IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BEA SYSTEMS, INC. : Consolidated
SHAREHOLDER LITIGATION : Civil Action No. 3298-VCL

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, March 26, 2008
1:37 p.m.

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BEFORE: HON. STEPHEN P. LAMB, Vice Chancellor.

- - -

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

CHANCERY COURT REPORTERS
New Castle County Courthouse
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1 APPEARANCES:

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3 MARCUS E. MONTEJO, ESQ.
Prickett, Jones & Elliott, P.A.
4 -and-
EMILY C. KOMLOSSY, ESQ.
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7
MARTIN J. LESSNER, ESQ.
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Young, Conaway, Stargatt & Taylor LLP
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WILLIAM SAVITT, ESQ.
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MICHAEL GERBER, ESQ.
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14 for Defendants

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1 THE COURT: Good afternoon,
2 Mr. Fioravanti.
3 MR. FIORAVANTI: Good afternoon, Your
4 Honor.
5 For purposes of introduction, seated
6 with me at counsel table today are Mr. Shane Rowley
7 and Ms. Emily Komlossy from the Faruqi firm --
8 THE COURT: Good afternoon.
9 MR. FIORAVANTI: -- plaintiffs'
10 co-lead counsel. Back counsel table, Mr. Marcus
11 Montejo from my office. Your Honor knows Ms. Herbert
12 from my office. Seated in the front row in the back
13 is Glenn Freedman, who is the president and CEO of
14 plaintiff L.I.S.T., Inc.
15 Mr. Lessner wants to make some
16 introductions.
17 THE COURT: Oh.
18 MR. LESSNER: If you wish, Your Honor.
19 Otherwise I can make introductions later.
20 THE COURT: No; that -- that's fine.
21 I did have a question, Mr. Fioravanti.
22 I noticed this afternoon that a notice of withdrawal
23 had been filed by Mr. Rigrodsky's firm?
24 MR. FIORAVANTI: That's correct, Your

1 Honor.
2 THE COURT: What was it that prompted
3 that?
4 MR. FIORAVANTI: I do not know that,
5 Your Honor. My -- I attempted to inquire and was
6 unable to get a response. But it -- in light of the
7 fast-moving events in this case and getting prepared
8 for a preliminary injunction hearing, I took it on
9 face value based on the -- the motion for withdrawal
10 that there was Delaware counsel in the case, that we
11 were prepared to move forward.
12 I can represent to Your Honor that
13 there was not substantive work done by the Rigrodsky
14 firm as far as litigating the preliminary injunction
15 hearing as far as depositions and drafting, things
16 along those lines.
17 THE COURT: Which complaint had they
18 filed?
19 MR. FIORAVANTI: They were local
20 counsel for both the Freedman complaint as well as the
21 Blaz complaint.
22 THE COURT: All right. And both of
23 those were filed by Mr. Rowley's firm?
24 MR. ROWLEY: By the Faruqi firm and

1 the Brower Piven firm, Your Honor.
2 THE COURT: All right. Thank you.
3 Mr. Lessner.
4 MR. LESSNER: Good afternoon, Your
5 Honor. On behalf of BEA Systems, I'd like to
6 introduce at counsel table, we have Bill Savitt from
7 Wachtell Lipton, Adam Gogolak, Michael Gerber, Ellaine
8 Golin, and Christian Wright from Young Conaway. And
9 Mr. Savitt will be making the argument on behalf of
10 defendants.
11 THE COURT: Thank you.
12 Good afternoon, everyone.
13 MR. FIORAVANTI: May it please the
14 Court. Your Honor, the issues are set forth and are
15 covered in our briefs. I want to focus today's
16 argument on additional points that the Court might
17 want to consider in connection with the preliminary
18 injunction motion. We obviously are not waiving our
19 other arguments, and we rely on our briefs for those
20 issues to the extent that I don't address them here
21 today. Of course, I'm prepared to respond to any
22 questions that Your Honor may have.
23 Your Honor, this is an unusual case.
24 In this case we have a short-term stockholder

1 negotiating the final merger price with the threat of
2 litigation and a proxy contest. It's not just any
3 stockholder. It's Carl Icahn. The defendants claim
4 it's not unusual to have a majority stockholder in the
5 role of negotiating a merger.
6 THE COURT: You said "majority
7 stockholder"?
8 MR. FIORAVANTI: Yes, Your Honor. The
9 cases that the defendants relied on in their brief --
10 THE COURT: All right. You're not
11 equating Mr. Icahn to a majority shareholder.
12 MR. FIORAVANTI: Exactly not.
13 THE COURT: You're saying they do.
14 All right.
15 MR. FIORAVANTI: My point, Your Honor,
16 is that we're not in the situation that the defendants
17 cite in their cases where there's either a director
18 who is also a controlling stockholder in a case
19 negotiating a merger.
20 In short, in the cases that the
21 defendants rely, the person negotiating the merger is
22 a fiduciary, whether it's a director or controlling
23 stockholder holding more than 50 percent of the
24 company. And in the cases that the defendants cite,

1 the situation was with -- the two situations where
2 there were controlling stockholders, they owned over
3 70 percent of the stock, I believe.
4 We don't have a situation here with a
5 fiduciary negotiating a merger price. We have Mr.
6 Icahn negotiating the merger price. He didn't own a
7 controlling interest in BEA. He certainly was not a
8 director.
9 There's little substantive disclosure
10 about Mr. Icahn's role in the merger negotiations
11 contained in the proxy statement. In fact, his role
12 was significant and material. It's detailed in our
13 briefs, but here are some of the more important points
14 that are misleading in the proxy statement: Mr. Icahn
15 sends a letter to the board on November 19th
16 threatening litigation for breach of fiduciary duty,
17 not unlike the original complaints filed in this
18 action. He accused the board of adopting an
19 entrenching severance plan and threatening the board
20 with personal liability. And that is PX-47.
21 That letter was not disclosed. In
22 fact, Mr. Icahn and BEA have designated it
23 confidential for reasons that they have been unable to
24 explain.

1 The proxy statement discloses that
2 Mr. Icahn's Section 211 litigation was settled in this
3 Court on December 20th, and that BEA had agreed on
4 extending the annual meeting date, record date, and
5 the nomination deadline.
6 The next paragraph in the proxy
7 statement says that BEA sent draft sections of the
8 merger agreement to Oracle's counsel and that BEA
9 proposed a reverse termination fee of 10 percent. And
10 that's at PX-1, page 25.
11 The proxy statement fails to disclose
12 how these two events were related. Mr. Icahn
13 testified that he agreed to an extension of the annual
14 meeting date because BEA had finally put on the table
15 a reverse termination fee amount. And that's at
16 Mr. Icahn's deposition at pages 41 and 42.
17 The proxy statement doesn't connect
18 these two events, which are part of the overall
19 failure to disclose Mr. Icahn's role in the merger
20 negotiations.
21 Mr. Icahn's negotiation of the final
22 merger price is material. The proxy statement merely
23 states that Icahn told Goldman on January 11th that
24 Oracle would pay 19.37 1/2 and that Icahn would

1 support it.
2 THE COURT: Let me -- some of these
3 things you're telling me you learned, as I understand
4 it, in Mr. Icahn's deposition; is that correct?
5 MR. FIORAVANTI: That's correct, Your
6 Honor.
7 THE COURT: And what evidence is there
8 that the people preparing the proxy statement or who
9 were responsible for preparing the proxy statement
10 knew --
11 MR. FIORAVANTI: Mr. --
12 THE COURT: -- for example, that Mr.
13 Icahn connected the willingness to pay a reverse
14 break-up fee with his decision to settle the 211 case?
15 Is there evidence that -- that someone in management
16 knew that?
17 MR. FIORAVANTI: Mr. Icahn testified
18 that there -- in his deposition about the issue of the
19 reverse termination fee. And when he finally
20 disclosed to Oracle that he had agreed to settle his
21 action, Oracle was furious. So the suggestion that
22 BEA didn't know that Icahn had agreed to a
23 settlement --
24 THE COURT: It's not a suggestion.

1 It's a question. Is there some evidence that BEA did
2 know? You're the one who took the discovery.
3 MR. FIORAVANTI: Other than
4 Mr. Icahn's deposition, no.
5 THE COURT: Well -- and you just made
6 the point that Mr. Icahn isn't a fiduciary. So the
7 proxy material is not his responsibility.
8 MR. FIORAVANTI: No. But certainly
9 Oracle -- or BEA knew the events that had been going
10 on with respect to his litigation and with respect to
11 the proposal of the reverse termination fee.
12 THE COURT: And they disclosed the
13 things that they -- that, so far as you know, all they
14 knew in two paragraphs that follow each other.
15 Now, you want -- what you want them to
16 disclose is some connection between the two that you
17 learned from -- about what Mr. Icahn put together.
18 And my question to you is simply, is there evidence
19 that supported -- would support any inference that
20 the -- it was a breach of fiduciary duty for the
21 directors to fail to include in their -- in their
22 proxy material a statement about how Mr. Icahn
23 connected two things?
24 MR. FIORAVANTI: Well, they certainly

1 settled the litigation with Mr. Icahn.
2 THE COURT: Which they say.
3 MR. FIORAVANTI: That's correct. And
4 I can go back and -- and look, Your Honor, at the
5 testimony from Mr. Icahn, but I think it was a little
6 bit more detailed.
7 THE COURT: Well --
8 MR. FIORAVANTI: But --
9 THE COURT: -- was there any testimony
10 from anyone at the company on this point?
11 MR. FIORAVANTI: No, Your Honor. Mr.
12 Icahn was the last witness who was deposed as far as
13 defense witnesses, and we just didn't get a chance
14 to -- we didn't have the opportunity to --
15 THE COURT: Well, but you understand
16 my point, don't you?
17 MR. FIORAVANTI: I do.
18 THE COURT: He isn't responsible for
19 disclosing what you learned from Mr. Icahn in his
20 deposition. That's not a fiduciary duty violation.
21 MR. FIORAVANTI: Understand. But
22 there are other points, Your Honor, with respect to
23 the negotiation of the merger price that they did
24 know. And Mr. Icahn testified that they did know.

1 THE COURT: Well, let's focus on
2 those.
3 MR. FIORAVANTI: Okay. The proxy
4 statement fails to disclose that Icahn told BEA that
5 he had made a deal with Oracle, that he would support
6 Oracle in a proxy fight if BEA rejected 19.37 1/2.
7 And that's at his deposition at page 89.
8 THE COURT: Well, all right. I looked
9 at his deposition and what is it you draw from 87 -- I
10 mean, 88-89?
11 MR. FIORAVANTI: "... Oracle now knew
12 that I'm supporting 19 and three-eighths, so they
13 didn't care, you couldn't go back to them anymore, and
14 I said I'm not going to back to them and try to
15 renegotiate."
16 THE COURT: He said, "I said I made a
17 deal with them, I'm sticking with it."
18 MR. FIORAVANTI: That's correct.
19 THE COURT: Now, what is it I'm
20 supposed to draw from that?
21 MR. FIORAVANTI: Your Honor, that he
22 had told BEA that he had made a deal with Oracle.
23 THE COURT: Speak -- in negotiating on
24 behalf of BEA or that he, Carl Icahn, got BEA or

1 Oracle to offer 19 and 3/8?
2 MR. FIORAVANTI: And he --
3 THE COURT: And he thought -- he had
4 told Oracle that that was a price that was acceptable
5 to him.
6 MR. FIORAVANTI: Correct. And he
7 said -- he -- he told BEA that "... I'm not going back
8 ... again." "... I told Oracle I support 19 and
9 three-eighths," and "I'm not going to change my view
10 on that ..."
11 THE COURT: So -- but does that mean
12 that BEA was bludgeoned into accepting 19 and 3/8, as
13 you suggest?
14 MR. FIORAVANTI: Yes.
15 THE COURT: They were threatened
16 somehow? What was the --
17 MR. FIORAVANTI: Yes. And, in fact,
18 he said -- he said it was a threat
19 THE COURT: Where?
20 MR. FIORAVANTI: Page 80.
21 THE COURT: What does he say?
22 MR. FIORAVANTI: "So what happened was
23 ... I would tell BEA at that point I have been" --
24 THE COURT: I'm sorry. What line are

1 you on?
2 MR. FIORAVANTI: 6. "I would tell BEA
3 at that point I've been with you up until now, but
4 basically if you don't do this, then I'm telling
5 Oracle, you know, what I told Oracle was I don't think
6 I could ever deliver it, but I'm going to tell you
7 something, you know, if we can get somewhere between
8 19 and 20, the shareholders are going to go for it and
9 I'm [just] going to ... go into the proxy mode again
10 ... I don't think I really needed to threaten them."
11 Those were Mr. Icahn's words.
12 Pardon me, Your Honor.
13 THE COURT: And you read this as
14 things he told BEA.
15 MR. FIORAVANTI: Yes.
16 THE COURT: Even though right in the
17 middle he starts talking about what he told Oracle.
18 MR. FIORAVANTI: Well, there was no
19 need to threaten Oracle.
20 THE COURT: I don't -- there may not
21 be a need to threaten them. And he says at the end "I
22 didn't" -- "I don't really think I needed to threaten
23 them."
24 MR. FIORAVANTI: But he did. He said

1 he was going to go back into proxy mode. There was no
2 need for him to tell Oracle --
3 THE COURT: Was this after the 19 and
4 3/8 was arrived at?
5 MR. FIORAVANTI: No. This was during
6 the day of those negotiations, Your Honor. The
7 minutes of the meeting of the 11th made clear that he
8 told Goldman, which was reflected to the board, that
9 he would reconsider his options.
10 On page 89, Mr. Icahn said "... I made
11 a deal with them, I'm sticking with it."
12 THE COURT: Which means "I'm not" --
13 "I'm not going back to them." That's what it says;
14 right?
15 MR. FIORAVANTI: Right. He made a
16 deal with Oracle, and he wasn't going back to them.
17 THE COURT: "So don't expect me to go
18 back and try to get more than 19 and 3/8."
19 MR. FIORAVANTI: Right, because he had
20 made a deal with Oracle that that's what he was going
21 to support. That's not reflected in the proxy
22 statement.
23 THE COURT: He agreed with Oracle.
24 Now, what is it reflected in the proxy statement?

1 MR. FIORAVANTI: All the proxy
2 statement says, Your Honor --
3 THE COURT: The words that are
4 missing, in your view, are that even though he told
5 them he arrived at 19 and 3/8 and it was a price that
6 he was prepared to support and he was prepared to give
7 a -- a written voting agreement in favor of, they
8 didn't put in here that he had made a deal with
9 Oracle?
10 MR. FIORAVANTI: That he had told BEA
11 that he made a deal with Oracle and that he had
12 threatened to go into proxy mode again. And the
13 circumstances are such that the deadline for
14 nominating directors is about 11 days away. So that's
15 the context here with Mr. Icahn's testimony of what he
16 told BEA with respect to the negotiations.
17 And when I asked him did they go back,
18 he said, "They couldn't go back because they knew that
19 Oracle knew that I supported 19 and 3/8. They weren't
20 going to get any more money."
21 THE COURT: Well, I find that part a
22 little hard to understand.
23 Now, is the evidence from the company
24 that after this 19 and 3/8 was reached between --

1 after it was communicated by Icahn to BEA, that no one
2 from BEA and no one from Goldman Sachs went back to
3 Oracle and asked for anything else?
4 MR. FIORAVANTI: That's correct, Your
5 Honor.
6 THE COURT: And where is all that
7 evidence?
8 MR. FIORAVANTI: There's -- the
9 defendants don't put anything forward to the contrary,
10 and there is evidence in the record that they didn't
11 go back. I believe it's in the deposition testimony.
12 I will get that for you. But they did not go back.
13 And there's nothing -- and there's nothing in the
14 proxy statement that indicates that the board went
15 back to Oracle to negotiate additional
16 consideration -- merger consideration.
17 So a reasonable stockholder would want
18 to know Mr. Icahn's role in negotiating the -- the
19 merger price. It's an unusual situation where you
20 have a nonfiduciary negotiating the merger agreement.
21 THE COURT: There certainly is a
22 reason. The proxy material discloses that he had a
23 role in the negotiation; and, indeed, it discloses
24 that he is the one who struck agreement at 19 and 3/8

1 and told BEA that; right?

2 MR. FIORAVANTI: I don't think the

3 proxy statement is that explicit, Your Honor. On page

4 25, "On January 11, 2008, Mr. Icahn called a

5 representative of Goldman Sachs and conveyed that, as

6 a result of the discussions and negotiations that had

7 occurred between ... Icahn and Oracle, Oracle would be

8 prepared to pay 19.37 [1/2] per ... share and ...

9 include a $500 million reverse termination fee in the

10 event regulatory approval was not received. Based on

11 those terms, ... Icahn said that he would agree to

12 vote in favor of a transaction, and that he would be

13 prepared to announce publicly his support of such an

14 offer ..."

15 THE COURT: "... by Oracle."

16 MR. FIORAVANTI: "... by Oracle," and

17 that's it.

18 THE COURT: All right. And you think

19 missing from that is some flavor that Mr. Icahn had

20 shook hands with Oracle and -- and said -- told the

21 company "This is the deal I'm prepared to do."

22 MR. FIORAVANTI: That's what he said.

23 THE COURT: Well, go ahead.

24 MR. FIORAVANTI: "... Oracle ... knew

1 that I'm supporting 19 and three-eighths, so they
2 didn't care, you couldn't go back to them anymore ..."
3 "I said I made a deal with them, I'm sticking with
4 it."
5 So in the unusual circumstance with
6 respect to Mr. Icahn's role --
7 THE COURT: When he says he couldn't
8 go back to them anymore, who did you think he meant?
9 MR. FIORAVANTI: BEA.
10 THE COURT: Did you ask him?
11 MR. FIORAVANTI: No, I didn't. But it
12 was clear he was talking in the context of BEA.
13 THE COURT: Well, it seems to me he
14 might well be saying "I'm not going back to them
15 anymore."
16 MR. FIORAVANTI: Well, he had said
17 that earlier.
18 THE COURT: He says that next; right?
19 MR. FIORAVANTI: Right. He had said
20 that --
21 THE COURT: Perhaps as by way of
22 clarification he says "... and I said I'm not going
23 back to them [to] try to renegotiate."
24 MR. FIORAVANTI: Well, if you look at

1 page 85, Your Honor, Icahn said "Then I said" -- this
2 is with BEA --
3 THE COURT: When is this?
4 MR. FIORAVANTI: This is on the day of
5 when he's negotiating the merger price --
6 THE COURT: Okay.
7 MR. FIORAVANTI: -- on the 11th.
8 "Then I said I'm not going back to them again. I
9 said" -- "I'm not going, I told Oracle I support 19
10 and three-eighths, I'm not going to change my view on
11 that ..."
12 That's what he told BEA.
13 THE COURT: And, again, it says "...
14 I'm not going back to them again."
15 MR. FIORAVANTI: Not going back to
16 Oracle.
17 THE COURT: All right.
18 MR. FIORAVANTI: And with respect to
19 the financial disclosures, Your Honor, there's
20 misleading partial disclosure regarding the present
21 value of future share price analysis. The
22 stockholders are entitled to a fair summary of the
23 substantive work provided by Goldman Sachs, and that's
24 supported by Pure Resources and Netsmart.

1 The proxy statement's description of
2 Goldman's present value of future share price analysis
3 is not a fair summary. As the Court explained in
4 Netsmart, "The cursory nature of the banker's fairness
5 opinion is a reason why the disclosure of the bank's
6 actual analyses are important to stockholders.
7 Otherwise they can make no sense of what the bank's
8 opinion conveys other than as a stamp of approval.
9 "Therefore," as the Netsmart Court
10 says, "the range of ultimate values generated by those
11 analyses must also be fairly disclosed."
12 The range of ultimate values generated
13 by Goldman's present value of future share price
14 analysis are not disclosed in the proxy statement.
15 The defendants touted to this Court in
16 their March 4th letter opposing expedited proceedings
17 that the present value of future share price analysis
18 was "fully disclosed," their words, not mine, fully
19 disclosed in the preliminary proxy statement. That
20 statement is false. It wasn't disclosed in the
21 preliminary proxy and it wasn't disclosed in the final
22 proxy.
23 The defendants never corrected that
24 representation, which is publicly filed as opposed to

1 the briefs, which are not.

2 They say it's similar to a DCF, which

3 is misleading, because the present value of future

4 stock price analysis is a measure of the stock price

5 that contains an inherent minority discount.

6 The present value of future share

7 price analysis is disclosed on page 33 of PX-1, which

8 is the proxy statement. Your Honor, if you compare

9 the final presentation by the banker, which is PX-2,

10 to what's in the proxy statement, it's clear that the

11 ranges under Sensitivity Case 2 are higher than the

12 street case and the base case. And that's at Bates

13 number 465.

14 THE COURT: I didn't bring your -- I

15 only brought one set of exhibits with me.

16 MR. FIORAVANTI: Exhibits 1 and 2 I

17 think is what we're dealing with here, Your Honor,

18 from the plaintiffs.

19 THE COURT: I'm pretty sure it's --

20 no. I have Mr. Wright's books, not your books. Do

21 you --

22 MR. FIORAVANTI: I think -- I think

23 Defense Exhibit 1 is the proxy statement.

24 THE COURT: No. 1 is the proxy

1 statement. No. 2 is not what you're talking about.
2 MR. SAVITT: What are you talking
3 about?
4 MR. FIORAVANTI: The
5 January 15th Goldman analysis, the banker analysis.
6 LAW CLERK: It's 21.
7 THE COURT: All right. I have it.
8 What page are you on?
9 MR. FIORAVANTI: It's 24 of the
10 presentation materials. The Bates number is 465 and
11 then also on 467, both of them. Probably 467 is the
12 best one to look at.
13 This is the one based on free cash
14 flow multiples. What's disclosed in the proxy
15 statement, Your Honor, is the street case and the base
16 case, and the Sensitivity Case 1 and Sensitivity Case
17 2 are not disclosed.
18 The defendants cite no case where the
19 actual analysis presented to the board was deemed
20 immaterial and not required to be disclosed. They
21 cite no documents, no minutes, no e-mails, no notes
22 where the board told Goldman Sachs to ignore the
23 sensitivity cases or where Goldman told the board it
24 never considered the sensitivity cases.

1 The sensitivity analyses are contained
2 in the board presentation. The board received the
3 board presentation. The board relied on the board
4 presentation. The proxy statement does not disclose
5 the ranges in those analyses.
6 It's important to note that Goldman
7 presented the BEA board with similar analyses complete
8 within sensitivity cases throughout this process. On
9 October 17th, again on October 24th the board
10 concluded that $21 per share was a "reasonable value
11 and a realistic valuation of the BEA stock," which is
12 contained in the board minutes of the meeting on the
13 24th.
14 It's also contained in the
15 January 11th presentation to the board. Nowhere in
16 any of the board minutes does it say that the board
17 wanted Goldman Sachs to ignore the sensitivity cases,
18 which the started out as Case A and Case C, and only
19 for the last report they turned into sensitivity
20 cases.
21 In fact, the minutes of the
22 January 15th presentation, Your Honor, which is
23 PX-50 --
24 THE COURT: Let's go back, if you

1 would, Mr. Fioravanti, to page 26, BEA 467.
2 MR. FIORAVANTI: Yes, Your Honor.
3 THE COURT: What's left off?
4 --just -- just --
5 MR. FIORAVANTI: The -- the ranges in
6 Sensitivity Case 1 --
7 THE COURT: Well, I shouldn't ask it
8 that way. What I mean, there are -- on this page
9 there are only four numbers both of which are at the
10 19x -- 6x and 19.7x, which are the two highest
11 multiples or whatever that multiplier is. And the --
12 those two cases yield numbers in the high sensitivity
13 case that are higher than the deal price.
14 MR. FIORAVANTI: Correct.
15 THE COURT: But only a little bit;
16 right?
17 MR. FIORAVANTI: Correct.
18 THE COURT: Every other number on the
19 page is lower than the deal -- every other number on
20 the page is lower than the deal price.
21 MR. FIORAVANTI: Well, Sensitivity
22 Case 2 at 19, 6, and 7 in the -- in FY2009 are higher
23 as well, Your Honor.
24 THE COURT: Would you say that again?

1 And what are you talking about?
2 MR. FIORAVANTI: Sure. There's FY09
3 and FY10. In Sensitivity Case 2, both of those are
4 higher than the merger price.
5 THE COURT: Right. And both of them
6 --
7 MR. FIORAVANTI: Right.
8 THE COURT: -- in this grid, the
9 sensitivity analysis, you get -- certainly in the
10 second one you get two prices that are $2 a share
11 higher than --
12 MR. FIORAVANTI: Correct.
13 THE COURT: -- than the deal price,
14 and the other ones you get two prices that are 75 or
15 80 cents higher.
16 MR. FIORAVANTI: Correct.
17 THE COURT: Or even less, 65 to 70
18 cents higher.
19 MR. FIORAVANTI: That's right.
20 THE COURT: And this is a material
21 omission?
22 MR. FIORAVANTI: Yes, Your Honor,
23 because it does not disclose the full range of
24 values --

1 THE COURT: You know, to say that is
2 one thing. To explain why in this particular case
3 it's a material omission of information is another. I
4 mean, tell me what's -- why that -- why it would be so
5 material -- material at all to anyone to understand
6 that the board saw sensitivity analyses that in the
7 high case yielded prices in -- only -- only at the
8 highest multiples that were somewhat -- slightly to
9 somewhat higher than the deal.
10 MR. FIORAVANTI: Because they
11 disclosed multiples ranges with respect to the base
12 case and the street case that were lower. It's a
13 partial disclosure. They disclosed the base case and
14 the street case. They did not disclose the
15 sensitivity case, and those analyses were presented to
16 the board. This is not as if we're in a situation
17 where they presented something six months ago and then
18 didn't present it. This was presented to the board at
19 the time the board adopted the merger price.
20 A reasonable stockholder would want to
21 know that the ranges that were presented were higher
22 than the merger price because it's not a
23 stock-for-stock merger. They need to consider whether
24 they're going to seek appraisal.

1 THE COURT: All right.
2 MR. FIORAVANTI: There's nowhere in
3 any of the documents in the record where Goldman was
4 told to ignore the sensitivity cases. In fact, the
5 minutes of the January 15th meeting expressly state
6 that Mr. Woodruff reviewed the transaction economics,
7 including implied premium analysis, illustrative price
8 per share, implied multiple analysis, equity value,
9 enterprise value, and sensitivity under certain
10 assumptions. So the record reflects that the board
11 did consider the sensitivity analyses.
12 And it's also clear in Goldman's
13 fairness opinion that it reviewed internal financial
14 analyses and forecasts prepared by the company.
15 Goldman relied upon and assumed the accuracy and
16 completeness of all of the financial and other
17 information provided to and discussed with Goldman.
18 Goldman assumed that BEA's -- with
19 BEA's consent, that the forecasts have been reasonably
20 prepared on a basis reflecting the best
21 currently-available estimates and judgment of the
22 management. The proxy says Goldman's
23 January 15th presentation was a material factor that
24 the board considered. It doesn't say that only

1 certain parts of that presentation were considered a
2 material factor.
3 Goldman's letter doesn't say that
4 Goldman ignored the sensitivity cases provided by
5 management. It says Goldman reviewed them, assumed
6 that they were accurate and complete and reflected
7 management's best currently-available estimates and
8 judgments.
9 THE COURT: Mr. Fioravanti, is there
10 case law that says that it's necessary to disclose
11 the -- a sensitivity analysis, not just that there was
12 one but, you know, what it -- what the actual
13 sensitivity analysis looks like in circumstances where
14 the management and the board do not consider it to be
15 reliable?
16 MR. FIORAVANTI: Your Honor, the
17 Netsmart case --
18 THE COURT: Either the high or the
19 low.
20 MR. FIORAVANTI: Well, the Netsmart
21 case, Your Honor, says "the range of ultimate values
22 generated by those analyses must also be fairly
23 disclosed."
24 THE COURT: But they did disclose a

1 range of values, and the question is do they have to
2 disclose the -- every element of the range, including
3 those aspects of it that they believe are not
4 reliable.
5 MR. FIORAVANTI: They do, Your Honor.
6 And if they don't --
7 THE COURT: Who said so?
8 MR. FIORAVANTI: The Netsmart case we
9 rely on, Your Honor, says that they have to disclose
10 the range of values that are presented. It's a
11 partial disclosure in this case. They presented the
12 other ranges.
13 THE COURT: Right, which is exactly
14 why in order to get -- to get a judgment from me that
15 it's a material omission, you can't just say it's a
16 partial disclosure. They have to disclose the rest of
17 it. You have to give me some reason to believe both
18 that the -- that the omission of the rest of what
19 there was to disclose is material.
20 MR. FIORAVANTI: It was --
21 THE COURT: Part of the materiality is
22 reliability.
23 MR. FIORAVANTI: It was provided to
24 Goldman Sachs on the day of its opinion. Goldman

1 Sachs relied on it. It's -- if the board -- if the
2 management didn't want Goldman Sachs to use it to rely
3 on it, they wouldn't have given to it them.
4 THE COURT: You're just arguing that
5 whenever anyone says to a banker, "Give me a
6 sensitivity analysis," so you have to expand what
7 you're looking at and come up with a larger set of
8 parameters, that in every case when you do that, that,
9 therefore, obviously every number on the grid is
10 material.
11 MR. FIORAVANTI: When it's included in
12 the final presentation, Your Honor, it needs to be
13 disclosed.
14 THE COURT: Who said so?
15 MR. FIORAVANTI: It's part of the
16 analysis that Goldman did in -- and they put it in the
17 proxy statement. They put ranges --
18 THE COURT: What law tells me or you
19 that every time there is a grid in a banker's book,
20 the whole grid has to be reproduced?
21 MR. FIORAVANTI: That's not what I'm
22 saying, Your Honor.
23 THE COURT: Well, it's pretty close to
24 what you're saying.

1 MR. FIORAVANTI: No, it's not. With
2 all due respect, Your Honor, it's not what I'm saying.
3 It's not like in the MONY situation where there was
4 something in an appendix that wasn't disclosed. These
5 were ranges -- remember, the context here is that
6 Goldman didn't do a DCF analysis.
7 THE COURT: Well, this is a
8 sensitivity analysis, isn't it?
9 MR. FIORAVANTI: Yes.
10 THE COURT: All right.
11 MR. FIORAVANTI: Well, that's what
12 they --
13 THE COURT: Now you're conceding they
14 didn't do a DCF analysis; is that right?
15 MR. FIORAVANTI: They did not do a DCF
16 analysis.
17 THE COURT: So the failure to disclose
18 the DCF analysis is not a problem, right; isn't that
19 right?
20 MR. FIORAVANTI: The fact that they
21 didn't --
22 THE COURT: Well, you wrote briefs
23 suggesting that the absence of the DCF was -- was a
24 material omission.

1 MR. FIORAVANTI: Yes, Your Honor.
2 That's -- that's also part of our argument.
3 THE COURT: And what's the basis for
4 that argument?
5 MR. FIORAVANTI: They -- Goldman had
6 prepared DCF analyses for this company with respect to
7 Oracle's overture and then stopped.
8 THE COURT: So what?
9 MR. FIORAVANTI: It's unusual that a
10 company that does fairness opinions, including DCF
11 analyses, suddenly stops doing -- does not provide a
12 DCF analysis.
13 THE COURT: But the absence is
14 explained in the papers I read --
15 MR. FIORAVANTI: The absence is not
16 explained --
17 THE COURT: -- that say they were not
18 reliable projections.
19 MR. FIORAVANTI: That's not explained
20 in the proxy statement.
21 THE COURT: They don't have to explain
22 in the proxy statement why they didn't do a form of
23 analysis.
24 MR. FIORAVANTI: But --

1 THE COURT: There's nothing talismanic
2 about a discounted cash flow statement. If you don't
3 have reliable projections, it would be an error to
4 prepare one.
5 MR. FIORAVANTI: Goldman Sachs
6 provided DCF analyses for BEA in July and in
7 September. And they didn't prepare -- they stopped
8 when they asked management for projections to do a DCF
9 in the context of a specific offer.
10 THE COURT: And what am I supposed to
11 take from that?
12 MR. FIORAVANTI: That as in the JCC
13 case and as in the Globis case, where it was disclosed
14 that the banker had performed DCF analyses in the past
15 and that they didn't have reliable long-term
16 projections to provide them here.
17 THE COURT: And that's a material
18 omission, to omit -- to not disclose that, although it
19 once did DCFs based on unreliable projections, that
20 when it came to the final preparation of -- of its
21 materials, that Goldman didn't do a DCF, so they have
22 to explain why?
23 MR. FIORAVANTI: I don't think --
24 THE COURT: Even though they -- you

1 know, they prepared six other forms of analyses that
2 are all disclosed.
3 MR. FIORAVANTI: I don't think the
4 record shows that the projections that were used in
5 the earlier DCFs were unreliable.
6 THE COURT: Well, I think -- that's
7 how I read it. I mean, if it's the same -- if you're
8 talking about the same projections they were given by
9 the management in the summer and the fall which
10 apparently they simply extrapolated, they took two
11 years and extrapolated another three.
12 MR. FIORAVANTI: The record is not
13 that Goldman extrapolated.
14 THE COURT: That is how I understood
15 the record.
16 MR. FIORAVANTI: No.
17 THE COURT: Maybe I'm wrong.
18 MR. FIORAVANTI: No, Your Honor. If
19 you look at Mr. Woodruff's declaration and if you look
20 at Mr. Chuang's explanation, they do not say that
21 Goldman extrapolated the projections. In fact, I
22 think the record is that Goldman does not do DCF
23 analyses without five years of projections. I think
24 that's what the record shows.

1 THE COURT: Well, paragraph 5 of
2 Mr. Woodruff's affidavit says that "It['s] my
3 understanding that BEA's management did not prepare
4 long-term management projections because they believed
5 the projections beyond fiscal year 2010 would not have
6 been sufficiently reliable for use by Goldman Sachs in
7 its analys[i]s. Because Goldman Sachs was only
8 provided with two years of management projections by
9 BEA, Goldman Sachs determined that a DCF would not be
10 an appropriate analytical tool to use in connection
11 with its Fairness Opinion work on this matter."
12 Now, somewhere in here, I think, they
13 talk about ... paragraph 9, "The July [8], 2007
14 presentation also included a preliminary LBO Analysis.
15 This analysis included assumptions with respect to
16 BEA's future revenue growth, operating margins,
17 expenses and other metrics for fiscal years 2011-2014.
18 Those figures for fiscal years 2011-2014 were not
19 management projections but were, rather" -- "rather
20 were assumptions (or extrapolations) based on BEA's
21 past results and on management" -- "and on the
22 management projections for 2009 and 2010."
23 Now, I agree, it doesn't say who made
24 the extrapolations. But maybe there's somewhere else

1 where it says who does, but you can infer from that
2 that it was done by Goldman. And whatever you
3 infer --
4 MR. FIORAVANTI: Your Honor --
5 THE COURT: -- the record is that
6 they're simply extrapolations, so they're not regarded
7 as reliable projections.
8 MR. FIORAVANTI: Mr. Woodruff's
9 deposition at page 42 says, "This page seems to
10 indicate that the projected information goes out to
11 2014; is that correct?
12 "Answer: Yeah. We have financial
13 information through fiscal year 2014.
14 "Question: And where did Goldman
15 Sachs get that projected information through 2014?
16 "Answer: It looks like we got that
17 information from management."
18 THE COURT: Well, his affidavit -- his
19 affidavit was given later.
20 MR. FIORAVANTI: And the -- and the
21 affidavit doesn't say they didn't get it from
22 management.
23 THE COURT: I agree, it doesn't. I
24 don't understand why it's important who did the

1 extrapolation.

2 MR. FIORAVANTI: It's important for

3 the fact that -- that Goldman Sachs had done DCF

4 analyses for this company based on management figures.

5 THE COURT: Based on what are now

6 called three years' worth of extrapolations on top of

7 two years' worth of projections.

8 MR. FIORAVANTI: That's what they're

9 calling them.

10 THE COURT: I can't imagine that's

11 material to anybody to know that.

12 MR. FIORAVANTI: Your Honor, with

13 respect to the present value of future cash flow

14 analyses, we believe that those ranges need to be

15 disclosed.

16 With respect to Goldman's fee --

17 THE COURT: The first thing is what we

18 just looked at and spoken about? That's just what

19 we've been talking about, the present value of the

20 future cash flows?

21 MR. FIORAVANTI: Right, the ranges,

22 Your Honor.

23 THE COURT: Goldman's fee, all right.

24 MR. FIORAVANTI: The proxy statement

1 contains a single-paragraph description of Goldman's
2 fee, which is PX-1 at page 37. It does not quantify
3 the contingent part of the fee, and it's impossible to
4 discern from the proxy statement. In fact, about
5 25 million, or 75 percent, of the Goldman's fee is
6 contingent.
7 THE COURT: Well, you have a fight on
8 that point.
9 MR. FIORAVANTI: Yes, we do. The
10 defendants contend that only 8 million, or 25 percent,
11 is contingent; but that's not what the fee agreement
12 provides. The fee agreement provides that Goldman
13 gets $4 million per quarter in advisory fees beginning
14 November 15th, 2007, for 18 months. Goldman gets
15 $3 million in an initial fee that's contingent upon
16 execution of the merger agreement. Goldman would then
17 be entitled to 33 million contingent upon consummation
18 of the merger, and they would get a credit for amounts
19 received to date for the advisory fee and the initial
20 fee.
21 Thus, as of the stockholders' meeting,
22 it appears Goldman will have received 8 million in
23 quarterly advisory fees and 3 million in that
24 contingent fee -- contingent initial fee.

1 THE COURT: So you're -- you're
2 calling the sort of quarterly -- the quarterly
3 advisory fee in the out periods a contingent fee? Is
4 that how you're doing this?
5 MR. FIORAVANTI: Yes.
6 THE COURT: And in what sense is it
7 contingent?
8 MR. FIORAVANTI: Well, I guess I don't
9 understand what Your Honor means. Maybe I don't
10 understand the question.
11 THE COURT: Why don't you explain it
12 to me again.
13 MR. FIORAVANTI: Sure. Goldman --
14 THE COURT: How much -- how much --
15 you say they got $4 million a quarter.
16 MR. FIORAVANTI: Right, beginning
17 November 15th. So presumably they've gotten two.
18 THE COURT: 2007?
19 MR. FIORAVANTI: 2007.
20 THE COURT: And were they paid nothing
21 for the earlier retention?
22 MR. FIORAVANTI: I think they got a
23 million. I think they got a million, which is --
24 THE COURT: How many quarters are

1 there in which they get this quarterly fee?
2 MR. FIORAVANTI: Six, 18 months.
3 THE COURT: So six quarters at
4 4 million a quarter is --
5 MR. FIORAVANTI: 24.
6 THE COURT: -- $24 million.
7 MR. FIORAVANTI: Right.
8 THE COURT: And they have another
9 million they already got paid.
10 MR. FIORAVANTI: Right. Then --
11 THE COURT: Why is any part of that
12 contingent?
13 MR. FIORAVANTI: The -- it's not.
14 THE COURT: Other than on the passage
15 of time.
16 MR. FIORAVANTI: That's right. It's
17 not contingent.
18 THE COURT: So 24 isn't contingent.
19 MR. FIORAVANTI: Right. I'm sorry.
20 THE COURT: So there's only 8 left out
21 of the 33; right?
22 MR. FIORAVANTI: No. The 24 million
23 is for advisory fees that they have to perform
24 services for. They get a $33 million contingent fee

1 upon consummation of the merger.

2 THE COURT: All right. You've lost

3 me.

4 MR. FIORAVANTI: I'm sorry.

5 THE COURT: Now, they get paid

6 $33 million in total, which includes the $24 million

7 they would have been paid over the period of time in

8 quarterly advisory fees had there been no deal. So

9 had there been no deal at all, they would have gotten

10 over time $25 million. Is that right?

11 MR. FIORAVANTI: Yes, that's right.

12 THE COURT: And then they got

13 4 million when the merger was signed.

14 MR. FIORAVANTI: 3.

15 THE COURT: And I guess there's

16 another payment -- 3 million when it was signed?

17 MR. FIORAVANTI: Yes.

18 THE COURT: And 5 million when it's

19 complete?

20 MR. FIORAVANTI: No. They get -- they

21 get --

22 THE COURT: Total of 33 when it's --

23 MR. FIORAVANTI: But they haven't

24 received the --

1 THE COURT: All right.
2 MR. FIORAVANTI: -- 24.
3 THE COURT: Well, the -- the -- the
4 issue is simply whether one would properly
5 characterize the 4 million a quarter for six quarters
6 as a contingent fee, which you do. At least you're
7 characterizing all but maybe the first quarter as
8 contingent. I don't understand why it's contingent.
9 MR. FIORAVANTI: Your Honor, I don't
10 think we're characterizing it as contingent. What
11 we're arguing is --
12 THE COURT: How much of the 33 million
13 is contingent?
14 MR. FIORAVANTI: All of it.
15 THE COURT: All of it.
16 MR. FIORAVANTI: Yes. They get -- the
17 way the agreement reads, they get --
18 THE COURT: So you are characterizing
19 the 4 million a quarter for 18 months as contingent.
20 MR. FIORAVANTI: They get a credit for
21 it.
22 THE COURT: It counts against the
23 33 million; right?
24 MR. FIORAVANTI: Correct.

1 THE COURT: I mean, they're going to
2 get paid 33 million. They would have been paid 25 had
3 there been no deal.
4 MR. FIORAVANTI: Right, if -- if --
5 THE COURT: So you credit all that
6 they've either been paid or are obligated to be paid
7 against the 33 million and you pay them the whole
8 thing at once.
9 MR. FIORAVANTI: Correct.
10 THE COURT: So I ask again: Why is
11 the quarterly $4 million fee a contingent fee?
12 MR. FIORAVANTI: Because they don't
13 have to perform services for it after the consummation
14 of the transaction.
15 THE COURT: Well, that doesn't make it
16 contingent.
17 MR. FIORAVANTI: Well -- and
18 8 million --
19 THE COURT: They were -- they were
20 entitled to get it over a period of 18 months by
21 performing services.
22 MR. FIORAVANTI: Correct.
23 THE COURT: All right. So you -- you
24 would agree with me had there been no deal, that would

1 not be a contingent fee.
2 MR. FIORAVANTI: That's correct.
3 THE COURT: That's a retainer of some
4 sort.
5 MR. FIORAVANTI: That's correct.
6 THE COURT: The fact that that
7 converts into -- they get paid it all at once when the
8 deal is done, how does that make it contingent?
9 MR. FIORAVANTI: It's a credit for the
10 $33 million contingent part of the fee.
11 THE COURT: Well, it's -- you're only
12 saying it because you're calling the $33 million
13 contingent. The $33 million is just a payment that
14 they receive at the end of the deal, which I gather
15 includes the 25 million they otherwise would have
16 gotten, plus 3 million for the signing and 5 million
17 for the completion, altogether $33 million.
18 MR. FIORAVANTI: Well, and 8 --
19 THE COURT: I really, frankly,
20 Mr. Fioravanti, I don't understand how the 25 million
21 can be possibly be considered contingent.
22 MR. FIORAVANTI: Well, we certainly
23 have at least 8 million that's contingent. I don't
24 think there's any dispute about that. Just

1 25 percent.
2 THE COURT: That's what they say is
3 contingent.
4 MR. FIORAVANTI: It's not clear from
5 the proxy disclosure how you could figure it out.
6 THE COURT: Well, the proxy does
7 disclose that a part of it is contingent, doesn't it?
8 MR. FIORAVANTI: Yes.
9 THE COURT: So how is it materially
10 misleading by omitting to say of the 33 million,
11 8 million is contingent? How is that materially
12 misleading? Not whether it would be nice to know, but
13 how is it misleading when it's characterized as
14 partially contingent?
15 MR. FIORAVANTI: It's misleading
16 without the amount, because the stockholders need -- a
17 reasonable stockholder would want to know how much the
18 contingent part of the fee is.
19 THE COURT: Well, if -- if a million
20 was contingent and 32 million was not contingent,
21 would it be materially misleading to say simply a
22 portion of this is contingent and not disclose that
23 it's a million dollars that's contingent? Would that
24 be materially misleading?

1 MR. FIORAVANTI: Perhaps not. But I
2 expect that Your Honor is taking me down the slippery
3 slope. In this case --
4 THE COURT: Slippery -- we're not
5 going very far. We're only going to 8 million out of
6 33. And I just need to understand how it can be
7 materially misleading, material information that needs
8 to be disclosed when the stockholders are told the fee
9 in part is contingent, that the exact amount of the
10 contingent fee is $8 million.
11 MR. FIORAVANTI: It's -- Your Honor,
12 the stockholders don't know based on the disclosure in
13 the proxy statement.
14 THE COURT: All right.
15 MR. FIORAVANTI: With respect to
16 synergy values, Your Honor, in rejecting Oracle's
17 $17-per-share offer and telling Oracle it would
18 authorize negotiations at $21, the board relied on
19 synergy value to Oracle. And the defendants made
20 those disclosures in the press. The board minutes
21 reflect the board's reliance on synergy value in
22 determining $21 per share. The synergy value
23 estimates are also reflected in Goldman's
24 presentations to BEA and the board and the

1 November 6th presentation to Mr. Icahn. As we
2 explained in our reply brief, that presentation should
3 be disclosed.
4 THE COURT: Why should that -- I mean,
5 what is it about that presentation that should be
6 disclosed? I mean, is it simply because it had --
7 Icahn agreed that -- Icahn made them agree that they
8 would disclose the information by some date, that
9 somehow that makes it material?
10 MR. FIORAVANTI: They also provided it
11 to a stockholder. Mr. Icahn got that information.
12 The rest of the stockholders did not.
13 THE COURT: He got it pursuant to some
14 confidentiality agreement he signed, didn't he?
15 MR. FIORAVANTI: Right. Pursuant to
16 that confidentiality agreement, if it's material, it
17 needs to be disclosed.
18 THE COURT: If it's material. But the
19 fact -- how do I know it's material? It isn't
20 material just because it was given to him in November
21 and it isn't material just because he, I assume,
22 obtained the company's agreement that they would
23 disclose at some future date, no doubt so that he then
24 would be free of sort of insider information

1 restrictions. Why does that make it material?
2 MR. FIORAVANTI: Because it discloses
3 the synergy values that the company considered with
4 respect to --
5 THE COURT: All right. So that just
6 gets back to the question of whether the company's
7 estimates of what -- what they're able to piece
8 together from other deals or other sources but not
9 from Oracle about what they estimate the synergy
10 values to be so that they can make some judgment
11 whether that's material information. Now, why is that
12 material information to a stockholder?
13 MR. FIORAVANTI: Because a
14 stockholder, in considering a share price from Oracle,
15 would want to know whether they are getting a fair
16 portion of the synergies.
17 THE COURT: Well, how -- but, really,
18 what you want to know is what Oracle thinks the
19 synergies are.
20 MR. FIORAVANTI: No, because that --
21 that's not the case, because BEA and the board
22 determined what it believed to be a reasonable price,
23 a realistic valuation of $21 based on Goldman's
24 presentations and synergies. So the board had made a

1 determination in coming up with the $21 number that it
2 included synergy values. And that's what needs to be
3 disclosed. And they've provided it in their materials
4 that they gave to Mr. Icahn.
5 THE COURT: Which doesn't -- I mean,
6 that -- that doesn't make it material. The fact that
7 they gave it to Carl Icahn and the fact that they
8 agreed with him to disclose it and never did so
9 doesn't make it material.
10 So the question is, is it somehow --
11 for some reason material when the company says "These
12 are just our estimates and it would be misleading to
13 disclose them to stockholders because they are not" --
14 "there's no" -- "there's no sense in which they're
15 accurate"?
16 MR. FIORAVANTI: Well, that's not what
17 the company said in the board minutes, and it's not
18 what the company told the stockholders when they said
19 that they would initiate negotiations at $21 a share.
20 THE COURT: Well, they didn't say
21 otherwise. They just said "Based on our view of,
22 among other things, what the synergy values are."
23 THE COURT: And a reasonable
24 stockholder would want to know that in determining

1 whether the ultimate price that was agreed to by the
2 board reflected an appropriate share of the synergy
3 values that the board had considered in coming up with
4 the $21 price.
5 THE COURT: Now, you concede that's
6 not something at all of interest to somebody seeking
7 appraisal, is it?
8 MR. FIORAVANTI: Well, it could be,
9 because if someone believed that they were receiving a
10 pretty large share of the synergies, they may not want
11 to seek appraisal, because under an appraisal
12 analysis, you don't count synergies.
13 With respect to the November 6
14 presentation, Mr. Icahn -- I do want to note that the
15 company provided ranges to Mr. Icahn with respect to,
16 for example, margins, operating growth, which are
17 similar to the sensitivity analyses that are included
18 in the present value of future share price analysis.
19 And that's on BEA 067.
20 THE COURT: Not -- not -- not in terms
21 of -- you're talking about in percentages, they're
22 revealing to him information that --
23 MR. FIORAVANTI: Margins.
24 THE COURT: -- expressed in terms of

1 margins as a percentage of --
2 MR. FIORAVANTI: Yes.
3 THE COURT: -- total --
4 MR. FIORAVANTI: Of income.
5 THE COURT: -- revenue or something?
6 MR. FIORAVANTI: Of income, yes. And
7 that's on page BEA 067.
8 THE COURT: And what do I gather from
9 that? You're not saying they gave him --
10 MR. FIORAVANTI: They gave him the
11 same margins that are essentially represented in the
12 sensitivity analyses.
13 THE COURT: Well, it's not surprising.
14 It's sort of where they came from, I guess; but why
15 does it matter that they gave them to Mr. Icahn?
16 MR. FIORAVANTI: They gave it to Mr.
17 Icahn so that they could get him to support --
18 THE COURT: But my point -- it doesn't
19 make it material that they gave it to him, does it?
20 MR. FIORAVANTI: No, but they
21 disclosed information to another stockholder that
22 the -- that the rest of the stockholders don't get.
23 He -- they give him an informational advantage.
24 THE COURT: And how did he use that

1 advantage?
2 MR. FIORAVANTI: In agreeing to 19.37
3 1/2.
4 THE COURT: Instead of the 17 that
5 your clients were urging the company to take back in
6 the fall, huh?
7 MR. FIORAVANTI: That's not correct,
8 Your Honor. We -- the complaints [sic] urged the
9 company to negotiate with Oracle, and they didn't.
10 They indicated that they weren't.
11 Finally, with respect to the street
12 estimates, I think we've covered that in the reply
13 brief, Your Honor. The defendants contend that
14 somehow the street estimates were considered to be
15 accurate after BEA had filed its financials in
16 November; but the testimony from Mr. Chuang is very
17 clear on that point, that he did not believe that the
18 street properly valued BEA after the financials were
19 filed.
20 THE COURT: The question is, are the
21 street estimates that are used -- I mean, have you --
22 have you looked and is there a record in which I could
23 look at say oh, these are all taken from analysis
24 performed in September or October?

1 MR. FIORAVANTI: No.
2 THE COURT: And the point is made by
3 the defendants that after they became current in their
4 filings, that the street estimates changed. So the
5 question, then, would seem to me to be, do these
6 street estimates reflect the revised estimates or are
7 these the old stale estimates?
8 MR. FIORAVANTI: No. These are
9 revised estimates, but the point is --
10 THE COURT: No. Your point is that
11 Mr. Chuang still thought they didn't reflect full
12 value; right?
13 MR. FIORAVANTI: Correct, and based on
14 the fourth-quarter financial information that the
15 company knew, which turned out to be a record.
16 THE COURT: But these were the street
17 estimates that people apparently believed were not
18 unfairly influenced by the company's failure to have
19 current financial statements that were publicly
20 available.
21 MR. FIORAVANTI: Well, the street
22 estimates are the street estimates.
23 THE COURT: No, that's not what the
24 record before me suggests. It's that there were

1 street estimates before, whatever the date was,
2 November 15th --
3 MR. FIORAVANTI: Right.
4 THE COURT: -- and street estimates
5 after November 15th.
6 MR. FIORAVANTI: Correct.
7 THE COURT: After the fact, when the
8 company's financial disclosures became up-to-date,
9 that the street estimates, in fact, changed and became
10 higher.
11 MR. FIORAVANTI: Right.
12 THE COURT: So street estimates are
13 not street estimates. And these are the current --
14 the more current ones. Now, the fact that Mr. -- is
15 it --
16 MR. FIORAVANTI: My understanding, the
17 pronunciation is Chuang.
18 THE COURT: -- Chuang still felt that
19 they didn't fully reflect the value of the company's
20 business is a different point.
21 MR. FIORAVANTI: And that's based on
22 his knowledge of the fourth-quarter financial
23 information and the company's process, which he knew
24 about at the time and were ultimately released at the

1 end of February --
2 THE COURT: And which are now
3 available to everyone.
4 MR. FIORAVANTI: That's correct, it's
5 now available.
6 THE COURT: All right.
7 MR. FIORAVANTI: Thank you, Your
8 Honor.
9 THE COURT: Thank you, Mr. Fioravanti.
10 Mr. Savitt.
11 MR. SAVITT: Good afternoon, Your
12 Honor. And thank you for -- for hearing us this
13 afternoon.
14 What -- what I hope to do is hit the
15 substantial points of our argument and substantially
16 in our briefs and, of course, be available to clarify
17 any issues with respect to which the Court would have
18 questions.
19 I'd wanted at the outset to make a few
20 fundamental points about the deal that's on the table
21 and the transaction that is set to be evaluated by BEA
22 stockholders next week.
23 The transaction that the plaintiffs
24 seek to have blocked -- and all of this is conceded, I

1 think -- was approved by a disinterested and
2 well-advised board. It is a third-party merger
3 proposal with no suggestion of conflict, no suggestion
4 of control. It offers a very substantial premium to
5 BEA stockholders. The company was fully shopped
6 before the transaction was entered into. The deal
7 contains no onerous deal protections; but
8 notwithstanding that, no other bidder has arrived at
9 any time offering any price still less the sort of
10 premium that is available on the transaction on the
11 table.
12 It is entirely clear that the BEA
13 board arrived at the decision to recommend this
14 transaction only at the end of a long and careful
15 process. It's clear as well that BEA stockholders and
16 the investment community generally enormously support
17 the transaction. The plaintiffs join issue on none of
18 these points. They are all effectively conceded. And
19 what we have before us is a claim based on eight
20 alleged omissions. There are no misrepresentation
21 claims here. Just eight alleged omissions.
22 I won't belabor the standards relevant
23 for preliminary injunction. I, of course, understand
24 that the Court's familiar with them. I did want to

1 emphasize that as the Court has done, that there is a
2 materiality standard here, and the burden to show
3 materiality rests on the plaintiffs. And it's not
4 enough to say, as the plaintiffs' papers have done so
5 frequently, that having gone down the path of saying
6 something about a subject, every detail imaginable
7 must be disclosed. The key is the demonstration that
8 something about what is disclosed is rendered
9 materially misleading by virtue of what has not been
10 disclosed. And we would submit to the Court that that
11 is precisely what has not happened in the papers that
12 have been submitted by plaintiffs or, indeed, that is
13 evident in any sense from the evidentiary record that
14 has been compiled.
15 I'd want to emphasize as well that
16 there's a very full evidentiary record that has been
17 made available to plaintiffs here. Plaintiffs
18 received every document they asked for, and there were
19 tens of thousands of them. They got every deposition
20 they wanted, and there were a lot of them. There is
21 no question but that there was a very substantial
22 evidentiary record. The plaintiffs had every
23 opportunity to bear their burden of materiality, and
24 -- and they have not.

1 THE COURT: Mr. Savitt, a curious
2 aspect of this transaction is Mr. Icahn's involvement.
3 And on that score, there are a couple of points.
4 This November 19th letter, I gather
5 even though Mr. Icahn sent it to the board, it wasn't
6 included as an exhibit to his 13D, never publicly
7 disclosed it.
8 MR. SAVITT: It appears Mr. Icahn did
9 not disclose it as a 13D.
10 THE COURT: Shouldn't he have?
11 MR. SAVITT: Mr. Icahn? Well, that's
12 a good question. And I'm not in a position to give
13 him counsel. It's a good question. I don't know the
14 answer to it.
15 THE COURT: I thought when you had
16 contacts and communications with the company, you were
17 required to disclose them.
18 MR. SAVITT: I -- I appreciate the
19 Court's question. All I can say, and I appreciate
20 it's not an entirely satisfactory answer, is that BEA
21 isn't responsible for that. But -- but --
22 THE COURT: No; but it points, I
23 suppose in some sense, at least in a very general way
24 to an idea that the SEC, in framing 13D, thought such

1 communications were important and -- and should -- and
2 are the sort of communication that should be
3 disclosed.
4 Now, there is this letter. It just
5 isn't in your proxy material.
6 MR. SAVITT: Well, let me say a couple
7 of words about the November 19th letter.
8 First of all, just so the record is
9 clear on it, this point was for some reason not raised
10 in the plaintiffs' moving papers, their opening brief.
11 Wasn't raised at all. There's no excuse for that.
12 It's not as if this is something that came up in
13 Mr. Icahn's deposition. Not at all. Therefore, the
14 issue as a matter of Delaware law is waived.
15 Putting that to the side, the
16 standard, as I tried to emphasize here, is one of
17 materiality. Is the law that every single
18 communication from Mr. Icahn, every utterance he may
19 have made with respect to BEA need to be disclosed?
20 The answer is, of course, no. And it's important in
21 this context, because Mr. Icahn was saying a great
22 deal of things about a great many things about a whole
23 lot of subjects during this period, including BEA.
24 The press is rife with his utterances about what he

1 may or may not do with respect to BEA.
2 And the fact that he wrote a letter in
3 November 19th, in mid-November, which is a full two
4 months before the deal was -- deal was considered, a
5 letter that begins by saying "As I have already told
6 you" in respect of communications that were disclosed
7 can't reasonably be said to be material to a BEA
8 stockholder now confronted with the choice months
9 later to decide whether to take -- to accept a merger
10 proposal or not. It is not as if Mr. Icahn is a
11 shrinking violet. It's not as if what he may or may
12 not have intended to do was in any way not disclosed
13 either by Mr. Icahn or anyone else.
14 THE COURT: All right.
15 MR. SAVITT: So it's a matter of
16 complete public record, and it fails the materiality
17 test.
18 THE COURT: There -- there's that
19 issue. And then there is some issue of -- I mean, it
20 is sort of stark when one reads the proxy material --
21 page 25, I guess it is -- the best I could understand
22 it, anyway, there's no talk, nothing has been
23 discussed between BEA and Oracle, at least that's
24 disclosed in the proxy material, about financial terms

1 of the transaction other than break-up fees, but no --
2 no -- no price per share. There's been no talk, and
3 then suddenly out of the blue we hear Mr. Icahn tells
4 Goldman Sachs that he's made a deal. Now, I mean --
5 is that all there is to say?
6 MR. SAVITT: Well, Mr. Fioravanti made
7 the point that this is an unusual case. I'm not sure
8 it's an unusual legal case. From a transactional
9 perspective, there was, as we tried to lay out in our
10 briefs, a delicate and very difficult problem that the
11 BEA board was seeking to navigate between having on
12 the one hand Icahn calling for an immediate sale of
13 the company starting from September forward, Oracle
14 making an opportunistic bid from October forward and
15 refusing to move on price, the restatement relative to
16 the -- to -- to the SEC problem, blacking out
17 financial information until mid-November. And what
18 BEA did was deploy Icahn, successfully deploy Icahn to
19 be a leverage agent for good for BEA stockholders and
20 avoided the very substantial problem that he would
21 become a leverage agent on Oracle's behalf that
22 would -- would create pressure for a more prompt sale
23 of the company.
24 There is no evidence at all, not a bit

1 of evidence has been developed on this record to
2 suggest that there were any undisclosed conversations
3 or communications relative to the price issue that
4 aren't -- that aren't in the proxy. There aren't any.
5 Now, if -- if what is being alleged
6 here is that there was an un -- that Mr. Icahn's role
7 was inappropriate, that's not a disclosure claim. We
8 would suggest it's clearly not a -- not a valid legal
9 claim, either. When one reads Mr. Icahn's deposition
10 transcript, it becomes very clear that BEA was
11 exceedingly engaged with him, that the BEA board was
12 monitoring his activities. The deposition transcripts
13 of the BEA directors is of a piece as is the
14 deposition transcript of Mr. Woodruff; that Mr. Icahn
15 had a central role in ultimately striking the price is
16 quite clear from the proxy, and this is not anything
17 that ought be the subject of criticism by the courts.
18 There isn't any allegation here, nor
19 could there be, that the BEA board failed to consider
20 deliberately, with the detailed advice of its legal
21 and financial advisors, the advisability of the 19 and
22 3/8 price on three occasions before ultimately
23 undertaking to recommend that transaction to
24 stockholders.

1 And on the subject of -- of -- of
2 Icahn, I wanted to respond to the colloquy between the
3 Court and Mr. Fioravanti and try and put a little bit
4 of -- of color on that.
5 It is -- it is simply -- it is simply
6 not so to allege that there was any sort of
7 undisclosed threat here. It -- Mr. Icahn's deposition
8 is -- well, it makes for an interesting read; but on
9 this point it seems quite clear. In the midst of an
10 extremely long answer, at one point Icahn says "...
11 what I told Oracle was [that] I don't think you could
12 deliver it" -- I'm sorry. I'm on page 80, Your Honor.
13 "... I told Oracle" -- "... what I
14 told Oracle [is] I don't think I could deliver it, but
15 I'm going to tell you something, you know, if we can
16 get somewhere between 19 and 20, the shareholders are
17 going to go for it and I'm [just] going to ... go into
18 proxy mode again, but I don't think I ... needed to
19 threaten them."
20 A number of observations about this
21 bit of testimony as the star witness for the
22 plaintiffs here. First of all, the evidence -- the --
23 the testimony suggests that Icahn was -- was reciting
24 a conversation he had with Oracle. There's also no

1 evidence to suggest that this was exactly in the time
2 period when the 19 and 3/8 price was on the table.
3 Notice, he doesn't talk about a 19 and 3/8 price.
4 Then he goes on and talks about the letter. Candidly,
5 Your Honor, I'm not sure which letter he's talking
6 about. The question at issue is a question that goes
7 back to conversations I believe in late November.
8 There is simply nothing to suggest that any sort of --
9 of remark here was made that BEA could have possibly
10 known about that would have been fit for disclosure.
11 The testimony ultimately becomes quite
12 clear, because at the end of the deposition, the
13 question is asked really quite directly to Mr. Icahn
14 on page 88 of his transcript: "Did you tell BEA when
15 you delivered 19 and three-eighths that if they didn't
16 take it, you would reconsider your options?" So now
17 we're right on the timeline. "When you delivered 19
18 and 3/8, what did you say?"
19 And he said, "I think I told you what
20 I said. I think I told them hey look, because I mean
21 BEA did really such a good job of saying they're not
22 going to come off 21 that I was starting to wonder.
23 So I said come on, that's it. I'm going with Oracle
24 now, if you don't do it" -- "I'm going to go with

1 Oracle now if you don't do it, and I did say that, but
2 it wasn't like a right. It was almost like come on,
3 let's get it done."
4 And I'd submit, Your Honor, that's
5 virtually what the proxy says. The proxy delivers the
6 concrete information that Icahn said "I'm going to
7 support this deal and I'm going to support any offer
8 publicly." And the suggestion that there was anything
9 more concrete that could be disclosed is entirely
10 belied by the record and, moreover, would be
11 immaterial in the context of a situation such as this
12 where Mr. Icahn's potential for seeking to run a proxy
13 fight couldn't help but be known by anyone paying
14 remote attention.
15 A word as well on the plaintiffs'
16 claim with respect to the Section -- the settlement of
17 the Section 211 action that Mr. Icahn filed. This
18 argument, too, we would observe, was waived. It was
19 not made the mention of any -- it was not mentioned at
20 all in the opening brief, and there's no reason for
21 that. It's not something that even remotely turned on
22 Mr. Icahn's testimony.
23 There -- Icahn's testimony, when
24 studied, does not support that -- the conclusion that

1 the Section 211 case was settled in exchange for BEA's
2 willingness to go for a $500 million termination fee.
3 In fact, it's entirely unclear which of the two events
4 came first. Mr. Icahn's explicit on the point. BEA
5 couldn't have known the contents of Mr. Icahn's mind,
6 at any rate, as I believe the Court properly pointed
7 out. And at any rate, here again, how could the basis
8 of a settlement of this 211 action back in December,
9 when BEA suggested a $500 million termination fee, be
10 relevant or material, I should say, to a stockholder
11 now seeking to make a decision about -- about whether
12 to accept the 19 and 3/8 price at this point?
13 Let me, Your Honor, discuss briefly
14 some of the additional disclosure claims that
15 plaintiffs have made, particularly with respect to the
16 Goldman Sachs analysis.
17 The idea that Delaware law requires
18 the disclosure of a discounted cash flow analysis is
19 simply false. We cite a lot of cases in our briefing
20 and stand on them. No court has ever announced such a
21 rule. The Delaware courts have repeatedly recognized
22 that a DCF analysis is only as reliable as its inputs.
23 The record here is clear that BEA provided forecasts
24 for two years and that Goldman thought them an

1 inadequate basis for a DCF.
2 The DCF analyses that were run back in
3 July were very prominently stamped preliminary and, of
4 course, they were prepared long before Oracle turned
5 up with its offer. No nonpreliminary discounted cash
6 flow analysis was prepared in this case at any time,
7 and that's because the projections necessary to run a
8 useful discounted cash flow analysis were not
9 available at any time. No DCF was run at any time
10 after the Oracle offer for $17 was received. No
11 reliable DCF was prepared at any time, period.
12 And the evidence is of a piece on that
13 subject. It's undisputed that neither the board nor
14 Goldman considered a DCF in evaluating the proposal
15 now put to stockholders. And given the lack of all
16 this -- and forgive me if I'm simply parroting the
17 Court's remarks from the initial colloquy -- what is
18 really being sponsored here is a per se rule. If you
19 have a deal, you either have to do a DCF and disclose
20 it or you have to say you didn't do a DCF and say why.
21 And that is effectively rewriting the basic idea of
22 materiality that has been and remains the touchstone
23 for disclosure.
24 Next up is the synergies point. The

1 plaintiffs spent a great deal of effort on this issue
2 in discovery. The claim seems to be that -- that BEA
3 should disclose what plaintiffs would characterize as
4 synergy values that Goldman allegedly prepared showing
5 the synergies Oracle expected to receive in a BEA
6 deal. Analyses of this sort can't be disclosed
7 because they don't exist. Goldman never prepared any
8 such analysis. They never had any basis to prepare
9 any such analysis because they never got any
10 information from Oracle on the subject.
11 Goldman did prepare two slides related
12 to synergies. One of them -- and this is -- should be
13 undisputed, if it's not. One of the slides relates
14 publicly-available information about other deals in
15 the past. The other slide is nothing -- literally
16 plug numbers. It takes various financial metrics of
17 publicly available for Oracle on the left side,
18 various potential price points on the topside, and
19 fills in what synergies would have to be -- would have
20 to exist to allow Oracle to complete a deal on a -- on
21 a EPS break-even basis.
22 It bears emphasis, the document does
23 not show what synergies were thought to exist. That
24 information just isn't out there. The information is

1 only what synergies would have to exist in order for
2 Oracle to achieve the deal on -- on a nondilutive
3 basis. This was a consideration for BEA's board
4 because it was seeking to understand how far to push
5 Oracle in negotiations. The suggestion that that
6 concern, which is properly disclosed in the -- in the
7 proxy statement, translates into the requirement to
8 disclose data that is plainly immaterial, is simply --
9 is simply far-fetched. And there is no evidence in
10 the record to support the idea that these numbers are
11 in any way material to any stockholder.
12 THE COURT: So this is -- it's an
13 accretion/dilution table; is that what it is?
14 MR. SAVITT: Effectively. Your Honor,
15 it appears on Exhibit 18 of the exhibit book I think
16 that the Court has, and it's page 44 of the Goldman
17 analysis. And it states quite clearly that what it is
18 showing is are the synergies that would be required
19 for EPS break-even by Oracle in the event of a
20 transaction at price points ranging in the $20 range.
21 That's all it is. They are plug numbers, nothing
22 more.
23 THE COURT: All right.
24 MR. SAVITT: A few words quickly, Your

1 Honor, on the sensitivity cases that plaintiffs spoke
2 about earlier this afternoon.
3 The proxy discloses the management
4 projections that BEA thought reliable and which
5 Goldman used in its fairness analyses. The
6 sensitivity cases that plaintiffs have spoken about
7 were not thought reliable and they were not used by
8 Goldman in its fairness analysis. All of the
9 evidence -- and there's a lot of it. All of the
10 evidence in the record confirms this point. It's what
11 BEA's directors said. It's what BEA's CEO said. It's
12 what Woodruff said, the Goldman Sachs banker. It is
13 of a piece.
14 Both sets of sensitivity cases,
15 accordingly, were excluded. And we wanted to draw
16 emphasis to the fact that it's not as if one set of
17 the sensitivity cases were excluded. Both of them
18 were, the gloomy side and the sunny side. There was
19 no attempt to mislead the public here. And that's the
20 reason that this case is just miles away from the
21 Netsmart case on which plaintiffs seek to rely.
22 The issue there was the selective
23 disclosure of information that gave rise to a concern
24 in the Court's mind that the disclosing entity was

1 hiding reliable estimates in order to make a deal
2 appear more attractive. Here, what was disclosed --
3 evidence is conclusive -- only the reliable estimates
4 and all of the reliable estimates. What was excluded,
5 only the -- the information that was thought
6 unreliable. And as I mentioned, it was the middle
7 case. There's no showing under this set of
8 circumstances that the material would take on
9 significance for reasonable stockholders seeking to
10 decide how to cast his or her vote. There's just no
11 showing here that -- that this exceedingly soft issue
12 would be material; and, indeed, there is some reason
13 to be concerned that it could be per se immaterial in
14 the sense that soft information that is unreliable
15 ought not be disclosed.
16 And, I mean, here again, what's being
17 put before the Court is the idea that there's a per se
18 rule. I think the Court asked my -- my adversary why
19 is this information material, and the answer was
20 because it was shown to the board. Well, that's not
21 the law. Something is material because it will
22 significantly alter the total mix of information
23 available to a stockholder. The McMillan case is
24 quite clear on the point, that something that bankers

1 get needn't be disclosed for that very reason. There
2 are other cases to the same effect, and it would be
3 rewriting the law of materiality with a per se rule
4 that is simply not consistent with Delaware
5 jurisprudence.
6 As to the Goldman fee issue, I believe
7 that the colloquy of earlier this afternoon
8 established the appropriate factual baseline, which is
9 without a transaction, had no transaction occurred,
10 Goldman's fee for this engagement would have been
11 $25 million. Because a fee did occur -- I'm sorry;
12 because a transaction did occur, the fee was
13 $33 million. 25 million, therefore, is noncontingent,
14 $8 million is contingent.
15 That's what defendants have been
16 saying all along. There is no evidence offered, no
17 argument at all to show that a principally
18 noncontingent fee of this matter would be material,
19 certainly nothing to show that the disclosure in the
20 proxy statement as to the fee was in any way
21 misleading or inaccurate. This case is just miles
22 away from the LAMPERS case where the fee disclosure
23 was thought to fail to alert investors that the fee
24 could incentivize the banker to favor one suitor over

1 another. There's just no record of it at all.
2 And I would -- to the extent
3 plaintiffs continue to sponsor this argument, I think
4 it bears emphasis that, for example, the Goldman
5 deponent in this case was not asked a single question
6 about the contingent fee. It's no wonder it wasn't
7 fully understood in the papers here. It wasn't even
8 thought important enough to explore with the Goldman
9 banker or, for that matter, any of the other deponents
10 in the case.
11 Your Honor, I think the -- the -- I
12 think that covers all of the matters that were the
13 subject of the colloquy between Mr. Fioravanti and the
14 Court. We'd, of course, be delighted to take any
15 questions that the Court might have or offer any
16 clarification that --
17 THE COURT: I have --
18 MR. SAVITT: -- the Court --
19 THE COURT: -- nothing else at the
20 moment, Mr. Savitt. Thank you.
21 MR. SAVITT: Thank you, Your Honor.
22 THE COURT: Mr. Fioravanti.
23 MR. FIORAVANTI: Your Honor had asked
24 the question earlier about whether there's any

1 evidence in the record as to whether BEA went back to
2 Oracle after receiving the 19 and 3/8 price from Mr.
3 Icahn. The answer is there is evidence in the record.
4 It's Ms. Abrams' deposition testimony on page 111
5 where she said that there was no authorization to go
6 back to seek a price other than 19.37 1/2.
7 Mr. Icahn's letter, as Your Honor
8 pointed out, of November 19th was not disclosed.
9 THE COURT: Well, I did point that
10 out, but why is it material?
11 MR. FIORAVANTI: Because it's part of
12 the background of this case and the pressure that Mr.
13 Icahn was putting on this board --.
14 THE COURT: Why -- why is its omission
15 in the context of what else is disclosed and what
16 else, frankly, was known publicly and as part of the
17 total mix, why is the omission of that letter from
18 this proxy material a material omission?
19 MR. FIORAVANTI: Mr. Icahn had
20 threatened personal liability to the board of
21 directors with respect to their negotiation with
22 Oracle or lack of negotiation with Oracle, and he also
23 threatened personal liability with respect to a
24 severance plan that had been recently adopted by the

1 board in the context of this negotiation.
2 A stockholder would consider it
3 important that the person who negotiated the merger
4 price was also threatening litigation against the
5 board of directors not to do a deal.
6 Mr. Icahn told --
7 THE COURT: Oh, the other point on
8 that subject, Mr. Fioravanti, is, why isn't this
9 argument waived?
10 MR. FIORAVANTI: We deposed Mr. Icahn
11 on Saturday after --
12 THE COURT: You didn't raise this
13 argument in your opening brief.
14 MR. FIORAVANTI: Mr. Icahn --
15 THE COURT: You raised it in your --
16 in your reply brief.
17 MR. FIORAVANTI: Mr. Icahn was not
18 deposed until after we filed our opening brief. Mr.
19 Icahn was deposed on Friday, Good Friday, at -- it was
20 supposed to start at 2 o'clock -- at 2:45 in his
21 office. Our brief was due the day before at 5 p.m.
22 So all the -- with respect to Mr.
23 Icahn --
24 THE COURT: Well -- but you had the --

1 certainly you had the letter before you deposed Mr.
2 Icahn.
3 MR. FIORAVANTI: We did have the
4 letter, but we didn't have --
5 THE COURT: And you didn't raise any
6 question about it in your brief.
7 MR. FIORAVANTI: That's correct.
8 THE COURT: What did you learn from
9 Mr. Icahn about the letter that you didn't -- that
10 made it now a live claim; you didn't know just from
11 the fact that you had the letter?
12 MR. FIORAVANTI: We didn't know the
13 basis for the confidentiality designation and --
14 THE COURT: So what?
15 MR. FIORAVANTI: And it was -- quite
16 frankly, it was in the rush of expedited litigation.
17 We had the opportunity to finally depose Mr. Icahn
18 about it, and that's when we put it in our reply
19 brief. It's part of the total mix of information we
20 think is material. We don't think the argument's been
21 waived.
22 Mr. Icahn said on page -- oh,
23 Mr. Woodruff, by the way, was asked about what Mr.
24 Icahn said when he delivered the 19 and 3/8 price.

1 And Mr. Woodruff from Goldman Sachs said, "I don't
2 recall the specifics, but it was clear he was
3 basically saying at this point 'I'm moving over. I'm
4 supporting the 19.375, and if you guys don't support
5 it, I'll fight you and endorse it with them.'"
6 Mr. Icahn at page 85 -- this is Mr.
7 Icahn saying with respect to BEA -- he was talking
8 about the back-and-forth. He said, "Then BEA was
9 still saying why couldn't we get at least 20, I think
10 that's what happened, we should have held out. You
11 should hold out for at least 20. I think Goldman said
12 it. I said come on, just get it over with. Then I
13 said I'm not going back to them again. I'm not going,
14 I told Oracle" -- this is in response -- this is what
15 he told Goldman Sachs. "... I told Oracle" --
16 THE COURT: Are you on page 80?
17 MR. FIORAVANTI: 85.
18 THE COURT: 85, all right. So all
19 good things come in the last 10 pages of Mr. Icahn's
20 deposition.
21 MR. FIORAVANTI: He said, "I think
22 Goldman said it. I said come on, just get it over
23 with. Then I said" -- it's line 18. "Then I said I'm
24 not going back to them again. I'm not going, I told

1 Oracle" -- "I told Oracle I support 19 and
2 three-eighths, I'm not going to change my view on that
3 and let's do it."
4 THE COURT: Why -- why isn't the sense
5 of that information conveyed on page 25 of the proxy
6 material in the middle paragraph?
7 MR. FIORAVANTI: Because it doesn't
8 say that Mr. Icahn told Oracle -- it doesn't say that
9 Mr. Icahn told BEA that he was going to support
10 Oracle.
11 THE COURT: I think it does.
12 MR. FIORAVANTI: No. It's -- what it
13 says --
14 THE COURT: It says, he, Icahn said
15 that he would be prepared to announce publicly his
16 support of such an offer by Oracle.
17 MR. FIORAVANTI: Right. And that's
18 misleading, because it could be interpreted as "If you
19 accept it, I will publicly endorse it."
20 THE COURT: I mean, you might think
21 that -- you might read that, if you leave out the last
22 couple of words. It doesn't say "I'll publicly
23 announce my support of a transaction with Oracle or of
24 a merger agreement." It says "a proposal by Oracle."

1 That's quite different.

2 MR. FIORAVANTI: And it doesn't -- and
3 it certainly doesn't disclose that BEA knew that Icahn
4 had told Oracle he was supporting 19 and 3/8. And as
5 Mr. Icahn explained, BEA couldn't go back and ask for
6 any additional consideration because they knew that he
7 was supporting 19 and 3/8.

8 With respect to the settlement of
9 the --

10 THE COURT: There is nothing anywhere
11 that says what you just said, that they didn't -- they
12 couldn't go back because he was supporting the price.
13 I mean, if they chose not to go back, it wasn't
14 because he was supporting the price. It's because
15 they concluded they couldn't -- they couldn't get
16 anymore. And if they went back, they might lose what
17 they had.

18 MR. FIORAVANTI: That's not what Mr.
19 Icahn said.

20 THE COURT: Well, I mean, I've now
21 read a good deal of Mr. Icahn's testimony sitting
22 here, and I'm not sure what you mean.

23 MR. FIORAVANTI: He said "... [Icahn]
24 now knew that I'm supporting 19 and three-eighths, so

1 they didn't care" -- Oracle didn't care -- "you
2 couldn't go back to them anymore ..." That was his
3 testimony.
4 With respect to the settlement of the
5 211 litigation, Your Honor, I think that's discussed
6 on Mr. Icahn's deposition at 42 and 43.
7 THE COURT: This is another claim you
8 didn't raise in your opening brief.
9 MR. FIORAVANTI: Your Honor, we
10 deposed Mr. Icahn after our opening brief.
11 THE COURT: I -- I did hear you say
12 that. Now -- but you had information about the
13 settlement in the 211 case.
14 MR. FIORAVANTI: But there was nothing
15 that indicated the connection between the settlement
16 of the 211 action and the -- and then BEA putting on
17 the table a -- a reverse termination fee number.
18 THE COURT: It's not the $500 million
19 number, is it?
20 MR. FIORAVANTI: Well, it's 10 percent
21 of a deal price is what -- is what --
22 THE COURT: This is BEA putting it on
23 the table?
24 MR. FIORAVANTI: Yes. Bottom of page

1 41, line 25. It says --
2 THE COURT: Of what?
3 MR. FIORAVANTI: Mr. Icahn's
4 deposition, at page 40. It says -- and there's a long
5 discussion before that about negotiating with Oracle.
6 But here's what he says. At the bottom of page 41, it
7 says, "So BEA, I think, had a meeting and comes up
8 with 500 million. They [say] okay, we'll take
9 500 million as the penalty. So I thought that was
10 pretty good because I said hey look, now Oracle should
11 do that. [So] I said to Oracle look, from my way of
12 looking at it, if you believe you're going to get
13 HSR," Hart-Scott-Rodino, "you've got to put out
14 good-faith numbers that you'll pay."
15 And then he says at the bottom of page
16 42 on line 22, he says, "Yes, so let me finish. So
17 what happened was I was very pleased that BEA now had
18 come up with a number and I felt we were negotiating
19 really in good faith, and to my surprise, so we made
20 the deal, so I made the deal with them and said great,
21 [I've] got the number, this is really moving ahead
22 here."
23 And then he says, "So" -- "I also
24 agreed to put off the meeting and the representative

1 from Oracle was very angry, to my surprise ..." And
2 he talks about Mr. Icahn getting angry at her.
3 So it's that connection with respect
4 to the $500 million -- putting a number on the table
5 regarding the reverse termination fee in the
6 settlement of the 211 litigation that's not reflected
7 in the proxy statement. And, again --
8 THE COURT: What's the materiality of
9 this connection?
10 MR. FIORAVANTI: It's -- it's part of
11 the piece with Mr. Icahn's pressure to force BEA to
12 accept a price that was acceptable to Mr. Icahn, which
13 was in this case 19.37 1/2. And that disclosure --
14 THE COURT: Well, this is long before
15 the 19.37 1/2. So --
16 MR. FIORAVANTI: No. But it's
17 leading -- it's the background of the merger.
18 THE COURT: Okay.
19 MR. FIORAVANTI: And -- and the
20 disclosure with respect to Mr. Icahn.
21 I have one other point about the issue
22 about the sensitivity cases. Your Honor asked me
23 earlier, Mr. Savitt raised it about the sensitivity
24 analyses. And Your Honor said well, the sensitivity

1 analysis only goes up to $20 or $21 based on the Case
2 2. But what's important to keep in mind is, this is
3 a -- not a DCF. This is a present value of future
4 stock price analysis which is -- measures the value of
5 equity and contains an inherent minority discount and
6 is not a fair value determination as a DCF analysis.
7 So that fair value, you'd have to take the numbers and
8 add back -- you'd have to correct for minority
9 discount, which -- which I think is important in this
10 circumstance.
11 Unless your Honor has any other
12 questions --
13 THE COURT: When you say you'd have to
14 do that, it's not done in the analysis, is it? I
15 mean, you'd have to do that in what context?
16 MR. FIORAVANTI: Well, the present
17 value of future share price analysis contains an
18 inherent minority discount. So ...
19 THE COURT: And what is it that says
20 that's true? --some -- some appraisal cases?
21 MR. FIORAVANTI: Mr. -- no. It's in
22 our brief. Mr. Woodruff --
23 THE COURT: I know it's in your brief,
24 but ...

1 MR. FIORAVANTI: No. Mr. Woodruff --
2 Mr. Woodruff was asked and he was asked about the
3 difference between the two, and he said that -- that
4 the present value of future share price analysis is a
5 measure of the value of the equity and that a
6 discounted cash flow analysis is a valuation of the
7 company. And as we pointed out -- and the defendants
8 didn't dispute it in their answering brief -- that
9 they're different, that the present value of future
10 share price analysis reflects a minority discount. So
11 that --
12 THE COURT: Well, if you -- if you
13 accept the premise that's -- I mean, there are some
14 Delaware cases that say this -- I don't know that
15 there's any Supreme Court authority -- the idea that
16 shares trading or always trading on a discount,
17 minority discount basis, I think there's a fair number
18 of people in the finance world who take issue with
19 that. I know there are, because I was recently -- I
20 was in a conference in Philadelphia not long ago where
21 the idea was made fun of.
22 MR. FIORAVANTI: Well, this Court
23 certainly in the appraisal context adds back, corrects
24 for minority discount with respect to an equity value.

1 THE COURT: It happens sometimes.
2 MR. FIORAVANTI: And that is not what
3 happens --
4 THE COURT: That's what you're talking
5 about. But you don't do it -- when you're preparing
6 this analysis, you don't -- at the bottom line you
7 don't add in a premium.
8 MR. FIORAVANTI: No. No. What I'm
9 suggesting, Your Honor, is in the context of the
10 ranges that are produced there, that that's an equity
11 value and that a stockholder might want to -- it's
12 important for a stockholder to consider adding back a
13 correction for a minority discount.
14 THE COURT: All right. Is there
15 anything else?
16 MR. FIORAVANTI: That's it, Your
17 Honor.
18 THE COURT: You know, I'm going to
19 take a recess and come back and let you know what I'm
20 going to do.
21 (A short recess was taken from
22 3:06 p.m. until 3:20 p.m.)
23 THE COURT: Ordinarily I would reserve
24 decision and give you my opinion in writing because

1 it's generally useful to have the opportunity to
2 collect one's thoughts clearly and express the opinion
3 in ways that later can be cited to and relied upon.
4 In this case, however, there are circumstances that
5 lead me to believe that the best thing to do here is
6 to proceed to give you my opinion orally. It's really
7 my ruling. I wouldn't consider this an opinion. And
8 those circumstances have mostly to do with the press
9 of time in both the time left in this matter to issue
10 a written opinion and other obligations that are
11 occupying my attention at the moment.
12 So I will, in what should be a
13 relatively short oral presentation, give you the
14 answers to the questions you have posed.
15 The motion for preliminary injunction
16 will be denied. I will begin by commenting that the
17 circumstance presented in this transaction and the
18 circumstances that exist in the markets today that
19 we've all been living through for the last several
20 months suggest that the opportunity to take this
21 premium offer is a valuable one. I refer to the fact
22 that this transaction has been known for some time.
23 The company was shopped before it reached its
24 agreement with Oracle. There is an opportunity in the

1 merger agreement for the company to accept a better
2 proposal if one comes along, but none has. The
3 transaction is a third-party, arms-length negotiated
4 transaction. The board of directors are, with the
5 exception of Mr. Chuang, who is a large shareholder
6 himself and one of the founders, independent and
7 highly-distinguished individuals. The board was
8 advised by highly-reputable bankers and lawyers. And
9 so the transaction on the table and which the
10 shareholders are expected to vote on next week is the
11 only available transaction at this time.
12 It is also a transaction that is
13 priced at a significant premium. I won't try to
14 express what those premiums are; but I know from
15 looking at the materials, that the premiums over
16 trading prices before the negotiations began or before
17 Mr. Icahn emerged or before whatever one looks at are
18 quite substantial.
19 To that let me add, as I observed at
20 the beginning, the disruptions in the marketplace that
21 exist that make it more risky certainly for the court
22 to undertake to interfere with the completion of a
23 transaction in the time frame that is set forth by the
24 parties and agreed to in the deal, that those risks

1 give me -- would give any judge even greater pause
2 before moving to restrain a transaction unless very
3 substantial grounds existed that required such action.
4 What I mean to express is the fact
5 that given a great many factors that are in either
6 part of this transaction or part of the current market
7 environment in which we all live, this Court would
8 hesitate before interfering with the completion of
9 this transaction on less than a compelling record.
10 Now turning to the merits of the
11 claims that the plaintiffs make, I have to begin by
12 observing, as the defendants have done repeatedly,
13 that this is, No. 1, entirely a disclosure-oriented
14 application and, No. 2, there are no allegations that
15 the proxy materials made available to shareholders to
16 make their decisions omit any material fact. Rather,
17 the claim is that the proxy material isn't complete in
18 certain respects in that it discloses some things but
19 not all of what the plaintiffs regard to be the full
20 story surrounding those various items that are
21 challenged.
22 I would observe that something that
23 makes this case unusual is the presence of Mr. Icahn
24 and the role that he played in the transaction. I

1 think I agree with Mr. Savitt that it doesn't really
2 create novel legal issues, but it's an unusual
3 circumstance that the plaintiffs rely upon in large
4 part to support their demand for additional
5 disclosure. Certainly that's true with respect to
6 Mr. Icahn's involvement in the transaction.
7 Turning to the particular claims that
8 the plaintiff has made in briefs or argued today.
9 First, the DCF analysis. There is a claim that the
10 proxy materials are misleading because they don't
11 explain the absence of a DCF analysis in Goldman's
12 final valuation material.
13 Now, the facts seem fairly
14 well-established that when Goldman was doing
15 preliminary work before the Oracle transaction
16 emerged, doing some preliminary valuation work in the
17 summer of 2007, that Goldman did prepare some
18 preliminary discounted cash flow analyses and did so
19 using a five-year set of projections, for want of a
20 better term. But the record is that those projections
21 consisted only of two years of actual management
22 projections and three years of extrapolations taken
23 from them. I can't tell at this point whether the
24 extrapolation was done by Goldman or done by

1 management; but in any event, the record is clear and
2 not controverted that none of Goldman's analysis done
3 after the Oracle transaction emerged contained a
4 discounted cash flow analysis or relied on that early
5 set of projections. And the record also is, from the
6 company, that the company does not as a matter of
7 practice prepare five-year projections because they
8 don't believe that any projections beyond two years
9 are reliable.
10 And so from that, when you put it
11 together, you would have to conclude that the
12 five-year numbers that were used in these preliminary
13 DCF analyses consisted of unreliable information.
14 There is nothing in the law that suggests that it's
15 necessary for the proxy material to explain why in its
16 final -- and, indeed, in the work that it did after
17 the Oracle bid emerged and in its final work, Goldman
18 didn't use a DCF model. The proxy material discloses
19 accurately the analyses that Goldman Sachs did rely
20 upon, and there is no reason whatsoever to believe
21 that there's any materiality to some possible
22 disclosure about why Goldman didn't use a DCF
23 analysis. Certainly, the omission of that
24 information, in the context of the disclosure made

1 about Goldman's work, is not material.
2 There is another claim about whether
3 or not the proxy material should disclose the
4 particulars of synergy estimates that the board of
5 directors saw or that Goldman prepared for the company
6 to look at in some presentations. The record is that
7 the company had no information from, and has no
8 information from Oracle, and Goldman had no such
9 information from Oracle, about the actual synergies
10 that Oracle expects to achieve in this transaction.
11 Instead, the information that Goldman compiled for
12 presentation to the board of directors apparently
13 consisted of publicly-available information about
14 other transactions.
15 While there are some uses to which
16 shareholders can put synergy information -- oh, and I
17 should add that the record in front of me is, from the
18 company, is that the information available is
19 certainly not considered in any way to be a reliable
20 indication of the synergies that would actually be
21 achieved in this transaction. For that reason alone,
22 I think there's clear precedent that such information
23 does not need to be disclosed.
24 Along the same line is the claim

1 that -- that the proxy material should have included
2 both a high case and a low case sensitivity analysis.
3 There is a chart in the Goldman presentations that has
4 to do with the present value of future stock value,
5 something like that. And in the chart there's a
6 series of numbers that are based on both a base case,
7 street estimates, and then a high and low sensitivity
8 case. In the proxy material, as I understand things,
9 what is disclosed is the range that is bracketed by
10 the base case and the street estimates. And the proxy
11 material does not disclose the other two sets of
12 numbers that were the low case and the high case. And
13 I guess the high case obviously is higher than the
14 base case. As I looked at it, when I studied it, it
15 seemed that the low case was in most instances lower
16 than the street estimates.
17 In any event, the record reflects that
18 while that analysis appears in a presentation that
19 Goldman made to the board of directors, Goldman did
20 not regard, and management did not regard, the high
21 case or the low case to be reliable. It is also the
22 case that Goldman did not rely on either of them in
23 forming its valuation opinion.
24 I don't understand why it would have

1 been material to disclose that information, as it is
2 considered to be unreliable and could well mislead
3 shareholders rather than inform them.
4 I'll also note in this connection, as
5 I discussed with Mr. Fioravanti, that only in the two
6 most extreme high cases do any of the numbers produced
7 by the Sensitivity Case 2, those found in the two
8 right-hand columns exceed or even equal the
9 transaction price, and then only by relatively modest
10 amounts.
11 And while I note Mr. Fioravanti's
12 observation that those numbers do not necessarily
13 involve any transaction premium, nevertheless, as I
14 understand things, when bankers prepare something like
15 this, it isn't their practice to include premiums in
16 that analysis. So, anyway, leave that as it is.
17 For the reasons I've discussed, it is
18 not a material omission of fact to have omitted both
19 the high sensitivity case and the low sensitivity
20 case. And as Mr. Savitt pointed out, this is not a
21 case where they've taken out the high case and left in
22 the low case. They've, in fact, taken them both out.
23 Next there is a claim about the street
24 estimates that appear, I guess, in that same analysis.

1 That claim evaporates based on my understanding of the
2 record, which is that while there was testimony that
3 street estimates before November 15th were
4 misleadingly low -- and I can be wrong about that
5 date, but I refer to the date on which the company was
6 able to publish the financial information that was
7 in arrears. So when the company was able to bring
8 itself up-to-date in making its public filings, which
9 I believe is November 15th, from that time forward the
10 street analysts were able to base their work on
11 fully-disclosed company information. And before that
12 date, quite obviously, they were not. But once the
13 company got its filings up-to-date, those analyst
14 estimates were changed and more accurately reflected
15 the company's value.
16 Now, Mr. Fioravanti argues that even
17 after that, Mr. Chuang's testimony is that he
18 believed, based on undisclosed fourth-quarter results,
19 that the analyst estimates were still low, but that's
20 quite a different point. The record reflects that the
21 street estimates used in the Goldman presentation were
22 the ones taken from after the November 15th date on
23 which the company brought its financial statements
24 up-to-date and the analysts revised their estimates.

1 Since those were based on complete information, their
2 inclusion in the Goldman presentation could not have
3 been misleading.
4 There is a claim about Goldman's fee,
5 and the issue is that the proxy statement discloses
6 the total fee and discloses that the fee is at least
7 in part contingent but doesn't disclose which part of
8 the fee was contingent and which part wasn't.
9 This might be a good claim if some
10 very large part of the fee was in fact contingent.
11 And that's the argument that the plaintiffs try to
12 make, that, in fact, the whole fee was contingent; but
13 I believe that's a mischaracterization of the fee
14 range. And at least as I understand things, of the
15 $33 million that Goldman will be paid, only $8 million
16 is contingent. And given that it's only 8 out of 33,
17 I can't see it's materially misleading to have merely
18 stated that a part of the fee was contingent without
19 saying how much.
20 There are some other claims that
21 relate more directly to Mr. Icahn's involvement in the
22 transaction. Now, the first is the argument that
23 the proxy statement should have disclosed the content
24 of a November 19th letter that Mr. Icahn sent to the

1 board of directors. And the reasons that it should
2 have been disclosed, according to plaintiffs, are that
3 in the letter, Mr. Icahn threatens a proxy contest if
4 the management doesn't behave to his liking and also
5 that he threatens litigation against management for
6 various actions they were taking.
7 The response to this is, No. 1, that
8 the claim was waived since it wasn't included in the
9 plaintiffs' initial moving papers. And that's a view
10 that, I must say, I'm sympathetic with.
11 Mr. Fioravanti argues that he didn't include it
12 because he hadn't had a chance yet to depose Mr. Icahn
13 and that deposition took place the day after the brief
14 was filed; but, nevertheless, the letter itself was
15 available in the production before the brief was
16 filed. And I think, in fairness, that the argument
17 should have been made then so that the defendants
18 could have had a full opportunity to respond to it.
19 Leaving that aside, I'm convinced,
20 nevertheless, that at least at this stage and on this
21 record that the failure to disclose that letter is not
22 a material omission in the proxy material. Very
23 briefly, the facts are that Mr. Icahn had publicly
24 filed an aggressive 13D not long before, that the

1 company understood from his 13D filing that a proxy
2 contest was a possibility - a fact that is disclosed
3 in the proxy statement. And beyond that, before this
4 letter was sent, Mr. Icahn had actually sued the
5 company in this court under Section 211 trying to get
6 the annual meeting held on an expedited basis.
7 Now, that obviously signaled that Mr.
8 Icahn was at least considering running a proxy
9 contest. So the fact that the letter reiterates that
10 I think is not material. And the facts of the 211
11 case -- the fact that it was filed and the relief that
12 it sought are disclosed.
13 Now, that 211 case -- and I have to
14 say, I haven't looked at the complaint again recently.
15 According to the proxy material, that complaint also
16 made claims against the board seeking to enjoin
17 certain other actions. I think that was a claim where
18 Icahn was trying to prevent the company from taking
19 strong defensive measures, very much like the sorts of
20 things that he was complaining about in the
21 November 11th letter. So I don't regard the omission
22 of that letter as material, either.
23 I have to say it's curious that the
24 letter never became a matter of public record. And it

1 is curious, as plaintiffs point out, that it was
2 stamped confidential apparently by Mr. Icahn when he
3 first sent it to the board. That is hard to
4 understand, but that seems to be the case. But those
5 facts don't make its omission from the proxy statement
6 a material omission.
7 There is a claim -- discussed at
8 length today -- and this is on page 25 in
9 particular -- the proxy material doesn't really convey
10 the fact that when Mr. Icahn negotiated the 19 and 3/8
11 price, that he brought it back to the company and to
12 Goldman Sachs and conveyed a threat, essentially, that
13 if the company didn't agree to this price, that he
14 would take action.
15 Now, I don't really read Mr. Icahn's
16 deposition as saying that he threatened the company.
17 I've read different parts of it, including sitting up
18 here today with counsel; and I think the fair reading
19 of it is it doesn't say that he conveyed a threat.
20 Nevertheless, it's quite clear from what he says and
21 from the company's proxy material that he told BEA and
22 told Goldman Sachs that this was the deal that he was
23 prepared to support and, more than just a deal, it was
24 an offer by Oracle that he was prepared to support

1 publicly.

2 Now, Mr. Fioravanti suggests that
3 means that he would lend his support to a transaction
4 if the company agreed to one at that price. But
5 that's not how I read the proxy material. I read it
6 as saying "If you don't agree to Oracle's proposal, I
7 will publicly express my support for that proposal."
8 And I think that is precisely the threat that the
9 plaintiffs -- to call it a threat I think overstates
10 it, but precisely what they say is not communicated by
11 the proxy material. As I read the proxy material, it
12 is communicated.

13 To double back to where I began on
14 this issue of materiality, the fact that something is
15 included in materials that are presented to a board of
16 directors does not, ipso facto, make that something
17 material. Otherwise every book that's given to the
18 board and every presentation made to the board would
19 have to be part of the proxy material that follows the
20 board's approval of a transaction. That certainly is
21 not the law. What the law is, is that a plaintiff has
22 to show why the omission of information in the
23 disclosure material amounts to a material omission.
24 That is, why a reasonable shareholder reading the

1 material would find it important in deciding how to
2 vote to know this particular omitted fact. And while
3 I understand the difficulty plaintiffs encounter in
4 bringing proceedings like this and proving cases, I
5 have to conclude from my review of the briefs and the
6 record that there isn't anything in the claims that
7 have been made that amounts to a material omission,
8 that is, one that would render the proxy material
9 materially misleading by its absence.
10 So essentially, even though I started
11 out saying that it would take a strong case to lead me
12 to enter relief in the context of this transaction and
13 the current marketplace, what I think I find instead
14 is that the claims the plaintiffs advance are not
15 strong but weak. Therefore, even if I thought there
16 was some colorable merit to them, there's no question
17 in my mind the threat of injury that could flow from
18 the entry of an injunction is much more powerful and
19 immediate than any injury that an injunction might
20 remedy.
21 So for those reasons I'm going to deny
22 the application.
23 We'll stand in recess.
24 (Court adjourned at 3:49 p.m.)

1 CERTIFICATE

2

3 I, NEITH D. ECKER, Official Court
4 Reporter for the Court of Chancery of the State of
5 Delaware, do hereby certify that the foregoing pages
6 numbered 3 through 101 contain a true and correct
7 transcription of the proceedings as stenographically
8 reported by me at the hearing in the above cause
9 before the Vice Chancellor of the State of Delaware,
10 on the date therein indicated, except for the rulings
11 at pages 86 through 101, which were revised by the
12 Vice Chancellor.
13 IN WITNESS WHEREOF I have hereunto set
14 my hand at Wilmington, this 28th day of March 2008.
15
16
17 /s/ Neith D. Ecker
18 -----------------------------
19 Official Court Reporter
of the Chancery Court
State of Delaware
20
21
22 Certificate Number: 113-PS
Expiration: Permanent
23
24