IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOANNE OLSON, Plaintiff, vs. EV3, INC., COV DELAWARE CORPORATION, JOHN K. BAKEWELL, JEFFREY B. CHILD, RICHARD B. EMMITT, DOUGLAS W. KOHRS, DANIEL J. LEVANGIE, JOHN L. MICLOT, ROBERT J. PALMISANO, THOMAS E. TIMBIE and ELIZABETH H. WEATHERMAN, Defendants.	:	Civil Action No. 5583-VCL

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Via telephone
New Castle County Courthouse
Wilmington, Delaware
Friday, June 25, 2010
2:00 p.m.

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

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ARGUMENT AND RULING ON MOTION TO EXPEDITE

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APPEARANCES:

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MR. HANRAHAN: Good afternoon, Your Honor.

THE COURT: That sounds like Mr. Hanrahan.

MR. HANRAHAN: It is, Your Honor. Also on the phone with me on behalf of plaintiffs are Paul Fioravanti and Kevin Davenport, of Prickett Jones, and Mike Wagner and Dan Albert, of Barroway Topaz.

THE COURT: Okay. Welcome to you. Do we have a court reporter on?

THE COURT REPORTER: Yes, sir.

THE COURT: Great. For the defendants?

MR. DiCAMILLO: Good afternoon, Your Honor. It's Ray DiCamillo, for ev3 and the individual defendants. I have with me from my office Blake Rohrbacher and Margot Alicks. Also on the line is Tariq Mundiya, from Willkie Farr & Gallagher, and Bret Puls, from Oppenheimer Wolff & Donnelly.

THE COURT: All right. All familiar folks to me. Anyone else on the line?

MR. BISSELL: Yes, Your Honor. Rolin Bissell. I'm here with Tammy Mercer, from my office.

We are appearing for COV Delaware Corporation. And also on the line for COV, from Ropes & Gray, Peter Welsh, Martin Crisp and Randy Bodner.

THE COURT: Also familiar folks to me. Old home week, with everyone on the phone.

All right. I will tell you that I have read all of the papers. So I am familiar generally with what we have got here, but Mr. Hanrahan, it's your nickel, so why don't you lead off?

MR. HANRAHAN: Thank you, Your Honor. Thank you for hearing us on a Friday afternoon when you were out of the office. Plaintiff seeks expedited proceedings to enable her to present a preliminary injunction motion based on her specific Delaware-law claims concerning the Top-Up Option and related promissory note. The article defendants cite, that I believe Your Honor is familiar with, confirms there is no definitive decision of this Court concerning the permissible limits of Top-Up Options.

Plaintiffs claims raise important Delaware-law issues concerning the particular Top-Up in this case. The transcript rulings referenced in defendants' memorandum, and the article they cite, did

not consider the implications of the use of a promissory note that will never be repaid as consideration for Top-Up shares. Nor do those rulings consider any claim as to the statutory validity of the option under Sections 152, 153 and 157. Moreover, the ev3 Top-Up Option is not limited to adding a percent or two, but commits the company to issuing up to 186 million new shares, almost tripling the outstanding shares, in exchange for a promissory note whose face amount may substantially exceed the value of the deal, but whose value may be substantially less than the offer price.

The fact that defendants did not even bother to set the terms of the note confirms that the option in this particular case is a sham transaction, where ev3 has agreed to issue up to 186 million shares that will be immediately canceled in exchange for what is merely a promise to make a promise to pay on terms Covidien will specify later, a promise that will never be fulfilled, because the note will never be repaid. Defendants here have conceded plaintiff's claim that such Top-Up shares and promissory notes must be considered as relevant factors in determining fair value in an appraisal. In short, plaintiff's

particularized claims relating to the Top-Up Option and promissory note are far more than colorable.

Moreover, the disclosure claims related to the Top-Up Option promissory note, appraisal, and other matters, are also colorable. A threat of irreparable harm exists because stockholders will be deciding in the next few weeks whether to tender their shares. That assessment will involve a valuation of alternatives, including appraisals. Defendants' misleading and incomplete disclosure concerning the Top-Up Option, promissory note, their potential effect on fair value in an appraisal, will be part of the mix for the stockholders making their tender decisions.

Plaintiff has met the two conditions for scheduling expedited proceedings. The vigorous debate over the claims in the papers on expedition underscores that there are novel and important issues of Delaware law here, that ought to be addressed by this Court. This is particularly true because on Monday some non-Delaware lawyers are going to be debating before a non-Delaware judge in Minnesota whether there should be expedited proceedings there. Given the important Delaware-law issue, plaintiff

submits it would be appropriate for this Delaware court to agree to hear a preliminary injunction in this Delaware case.

THE COURT: I have two questions for you, Mr. Hanrahan. The first is: Who is Ms. Olson?

MR. HANRAHAN: Excuse me?

THE COURT: Your plaintiff, Ms. Olson.

MR. HANRAHAN: She is an individual who is an owner of common stock of ev3.

THE COURT: Is she going to seek appraisal?

MR. HANRAHAN: I don't know, Your Honor, at this point. I think one option that stockholders have is to try to seek relief prior to having to make an appraisal determination, and that's what she has done. I know the defendants say that nobody should be allowed to do anything until after they close their transaction, but Ms. Olson has gone forward to try to get relief, equitable relief, rather than being relegated to a very uncertain appraisal remedy. The defendants concede that if the Top-Up Option is issued and -- exercised and shares are issued and a note given, that that is going to be part of the mix in appraisal.

Well, how does a reasonable stockholder assess the viability of an appraisal remedy when you are told that there is this option out there? Now, they are not told all the information, including a lot of the information that is raised in the defendants' papers, about how many shares may be issued, how many authorized shares there are, the fact that the issuance of shares and the note would be relevant factors in an appraisal. Their partial disclosure on appraisal doesn't mention any of that.

I don't believe Ms. Olson has made a determination as yet. We would certainly like to get relief from the Court that doesn't force her to make an appraisal determination based on, you know, essentially being told, "Well, you can either seek appraisal, with all its limitations, plus the added uncertainty of the effect of the Top-Up shares and note" -- and that's why we are here seeking relief.

THE COURT: Second question: You said in your letter, your reply letter, that because of margin regulations, a note likely cannot be secured by the ev3 shares COV will purchase in the tender offer. Tell me more about the margin regulations.

MR. HANRAHAN: Well, Your Honor, I

don't pretend to be an expert on those. And in fact --

THE COURT: I'm not, either.

MR. HANRAHAN: There are people on the call who are.

THE COURT: I'm not an expert on them, either. That's why I was asking. I was curious.

MR. HANRAHAN: The promissory notes in Top-Up Option situations are generally unsecured, and I have inquired in other matters of people who are knowledgeable, and I have been told that no, you can't secure it with the shares that are purchased in the tender offer, because margin requirements -- I have looked at the regulations. That appears to be what they -- the implications of them, although I can't say that I am an expert in that regard. But certainly, we haven't heard anything from the defendants that says, "Oh, we will secure the obligation with the shares."

THE COURT: I'm pretty confident it's unsecured. I was curious about the margin regulations. It's not something that I'm very knowledgeable about. Anybody else have -- on the plaintiff's side have any further thoughts on the margin regulation?

MR. HANRAHAN: Your Honor, I think it's Regulation U that I think is the -- my recollection is, and we can certainly provide that to the Court.

THE COURT: All right. We will see if that is necessary, but I appreciate that, because it was something that when I read, you know -- it was something I wondered about.

All right. Who is going to speak, Mr. DiCamillo, from your team?

MR. DiCAMILLO: Your Honor, Mr. DiCamillo. It will be me. Some people may jump in to the extent there are issues involving the Minnesota litigation, or any other questions Your Honor may have, but I will give the main presentation.

Your Honor, in this case plaintiffs have filed a 34-page complaint, 24-page motion to expedite and, just a short while ago, a 12-page reply letter. There are a lot of issues raised in those 70 pages, but what is remarkable is, I think more, what is not in those pages.

There is not one attack on the price of this deal in anything the plaintiff has filed. There is also no challenge to any of the -- any

alleged deal-protection measures. There is no allegation that any of the ev3 directors had any relationship with Covidien, or anybody on the Covidien side. So from those omissions -- and I think this is maybe where Your Honor was going with your question to Mr. Hanrahan about whether Ms. Olson is going to file appraisal. I think we can conclude that at least this plaintiff thinks this is a good deal and that there is no impediment to anybody coming in and offering a better deal, to the extent there is a better deal to be had.

But for some reason, this plaintiff is asking Your Honor and this Court and defendants to engage in expensive and burdensome expedited proceedings over the next couple of weeks, and potentially is asking the Court to stop the deal. And what makes this request even more curious is that the reason they want Your Honor to stop the deal is because of an existence -- the existence of a feature whose sole purpose is to put money into the hands of the stockholders quicker, to get the deal closed quick, so stockholders can get their money quick and don't have to wait for a long-form merger to go through.

This is a $2.6 billion deal, with a third party, at a significant premium. Not even this plaintiff has asserted a claim that this is a bad deal. And none of the claims that they have asserted are colorable, and certainly none of the claims that they have asserted give rise to irreparable injury. Accordingly, the motion to expedite should be denied.

Now, I won't belabor the things that we have put in our opposition, but I do want to make a few points. First and foremost, this entire claim is speculative and unripe. There are a number of things about the Top-Up Option that we don't know now, and that we can't know and will not know prior to the closing of the tender offer.

We don't know whether it's going to be exercised. If it is exercised, we don't know how many shares are going to be issued. We don't know if any stockholder will perfect their appraisal rights. The rational inference, since this plaintiff hasn't challenged the deal price, is that at least this plaintiff will not exercise her appraisal rights. We don't know if the fair value of a share of ev3 common stock is 22.50, more than 22.50 or less than 22.50. And based on other cases and -- and comments made in

articles about third-party deals, a reasonable inference is that the fair value is probably less than 22.50. If that is true, the issuance of Top-Up shares would be accretive to fair value in an appraisal case.

Also, the Top-Up Option is not coercive. I have not seen in plaintiff's papers or in anything we have heard today any cogent explanation of why a stockholder who was thinking about exercising appraisal would be coerced into tendering by the mere existence of a Top-Up Option. They don't have to make that decision right now. They can wait until the appraisal notice comes out, and if at that time -- at that time, they will know if the Top-Up has been exercised or not, how many shares were issued, and at that point they can decide whether or not to demand appraisal. And they have got 60 days after that to change their mind. So there is no real harm there.

And one thing that I think plaintiffs tend to lose sight of is that none of this becomes an issue at all unless 73 percent -- slightly over 73 percent of the stock is tendered. Now, plaintiffs make a big deal out of the fact that Warburg is a controlling stockholder. That is not true. Warburg is not a controlling stockholder. Warburg owns

24 percent of the stock. The directors and officers own a small percentage, less than 2 percent more. So it takes, to get to this 73 percent threshold -- it's going to take about 50 percent of the rest of the stock to tender. Otherwise, this option will never be exercised.

They make a lot of arguments about statutory invalidity, but again, they hinge -- they seem to hinge on the fact that the board did not do something that they should have done, that the board didn't fix the consideration. The board did fix the consideration. The consideration is the offer price, 22.50 per share. And if and when this Top-Up Option ever gets exercised, if there is going to be a note, then the board is going to have a chance to review the terms of the note and will make a decision with respect to the consideration then.

The disclosure claims, I think it's fair to say that none of them are colorable. The ones about the Top-Up and the appraisal, they are speculative and unknowable for the same reasons that we talked about before, so I won't go into that again.

The other claims that they make, they ask for more on the negotiating process. I don't know

what more they want. It's all there, pages 18 to 25 of the 14D-9. They haven't really identified anything that is missing.

With respect to the financial advisors, the roles of JPMorgan and Piper Jaffray are extensively described in the 14D-9. Pages 30 to 36 describe JPMorgan's role, describes the past relationships that JPMorgan had with both ev3 and Covidien. The fee is disclosed on page 35. How much it was paid by Covidien in the past two years is disclosed on page 48. Similar issues -- similar disclosure with respect to Piper Jaffray. There -- pages 36 to 46 of the 14D-9, their opinion is described, the past relationships with both ev3 and Covidien are described, the fee is described, the fact that they have done no work for Covidien in the past two years is described. So it's all there. There is nothing that's been identified that is missing or misleading from the disclosure document.

Let me back up and make one more point about the Top-Up. They say we have got to disclose it. It's not clear what they want us to disclose and what we could disclose, because we don't know these things. We don't know if it will be exercised. We

don't know, if it's exercised, how many shares will be issued. We don't know what effect, if any, it will have on an appraisal case. So it's not clear to me what we could say about the Top-Up Option that we haven't said, that would not be misleading.

And Mr. Hanrahan said a couple of times that we conceded that it will have an effect on an appraisal case. We have not. It might, but that is for the Court in the appraisal case to decide. We think the Court would have -- to the extent Top-Up shares were issued, we think the Court would have the power to ignore those shares, if it wanted to, or find some other way to factor them out, if the Court thought it was appropriate. As we said before, if the fair value turns out to be less than 22.50, plaintiffs don't want those shares factored out, because it's going to help them in their appraisal case.

We have made a couple of points in our papers about delay, Your Honor. This deal was announced on June 1st. The merger agreement, which had everything you needed to know about the Top-Up option in there, was publicly disclosed at that time. Tender offer commenced on June 11th. The complaint wasn't filed until June 18th. They didn't really seek

to engage this Court until their brief was filed on June 23rd. And the document request was just filed yesterday, on June 24th. So a lot of time that could have been used litigating this matter has already been used up. For all of those reasons, we think that the Court should deny the motion to expedite. There is nothing colorable here. And to the extent there is, there is nothing that can't be dealt with after the fact.

THE COURT: Mr. DiCamillo, on the "we don't know what to disclose" point, why can't you say things along the same lines that you do with the potential delisting of shares? In other words, you could say something about the Top-Up Option like if the front end of the merger closes with -- if the front end of the tender offer closes with 75 percent shares, then along the same lines that you have described in neutral terms, as opposed to threatening terms, the potential delisting of shares.

MR. DiCAMILLO: I think the delisting is an easier thing to deal with, Your Honor. You can say if something happens, we may be delisted. It's kind of an either/or. With respect to this issue, there are so many variables -- I suppose you could say

the Top-Up Option may have some effect on an appraisal proceeding, and people should think about that. I don't know that that is particularly meaningful. I don't think it's meaningful and certainly don't think it's material. But you really would have to -- to raise all the issues that plaintiffs say you have to raise, you have to -- there would have to be a series of hypotheticals. "This might happen. And if this might happen, the following three things might happen, as well. But they might not, because all that is going to hinge on whether or not the Court can do this, what the Court decides with respect to fair value, how many shares are exercised."

To me, it's not as simple as the delisting example that Your Honor raised. It is going to result in a series of hypotheticals upon hypotheticals, that are going to do nothing but confuse the stockholders.

THE COURT: Second question: It didn't seem to me from the complaint or from my perusal of the scheduled TO and D9, that there had been any disparate consideration offered to Warburg. Looked like they were just getting what the stockholders were getting, and their director

designees were just getting what they would get otherwise. But you and your team are far more immersed in these matters than I. Is there any disparate consideration, in any form, going to Warburg or its designees?

MR. DiCAMILLO: There is no disparate consideration going to Warburg or its designees, Your Honor. Warburg is going to get the 22.50 per share that every other stockholder is going to get, and that's one of the reasons that this transaction is not an entire fairness case, because Your Honor recognized in CNX -- one, it's not a situation where there is a controlling stockholder at all. But certainly, it's not a situation where Warburg stands on both sides of the transaction. This is a third-party, arm's-length deal, in a situation where a significant but noncontrolling stockholder is getting the same consideration as the public.

THE COURT: Thank you, Mr. DiCamillo.

Mr. Bissell, I appreciated you not piling on in terms of your briefing, but if there is anything you would like to add now, this is your chance.

MR. BISSELL: Thank you, very much,

Your Honor, but no. I think Mr. DiCamillo has covered it well.

THE COURT: Mr. Hanrahan, any reply?

MR. HANRAHAN: Yes, Your Honor.

My friend, Mr. DiCamillo, first starts out by, I guess, advising us we should have filed some different claims. But these are the claims that have been filed. We do raise considerations as to price in paragraphs 69 to 71. You are always in a position where if you focus on price in connection with a preliminary injunction application, then the defendants simply say, "It's a price case, and damages are an adequate remedy."

We do raise issues about price, and that is something that would be explored at trial, because, you know, one of the things that is interesting, they say, "Well, we have got to get 73 percent." Well, you know, I recall, for example, with Section 203, that the level was set at 85 percent because it was felt that was the level that was necessary to ensure that there was a full and fair offer, and that 80 percent, or 75 percent wouldn't be sufficient.

So is this the best offer possible?

We are not convinced. There was only, apparently, one bidder. They did not pursue financial buyers. And so that is not the focus of our injunctive application, but we're by no means conceding that issue.

Mr. DiCamillo concedes that the sole purpose of the Top-Up Option is to allow for the cash-out of the minority after the tender offer closes.

Now, he says that they can't disclose things they don't know, but as I think Your Honor pointed some out, there are things that they do know, that they have asserted to the Court, that they didn't disclose, such as authorized shares, the number of shares that may be issuable pursuant to the Top-Up Option, the fact that -- now they seem to be waffling. We understood from their letter memorandum that they agreed that the Top-Up shares and note would be considered in an appraisal. I guess they are now revisiting that. But certainly, at least the fact that they might be considered ought to have been disclosed.

They made other disclosure regarding appraisal, about, "Well, you should know that investment banking opinions aren't, you know, determinative of fair value in an appraisal," and so

on. Well, once you start down that road and you have made disclosure about the Top-Up Option, you have got to give a full and fair summary. They haven't done that. They say, "Oh, the Top-Up Option would require 73 percent of the shares be tendered." They don't say that in their disclosure documents. They say it would require 50 percent of the stock other than that held by Warburg. They don't say that, either. There is a lot they could have disclosed, and they didn't. And what they have done is to give a very misleading and incomplete description.

Now, Mr. DiCamillo again repeats what is in their papers; that is, "Well, it's likely that the issuance of the Top-Up shares would be accretive to value." Well, there is a very important assumption there. They are assuming that the note that would be given -- and they haven't made any response showing that they are going to pay $3.9 billion, or so, in cash for the Top-Up shares, rather than a note. Obviously, they are going to use the note.

They haven't focused on, "Well, what if that note is worth a lot less than 22.50 a share," as it might well be, because we don't know anything about the interest rate. We don't know anything about

the repayment term. It's probably going to be unsecured. It's probably not going to be negotiable or transferable. So it is quite likely that this note would have a value of substantially less. And when you are talking about, as has happened in recent Top-Up mergers, issuing 100 percent, or even 200 percent, of the existing outstanding shares, it's going to have a huge impact, and it very well may not be at all accretive. And so the idea of, "Well, unless the merger -- unless the fair value is greater than 22.50, it won't be affected," oh, yes, it might. What if the fair value of the note is 17.50 a share? What is the effect then?

The idea that somehow stockholders can wait, make a decision later -- they have got to make a decision on whether to tender now. And one of the options that has been raised in defendants' disclosure documents is appraisal. And so they need the information now. The fact that, "Well, if you wait and wait and wait, maybe you will get some more information," well, of course, anybody who tenders isn't going to get any more information. And they have got to make that assessment now. And if you are faced with a Top-Up Option that can be paid for with a

note that you don't even know what the terms are, then how do you assess how that might affect your rights in an appraisal?

Another issue that the defendants are trying to get -- of many, that defendants are trying to get the Court to decide on a motion to expedite -- Mr. DiCamillo says Warburg is not a controlling stockholder. Well, they have been the controlling stockholder of this company since it went public. Yes, they have reduced their share ownership, but every single director is affiliated with Warburg. And the determination of controlling stockholder is a factually intense issue. It's not the kind of thing that the Court can now say, "Warburg is not..." -- and is Warburg getting disparate consideration? No. But, you know, Warburg, they are looking for an exit strategy. Their agenda may be very different. And they control the board. And if they want to sell their shares, that is one thing. But essentially, they have locked up a deal where the other stockholders are forced to sell because Warburg wants to sell at this time.

Mr. DiCamillo, I think, made a very interesting concession, and that is, "Well, the board

will review the consideration and determine the consideration when the option is exercised." Well, if that's the case, then there is no option. It's invalid, because the statute is clear, the case law is clear. You have got to determine the consideration at the time you make the contractual commitment to issue the shares. And he said, "Well, don't worry about it. We are going to do that sometime down the road, maybe." He said, "The board will review it." That is not the same as being able to negotiate it. That is not the same as determining it. And they are going to review it when, after Covidien already controls the company?

So I think, you know, they essentially conceded that this option is invalid.

THE COURT: Think how much easier that would make it to adopt a rights plan. You wouldn't even have to set the exercise price. You could just say, "We are going to do it in the future." It would simplify things so much.

MR. HANRAHAN: Yeah, but simple isn't always better. And in terms of, well, the Court could always fix it in an appraisal, I think our case law is pretty clear; the Court is not free to rewrite Section

262. I think the article they frequently cite makes that very point, and we think it's correct, and we have specifically alleged that.

The problem that they have is they have come up with this manipulative device to try to bridge the gap between the tender offer that may not be sufficiently strong to garner 90 percent, or close to 90 percent, participation and doing a short-form merger. And so they have come up with this massive option, that enables them to do that, but the problem is it impairs the stockholders' appraisal rights, and they can't fix that.

They either have to do something that neutralizes that effect by -- for example, like the case they keep citing with Vice Chancellor Lamb. There, the Top-Up, you had to have 88 percent. That is still a lot of shares. That is 20 percent of the outstanding you would need to raise it two percent. But it isn't like here, where it's 15 percent, and you are talking about raising the outstanding stock by a factor of 150 percent more than the currently outstanding shares.

So, Your Honor, I think -- we can discuss the laches issue. I mean, we --

THE COURT: You don't need to. You don't need to.

Remind me. Are they paying the par value in cash, or is it notes for the whole thing?

MR. HANRAHAN: They don't say, Your Honor. They say it can be cash or, at the option of Covidien, a note.

THE COURT: Okay.

MR. HANRAHAN: I think defendants make the point in their papers that, well, the par value would be 1.1 million, or something like that. So the par value -- the cash portion, if they paid the par value in cash, would be minimal.

THE COURT: What is your reason for thinking that Warburg wants an exit that would affect the incentives?

MR. HANRAHAN: Your Honor, they have been in this company since 2002. I think it went public in 2005. I think we have alleged five years is a usual horizon. Now, we haven't had the opportunity, obviously, to take discovery of Warburg as to their specific motivations, and they are not disclosed in the disclosure documents.

THE COURT: Okay. All right. Well,

thank you, everyone. That is -- very helpful presentations. I appreciate everyone's time and everyone getting on the phone.

I am going to expedite this in part. And let me tell you why. First of all, I note this is an arm's-length deal. It's a third-party transaction. Although there are price-related claims in the complaint, I find them to be particularly unimpressive. There aren't really meaningful attacks on the process. The lead attack is the financial buyers weren't targeted. For reasons Vice Chancellor Lamb explained, that is a logical thing to do when you have a financial buyer selling, and it's also not inherently problematic from a conflicts perspective, because strategics are the ones who are likely to replace the incumbent management team. The decision to pursue only strategics is not suspicion raising to the same degree as a decision to pursue only financial buyers.

But more importantly, we do have here a dominant stockholder. Whether they are controlling or not, I won't tread on, but certainly a dominant stockholder with a large block, who is getting the same consideration as the rest of the stockholders.

It isn't a situation, at least as alleged in the complaint and from my review of the transaction, where there is an allocation issue between the dominant stockholder and other stockholders, or some other form of disparate consideration that might affect the dominant stockholder and put them on both sides of the transaction.

So this is a situation where at least as to the deal price, there isn't a lot of reason for a court to be suspicious and a lot of reason to merit any type of expedited preliminary injunction proceeding.

I'm also unimpressed with the disclosure claims. They are not really pressed with the vigor that plaintiffs who have meaningful disclosure claims usually raise. By "disclosure claims," I'm now excluding claims about the Top-Up Option. I'm talking only about the Piper Jaffray role and the deal process claims. They are things that are quibbles around the edges, and I don't see any reason to permit expedited proceedings on those.

But this brings me to the core of the application for expedited relief, which is based upon the Top-Up Option. It's based upon the Top-Up Option

both in terms of the validity of the option issuance on the facts of this case -- i.e., did the board of the target corporation, ev3, get it right when they put out the corporate documents and issued the option. It's also based on a theory of coercion, both in the Top-Up Option itself and also in the form of appraisal dilution.

The appraisal dilution concept was not addressed by Vice Chancellor Lamb in his Prima Energy transcript. It seemed at that point the plaintiffs were really just advancing a Blasius-style claim about a deprivation of vote, and everyone assumed there wouldn't be any impact on the appraisal process. So the appraisal dilution claim wasn't addressed there, it wasn't addressed in Gateway, you know, and it is something that is -- all these issues are things that are unsettled in our law. They are open questions. And they are things that I think that it is important for our law to address.

It is an intellectually interesting argument as to whether this ruling is -- whether this deal structure is coercive. The Top-Up Option is designed, as everyone on the phone recognizes, to get money into the hands of the stockholders faster. But

there also is this potential unintended consequence -- because I don't think it's an intended consequence to dilute down appraisal rights, but there is this potential unintended consequence on the appraisal process, and that's what the plaintiffs have focused on here, and that's something that hasn't, as I say, been definitively addressed.

The potential coerciveness of these options, and the potential validity, though, is of significant import. Top-Up options are a relatively recent vintage. And in fact, I think it's thanks to the creativity of Don Bussard and Bill Haubert and Mark Morton, over at Potter, in the deal that underlie the Kohls v. Kenetech decision, that we actually have Top-Up Options. But their use has skyrocketed. I got on the internet to look around a little bit in anticipation of today, and I found at least one deal study that suggests that right now they are running 100 percent of tender offer plus short-form mergers. It, essentially, has increased steadily since about 2000, until now they are almost ubiquitous.

So if there are problems with this deal structure, it's something important that needs to be addressed. And the coercion argument, and the

suggestion that there are things about the Top-Up Option that should be disclosed, even in some type of contingent fashion, are ones that do give rise to a basis to claim irreparable harm and, hence, merit the scheduling of a preliminary injunction hearing.

Now, I will tell you, you have all made reference to this article that Matthew Davis and I wrote back in January of 2009. Those remain my starting views on this, and so people ought to take that into account. That doesn't mean that either side can't push me off them. One of the wonderful things about this job is you find out how wrong you are on so many things. In fact, half the people think you are wrong in pretty much every case. But regardless, Mr. Hanrahan is a very persuasive advocate, and so are Mr. DiCamillo and Mr. Bissell. So no one should come into this thinking that I'm simply going to put a decisional caption on my January 2009 article. But you also shouldn't think that, you know, I just wrote that for no reason, and that the ideas in that article don't have some persuasive force with me.

So the other thing, though, I point out: I am interested in the idea of whether this issue, and how, can be addressed in the form of --

essentially, affix to the appraisal process. Because the easy and obvious solution to this is that these shares and the note just don't get counted in terms of the appraisal proceeding. Now, in -- whether that happens because the parties moot this out by saying in their merger agreement what the number of shares will be, whether this happens because the parties stipulate in this, I don't know. Whether it's something the Court can do, I don't know. But that is something I'm interested in, and I do recall that after the January article went to press, I found an appraisal decision by Vice Chancellor Parsons -- I would bet that Mr. Rohrbacher has already found it -- where he allowed the parties to stipulate to the number of shares in an appraisal proceeding, which to my mind, at least, casts some additional support for that idea being a way out of the coerciveness problem.

But I think it's also -- you know, it's curious whether -- in 225 actions, we are allowed as a court, to address collateral -- you know, issues that relate to the 225 proceeding, as long as they are not so collateral that they are separate and independent. It's not clear to me why in a 262 proceeding you couldn't address some issues relating

to the number of outstanding shares even if you couldn't get the full-blown breach-of-fiduciary-duty-type claims, a la Cavalier Oil or Gentile. It's also not clear to me whether in an appraisal proceeding you couldn't have something along the lines of what the Chancellor did in Caremark/Express Scripts. You guys all remember everyone was up in arms because he said that the stock-for-stock deal in Express Scripts triggered appraisal rights, because they were the dividend that was part of the merger agreement; and that, therefore, was part of the consideration for the merger and triggered appraisal rights.

Well, is the converse of that, then, that something like this, where the Top-Up Option is part of the merger agreement, really is value -- or an aspect of value that is part of the merger and, hence, could be excluded from the appraisal proceeding? I don't know. But these are things that I'm interested in, and that it would be interesting to have you all weigh in on, because I'm letting you know now that they are on my mind.

So, what I want to do, in terms of the hearing, is I want to schedule a hearing for

10:00 a.m. on July 8. I'm sorry that that will devastate people's holiday weekends. Perhaps you guys can work it out so everybody at least takes some time on the 4th with their families. I hope you can. I do think that this is largely a case involving legal issues, as opposed to discovery and fact-specific issues, at least, because I'm only scheduling the Top-Up questions. I think there needs to be some discovery into the validity of the actual option as a 157 matter. There are allegations about that, but there needs to be some discovery into that.

It's, frankly, not clear to me how much more discovery there needs to be. I think people need to approach this with the idea that the scope of discovery should be limited. I was thinking along the lines of this, if the plaintiffs are allowed 10 to 12 hours of deposition time, to whack up however they want, and, you know, the defendants get a deposition of the plaintiff, two hours or so.

I'm not saying you have to do it that way. I think the parties ought to talk about it. But again, I'm letting you know that that is my inclination. So if people want to come in front of me and fight and say either less time is appropriate or

more time is appropriate, you really ought to have a good reason why, because what I'm letting you know now is that that's where my head is in terms of the scope of what I think ought to be necessary for this case.

The other thing I would say in making that determination is that I am influenced somewhat by the timing of this application. I don't think that it's something that should be barred on grounds of laches. I do think that we have a bad habit of getting the plaintiffs coming and going, by saying if you file too early, the defendants get to say it's not yet ripe; and if you wait and file too late, then you have committed laches. So I resist that type of laches analysis. But I do think that this was a little bit delayed in terms of a move forward, and that has to figure in, into the scope of what plaintiffs are allowed to inquire into.

And so that's my guidance on those things. Again, I'm not ruling out Mr. Hanrahan's ability to come in and say that he needs to follow up on X, Y and Z. And so the defendants are to take that into account if Mr. Hanrahan makes a reasonable request. But it needs to be something that makes sense, because this does seem to me to be a fairly

targeted and focused application, and should be treated that way, and what I don't want is this to be some type of nuclear war. And hopefully, the narrowness of it will actually allow you to spend at least an hour or two at the barbecue with your families.

The other thing I would say is I do want the last brief on July 7th at noon. So the hearing is July 8th at 10:00 a.m. I want the last brief July 7th, at noon. You all should be able to work back from there, particularly with the caliber of these people on the phone. As I say, I think I know pretty much everyone personally. I know you all know how these things work. But if for some reason you do have disputes, certainly, this is an expedited case, and so it goes to the top of my queue, and if you all need to reach me, you know where to find me.

So with that, I think if the parties want to work out a scheduling order, I think it's usually helpful, particularly helpful to me, to find out when the briefs are coming in, so I can budget my time accordingly. I would like people the work out a scheduling order that at least puts in the dates of briefing. But I will leave that to you. Again, the

key date for me is I want the last brief July 7th, at noon.

Is there anything else that I can help people with this morning, in terms of giving guidance going forward?

MR. HANRAHAN: Thank you, Your Honor.

MR. DiCAMILLO: Thank you, Your Honor.

THE COURT: All right. Well, you all now have to go off and start working, so I will let you get to it. Please have a good day.

MR. HANRAHAN: Thank you.

MR. DiCAMILLO: Thank you, Your Honor.

(Recess at this time.)

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CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 38 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 26th day of June, 2010.

/s/William J. Dawson
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 187-PS
Expiration: Permanent