IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL RAFTERY, On Behalf of Himself and All Others Similarly Situated,	:	
Plaintiff,	:	
v	:	Civil Action No. 11520-VCG
ROBERT B. GOERGEN, ROBERT B. GOERGEN, JR., JANE DIETZE, ANDREW GRAHAM, BRETT M. JOHNSON, ILAN KAUFTHAL, HOWARD E. ROSE, JAMES WILLIAMS III, THE CARLYLE GROUP L.P., CB SHINE HOLDINGS, LLC, CB SHINE MERGER SUB, INC., and BLYTH, INC.,	:	
Defendants.	:	

- - -

Chancery Court Chambers
Court of Chancery Courthouse
34 The Circle
Georgetown, Delaware
Thursday, October 1, 2015
11:03 a.m.

- - -

BEFORE: HON. SAM GLASSCOCK, III, Vice Chancellor.

- - -

TELEPHONIC ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR EXPEDITED PROCEEDINGS and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

APPEARANCES: (Via teleconference)

BLAKE A. BENNETT, ESQ.
Cooch and Taylor, P.A.
-and-
W. SCOTT HOLLEMAN, ESQ.
of the New York Bar
Johnson & Weaver, LLP
for Plaintiff

GARRETT B. MORITZ, ESQ.
Ross Aronstam & Moritz, LLP
-and-
ANDREW J.H. CHEUNG, ESQ.
of the New York Bar
Wachtell, Lipton, Rosen & Katz LLP
for Defendants Robert B. Goergen, Robert B. Goergen, Jr., Jane Dietze, Andrew Graham, Brett M. Johnson, Ilan Kaufthal, Howard E. Rose, James Williams III, and Blyth, Inc.

SAMUEL A. NOLEN, ESQ.
J. SCOTT PRITCHARD, ESQ.
JOHN MEZZANOTTE, JR., ESQ.
Richards, Layton & Finger, P.A.
-and-
GLENN M. KURTZ, ESQ.
ANDREW W. HAMMOND, ESQ.
of the New York Bar
White & Case LLP
for Defendants The Carlyle Group LP, CB Shine Holdings, LLC, and CB Shine Merger Sub, Inc.

- - -

THE COURT: Counsel, this is Sam Glasscock. Who do I have on the line, please?

MR. BENNETT: Good morning, Your Honor. This is Blake Bennett from Cooch & Taylor on behalf of the plaintiff Michael Raftery. With me on the line is Scott Holleman from Johnson & Weaver. Mr. Holleman's been admitted pro hac vice and, with the Court's permission, will speak for the plaintiff today.

THE COURT: I'll be happy to hear from Mr. Holleman.

MR. HOLLEMAN: Thank you, Your Honor.

MR. MORITZ: Good morning, Your Honor. This is Garrett Moritz from Ross, Aronstam & Moritz on behalf of the Blyth defendants, and I'm joined by co-counsel Andrew Cheung from Wachtell Lipton.

THE COURT: Welcome. And who will be arguing, Mr. Moritz?

MR. MORITZ: I will be, Your Honor.

MR. CHEUNG: Good morning, Your Honor.

THE COURT: Okay. I'll be happy to hear from you.

Good morning.

And who is --

MR. KURTZ: Good morning, Your Honor. Glenn Kurtz and Andy Hammond from White & Case. I think Sam Nolen is on the line.

MR. NOLEN: Yes. Let me make introductions.

MR. KURTZ: Sorry.

MR. NOLEN: Your Honor, it's Sam Nolen from Richards, Layton & Finger on the line for the Carlyle defendants. With me in my office are my associates Scott Pritchard and John Mezzanotte, and you heard Mr. Kurtz of White & Case. And also with him is Andrew Hammond of White & Case.

Mr. Hammond has been admitted pro hac vice and Mr. Kurtz's application is pending before Your Honor. With Your Honor's permission, Mr. Kurtz would speak for the Carlyle defendants this morning.

THE COURT: Yes. Let me orally grant that motion. And it will be superceded by a written order, formal order, but I'd be happy to hear from Mr. Kurtz.

MR. NOLEN: Thank you very much, Your Honor. Much appreciated.

MR. KURTZ: Thank you, Your Honor.

THE COURT: Anyone else? All right.

Would you like to go ahead, then. I'm sorry, is Mr. Bennett or Mr. Holleman going to argue?

MR. BENNETT: Mr. Holleman.

THE COURT: Mr. Holleman, happy to hear from you.

MR. HOLLEMAN: Thank you. Good morning again, Your Honor. Scott Holleman from Johnson & Weaver on behalf of the plaintiffs. My firm represents Mr. Raftery and Mr. Berry, and we are joined in this motion by all other plaintiffs who filed suit in Delaware. By now the count is somewhere around six or seven.

This is a motion to expedite. It's not an injunction motion, not a motion to dismiss or a motion for summary judgment. And on a motion to expedite, all plaintiffs have to show is a sufficiently colorable claim and a sufficient possibility of threatened repairable injury. And what plaintiffs have shown here today, we believe, is more than sufficient to grant expedition.

Plaintiffs assert two types of claims, one targeting the price and the process leading up to the acquisition and another targeting the disclosures disseminated in connection with the acquisition.

THE COURT: The price --

MR. HOLLEMAN: Yes, Your Honor.

THE COURT: The price and process claims are exceedingly unlikely to lead to preliminary injunctive relief, aren't they? Aren't we really talking about the colorability of the disclosure claims here?

MR. HOLLEMAN: I think that exactly what Your Honor stated, and based on recent case law, I think that's a fair statement, that it is less likely than the disclosure claims -- because there is, of course, the argument that the price and process claims can be remedied through an award for damages after the close of the acquisition.

THE COURT: Sure. And --

MR. HOLLEMAN: The case law --

THE COURT: -- if you're right that this is an entire fairness claim, that's particularly the case. I think it would probably be a better use of our time to concentrate on your disclosure claims.

MR. HOLLEMAN: Thank you for that guidance, Your Honor. And with that, I will turn to the disclosure claims and not belabor the Court with an extensive background of what led to this deal.

THE COURT: All right. Because I know you are alleging entire fairness, and that is something that we can in a more leisurely fashion come to a resolution on. But I'm not sure it really bears on what I have to decide if I'm going to go forward to preliminary injunctive relief.

MR. HOLLEMAN: Certainly. And while we're happy to move quickly, I think that a more leisurely approach for those more complex claims is something that makes sense for both the parties and the Court.

THE COURT: Right. Relatively leisurely is what I meant, compared to the expedition that would be required to, in the next week and a half, reach a PI decision.

MR. HOLLEMAN: Certainly. Well, turning to the disclosure claims, then, as this Court is well aware, and as Delaware law holds consistently, defendants must disclose any and all material information in a nonmisleading manner in connection with a stockholder's decision on a merger like the one in question. That implicates both the shareholders' ability to make a fully informed decision about whether to tender their shares and, also, whether to

exercise their appraisal rights under Delaware law, because this is a cashout merger for $6 a share, so Delaware stockholders would, in the event that they do not support the merger, have the opportunity to exercise their appraisal rights.

We allege several in our complaint, and for the purposes of today's proceedings, we have attempted to narrow our disclosure claims to what we believe are the most important ones. The first one I'll turn to is the disclosure of after-tax, unlevered free cash flows. The financial advisor that was retained here just about a week or so before the deal was -- the merger agreement was executed is Houlihan Lokey. And Houlihan performed a discounted cash flow analysis. And of course, one of the necessary inputs in the DCF analysis is unlevered free cash flows. The 14D-9 and subsequent amendments thereto that address some of the allegations we raise in our complaint does not disclose after-tax, unlevered free cash flows, which the 14D-9 makes clear were used in Houlihan's discounted cash flow analysis.

I think one of the issues here is who calculated it. If management calculated it and management provided it to Houlihan Lokey, then, under

the Plato Learning case and under various other cases, that's information that needs to be disclosed to stockholders. If Houlihan Lokey calculated it, well, then the 14D-9 is simply unclear. Nowhere does it state that Houlihan Lokey provided it. In fact, it states that Houlihan used forecasts that were provided by management. So under Your Honor's decision in the Parlux case and the Dias vs. Purches case pending before your court a few years ago, that needs to be clarified insofar as Houlihan Lokey was actually the party that calculated the free cash flows.

Turning to the next disclosure claim we have, it relates to Houlihan's financial analysis. There were the selected companies analysis and the selected transactions analysis that Houlihan performed, and while it discloses some information -- indeed, the high, low, mean, and median -- it does not disclose all the multiples. And we believe that it's not an overinundation of information -- and actually, a very helpful thing -- for shareholders to have all of the multiples observed. That lets you see a little bit more what each company that was used in the analysis and how it compares to Blyth contributed to the implied price range that was calculated by

Houlihan Lokey. We believe that, under Delaware law and best practices, that's something that also should be disclosed.

The next set of disclosures relates to the process, but all circles around the goal of Houlihan Lokey and the job that Houlihan Lokey did in connection with their work. This was not a situation where Houlihan Lokey was retained from the outset and provided ongoing advice about how the company can realize certain of its strategic alternatives. It's also interesting to note that in 2013, when the company received an offer from a company called CVSL worth $16.75 per share, the company, in that situation, retained Jefferies to evaluate that offer and to help the board make an informed decision about how to respond to CVSL's offer.

Here, in May 2015, when Carlyle, through its financial advisor Threadstone, approached Blyth, the board did not retain a financial advisor. When it negotiated with Carlyle for the rest of May, for June, for July, for the better part of August, it was not acting with the information and the assistance of a financial advisor.

In mid-August, the board decided to

reach out and retain a financial advisor, and in mid-August Houlihan Lokey appeared before the board and described generally what types of financial analysis it might perform if there was actually a fairness opinion that needed to be rendered.

But at no point in time prior to the ultimate board meeting where Houlihan Lokey rendered its fairness opinion did Houlihan Lokey provide any financial analysis to the board about whether the per-share offer that Carlyle was putting forth was fair. In fact, when the board agreed to accept Carlyle's reduced offer -- at the very beginning it was around $9, and then $7, and then less and less -- when the board accepted Carlyle's final offer of $6 per share, it did so without the assistance of any financial advisor.

And plaintiffs also assert that, given the extraordinary limited amount of time that Houlihan Lokey had to actually get acquainted with the company, to learn what was going on with the company, what was going on with its prospects, what was going on with its ongoing business -- because it's an interesting business. There are various segments, and Blyth does business in markets all around the world. It's been

in Europe for quite a while, it's been in the Northern American markets for quite a while, and it recently expanded certain aspects of its business to Turkey and to South Korea. And given the currency fluctuations, and how that's had an impact on the business, and an interesting sales model, that it goes through independent sales consultants that have traditionally operated things akin to Tupperware parties, we think that it's important for there to be much more comprehensive disclosure of what the interaction was between Houlihan and the board, what the board's methodology was for actually retaining Houlihan and eschewing the banker it had previously retained when it last had to confront what to do about the company's strategic alternatives. So we believe that more voluminous process disclosure is warranted here as well.

The last category of disclosure claims that we allege relate to potential conflicts of interest affecting the Goergen family. Robert Goergen, Sr., he has been with the company, he founded the company, and he controls the company, along with other members of his family who also own considerable numbers of shares of Blyth common stock. Based on

public statements made in connection with the proposed acquisition, it seemed clear that numerous members of management are going to stay on through the consummation of the deal if it, indeed, closes, and will have a role in the post-close entity.

What's unclear is when those discussions arose. What's unclear is what exactly type of role is contemplated. Is it just going to be they're going to be now employees of Blyth, which it will be wholly owned by Carlyle? Will they have an investment interest? Because in my practice, in my experience, typically when you have deals like this involving founders, they retain some sort of a post-close ownership interest.

I understand that the proxy statement -- not the proxy statement, the 14D-9 and other documents state that they will be selling their shares of Blyth common stock for the same $6 per share that everybody else is. Nonetheless, it seems somewhat inconsistent with the normal course of business, in terms of how these deals are done. And there's zero disclosure about any background discussions between Blyth management and Carlyle about post-close investment, employment, and/or other

opportunities, and we believe that, given the nature of the Goergens' control over the company and given the nature that this is essentially a single-bidder process, we think that such disclosures are material and need to be provided.

That sums up my discussion of the materiality. If Your Honor has any questions, I'd be happy to address that or any of the other points we've made in our papers.

THE COURT: No. Thank you. I appreciate the argument. There may be a question or two after I hear from the defendants.

Is it Mr. Cheung who is going to argue for Blyth?

MR. CHEUNG: Your Honor --

MR. MORITZ: Your Honor --

MR. CHEUNG: Go ahead, Garrett.

MR. MORITZ: This is Garrett Moritz. I'm going to argue for Blyth.

THE COURT: You told me that, Mr. Moritz, and I forgot to put a line under your name. I apologize.

MR. MORITZ: Not a problem, Your Honor, and good morning. Of course, the Blyth

defendants disagree on the merits of the price and the process claims that the plaintiff has asserted here, and we don't concede that this third-party premium deal is subject to entire fairness or problematic in any way.

THE COURT: I understand that. But that's for another day, I think.

MR. MORITZ: Great. Well, then, I'll go directly to the disclosure claims. I'm going to try to address them in the order that Mr. Holleman set them up.

So first the plaintiff asks for unlevered free cash flow or inputs used to derive unlevered free cash flow, and the briefing also asks for other unspecified material information about financial projections, but it seems that this has now been focused to unlevered free cash flow.

This is not a case where the defendants are holding back projections. The 14D-9 discloses three versions of the management projections from 2015 through 2018. That's at page 27 and 28 of the 14D-9. These are actually the metrics that company management used and believes were useful. They were provided to Houlihan and to Carlyle.

And Blyth didn't just disclose its final projections. It disclosed its original higher projections and then updated versions, so the stockholders could see how they changed. Now, then, in response to comments from the SEC, the company provided reconciliations of the company's projections, which had used non-GAAP metrics with GAAP metrics. And this disclosure included four-year projections for, among other things, interest, taxes, capital expenditures, depreciation, amortization, a number of other items. And that's ample disclosure regarding projections under this Court's precedent. And we cite a number of cases in our brief. Plaintiff's demand for input about unlevered cash flows is very reminiscent of the Plains Exploration case, in which this Court denied the motion for preliminary injunction based on the alleged failure to disclose the financial advisor's unlevered free cash flows.

Here, plaintiff attempts to distinguish that case by suggesting that Blyth derived the unlevered free cash flow, but, in fact, what Blyth management provided to Houlihan is what was disclosed: the non-GAAP projections that are in the 14D-9. And Houlihan derived the unlevered free cash flow. So

this is very similar to Plains Exploration. It's not a colorable disclosure claim. And certainly the stockholders have gotten what they are entitled to under Pure Resources and other cases: a fair summary of the substantive work provided by the investment banker, Houlihan. And unless the Court has questions on that, I'll move on to the multiples issue.

THE COURT: Well, the allegation is that the disclosure is not clear, that it's confusing as to whether management or Houlihan came up with the unlevered free cash flows.

MR. MORITZ: Yeah. So I'm looking at page 25 of the 14D-9. And there it says, "Houlihan Lokey performed a discounted cash flow of Blyth by calculating the estimated present value of the projected unlevered, after-tax free cash flows of Blyth based on the Forecasts." And the forecasts are what was provided.

THE COURT: All right. I understand.

MR. MORITZ: Okay. Thank you, Your Honor.

On the allegation, the second allegation, which is that the 14D-9 was required to disclose the specific multiples of the selected

comparable companies and selected comparable transactions, rather than disclosing the low, high, median, and mean multiples, we cite in our opposition brief the Ramtron and OPENLANE cases, which fall directly to the contrary.

Plaintiff didn't try, in the reply or today, to distinguish those cases. Instead, plaintiff relies on Turberg vs. ArcSight, which is a 2011 settlement approval hearing transcript, in which the Court approved a disclosure of settlement after "thinking hard about it," because adding specific multiples to the disclosure of the investment banker's work there was "sufficiently helpful to justify the settlement."

We think that Ramtron and OPENLANE are better precedents than a comment in a settlement approval hearing. And similarly, the other authority, In re Celera, which plaintiffs cite for the principle that the actual multiples themselves must be disclosed, actually points the other way. First of all, it's also a settlement hearing ruling. But in any event, the page of Celera that plaintiff cites, star 122, actually seems to be praising supplemental disclosures that provided high, low, median, and mean

multiples of the selected comparable company analyses. And that's exactly what we did here. So I don't think that's a colorable claim.

Third, the plaintiff makes a number of additional requests for process-related disclosures, but now they're -- I guess the focus at this point has boiled down to Houlihan, before I take on the final issue. And one of them is did the board consider hiring other investment advisors prior to deciding to retain Houlihan. That's really a "tell me more" type of claim that's not colorable. And we cited Clements vs. Rogers in our opposition brief for the proposition that why a particular investment banker is retained, versus another, is rarely of material interest to investors. And there's no attempt to distinguish Clements or to explain why that wouldn't apply here.

You know, we have disclosed Houlihan's historical work for Carlyle affiliates in the 14D-9. That's out there. Plaintiffs ask for additional play-by-play minutia of the kind the Court has held is not a colorable disclosure claim, regarding things like when Houlihan was retained and how exactly it's work -- what the timing of when it was brought to the board was, and things like that. And on that I would

note, although I believe I heard Mr. Holleman say there wasn't information in the 14D-9 about when Houlihan was retained, in fact, at the bottom of page 13 of the 14D-9, which is Exhibit A to my transmittal affidavit, it says that there was a board meeting on August 6, 2015, and "At such meeting, the Blyth board of directors authorized the Company's management to engage Houlihan Lokey as the Company's financial advisor in connection with the proposed transaction with Carlyle." So that's there. An additional play-by-play is not required under the Court's precedent.

The last thing I'll take up is a demand for additional disclosures about the Goergens' interest in the transaction and post-close employment opportunities, with the focus that plaintiff has put on Robert Goergen, Jr., the current CEO. The plaintiff ignores what the 14D-9 actually says on this subject. For example, they say pointblank in their brief that Blyth management, which definitely includes Goergen, Jr., will be staying on in a continuing employment capacity following the acquisition. But the 14D-9 -- and I'm looking at page 7 -- cannot be clearer. It says that "None of the Company's current

directors or executive officers have entered into any agreements or arrangements with Parent, the Company, or their respective affiliates regarding continued service with Parent, the Company, or their respective Ave affiliates after the Merger Effective Time."

Now, they point in their briefing to a transcript of a message to Blyth employees. It's a generic message, it's a standard type of communication to employees after the private equity deal was announced, to keep up employee morale and assure that there are not going to be radical changes at the operating level. It did not say that Goergen, Jr., or any other senior executives, for that matter, will be staying on after the merger. And lest there be any doubt, we have confirmed with our client, Robert Goergen, Jr., that he has no expectation or understanding of continuing on at Blyth after the merger. We can't disclose what does not exist. So that addresses the disclosure claims.

One other point I wanted to bring up is the scope of the discovery that plaintiff is asking for. I won't go into the number of requests and subrequests which are brought, but I will note that the plaintiff is asking for broad e-mail searching

from a time period of October 29, 2013, to the present. That's almost two years worth of e-mails. They want a privilege log. And, you know, a privilege log for that type of review is a very significant amount of work that could take a number of lawyers the amount of time we have before October 13th alone. They've asked for six depositions, and they want all this to happen in time for briefing and argument by October 13.

Now, the lawyers involved, and certainly the Court, are no strangers to expedited proceedings where they're appropriate. But the plaintiff here hasn't made any effort to reasonably tailor the request for expedited discovery to the circumstances, the timing, or the claims that he's actually pursuing. Plaintiff hasn't even tried to explain what the schedule would look like, given at this point we have less than two weeks to October 13, with Monday, October 12, being Columbus Day. And plaintiff didn't make things easier by waiting a week after filing the motion to expedite to even reach out to chambers to schedule a hearing on the motion.

So we would submit that the extreme burden of the expedited discovery that the plaintiff

is asking for here, and the argument schedule, and what that would impose on the Court and the parties, is still further reason weighing against expedited proceedings here. The case doesn't warrant expedition at all, and it certainly doesn't warrant the kind of hyperexpedition that the plaintiff is seeking.

If the Court has any questions, I'd be happy to address them, but otherwise, just respectfully submit that the motion should be denied.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Moritz.

Mr. Kurtz.

MR. KURTZ: Thank you, Your Honor. I don't want to unnecessarily belabor this, and I'm not going to repeat arguments that have been presented. I would limit myself really briefly to just two points, Your Honor.

Number one is, with the one exception relating to some speculative allegations about employment, none of the discovery is actually properly directed to the Carlyle group defendants. We wouldn't have the information that the plaintiffs are focusing on, except with respect, perhaps, to the allegations about employment and, without repeating, but very

briefly clearing up, obviously, there is no evidence of an employment arrangement.

And the basis that plaintiffs assert is a comment in a transcript that's as follows: "We spent considerable time with Carlyle throughout this process" -- and that's referring to the deal process -- "and because of this, I'm confident they understand what our team has accomplished and support our vision for the future."

That is obviously a pretty boilerplate statement that the company is going to continue in the future. It doesn't say anything about employment relationships. And I can represent to the Court that there are no new employment arrangements with the Goergens whatsoever. There were no discussions about any potential employment arrangements with the Goergens prior to execution of the merger agreement. There have been no discussions with Goergen, Sr. at all about any role at Blyth, and that there is no expectation that Goergen, Jr. will remain with Blyth, other than potentially for transition services over a very short period of time while the company is segued into new management.

THE COURT: All right. Thank you.

MR. KURTZ: Thank you, Your Honor.

THE COURT: Mr. Holleman.

MR. HOLLEMAN: Your Honor, I'll just briefly respond to my friends on the other side's comments. With respect to the free cash flow, the Plains Exploration case was one where the plaintiffs in that case simply misread the proxy. That's what the Court's opinion made clear, that it disclosed what Barclays' metric was. And I think the plaintiffs in that case were just, perhaps, unaccustomed to seeing that metric and were expecting to see free cash flows and didn't. So there was full disclosure. It was merely a misreading, and there was no need for any extrinsic evidence to demonstrate what the inputs were. It was just -- it was reading comprehension.

Here, I looked at the section that my adversary just referred us to on the proxy statement -- the 14D-9. It's page 25, and it's the statement that counsel read aloud. And nowhere in there does it refer to Houlihan Lokey calculating the free cash flows themselves. It's not clear in the section that sets forth the forecasts. And I'll applaud defendants for providing the March 2015 forecast, providing the June 2015 forecast, and

providing the August 2015 forecast. That saves me a little bit more time for having to try to seek that through an injunction. But nowhere in the section discussing the forecasts does it say who is calculating the unlevered free cash flows. And I think, in the absence of any such clarity, and then the clear statements that Houlihan used the forecasts that were created by management, I think that this is something that warrants expedition and, potentially, down the road, an injunction.

With respect to the arguments about disclosure of the multiples, every case is different. And the multiples that each financial advisor -- or the comparable companies and/or transactions that each financial advisor chooses to use may be different depending on the case. Here, you do have a high, low, mean, and median disclosed, but if you compare those metrics that were disclosed to the reference ranges that were actually used, they seem out of whack.

You have, for example, on the last 12 months adjusted EBITDA multiple, a reference range of 6 1/2 to 7 1/2 times, compared to multiples that were observed that were considerably higher than that. So I think that it's important to understand, is that

metric, is that reference range, an appropriate reference range?

And the only way that you can do that is by seeing the additional multiples that were provided for all of the companies. If those multiples were closer to one of the companies that were very much life-like, then perhaps that's a decent reference range. If they weren't, then perhaps that's an unreasonably low reference range. And that's really -- while the multiples can be quite instructive, that's why we think that they need to be disclosed here.

With respect to our process disclosures, the involvement of Houlihan Lokey, counsel's correct, on page 13 it states that on August 6, the board decided to retain Houlihan. It also states that, on page 14, Houlihan showed up at a board meeting and told the board what types of financial analysis it might provide. Page 15, it states that Houlihan attended the final board meeting on August 30 to give a fairness opinion presentation. And there's no disclosure whatsoever beyond that saying what Houlihan did, what Houlihan did to understand the company, what Houlihan did to advise on the process,

what Houlihan did in connection with discussing the company with management. And I think that, given the board's previous reliance on a financial advisor, Jefferies, when it was rejecting CVSL's 16.75 per-share offer, we think that additional disclosure is certainly important here. And again, I'd also like to just remind Your Honor that this is a motion to expedite and not a motion for an injunction. So I think that these are more than sufficiently colorable to warrant discovery into those issues.

With respect to the potential conflicts and the potential role that the Goergens have post-close, again, it's simply unclear. It would be great if these representations by Carlyle's counsel could be conveyed to the class and taken at face value. But I think that the truth is that every single disclosure statement that comes out -- well, I don't want to say every, but most of them, even where there is the anticipation or the contemplation of a post-close relationship, it's the same legalese.

No agreements have been finalized. There is no expectation -- and that may or may not be true, but the other public statements, the ones cited in plaintiff's complaint, the ones cited in the

brief -- and here I'm particularly referring to the transcripts that we attached to the Bennett affidavit. Those are summarized at footnote 14 on the bottom of plaintiff's reply. It suggests, and is highly suggestive, that there is going to be a post-close relationship. It describes Carlyle as a partner. It describes Carlyle as being supportive of management's vision of the future. And the press releases have this pervasive message of stability and continuity as it relates to anything regarding employment.

I think that, given the apparent disconnect between what counsel is now saying on the phone and the numerous public statements made in connection with or in possible revelation of post-close arrangements, we think that this is certainly something that warrants expedition.

With respect to the scope and burden associated with the plaintiff's discovery requests, those were predicated on this motion on both the disclosure claims and the process claims. Now that the focus of this motion has turned quite substantially just to the disclosure claims, I think it's fair for those to be narrowed considerably. And I would agree with Carlyle's counsel's statement that

the disclosures that are sought with Carlyle relate solely to the possibility of a post-close involvement by either of the Goergens.

So insofar as Your Honor is willing to grant this motion, then I would submit that the parties could meet and confer following to discuss a more appropriate scope of discovery, including the e-mail searches. If it's just focusing on the sales process that went on with Carlyle and the issues that we discussed today, I think the e-mail search could be limited considerably to make it a much more feasible burden for defendants to contend with.

One last note with respect to the timing of things. Plaintiffs filed their motion to expedite three days after the 14D-9 came out. Plaintiffs attempted to engage with the defendants concerning scheduling. We reached out to the Court the following week, after plaintiffs were able to secure an agreement with the other plaintiffs that filed suit in Delaware to alleviate the defendants' concerns that there would be numerous motions to expedite to deal with, because defendants made it perfectly clear that they were not interested in engaging in duplicative motion-to-expedite

proceedings.

THE COURT: And, Mr. Holleman, let me set your mind at ease. I don't consider the plaintiff's proceedings here to be deletory in any way, or that some type of laches analysis or equitable weight should be given to the passage of time. And in fact, I would appreciate hearing from you whether there has been any discussion of consolidation in these cases for post-closing, if indeed there is a closing, litigation.

MR. HOLLEMAN: Yes, Your Honor. And I am happy to represent that, on behalf of all of the plaintiffs that filed suit in Delaware, there has been an agreement to coordinate and consolidate, which is why I think that the other plaintiffs have stood down as far as genuine litigation activity. But I think that, given the obvious time constraints and the resources that have to be devoted to these expedited proceedings, that has been our first and foremost priority. So I will represent to the Court that the plaintiffs will intend to consolidate these actions for all purposes in the coming days.

THE COURT: That's good. I'm glad to hear that.

Anything else, Mr. Holleman? I didn't mean to cut you off. I just wanted to tell you you didn't need to convince me that the plaintiffs had not been acting in a deletory faction.

MR. HOLLEMAN: No, Your Honor. I have nothing more. I think that was my last point, so thank you for your time.

THE COURT: And anything else from anyone?

Counsel, I appreciate the argument very much, and the briefing, which I continue to be impressed with in these situations where briefing is produced on such a compressed schedule and is of such high quality. I appreciate the argument as well.

You're well aware of the standard under which I have to evaluate a motion to expedite. There has to be a colorable claim -- which is, as has been pointed out, a low standard -- and then there has to be threatened irreparable harm sufficient to justify what in this case would be a fairly substantial undertaking, to redd up a preliminary injunctive relief hearing in time to potentially enjoin a closing coming up in a week and a half or so. So that's the standard. The Court is always

solicitous of litigants who need prompt redress, but in cases such as this, I think it is appropriate to closely examine the claims for colorability. It's a low standard, but it has to be met in order to justify the very stringent litigation that is proposed here.

I'm going to take these in reverse order. Let me explain just very briefly that I'm limiting this to the disclosure claims, because the colorability of the process claims does not really go to expedition. What would be heard at a preliminary injunctive relief hearing would be a claim that there would be irreparable harm because the stockholders were being asked to either consent to the merger or dissent and accept appraisal or vote against the merger and try to prevent it from being consummated, and that without sufficient disclosures, that that exercise of the franchise is in fact a nullity. Where disclosure claims are sufficiently colorable, irreparable harm is presumed to be present because that exercise of the franchise is among the most important of the stockholders' rights, and it is an illusory right without sufficient information.

As regards the process claims proper and whether this is an entire fairness case, that

certainly does not require preliminary injunctive relief to be redressed. So I'm limiting myself to the disclosure claims here, and I'm going to take them in reverse order.

The last that was argued is the potential conflicts of management post-closing, particularly the Goergens. The argument is that there may be something that hasn't been disclosed, although there's a disclosure that says that there have not been negotiations finalized with respect to any of the Goergen family staying on or management staying on. This is just speculation. There really is nothing here that raises a colorable claim that there is information that exists that has not been given to the stockholders. So I don't think that, as stated, that states a colorable claim.

The next claim involves the financial advisor and why it was hired. That strikes me as precisely the kind of "tell me more" information that would not support preliminary injunctive relief. Once again, it's pure speculation as to what might be out there, but the stockholders know who was hired, when they were hired. More than that, it seems to me -- while it may be of interest to stockholders -- would

not be material. And without an allegation that there has been a material omission, I don't think that there has been a colorable claim that would require redressing by preliminary injunctive relief.

The other financial claims are the more substantial. I first look at the comparable companies analyses, and the argument is that there wasn't disclosure of the precise multiples. But there has been a disclosure of the high, the low, the median, and the mean. It might be useful to stockholders to have more, but it seems unlikely to me that it will be material to stockholders to have more than that, and I don't think that the lack of that specific information supports a colorable claim that material omissions have been made, requiring expedition.

And finally I turn to the last claim, and it's the one that facially, I think, is the strongest. That involves the unlevered cash flows. As I understand our past case law and as I understand what is material to stockholders, if management has come up with projections that they have given to a financial advisor and the financial advisor relies on those projections, the stockholders have a right to

that, because management is in a position of trust with respect to the stockholders and those may be important. If the financial advisor takes inputs and derives its own projections from those inputs, its calculations don't need to be disclosed. They, once again, may be of interest to stockholders, but they're not considered material to the decision that has to be made.

What I am hearing here, and after looking at the disclosures that have been made, it's been disclosed what has been provided. It's been disclosed that the financial advisor took those disclosures and did a DCF. The real argument is that there's confusion about whether that means that there is some hidden unlevered cash flow projection that management provided that was not disclosed but that the financial advisor relied upon.

I don't read the disclosures that way. It seems to me clear enough what management disclosed. The supplemental disclosures make that clear. I think any stockholder would know that, in taking those and coming up with a DCF analysis, the financial advisors would have to derive unlevered cash flows as part of its analysis. I don't think that has to be disclosed

specifically. I think there is sufficient information that a stockholder can make an informed decision.

So while a number of these, and particularly the financial end, may involve proposed disclosures that would be of interest to stockholders, none of them, it seems to me, amount to a material faulty disclosure or nondisclosure such that there's a colorable claim that a preliminary injunction should issue in order to protect the stockholders' franchise. For that reason, I don't find that there is a sufficient showing that a colorable claim of material nondisclosure exists sufficient to justify the rather substantial burden that would be required here of ginning up a preliminary injunctive hearing.

I think if this tender offer is successful and if this closes, we can go forward in regular order and determine the process claims, and particularly the entire fairness claims, if that's appropriate. But I don't think that there has been a sufficient showing to go forward on an expedited basis to a determination of whether preliminary injunctive relief should issue.

Was that clear enough, Mr. Holleman?

MR. HOLLEMAN: It was clear enough,

even if it wasn't the result I was hoping for. Thank you.

THE COURT: I appreciate that. I wasn't asking you to agree, I just wanted to make sure I wasn't so rambling that you were confused as to what I was doing.

Mr. Moritz, was that clear enough?

MR. MORITZ: Yes, Your Honor. Thank you.

THE COURT: Mr. Kurtz, clear enough?

MR. KURTZ: Certainly was, Your Honor. Thank you.

THE COURT: All right. I look forward to a consolidation of these cases and moving them forward, and once again, I appreciate the effort that went into putting this matter before me on such an expedited basis and the attention you've given me here today.

Thank you all.

(Hearing concluded at 11:48 a.m.)

- - -

CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 38, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 2nd day of October, 2015.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public