has -- it has the list of background and then it has some possible scripts, Alternative A, Alternative B, right, where Alternative A is -- it's called something like accept and run forward and Alternate B is, you know, reject and negotiate, something like that.

THE COURT: Uh-huh.

MR. SAUNDERS: And it identifies pros and cons. And one of the cons of rejecting, right, is Orion, which is Oracle, you know, may go away. They don't say "go away." They say "may lose Orion" or something like that is the language, right?

So, I mean, there we are. The board's given the presentation, right. And from its expert advisor that identifies this as one of the key cons of proceeding that way, I don't think that within the extremely broad purview of a range of reasonableness that a board gets to act even in Revlon, right, that the weighing of those pros and cons, you know, is something that you can think that the plaintiffs have a likelihood of success on.

(Reviewing) Okay. I think that's -- again, I'm happy to go over any more questions Your Honor has about the chronology, but I think that covers what I would like to say for now.

THE COURT: Thank you, Mr. Saunders. Very helpful, as always.

MR. SAUNDERS: Thank you, Your Honor.

THE COURT: Good afternoon, Mr. Nachbar.

MR. NACHBAR: Yes. I'll be very brief. I join in Mr. Saunders' excellent remarks, and I'll try not to repeat them, or at least not too much.

The transaction will close immediately, to answer one of Your Honor's questions. That's the plan, absent an injunction.

I guess I would like to touch briefly on -- on Morgan Stanley and the work it did for Oracle, because I know Your Honor had questions about that. Obviously the proxy does disclose that Morgan Stanley did work for Oracle and that information is publicly available. The plaintiffs found it. It's in their amended complaint. If it were really that important to others, analysts and, you know, people like that, ISS, it was out there. They could find it.

But -- but let's step back a little bit and look at plaintiffs' theory, because plaintiffs' theory is, well, Morgan Stanley's incentives here are an issue because, you know, they -- they're supposed to be working for ATG. And they did do an offering for ATG and, you know, they made a lot of money doing that. But gee, they've done some work for Oracle and so, therefore, it's like they're, you know, bribed or something. You could question their integrity. That's the theory.

Well, that theory makes no sense when you're talking about something that is 25/1,000ths of one percent. You know, if it were 5 percent of Morgan Stanley's revenues or 5 percent of Mr. Wyatt's bonus was tied to Oracle work, you'd have something and -- and you would have to disclose that, I think. But this is the equivalent, to put it into human terms, of $25 to somebody making a hundred thousand dollars a year.

Now, I know for federal employees, gifts of $25 are okay, they don't even need to be reported. Above that, I think they do. I don't know what it is for state employees. I've never found out. But, you know, I don't think that if a judge, you know, had a drink bought for him at Tulane, people need to disclose that. I mean, it's just too small.

And that's what this is, when you put it in human terms. I know, you know, $4 million a year sounds like a lot of money. And, you know, to me or to you it is a lot of money. To Morgan Stanley, with, you know, a hundred billion dollars over the four-year period, it's a lot less money, that's -- that's the point.

THE COURT: Should I worry at all about eventually them not being material to these big banks?

MR. NACHBAR: No. I mean, I think it is material, and I think -- you know, I don't know where the line is. Maybe it's one percent, maybe it's half a percent; but we do have some guidance here because the Paxson versus NBC Universal case, our client was required to hire an independent investment bank and we hired CIBC. And oh, my God, they were paid millions of dollars by Paxson. And they were. But in that case it was 1/100th of one percent. This is marginally higher. It's 25,000ths of one percent. But it's still -- I don't know exactly where the line is, but, you know, I think this is clearly on the nonmaterial side.

THE COURT: I mean, the other place that I wonder is, in -- in the sense of tainting a process, I'm a hundred percent with you. And, you know, the Paxson case, the -- the concern about hiring the independent banker and the independent's definition seems to be about tainting a process. You know, here, it's almost what the plaintiffs are arguing for is a, you know, prophylactic disclosure because you're disclosing the one side of the con and you're making the argument that they're incentivized, it's really a partial disclosure situation where you ought to disclose the other side of the con.

Does that distinguish the Paxson case and mean that in this situation, because the numbers are relative order of magnitude, there ought to be some type of balancing disclosure?

MR. NACHBAR: I think not, because we did disclose. You know, it's not like the proxy doesn't -- it says Morgan Stanley has done work for Oracle. And the only theory for further disclosure is that a stockholder who actually knew the facts would say "Oh, my God, I cannot trust this fairness opinion because of the amount of" -- you know, "these guys" -- "these guys are in Oracle's pocket."

Now, there are two problems with that. One, most of their financial work and their financial analysis was done when Company H was the bidder, not when Oracle was the bidder. So even if they somehow were in Oracle's pocket, all their analysis pretty much was done before Oracle was even on the scene. But -- but beyond that, you don't get to be in somebody's pocket for $25 over a hundred thousand. So anybody who read the disclosure that was made, if you said to them "Guess" -- "Out of a hundred thousand dollars, guess how much Oracle was actually paid?," they would probably assume it was a hundred dollars, a thousand dollars, $2,000. People would think you wouldn't put it in if it was $25 out of a hundred thousand. That's the point.

So if they learned the facts, it could only -- they're just not material. The only thing it could do is -- is say oh, well, this isn't -- this couldn't affect anybody's judgment. That's the only effect further disclosure would have would have, would be to make the reader say "All right. This can't be material." You know, maybe if it was 10 times this amount, it might be material; a hundred times, it probably would be. This can't be material.

So that's where we are on the Morgan Stanley thing.

The only other couple points I want to make is, there is no basis here for any aiding and abetting claim. You know, we pointed out in our brief that the complaint doesn't even state a claim for aiding and abetting. And we said we think the plaintiffs have abandoned it. They came back, "No, we haven't abandoned it." They didn't come back and explain why it states a claim, though. So if they're going to pursue it, it's going to be in an amended complaint because it sure isn't in the complaint they've got now. And there is, in fact, no wrongdoing at all by Oracle. And that's important, because Oracle's rights are sought to be affected here.

A preliminary injunction on substantive grounds would convert the merger into an option on the part of Oracle, I believe. And it's Long affidavit Exhibit E, which is the proxy statement, has the merger agreement attached. It's page A-43 of the merger agreement.

THE COURT: Uh-huh.

MR. NACHBAR: And it's Section 8.02(c) -- 7.02(c), sorry. And it says that a condition to the merger -- well, first of all, there's a representation in -- in Section 4.12 that there's no litigation challenging the merger. So that one is already implicated. And if it -- if it's -- that could have a material adverse effect, we're already there. But -- but beyond that, Section 7.02(c) says that there's a closing condition, that there's not a proceeding that has a reasonable likelihood of success. And Your Honor's going to have to find that to issue an injunction that is "challenging ... seeking to make illegal, delay materially or otherwise directly or indirectly restrain or prohibit the consummation of the Merger or seeking to obtain material damages in connection with therewith ...."

THE COURT: Uh-huh.

MR. NACHBAR: So I think if the Court finds a reasonable likelihood of success on plaintiffs' substantive claims, I think the closing condition can't be met. Now, whether Oracle would close or not, I don't know. And -- and, frankly, it could depend on what happens in the economy. If you take Mr. Russello up on his invitation and delay this by a month, I don't know what's going to happen in that month, you know. The stock market could drop 3,000 points. That's happened before. And if that happens, Oracle would certainly have the right not to proceed. I'm not going to stand here and predict one way or the other what they would do, because it's purely hypothetical; but they would certainly have the right not to proceed and the stockholders would certainly be a lot worse off in that scenario.

THE COURT: Yeah. I think -- I mean, I was distinguishing in my mind between consummation of the merger which wouldn't be enjoined and a, you know, injunction that would, for example, enjoin the termination fee for a period of X days.

MR. NACHBAR: Right. Well, that brings me to my next point. And that is that, you know, two things about the deal protection measures. First, deal protection measures almost identical to those in this case in almost identical circumstances were upheld in the Cogent case. And there, it was Company D, not Company H, who was the original bidder. And it was 3M, not Oracle, who acquired the company ultimately, but the same, almost identical suite of deal protections, including a match right, including a voting agreement that covered a lot more stock than the voting agreement did.

THE COURT: The voting agreement here is so small, it's really beside the point, which raises the question, then why'd you get it? But I hear you. Keep going. I don't mean to interrupt you.

MR. NACHBAR: No; that's fine.

A -- a no-shop that is virtually identical. The words are -- they're just not materially different. A match right that was very similar. And the Court refused to grant an injunction there, finding that the deal protections, taken together, in a very similar context didn't impede anyone from coming forward. And, in fact, nobody has come forward. Nobody has even come forward conditionally. I mean, it's not hard to write a letter that says, you know, "Boy, we would have an interest were it not for these horrific breakup fees or this terrible match right."

THE COURT: No. Look, there's definitely an empty chair --

MR. NACHBAR: Exactly.

THE COURT: -- where Company H is sitting. I mean, they're the natural folks to come forward and -- and they haven't done it.

I mean, part -- part of what nags at me -- and I understand what you're saying about -- and I think of it in terms of Cogent, and I think of it in terms of Pennaco. But, you know, if a termination fee, in fact, is designed to price things like opportunity costs and is in part designed to give deal certainty as a reward for participating in a process and putting your best price forward, you would expect differential termination fees because those are different risks.

I mean, Oracle here is a -- you guys, you know, explained it -- they're a regular acquirer, they're a regular bidder. This is probably a size deal where they're not really foregoing any other deal to take these guys on. So that, to my mind, thinks okay, well, this really isn't pricing opportunity cost.

And in terms of, you know, bidding up the price or extracting a higher bid, again -- this is partially the plaintiffs to blame -- the record in front of me just shows a tradeoff of price for exclusivity. And so it's weird that, you know, 3 percent or 3 to 3.5 percent would be some type of bright-line rule across all different situations. You would think that -- that -- actually, in this type of situation, people would be pricing these things lower.

And part of my discomfort is that, at least our case law -- and be it Cogent or Pennaco -- I mean, the case (Inaudible), all right, Express Scripts. Chandler in Express Scripts says really, we ought to be thinking about these things. And if people want to make a showing that, for example, they're pricing off this, more power to you. But I think our case law seems to be ignoring these differences. And I'm not sure it should be.

MR. NACHBAR: Well, two comments on that. First of all, there was negotiation over the termination fee here. I know that the company asked for a lower termination fee.

THE COURT: Uh-huh.

MR. NACHBAR: No one at my table recalls whether we asked for a higher one. We may have. We just don't remember. But -- but there are -- they were produced, drafts of the merger agreement. And if you look in -- in the Morgan

Stanley presentation, the termination fee is in brackets because it was being negotiated. And they didn't know where it was going to come out. So that's Point No. 1.

Point No. 2, there is an opportunity cost to Oracle. As Your Honor just heard, Oracle does its M and A in-house. It doesn't have an unlimited number of in-house people. And a $1 billion deal versus a $10 billion deal takes, you know, roughly the same amount of effort. There may be another zero on the end. In terms of financial capacity, Your Honor's probably right. You know, could -- you know, would it be different for Oracle to do two $1 billion deals versus one $5 billion deal? In terms of financial capacity, maybe not; but in terms of people capacity, which is probably where the real constraints are, yeah. There's a huge difference.

THE COURT: Yeah. And that makes a lot of sense. I follow you on that sense.

MR. NACHBAR: So there was that. Now, in terms of a modified go-shop, I think Netsmart reads directly on this. And this is 924 Atlantic 2d at 209. And I'll just quote from the case, because Vice Chancellor Strine said it better than I could.

"Insight did not promise to pay [16.50] per share in a deal when Netsmart got to actively shop their bid. They promised to pay [16.50] per share based on the opposite: Netsmart could only respond to unsolicited superior bids. I perceive no basis where I would have the equitable authority to require Insight to remain bound to complete the purchase of Netsmart while simultaneously reforming the Merger Agreement to increase [the] transactional risk in that endeavor. Certainly, on this record, I could not justify such an unusual exercise of authority on the grounds of any misconduct by Insight."

I would submit all of that applies here. You can change "Insight" to "Oracle" and you're in the same at 16.50 to the deal price here and you're in the same position. The Court went on to say, by the way, that "It would be hubristic for me to take a risk of [the] kind for ... Netsmart stockholders ..." and noted that the plaintiffs had not volunteered to back up their demand with a full bond, all of which is equally true here.

THE COURT: Yeah. In terms of the economic decision, I think that's exactly right. And it may -- it may be that the way these things are drafted, that you're boxed in terms of either a -- an injunction that gives the walk or not. But it strikes me that puts a lot of pressure, particularly as you continue to get bracket creep, on termination fees. It's an awkward -- it's an awkward box for a court to be in. But I hear what you're saying and -- and I understand where you're coming from.

MR. NACHBAR: Right. And finally, the last point I'll make relates to Health Grades. And what the Court said there is, you know, if -- the company went back to a particular bidder. And the Court said, you know, "If you would analyze that and" -- "and said which bidder is the one who's likely to be able to bid and" -- "and had gone through the correct process, I'd have a lot more confidence in it." And I would submit -- this is really Mr. Saunders' argument, but I would submit that's exactly what the board did here. They looked at the available bidders. They had been at this in one form or another for three years. They had spoken to a lot of bidders. You know, you're up to Company H because there was an A, B, C, D, E, F. And G was a different type of transaction. But there were a bunch of bidders and they looked at who the likely bidders were. And they determined that Oracle was the one bidder who, on this time frame, could come out and -- and put a bid out there -- it been out there since November 2nd, that anybody could come along and top it; but they were the ones who could bid up $6, a 43 percent premium and be out there. And if somebody wants to top it, great. And, you know, they proved to be right. I mean, they -- they went to the right party. Oracle did make that bid. If they had gone to Company C or D or E, might -- you know, they might have been stuck with 4.85 and an oral 5.75. Instead, they went out, they seized the moment. They got a $6 floor. And I think they did pretty well by the stockholders.

Thank you, Your Honor.

THE COURT: Thank you.

Before we do reply, I think I'd like to take a 10-minute break for the good of our court reporter. That will also give counsel a chance to talk among themselves and see if there's any final points that we want -- they want to make when we reconvene. So when we come back, we'll start with you on reply.

And so it's now quarter after. We'll

come back at 25 after. We'll stand in recess until then.

(A short recess was taken from 4:14 p.m. until 4:29 p.m.)

MR. RUSSELLO: Thank you, Your Honor.

I'm just going to focus on, really, several points, but they're going to essentially relate to these connections between Morgan Stanley and Oracle, because I think that's where the focus now is.

The -- the first point I wanted to make again was that the materiality standard does not necessarily concern itself with the materiality factor, the importance of a fact to the person that -- that it may relate to. In this case it's Morgan Stanley. It doesn't matter whether the fees would have really made a difference to Morgan Stanley or not if a reasonable shareholder would have looked at those fees and thought to itself that Morgan Stanley was doing work for Oracle at the same time it was doing work for ATG. It may have impacted the fairness opinion.

But we don't need to show that it actually did. And I think Chancellor Chandler said that in the Hammons case, that you don't need to show that the conflict impacted the fairness opinion. That's not a requirement. The facts exist. They're material to shareholders, and that's where it lies.

Now, there were some issues that were raised concerning the factual basis for the Court to rule on materiality. But the courts are -- are generally every day put in a situation where they're determining whether a fact is material or not under given circumstances. So we don't think that that is the death knell for our case.

In addition to that, of course, as is the Court's customary practice and rules require us to, we submitted affidavits in support of each complaint, each iteration, the opening complaints, the initial ones, the consolidated amended complaint, from our clients, indicating that they had read the complaint, that they supported the allegations to the extent that that is something that the Court would find useful, we, of course, would comply with it.

With respect to the issue itself, though, I mean, it's easy to try to belittle the importance of the issue when you look at Morgan Stanley's complete -- or total revenue, rather. When you look at the total revenue figure, of course, it's perhaps not a lot; but you could say that with respect to any investment bank of the size of Morgan Stanley, those issues would then never be material, but yet sometimes they are and sometimes they're not. We don't need a bright-line rule that connections and relationships between investment banks and buying groups or buyers is always material and it's always inherently material and must be disclosed. What we need is a rule that, of course, is contextual, that follows along the facts and circumstances.

And here, adhering to the facts and circumstances, the engagements that Morgan Stanley has had for Oracle are material and need to be disclosed. I want to, once again, bring the Court to the disclosure that Oracle itself makes in its own filings, which is "Each of the representatives acted as an initial purchaser in connection with our issuance of $5.75 billion aggregate principal amount of senior notes in January 2006. In addition, affiliates of each of the representatives are lenders under our five-year revolving credit agreement and under our 364-day revolving credit agreement, for which, in each case, they receive or have received customary fees and reimbursement of expenses.

Furthermore, each of the representatives acted as an underwriter in connection with our issuance of $5.0 billion aggregate principal amount of senior notes in April 2008." That's in Oracle's July 1, 2009, Form 424B2, and that related to Morgan Stanley specifically.

So it's easy for the company to make a disclosure like that here. If it's material there, it's certainly material here.

But another point that I wanted to reach was just this notion that we should be posting a multimillion-dollar bond in the event that the Court enjoins the transaction. Now, the recent Guzzetta case search addresses the issue, but what I believe the Delaware Supreme Court meant in that case was that there needs to be a sufficient evidentiary basis to establish a bond amount.

In this case, Your Honor, we respectfully suggest that defendants have not established that basis. What you had here was a confluence of events. One was the announcement on November 2nd of the proposed transaction, and the second was the announcement of better-than-expected third-quarter results. You can't tell which one resulted in the stock price doing what it did. You can't tell which one in isolation resulted in, you know, or influenced the stock price; yet what we do understand is as of this day the stock price is trading around 5.98 or 5.99.

To the extent that shareholders might have an issue with time value of money, Your Honor, they can simply exit their positions. They wouldn't necessarily lose money if the deal is enjoined. I don't know that that should be the benchmark if it doesn't reflect the actual harm that would be occasioned or caused to the defendants themselves. They seem to suggest in their papers that the real harm is the difference between the preannouncement price and the postannouncement or offer price, rather. There's no way that can be. There hasn't been sufficient evidence submitted in support of that. So --

THE COURT: Why don't you think -- why isn't it logical that the stock would go back and trade for a preannouncement price?

MR. RUSSELLO: Well, we thought it would based on the fact that the third-quarter results were favorable. The third-quarter results could have had and certainly presumably would have had a material impact on the stock price.

THE COURT: They're a penny higher. I mean, what's this thing's multiple?

MR. RUSSELLO: Well, I'm not quite sure the multiple sitting here; but I do understand, I believe revenue was 16 percent higher year over year than it had been. So, I mean --

THE COURT: No; look, I mean, I don't buy that at all. I do question whether Guzzetta is supposed to apply to deal litigation. I -- I don't know what they want us to do after Guzzetta, I really don't. I mean, it's a very odd case. It involves, you know, a neighborhood and, you know, quantifiable damages in a neighborhood dispute. And I completely understand why defense counsel would argue it broadly, you know, when it came down. I remember thinking geez, what does this mean to deal cases.

MR. RUSSELLO: And I think the amount in dispute in that case, anyway, Your Honor, was $10,000, $20,000. It wasn't, you know, potentially millions and millions of dollars here.

THE COURT: Right. It's a legal principle.

MR. RUSSELLO: Right.

THE COURT: And they said it and they held it. And, you know, I do try to follow what the Supreme Court says. So it's -- it's an odd situation to be in.

I mean, what would -- to post a bond, what -- what is the cost of posting a bond? I have some vague recollection from practice it was about 10 percent of face, but is that all in the neighborhood? Am I --

MR. RUSSELLO: With nary a basis really to -- to assist the Court on this --

THE COURT: You've never done it.

MR. RUSSELLO: -- I've never done it, but I believe Your Honor is correct. I was going to say my understanding was that it was 10 percent of the -- the face amount. That's based on, you know, not my current practice but my understanding, my general understanding of the way bonds work.

THE COURT: Yeah. I remember at one point maybe once or twice I had to look into bonds, and that's what I remember being the approximate number. I mean, you guys -- so that means you'd have to post a hundred grand; right, to have a million-dollar bond?

MR. RUSSELLO: It sounds like it, Your Honor. It sounds like it.

THE COURT: Mr. Robbins can write that check out of petty cash; right?

MR. RUSSELLO: Well, I don't know what Mr. Robbins can do. I can tell you I can't, Your Honor. And that would be -- I still say that that would be material to him, Your Honor. And I think that's the point to make here, that even for somebody like Mr. Robbins -- I don't know what it is is a percentage of his net worth, Your Honor, but ... And that brings me back to Morgan Stanley.

But the Delaware Supreme Court has been clear that materiality does not concern itself necessarily with the subjective views of the directors. The shareholders are what counts. They're not -- it's not incumbent upon them to search through Oracle's files. These are ATG shareholders, not Oracle shareholders.

Those are the remaining points I wanted to make, Your Honor. I don't want to belabor the issues any longer, unless Your Honor has any further questions.

THE COURT: No, unless you have more to talk to me more about the bond, because, again, it's -- it's an odd situation that I'm now in after Guzzetta, and it's something that I think the members of the Court are thinking about and wondering what do they do with this, if anything, or if it's simply so factually distinguishable in terms of the context of the case, that we ought to, you know, continue until we get further guidance as to whether this really applies to deal cases.

MR. RUSSELLO: Well, I think, Your Honor, to the extent Your Honor is inclined to grant some sort of injunctive relief and would consider requiring the plaintiffs to post the bond, certainly we would ask that defendants come forward with some sort of evidence to establish the -- the total amount of the loss in some reasonable way that we would perhaps establish before the Court.

The second is that to the extent the Court would simply require the plaintiffs to post a bond, that Your Honor would provide me with a little bit of additional time to call somebody like Mr. Robbins concerning the posting.

Thank you, Your Honor.

THE COURT: Thank you.

Do either the defendants have any final words? I'm not asking for any. I just don't want to cut anybody off if they have some last thought they want to share with me.

MR. SAUNDERS: I'm sure I should sit down, but just one sort of factual issue I want to make Your Honor -- make sure Your Honor is clear about, because it came up just a minute ago.

The -- I think the critical thing about the third-quarter earnings announcement was that the company was not changing guidance for the year, okay. So the third quarter was good, okay, but essentially it was cannibalistic of the fourth quarter in the overall year results.

THE COURT: Well, all right. I thought about this during the recess and where I am on it. I'm going to give you something in writing, but because of the timing, I'm going to go ahead and tell you.

I just can't get comfortable with the Morgan Stanley issue, I really can't. I understand the arguments that Mr. Saunders and Mr. Nachbar have raised. They were very well argued, but I do think that given the nature of the disclosure already in the proxy statement, given the magnitude of the fees on the Oracle side, there needs to be supplemental disclosure of that. And I have thought about the injunction risk and the balancing of the equities and have taken into account those issues as well. But because I do think that the Morgan Stanley issue is material, I will be enjoining the vote on the transaction.

Now, what I don't have any problem with people doing is convening and adjourning to the extent that is helpful to people who are holding proxies and record dates. I, frankly, didn't think through where you guys are in terms of the 60 days or -- or in terms of the proxy. So to the extent you all want to convene and adjourn in light of that, that is fine with me.

I am going to give you something in writing that gives you my thoughts in a more -- I don't know if "eloquent" is the right answer, but at least more detailed fashion on this issue. And I will do that -- I'll try to do it as fast as I can. I can't promise you that it will be tomorrow. It might be later in the week. It will certainly be this week.

And in that I will address the amount of time that I think is necessary for the curative disclosure to be out there.

In terms of a bond, I am really troubled by this. I think what a lot of Mr. Saunders says makes a lot of sense to me. And I really think there is a lot of reason to wonder whether entrepreneurial plaintiffs really should have a free option to enjoin deals, you know. And I don't know if Guzzetta is supposed to get Chancery judges thinking about that. It does seem to me to be a very distinguishable set of facts and circumstances and really a -- a, you know, radically different order of magnitude in terms of what's going on.

I also think that there are differential considerations in play in the deal context, because although Oracle certainly could close immediately -- and I have no reason to disbelieve Mr. Nachbar that's their intent. I'm sure it is their intent. (Continuing) -- you know, that intent could change. The drop-dead date isn't for some time yet. And, you know, part of what stockholders agree to when, in the proxy that was solicited and necessarily the board has the power to do under Delaware law, is adjourn. So it's not clear to me what expectancy stockholders necessarily have in getting money immediately, such that there should be a large bond on the time-value-of-money basis.

So as of today, I'm not prepared to revisit or change this Court's historical practice of not requiring bond in the circumstances, but I'm not intending to announce a rule for all-time. I definitely think it's something that I am thinking about, particularly in the context of the -- of the free option against enjoining deals; but for those reasons, I am not going to condition the injunction on a bond.

Now, for Mr. Saunders and Mr. Nachbar, is that sufficient for your purposes, or do you need a one-page order from me saying that the vote on the merger is enjoined and essentially saying that I'm going to provide you with further detail this week?

MR. NACHBAR: I think in terms of what Your Honor said -- I'll let Mr. Saunders speak, but I think that's sufficient, provided we can get a copy of the transcript. I'm sure we can at least get the ruling very promptly.

The question that I have that's

unclear is whether the company, assuming it sends out corrected disclosure and assuming it gives people the full right to revoke, may vote the proxies that it already has, because two-thirds of the stockholders have spoken. And I -- I honestly don't think this is material, so I don't think it's going to change very many people's minds; but, you know, we might be proved wrong. But I think it would be better not to have to start over at Square 1.

THE COURT: No. And that's my intention, and that was part of my intention in letting you all convene and adjourn. I think if people have the right to revoke, that's sufficient. Look, it very well could be for a lot of reasons that the vote pretty much stays as it is. But as I say, I -- the Morgan Stanley number, at bottom, seems to me something that could be material, is material to stockholder voting decisions. Some stockholders may look at it and say "We don't care." But it's information that I think, given in this context, they should have.

MR. NACHBAR: We understand.

THE COURT: Mr. Saunders?

MR. SAUNDERS: Yeah. I guess the

right to revoke was my first issue. We've nailed that down.

My second issue was, I don't know for sure, but I think we'll need to know tomorrow when we have the meeting and adjourn, you know, until when we're going to adjourn.

And I -- so I don't know -- I guess I had hypothesized a week. I don't know how quickly we could find out from Your Honor how much time you think the supplemental disclosures need to get out there.

THE COURT: Right. Well, look, I mean, I can tell you the range. I think because of the drafting of 251, the notice requirement there, under no circumstances would it be more than 20 days, because given that the statute allows a notice of merger ex ante to be given on 20 days' notice, it doesn't make any sense to me that it would be outside of 20 days.

I haven't -- I mean, when I researched this issue before, it seemed to me that there was one tight case -- it might have been Gintel v XTRA -- where five days was allowed. That always struck me as a little short. So my expectation would be that I would probably be in the 10 to 15 days' range, and I'm probably going to fall off closer to 10; and if I had to bet, I would bet on 10. And it'll be, you know -- part of what I know you have to wait for is clarification from me on exactly how much I'm going to require you all to disclose about the Morgan Stanley fees. But I think 10 days in the market is probably what I'm going to require.

MR. SAUNDERS: And then I guess that was my third question, was do we know what we're going to have to disclose, or is that coming in Your Honor's opinion?

THE COURT: I think it's going to come in My Honor's -- my opinion. My Honor's. How's that for self-congratulatory?

I have to think about that. And there again, to give you some insight into where I'm going, reserving the right to change my mind, I am influenced by the fact that the proxy chose to go back to 2007 in terms of reciting historical facts and that that's when the original Morgan Stanley agreement was entered into. And so were I ruling orally, that would be the amount -- the time period that I'm focused on, and that's what I expect to focus on in my written opinion.

MR. SAUNDERS: Would it be helpful, Your Honor -- I mean -- and -- would it be helpful for Your Honor for us to try to reach agreement on it? I mean, obviously the sooner we can get out the supplemental disclosure, the sooner --

THE COURT: Mr. Saunders, that would be wonderful. And -- but my -- the fact that I plan to write on this, you know, if you all want to moot that, you know, feel free. What I felt like I needed to do was give you all some explanation for where I'm coming from more eloquently than I thought I could do off-the-cuff here today. And while I don't find any of the other plaintiffs' claims to be material, I also thought that I should go through them and explain why.

But if the parties were to reach agreement on a supplemental disclosure that were to cover that period and to let me know about that, that would be fine with me and it would, you know, save what's going to be, you know, some hard work this week for my clerks and me.

MR. NACHBAR: Your Honor, I'm pretty confident that we'll be able to reach agreement, with the guidance that Your Honor has given and some of the statements that the plaintiffs have made as to the type of disclosure they're looking for.

Again, we don't regard any of this as sensitive or earth-moving. We may be proved wrong, but it's -- it's, at least from our standpoint -- it's obviously the company's disclosure -- but it's -- we're not afraid to put facts out there. So my guess is we'll be able to agree on the best way to do that.

THE COURT: Well, let's do this, then: We'll -- we've been working. We'll keep working. We won't burn the midnight oil tonight. But, you know, we'll probably have a late dinner, gentlemen. But then if -- if you all can let us know. I mean, my team and I will be working on this tomorrow and the next day. And certainly if you call us up, call chambers up and talk to Kristie and say where you all are, that's fine.

Again, in terms of where my head is, I'm thinking about, you know, 10 days in the market. I'm thinking about the same time period covered by the background of the merger section. And those are really -- the Morgan Stanley issue is the only one that bothered me, and I felt like the rest of it were things that were adequately explained.

And I should say on the termination

fee, I do think that ultimately I don't think the record, as developed, provides a basis for me to provide any more targeted relief along the lines that I was asking Mr. Nachbar and Mr. Saunders about whether there might be some room for.

So that's -- that's essentially a preview of what you will get sometime later this week.

Yes, sir.

MR. RUSSELLO: Your Honor, the first thing I wanted to note is that, of course, we will make every effort to work out adequate disclosure; but to the extent the Court has any additional guidance, it would certainly be worthwhile for us.

The second is that the 10 days that the Court has in mind presumably would be influenced by the manner in which the disclosures are disseminated to shareholders. In other words, if they're mailed --

THE COURT: I'm not going to require mailing. This is going to be a --

MR. RUSSELLO: Form 8-K, Your Honor?

THE COURT: -- a Form 8-K or supplement. The securities jocks can figure out what has to be required there, but I'm not going to require another mailing.

MR. RUSSELLO: Understood. Thank you, Your Honor.

MR. SAUNDERS: Is the -- I apologize, Your Honor. Can I ask another question?

THE COURT: Yeah. Look, I -- I actually think it's good to get this stuff hashed out, because I could -- I could give you all a decision, let's say, Wednesday night or the first thing Thursday morning and you all could have all these questions. So, please, Mr. Saunders, you're not disturbing me at all.

MR. SAUNDERS: Can we reach agreement on the amount of time as well or --

THE COURT: I think 10 days is where I'm headed. And I think it would be difficult to get me less than that. But I think 10 days is the right amount for something like this. You know, something that might be bigger, like if there really had been some price-oriented stuff in the proxy statement about the projections or that type of thing, I might have erred on the side of 15; but for something like this, I think 10 days is where I'm leaning.

MR. SAUNDERS: Thank you, Your Honor.

THE COURT: All right. And the last thing that I wanted to say to everybody is really just to compliment you on what I thought was a well-presented case and particularly for those of you who aren't in front of me often. You may be wondering well, does he say that to everybody. And I don't. We -- you know, we have a culture where everybody gets a trophy, but I don't believe in everybody gets a trophy. I believe that when you do something good, you ought to be told you do something good. And when you do something less good, you ought to be told you do something less good so that you can do better next time.

And there are three things that I really thought were well-done in this case. First of all, as I said before at the scheduling conference, I very much appreciated the responsible approach Mr. Saunders and Mr. Nachbar took to scheduling. I had concern that we were going to be jammed. And so I was very glad to know that they had already undertaken to start the process of making sure this case was presented responsibly.

The second thing that I thought was well-done were depositions. I read the depositions and I didn't see any type of, you know, obstructionist objections. The objections were minimal. I think, you know, the only, frankly, eyebrow-raising moment I had was the pound sand answer; but people seemed to drive on over that. Maybe if you called me, I would have said "Look, you know, I get to decide and you can caveat it however you want." But, you know, in terms of fights among counsel, there weren't any. And I think that's a very important part of Delaware practice, that people handle themselves appropriately at deposition. And it was clearly done in this case. And so I appreciate that.

And then, finally, I did think that in terms of the briefing, while I empathize with Mr. Saunders and I agree that, you know, you shouldn't be intimating intentional misconduct, I generally thought the briefing was -- was very well-targeted. I thought that the plaintiffs picked their spots. So many times you guys come in and have the laundry list of disclosure issues. And I thought you did a good job here of focusing in on what you really cared about and allowed the defendants to address it.

So, as I say, I thought it was a well-presented case. And I don't say that every time.

And so I appreciated your all's professionalism and hearing the arguments today.

So I will get to work on an opinion. If you guys can alleviate our burden in that regard, certainly just give my chambers a call.

Thank you, everyone.

We stand in recess.

(Court adjourned at 4:53 p.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 114 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 28th day of December 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
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