IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELL, INC. SHAREHOLDER LITIGATION : Consolidated
: Civil Action No. 8329-CS

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Chancery Court Conference Room
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, June 19, 2013
12 Noon

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BEFORE: HON. LEO E. STRINE, JR., Chancellor.

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SCHEDULING OFFICE CONFERENCE ON PLAINTIFFS' MOTION FOR EXPEDITED PROCEEDINGS and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
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THE COURT: Good afternoon.

ALL COUNSEL: Good afternoon, Your Honor.

THE COURT: I'm going to -- I've read all these papers. I'm going to -- I'm -- I'm confused, profoundly confused. And I want -- and I'm really going to ask people a couple of factual questions.

What I understand -- what percentage of the transaction value is 450 million?

MR. KUBEK: Less than 3.

MR. HURD: Less than 3 percent, Your Honor.

THE COURT: Less than 3 percent. So 180 is what percentage of it?

MR. KUBEK: A little less than one.

MR. HURD: Less than one.

THE COURT: It's my understanding that Icahn Associates/Southeastern has never yet made a conventional courage-of-their-economic-convictions offer, which is to actually agree to keep their equity in the company, make an offer to purchase everybody else's equity, obviously being able to provide debt financiers with the idea that "If we own everyone

else's equity, then the company's assets can back it." That's a traditional leveraged buyout. They have yet to ever make an offer of that -- in that structure; correct, Mr. Barry?

MR. BARRY: That's correct.

THE COURT: You would agree with that, Mr. Hurd?

MR. HURD: I would, Your Honor.

THE COURT: That, as I understand it, if they make such an offer, because the equity would not be purchased by the company, then that offer would be capable of being accepted as a superior proposal; is that correct, Mr. Barry?

MR. BARRY: Because it would qualify as a change of control that would fall within the definition of a superior proposal under the merger agreement.

THE COURT: Is that correct, Mr. Hurd?

MR. HURD: That is correct, Your Honor.

THE COURT: That because Icahn and Southeastern have steadfastly refused to actually make an offer of any kind in which they and their partners would buy the equity of others but instead wish to

cause the company itself to make the offer to others, the structure of their offer is excluded from the type of transaction which can be considered a superior proposal and where the board can accept it and terminate the merger agreement?

MR. HURD: That answer, Your Honor, may be a little more nuanced than a simple yes or no.

THE COURT: That would depend on this thing, which is if -- if, after the -- if, after the company were to buy all the stock -- is it your position, Mr. Hurd, if it bought all the stock and the only remaining stockholders were Icahn and Southeastern, such that Icahn and Southeastern now constituted the controlling stockholder of Dell, it would be a change-of-control transaction and, therefore, be one that could be considered a superior proposal, notwithstanding the fact that the company itself was the actual one purchasing all the stock?

MR. HURD: On that question, Your Honor, if I may, I'm going to defer to Mr. Kubek, who's lead counsel for the special committee as well. But --

THE COURT: Okay.

MR. HURD: -- I think, again, that's a

bit more of a nuanced answer.

THE COURT: Well, then, I'm trying to get to where this -- because I'm not -- and, look, Mr. Barry, I want -- I'm going to ask each side this, because I'm really confused by the plaintiffs' position and the position of Icahn and Southeastern, which is rather unprecedented to me, why a bidder, who is so familiar with our courts, both as a successful plaintiff and a successful defendant, is writing letters to people who haven't amended their complaint about gossamers.

But there's some breakdown; right? The stark thing is that they cannot get their proposal considered because -- as I understand, it's not even a situation -- let me just clarify the thing.

If the board changes its recommendation for any reason, it is free to do so; correct?

MR.WILLIAMS: Correct.

MR. HURD: That's correct.

THE COURT: But if they change their recommendation for any reason and the stockholders vote down the transaction -- and they vote down the transaction, then the $450 million termination fee is

payable; correct?

MR. HURD: That is correct.

THE COURT: So that the board has at all times the fiduciary ability to change its recommendation for any reason, including that they just decided that they wanted to upset Mr. Dell and Microsoft. If they considered that was appropriate fiduciary reasons --

MR. WILLIAMS: Yes.

MR. HURD: That is correct, Your Honor.

THE COURT: -- they would be able to do that, but there's a higher cost to that. When it comes to a superior proposal, consistent with the whole idea of the go-shop and other sorts of things, if it's a superior proposal, consistent with the definition under the definitive acquisition agreement, they can change their recommendation. They can, in fact, exercise a fiduciary out as long as they give the original merger partner their first match right.

As I understand it, then, Mr. Dell is actually obligated to vote his shares in that situation proportionately with the other stockholders, essentially turning him from anything -- for one, he's

not anywhere close to the level of stock ownership that's ever been considered a controlling stockholder, but actually giving him less of a vote than Icahn and Southeastern will have because Icahn and Southeastern have 13 1/2 percent approximately under their control. They are under no contractual obligation to vote except in their own self-interest, whereas Mr. Dell will actually have to essentially cede his vote to the disinterested electorate; correct?

So the question we have now of the big barrier is that -- and this is where I need you, Mr. Kubek -- and again, Mr. Barry, I'm going to give you the same chance -- but I want you-all to dilate very specifically on what I'm talking about.

As I understand it, I don't really get the Icahn & Associates and Southeastern barrier to actually making an offer. It is undisputed on this record the plaintiffs have not bothered to amend their complaint. You have not challenged anything in the proxy; that during the go-shop period Icahn was offered a confidentiality agreement. He took -- it took awhile to actually negotiate it in comparison to the other people who signed up rapidly, but there was access to the data room and due diligence.

I believe it's undisputed that Dell not only facilitated access to due diligence for Icahn and for -- I think it's been reported Blackstone; right? I don't think it's a state secret. (Continuing) -- but actually offered to pay expenses for people. Did they pay expenses to Mr. Icahn?

MR. KUBEK: They did not, Your Honor.

THE COURT: But there was a contract made to actually offer to pay the expenses of this party doing the thing.

MR. KUBEK: Yes.

MR. HURD: Yes.

THE COURT: If -- if, by their own advocacy, the reality is that Dell is worth substantially more than 13.65, by conventional logic of the private equity industry, it means if the business is worth 17.50, then you buy it for 14, make everyone happy, and you take the 3.50 per share upside for yourself. If that is correct, there are people who finance those kinds of transactions because they get high rates of return, almost an equity-like return, for providing the debt financing.

If Icahn and Southeastern do that, the only match right that Dell and the first people have

is a single match right with a very insubstantial termination fee, and they know that they actually have a voting advantage -- advantage, to use the French word -- a voting advantage over the insider because the insider has committed to essentially cede his vote to the disinterested electorate if the special committee concludes -- and it would be really easy to conclude -- that a fully financed cash deal in excess of 13.65 is superior.

Now, you have to offer -- it has to be fully financed and there has to be the same closing certainty, but it's rather easy.

What I'm supposed to expedite on is that Icahn and Southeastern, who are not here to litigate, have sent a letter, saying -- making unspecified allegations about how it would be impossible to overcome the single match right with a $180 million termination fee, or let's even say a $450 million termination fee.

As I understand it, frankly, from the proxy statement, Dell -- Mr. Dell actually took a lower value than the deal price for his equity and that the lower value might actually be something approximating the termination fee, the higher

termination fee, at least as I read it. This comes on top of the fact that the proxy indicates that there were several other potential private equity sponsors brought in before there were any deal protections, and during the go-shop period there was a ginormous number of strategics and other private equity firms contacted.

This seems to bear no rational relationship to Revlon at all in terms of any contextual resistance to selling at a higher price. I really don't understand the decontextualized references to controlling stockholder cases because controlling stockholder cases, where people say they're only a buyer and not a seller is exactly the opposite of somebody saying "Not only will I sell, I'm giving my" -- "I'm not only personally willing to sell and I'm not only personally signaling that I might actually work with another buying group," which, as I understand, is also in the proxy, that Mr. Dell has promised to -- if you want his management services, to be open to potentially working with other credible partners but has contractually bound himself to give his vote to the disinterested electorate and to let them decide -- has -- bears no relevant -- resemblance

at all to Kahn v Lynch, bears no resemblance to Revlon because there's no apparent resistance to getting the highest value. There was not only presigning competition among private equity sponsors, there was an active postsigning go-shop with insubstantial deal protections. And what we're down to is the plaintiffs seeking expedited discovery about the operation of some contractual provision, not at the instance of the actual party who claims that it somehow thwarts them, but by plaintiffs who haven't amended their complaint.

So what I'm asking -- that's a long-winded way of saying I get the case. I kind of spent a lot of time reading it. The papers don't -- on the plaintiffs' side don't actually tend to deal with any of that reality.

And it's a very -- again, the Court will also not indulge being drawn into an electoral contest. We're not going to do fight letters through plaintiffs' lawyers. And it's very strange to me to see the correspondence. I'm not saying there's anything -- I'll just -- I mean "strange" in the sense I've been doing this for a long time. It's a very unusual way to play things. And there was -- there was a -- a -- an amazing lack of specificity when it

came to actually identifying how any of these things, which are not really barriers that we would ever have in our case law see as big barriers, are actually barriers.

So in terms of this, tell me what is eligible and what is not, because I have to read -- you know, you mentioned that there's something about a change of control. So that even if the company buys it, if it was a change of control, that your clients, you believe, could accept it?

MR. KUBEK: If I could back up for one second, Your Honor. Gary Kubek from Debevoise & Plimpton LLP for the director defendants.

If we look at the May 9 proposal that Icahn made, which was the one that was the predicate for the plaintiffs' motion here eventually, and not his new letter that he submitted yesterday about his self-tender; but if we go back to that one, that proposal called for a large dividend, extraordinary dividend. People could either take it in cash or they could buy new shares with it.

THE COURT: Okay.

MR. KUBEK: And Icahn and Southeastern said they would buy new shares with their stock -- or

with their cash they got in the dividend.

If they had done that and if you do the math -- and leaving aside what anybody else might have done -- they would have ended up with 54 percent -- or something over 50 percent of the stock. It was the view of the special committee that that certainly could potentially lead to a superior proposal; and, therefore, the committee asked on May 13th --

THE COURT: Okay.

MR. KUBEK: -- for information.

THE COURT: So if -- for my lack of speed here, if the company did a big, big dividend with an ability -- they just dividended out the cash, the participation was such that that left the -- you had -- was it a dividend -- how would the dividend work where the -- you could roll it back into shares?

MR. KUBEK: Yes. You could take the dividend and buy stock with it. And Icahn and Southeastern said that's what they would do.

THE COURT: And because the company would not be purchasing the stock but it would be the opposite, Icahn and Southeastern then top up, there's a change of control.

MR. KUBEK: That's correct.
THE COURT: Okay. That in -- and -- and in the new proposal, where the company will simply buy back shares at a number, you could concede that that is not -- that could not be accepted as a superior proposal.
MR. KUBEK: As it was described in that letter, that's correct. It's conceivable it could lead to negotiations or discussions at which it might be restructured in such a way --
THE COURT: Right.
MR. KUBEK: -- but yes, that's --
THE COURT: And in that -- in that configuration.
MR. KUBEK: They also would have ended up with only 35 percent.
THE COURT: Okay. Can I ask this question about due diligence, which is: Earlier on Icahn was under a confidentiality agreement during the go-shop period. The window closed; right? Does that mean due diligence closed?
MR. KUBEK: I believe that's correct, Your Honor.
THE COURT: It could be reopened under

superior proposal, but because -- two things: One, I don't -- there's been no economic judgment by the special committee that even if it were eligible as a exterior proposal, one has been made; right?

MR. KUBEK: Right.

THE COURT: And that structurally it may not even be eligible --

MR. KUBEK: That's correct.

THE COURT: -- correct?

And the committee has asked for more information. And you understand -- how do you respond to the thing, Mr. Icahn saying, "I can't get financing because nobody has any information to provide me funds"?

MR. KUBEK: My response to that is "You had due diligence for two-plus months. You have lots of information about this company. You were looking for financing all along. You've got plenty of information."

MR. WILLIAMS: There was a letter yesterday that says he can get financing, Your Honor.

THE COURT: No; I get that. And I'm also assuming that people often free-ride on other people's money, which is -- what I mean is if the

original people are financing at 13. -- $13.65, then that provides the comfort to others -- they may not want to go materially north of that, but at least they've got some sucker insurance that they're not the only people in the world willing to do this.

Okay. Mr. Barry, have I got your position right, that the concern is simply that the committee has somehow -- that the colorable claim you have is that the committee, by negotiating the definitive acquisition agreement in this connection, whereby a leveraged recap in and of itself cannot constitute a superior proposal, and if you conclude that a leveraged recap is a more viable option, what you have to do is essentially change your recommendation to the stockholders, pay the compensation of 450 million and then proceed to implement your leveraged recap. And you would say that under our law, that provides a colorable claim under Revlon that this board of directors has breached its obligations to maximize value?

MR. BARRY: No, that's not our claim. Our claim is that by -- they've agreed to a restriction in the merger agreement that precludes them from exercising their fiduciary out to consider a

transaction, an alternative transaction, that may provide more -- more value to the shareholders unless and until that alternative transaction also results in a change in control of the company. It doesn't necessarily mean leveraged recap. It doesn't necessarily mean any other --

THE COURT: No. But what they can do -- what you're saying -- again, let's be precise here.

They are entitled to change their recommendation for any reason that's an appropriate fiduciary reason, including that they have become convinced that a leveraged recapitalization will be a more viable way to go forward with the Dell stockholders.

There's a cost to that, which happens to be the kind of thing that Delaware law understands that we're not in Fantasy Island; that you don't get people to actually pay premiums to market, tie up capital, incur opportunity costs without some compensation if you're jilted. So we're really talking about the delta between 180 million and 450 million.

Delaware statutory law also -- is

there a force-the-vote provision?

MR. KUBEK: We have to go forward with the vote, but we can change the recommendation.

THE COURT: Well, that's what I mean. There is a force-the-vote provision, again, a provision contemplated by our statutory law.

So what you're talking about is that they cannot -- what they cannot do is to actually terminate the merger agreement in favor of this, using the superior proposal and, after giving the original merge partner their out, pay $180 million and proceed with a leveraged recapitalization. They have to actually recommend against. Then they have to put it to a vote if Dell and Microsoft insist -- of course, if the board recommends against -- if they recommend against, what happens with Mr. Dell's -- is he allowed to still vote in that situation and there's not an alternative proposal?

MR. KUBEK: Well, even in these circumstances, apart from that, his vote doesn't really -- we need a separate vote of the majority --

THE COURT: Ah.

MR. KUBEK: -- of the outstanding shares other than his.

THE COURT: So he's already --

MR. KUBEK: He's already out.

THE COURT: So he's neutralized other ways. So -- and, then, therefore, the largest stockholder block in that vote will be Icahn and Southeastern.

MR. WILLIAMS: Yes.

MR. KUBEK: Correct.

MR. WILLIAMS: And it's an absolute vote, Your Honor. So if the stockholders don't vote, it's effectively --

THE COURT: You got to get a --

MR. WILLIAMS: -- a vote against --

THE COURT: Right.

MR. WILLIAMS: -- you have to --

THE COURT: So you have mobilize in favor -- in a circumstance where there would be an adverse recommendation.

MR. WILLIAMS: Right.

THE COURT: Is that -- am I getting the --

MR. BARRY: Your Honor --

THE COURT: What am I missing?

MR. BARRY: The issue -- because

under Delaware law, the -- historically the issue on the fiduciary out of the -- of the -- of the merger agreement has been a focus. And here, they're restricting their abilities to exercise their fiduciary duties to terminate that agreement. To terminate the agreement, not just change their recommendation, but to terminate the agreement.

The case law is clear that where you're talking about the reasonableness of deal protections and the reasonableness of the fiduciary outs, the fiduciary out must be consistent with the board's ability to exercise their fiduciary duties.

THE COURT: And they are, which is that they have -- no one has said -- again, there's the force-the-vote provision in the statute. The force-the-vote provision was precisely to allow boards of directors to engage in contractual give-and-take where you say to someone "Okay" -- because there used to be -- you were in this sort of -- I believe it was called -- it was sort of the Van Gorkum purgatory, which is if the board of directors actually changed its recommendation, you were in a situation where the board was actually not allowed to put it to a vote. And so you would be in a sort of limbo.

The statute addressed that by saying the following: The board can contractually bind itself to put something to a vote. Now, does that mean that it gets voted up or down? No, it's not a promise that you're going to ram it through. It's a promise that the person who put good money on the table and contractually bound itself to close in certain conditions -- I don't believe Southeastern -- I mean, I don't believe Microsoft and Mr. Dell probably get to have a stockholder vote seasonally to determine whether to pay the equity. If there's no contractual closing condition that excuses them from closing, they have to close.

So what they obtained in advance -- in exchange is a force-the-vote. What they also exchanged was that unless someone does what we are doing, which is essentially engage in a change-of-control transaction, then we will get a termination fee which is still within bounds of historical things, but the board can change their recommendation for any reason. And, in fact, Mr. Dell himself cannot even really influence the outcome. And if somebody does come in and propose a change-of-control transaction, ala what you're talking

about here, Mr. Barry, is Revlon, is if they propose the thing, it's only a $180 million termination fee, there's only a single match; and Mr. Dell will actually -- if all the stockholders like it, he will actually vote in favor of it.

And so what you're saying is now that a board cannot do any of this, that the board has to consider as a superior proposal -- under your philosophy, if a stockholder wrote and said that "The superior proposal is simply to do nothing and we've concluded to remain a stand-alone," they would have to consider that as a superior proposal?

MR. BARRY: No.

THE COURT: Why?

MR. BARRY: That's not what I've said. And what -- the issue is not what -- whether or not they have to consider something a superior proposal. The issue isn't that they have to consider Mr. Icahn's or Southeastern's proposal a superior proposal. The question is can they contractually limit themselves to consider alternatives. Here --

THE COURT: How --

MR. BARRY: -- they've contractually --

THE COURT: How have they contractually limited themselves when they gave Mr. Icahn and his partners confidential nonpublic information, even offered to reimburse him search expenses, and when he understood going in exactly what the definitive acquisition agreement said and has -- his own arguments -- under his own arguments, he should be able to make a qualifying offer to everyone; wouldn't you agree?

MR. BARRY: Mr. Icahn might have the capacity --

THE COURT: If his arguments are correct economically, the 13.65 is a material underpayment, if he has financing sources, then he and Southeastern should, together with their financing sources, simply be able to, right, make the offer themselves and do a traditional leveraged buyout. That would immediately qualify him for the lower termination fee because the board of directors, as you know, contrary -- to the effect that he was selected out, he was selected out with Blackstone as the parties eligible to take advantage on a continuing basis of the go-shop provision. That's how he was selected out, which was given an upper hand.

He has intentionally chosen to make a nonqualifying offer, which he knows will -- can the -- the board can take into account in changing its recommendation but cannot terminate the merger agreement in favor of unless somehow he commits to a structure where it's a change in control. He's the master of his own offer.

He then complains about higher deal protections which are still lower than market standard and do not raise any concerns on this record, given the avidity of the search process and given the actual inducements given to bidders; but he's intentionally chosen to erect a higher barrier to himself by causing the company to make the offer in his structure; right?

MR. BARRY: He's made an offer that -- he's made two proposals --

THE COURT: He has not made an offer. He actually --

MR. BARRY: He's made two proposals.

THE COURT: He's making an offer to cause other people to buy -- cause the company to buy stock. I mean, I suppose he and Southeastern are saying -- although Southeastern has now sold most of their position to Icahn?

MR. BARRY: Sold half of their position.

THE COURT: Sold half of their position, but they're really offering to have the company make the offer; right?

MR. BARRY: They've made a proposal of a structural alternative. I'm not here to defend Mr. Icahn --

THE COURT: Well --

MR. BARRY: -- or suggest what Mr. Icahn --

THE COURT: -- I don't know. You're sending me letters that your cocounsel has procured from him.

MR. BARRY: Well, Your Honor, let me explain that. We filed to challenge the contractual provision. The contractual provision exists without regard to Mr. Icahn or Southeastern. We got a response back that says the contractual provision is not impeding anything. So we called -- so apparently Joe Rice called Mr. Icahn and Mr. Icahn said it is.

But our issue does not center around Mr. Icahn, because the issue centers on the contractual provision that exists regardless of the

source. For example -- let me give you this hypothetical. They agreed to sell -- Company A agrees to sell itself to Company B for $10 a share, all right, to sell a hundred percent of Company A to Company B for $10 a share. Company C then comes forward and says, "I'll pay 47" -- something happens, something happens that makes Company A a lot more -- a lot more valuable, and Company C comes in and says, "I'll pay for 45 percent at $30 a share."

This provision would prevent the board of Company A from even talking to Company C because, by definition, it can't constitute a superior proposal because it wouldn't change --

THE COURT: It could, but --

MR. BARRY: -- result in a change of control.

THE COURT: -- if they -- if they combined it -- if they sent it in and the blended economics of it worked, which is a strange thing, because you realize you're also -- it is very common for -- for the -- to the superior proposal out to actually require a transaction, which is of a certain magnitude, and not allow folks to pick and choose small assets and terminate deals.

There's nothing new about that. And there's nothing in our law that suggests that that's at all unusual if the board remains free to recommend against the deal for any reason. And if then, in the wake of the deal going down on its merits and the payment of the reasonable compensation, it's still viable to do whatever is in the best interests of the stockholders, that's called the real world of commerce and of actually -- that's how you induce people to make premium bids. It's not to -- you can't induce people to make premium bids by telling them that if they make -- if they tie up all this capital, if they give up other opportunities, that when they get shirked, they get nothing.

I'm not really understanding how at all it's willful blindness, when all -- there would have to be a commitment letter from a bank, when, again, under the logic of the thing -- under the logic of it, there is no reason why it can't be done in the conventional manner. They knew going in what the price was, and they're intentionally choosing to structure it in a way that raises the cost of an adverse recommendation. I don't know why anyone would intentionally choose to proceed that way, but that's

the way it is. And that may be fine. And that's what they're arguing, then, is -- and then they want to have a coincidental vote.

But the reality is they'll have a vote at the next meeting, which is if they defeat this -- and they'll have the biggest block to defeat it -- they can then vote on the board. And if they defeat this, then they can have the board. Then they'll be fiduciaries, by the way, if they get elected to the board, and when they propose this, they'll be fiduciaries. But that can all happen.

And willful blindness, again, commitment letter -- I mean, they had -- don't you suppose -- don't you suppose during the two months of due diligence they had financing partners that they were working with? And if not, is this serious? Because that's obviously one of the first things that you would do, right, is come up with -- is to be getting the due diligence to arrange financing.

So this is -- but, I mean, you're bound to willful blindness and that -- like that this sort of provision is -- is in itself invalid under our law.

MR. BARRY: Your Honor, I'm looking

at -- can't -- we're not focused on Icahn, and you keep going back --

THE COURT: Well, no.

MR. BARRY: -- and looking at Icahn itself.

THE COURT: No. See, here's the thing. No. We actually do focus in the real world on real-world cases.

There's a mandate for us not to deal with purely hypothetical cases. This is a real-world situation in which there's going to be a vote. It is not a free lunch day here. If I say you get to go forward, it imposes millions of dollars in cost. I'm not going to trivialize that.

I'm also not going to say, given -- and I'm saying this to very excellent lawyers, a group of lawyers you got right here, tremendous amount of talent on the plaintiffs' side. You have not bothered to amend your pleading. You have not done anything to raise it. And we're dealing with a situation here where yes, we are down -- it is traditional. In the 1980s it was traditional to deal with a concrete situation, the actual resistance by a company or an actual contractual impediment of some specific player.

Here, the entire world was invited in. We are down to the remaining player, a player who was actually offered the unusual advantage of having its expenses defrayed, who was offered a contractual due diligence period, and who is able to top, based on a less than one percent termination fee and only having to face a single match and then having the competing bidders' votes essentially neutralized, while he doesn't have his votes neutralized. He gets his 13 -- he and Southeastern get their 13 1/2 percent that they can cast free and clear.

But what you're saying is -- so you're really just focused on this provision is invalid as a matter of Delaware law in itself.

MR. FRIEDLANDER: Your Honor, if I may, I think a couple of real-world facts here make this not an abstract question of law, which is that we're dealing with the very practical impediments that the merger partner that was agreed to is the founder, is the CEO, the chairman, is a substantial stockholder, and the company has a lot of cash. So the question is whether it was practical for other people to come in -- whether these -- whether these sort of contractual provisions, whether it's expense

reduction or -- or -- or -- or -- or vote reduction, are -- are feasible ways of dealing with the practical problems of the difficulty of putting in a competing bid of --

THE COURT: Wait a minute.

MR. FRIEDLANDER: -- the CEO and chairman.

THE COURT: I don't really understand the difficulty, which is this is the thing: If this company has no value without Mr. Dell, then it comes with ill-grace to be throwing rocks at him in a circumstance where he has committed to consider working for others and where he has neutralized his own vote. Dell's a pretty established company at this point, and he is a founder.

But, you know, I don't see any of the others -- I mean, there's -- there are other people in the world who -- the computer industry is a fairly mature one now. And I don't -- it's hard for me to imagine what more Mr. Dell could do in this circumstance. And you-all haven't filed any amended pleading. You haven't attacked any of the things that are in the proxy statement about him neutralizing his vote, about him in any situation even on his own deal,

essentially neutralizing his vote, agreeing to vote for another deal, agreeing to listen to anyone in the world. Like, I have no reason to believe rationally from anything you filed that if KKR, if Blackstone, if somebody else really -- a high credible private equity firm or another -- if Google wanted to buy Dell, that Mr. Dell would not consider that with an open mind. There's not one fact pled that suggests anything of that kind.

MR. BARRY: It doesn't have to be. Here -- here's the issue.

THE COURT: Okay. I'm going -- I'm going to do this. I'm going to say I have great respect for you and Mr. Friedman. I have too much respect for us to just get into a back-and-forth. I wanted to hear what you had to say additionally. I take very seriously what you-all write. You have -- you have all won big cases before me in the past and before the Court.

I'm not going to expedite this. If all that you -- that we really have here is the argument that because Mr. Dell was considered a special person who founded this company, that when you put this together with what appears to me to be

nothing as exotic as pistachio gelato would be in Italy, which is -- that's not -- that is not an unusual flavor in Italy -- I don't get it. There has to be color here.

And I'm going to make my findings. Here's why I don't see any color: The un -- if the plaintiffs don't wish to amend their complaint -- and they haven't -- they haven't put in any fair doubt the proxy statement that's out there and the uncontradicted rendition of facts, where not only -- not only was there a postsigning market check, which I'll get to; but there was, in fact, an active look at other potential private equity sponsors for doing a transaction of this size.

Is this an unusual transaction because it's so large? Sure, it is.

Under our law -- see our Supreme Court's decisions in QVC and Lyondell -- a board is entitled -- a board acting in good faith, an independent board, is entitled to make a variety of choices. And as long as there are reasonable attempts to maximize stockholder value, this Court is not entitled to intrude.

I see no vibrance -- no glimmer of

color to the notion that by doing a presigning market check with selected private equity firms, signing up -- and negotiating extensively with Dell and Microsoft to actually move their price up and their extension things, getting concessions from Mr. Dell about things like the cost of his equity, by ensuring in that acquisition agreement a vibrant postsigning market check in which Mr. Dell's voting power would be entirely neutralized, giving a leg up to other large stockholders such as Icahn and Southeastern.

Icahn and Southeastern come in and complain that Mr. Dell on this record is a controlling stockholder. It is true, he is the CEO of the company, and it is true he has a larger block of stock. He effectively does not have a larger block of stock than they do right now, because by virtue of the agreement that was negotiated, he has to vote in favor of a superior proposal. And even if there's not a superior proposal, he cannot -- his voting power essentially is not counted in terms of pushing through his own deal, and the Southeastern and Microsoft -- Southeastern and Icahn voting power is.

So he's been completely neutralized with respect to his voting power, which, by the way,

is at a percentage level well below even the edgiest of us. I believe in Cysive I might have been the edgiest where I said that somebody who I said had, I think, 30 to 31 percent of the vote, who was also the CEO and had some family members, could be a controlling stockholder. And I think many of you in the room think that's heretical.

(Laughter)

THE COURT: But this is 16 1/2 percent that has been neutralized.

Then we get -- then he has also pledged, as I understand it, to consider working with other private equity or other sponsors if someone comes forward. There is then a go-shop period. And there are -- there are many, many, many, many, many, many, many parties, both strategic and private equity, are contacted; and additional parties come to the table because of the resounding noise in the marketplace made over the go-shop.

During the go-shop, rather than display resistance to anyone, when the two most apparently serious candidates came forward, the board not only gave them confidential information, but they also took the unusual step of offering up to expense

reimbursement to make it worth their while to stay in the process. One of the parties took advantage of that. I believe the Icahn-Southeastern group was offered it but did not. It was a substantial period of due diligence.

And if you -- the only thing that you really -- the only barrier to entry to getting a situation where not only would Mr. Dell not be able to block you but his shares would be voted in proportion to the electorate at-large would be paying a $180 million determination fee, which is substantially below what is typical, and facing a single match right. So that's the only barrier. And even if you don't want to make a qualifying offer, you're allowed to tell the electorate about it, and the board can still change its recommendation if they think it's not qualified; and then you'd be -- there would be a standard termination fee that would be paid and you would be able to go forward. And, again, Mr. Dell would not be able to push the vote through over the board's recommendation by his own 16.5 percent vote. He would essentially be neutralized, whereas the party proposing the alternative would get to vote in its self-interest.

And what we're down to is the difference between 180 and $450 million in a context where the plaintiffs have not actually amended their complaint, where the party that is writing the stockholders and telling them that there is a substantial value gap between what is being offered and what the company is really worth and where conventional technique would be to make an offer that would qualify, leveraged buyouts are not new. And it is very easy to structure an offer if one is serious. And if one believes that the company is worth 17 or 18, it should -- there should be a substantial room to make a qualifying offer in which the only match right would be a single match right and a $180 million termination fee and the board can consider that.

There's also been due diligence given. And one of the first things that any serious bidder does in due diligence is to figure out what's of most interest to its financing partners. This also has the sucker insurance of very credible parties who have engaged in due diligence themselves and have paid -- have bound themselves contractually to pay a healthy price.

So at the end of it, we have a letter

that -- the plaintiffs do not attach an amended complaint; they attach a letter from someone referring vaguely to the insuperability of barriers that past experience have shown are below market and easily topped by someone who is serious. I am not inclined to have this Court become a forum -- a sideshow to a real proxy contest. Bidders have historically -- in fact, most of the most interesting so-called Revlon situations is where a bidder has actually come in to court and said, "I'm being thwarted X, Y, and Z." There's a specificity about that kind of record which is actually important. We're supposed to gin up expedited proceedings when I understand that the bidder has expressly eschewed wanting to litigate, has expressly eschewed pushing further for a superior proposal, and has not -- is not responding to the special committee's request for information by saying it's in an impossible position to do so. "I can't give you assurances about finance, but trust me, the financing is easily available."

I don't know what to do with that cognitive dissidence except to say that it does not create a colorable claim. And as I understand the situation, if the board, Mr. Kubek, does not change

its recommendation and the stockholders vote down the deal, what's the compensation?

MR. KUBEK: I believe there is only compensation if the company does an alternative transaction within some period of time. I actually don't happen to have that --

THE COURT: That constitutes --

MR. KUBEK: -- at the tip of my fingers.

THE COURT: That's within the same definition?

MR. KUBEK: I believe so.

MR. HURD: Yes.

THE COURT: So if they actually did the leveraged recap without a change in control, it would not trigger any compensation? Or would it?

MR. KUBEK: I'm not positive about that. I would need to check further.

THE COURT: But the point is it's not --

MR. KUBEK: Mr. Kreissman, who represents the bidder, may -- may have --

THE COURT: But the point is it's not a naked no vote?

MR. KUBEK: That's correct.

THE COURT: So, again, I don't see -- the stockholders are fully able to protect themselves.

I take the case very seriously, as I hope the record reflects. I've studied the record intently. I just think it's pretty much settled law under QVC and Lyondell and this Court's decisions that adhere to our binding Supreme Court precedent, including Barkan, that boards are entitled to give reasonable contractual inducements in their pursuit of high value.

This seems to be a situation where people -- maybe people can do it better. Maybe the good plaintiffs' lawyers in the room could have done better than the Dell board. Maybe Mr. Icahn could have. I do not see any plausible, conceivable basis in which to conclude that it is a colorable possibility that you could deem the choices made by this board to be unreasonable with all the different safeguards. There is some credit given to open market searches. And if this deal is really as mispriced as the plaintiffs would allege, then there's an easy solution for that, which comes from the avidity of people to make profits, which is the people who are

making an offer in a forum that seems to be awkward and unusual, would put it in the conventional forum that would qualify it for trifling deal protections and allow it to proceed.

But that's really their choice. The Court obviously isn't in that situation. But if you're trying to come to the Court and say that there is a colorable basis that there was a breach of fiduciary duty, you do actually have to make it concrete and tangible. And I would obviously take very seriously if the board could somehow not change its recommendation at all, was inclined to do so because of some forum. I do believe that that kind of connection creates some real fiduciary concerns.

The idea of different gating, the idea that if I'm going to buy the whole enchilada, that they can just come in and buy the little, you know, thing of caso or sour cream that comes with the enchilada and I don't get a market termination fee for that, I think that's exactly what Revlon, Barkan, Lyondell, and even Omnicare -- if you recall Omnicare, one of the things it was very careful to do, which did not divide the majority and the minority, which was to say that reasonable contractual inducements that have

a cost but are not actually a barrier to the ultimate ability of the stockholders to turn down the first alternative and to accept another one, that those things are a natural and expected part of the M&A process, that they can be valuable -- value maximizing; and the courts have to be careful to respect the teachings of QVC and others, that they're only to be condemned if they're actually unreasonable.

So I will -- I probably said too much, but I see no color. And seeing no color and also recognizing that the stockholders themselves have a free vote and that there appears to be a full -- the -- frankly, the disclosure claims lack even the vibrancy of the merits claims -- they lack it even more -- there's going to be a full and vigorous market contest here, and the Court is not going to get in the middle of it.

And I do appreciate and respect -- I understand when we've got such a talented group of plaintiffs' lawyers -- and I mean that -- that it's difficult to turn you-all down. But, honestly, when -- as great a group as you as this is what you come up with, I think that's just sometimes the circumstances in life when there's been a process that

-- again, anyone can second-guess something, but no objective person, I think, could say is likely to be found to be unreasonable.

So thanks for taking your lunch and ...

MR. HURD: Thank you, Your Honor.

(The proceedings concluded at 12:49 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief 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 that the foregoing pages numbered 4 through 45 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 20th day of June 2013.

/s/ Neith D. Ecker

Chief Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public