



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GEN-PROBE INC. : Consolidated
SHAREHOLDERS LITIGATION : Civil Action No. 7495-VCL

- - -

Chancery Courtroom 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, April 10, 2013
2 p.m.

- - -

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

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 GINA M. SERRA, ESQ.
Rigrodsky & Long, P. A.

3 -and-

4 DONALD J. ENRIGHT, ESQ.
of the New York Bar
Levi & Korsinsky, LLP

5 -and-

6 JESSICA ZELDIN, ESQ.
Rosenthal, Monhait & Goddess, P.A.

7 -and-

8 KIRA GERMAN, ESQ.
of the New Jersey Bar
Gardy & Notis, LLP
for Plaintiffs

9

10 EDWARD B. MICHELETTI, ESQ.
CLIFF C. GARDNER, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
11 for Defendants Gen-Probe, Inc., Carl W. Hull,
John W. Brown, Armin M. Kessler, John C.
12 Martin, Phillip M. Schneider, Lucy Shapiro,
Patrick J. Sullivan, and Abraham D. Sofaer

13

14 ANNE C. FOSTER, ESQ.
Richards, Layton & Finger, P.A.
-and-

15 JAMES W. STOLL, ESQ.
of the Massachusetts Bar
16 Brown Rudnick LLP
for Defendants Hologic, Inc. and Gold
17 Acquisition Corp.

18

- - -

19

20

21

22

23

24

1 THE COURT: Welcome, everyone.

2 MR. ENRIGHT: Good afternoon, Your
3 Honor.

4 MS. FOSTER: Good afternoon, Your
5 Honor.

6 THE COURT: Ms. Serra, how are you?

7 MS. SERRA: I'm good. How are you,
8 Your Honor?

9 Good afternoon. May it please the
10 Court. Gina Serra from Rigrotsky & Long on behalf of
11 plaintiffs. With me today are Jessica Zeldin from
12 Rosenthal Monhait --

13 THE COURT: Come on, Ms. Zeldin. You
14 know to stand up.

15 MS. ZELDIN: Sorry, Your Honor. Not
16 likely introduced.

17 MS. SERRA: -- Kira German from Gardy
18 & Notis --

19 THE COURT: Welcome.

20 MS. SERRA: -- as well as Donald
21 Enright from Levi & Korsinsky.

22 THE COURT: Mr. Enright, how are you?

23 MR. ENRIGHT: I'm okay, Your Honor.
24 How are you?

1 MS. SERRA: Mr. Enright has been
2 admitted pro hac vice and will be presenting today's
3 argument.

4 THE COURT: Great.

5 MS. SERRA: Thank you.

6 MR. ENRIGHT: Good afternoon, Your
7 Honor.

8 THE COURT: So, Mr. Enright, let me
9 start by asking you, why are you here?

10 MR. ENRIGHT: Your Honor, that was
11 going to be the first thing that I was going to start
12 off telling you.

13 THE COURT: I got to tell you, you
14 didn't take any depositions and you have zero time
15 recorded on any of the attorneys' affidavits.

16 MR. ENRIGHT: That's right.

17 THE COURT: And yet -- I mean, I'm not
18 saying -- you're obviously welcome in this courtroom,
19 and you're a good lawyer. But why are you here on
20 this case?

21 MR. ENRIGHT: Because my partner,
22 Shannon Hopkins, who spearheaded this case, ruptured
23 her ACL the other day --

24 THE COURT: That I'm very sympathetic

1 to.

2 MR. ENRIGHT: -- in karate class, and
3 had to have surgery to repair it.

4 THE COURT: So you are pinch-hitting.

5 MR. ENRIGHT: That is exactly the word
6 I was going to use, Your Honor, pinch-hitting.

7 THE COURT: Well, as someone who
8 ruptured his own ACL and his meniscus as well, I have
9 deep sympathy, and I hope your partner is -- mends
10 well.

11 MR. ENRIGHT: I do, too. She -- she
12 had surgery late last week and is apparently on the
13 mend. Apparently they have you up and about, walking,
14 and stuff like the next day now to -- to try to rehab
15 it. But apparently she's okay, but she's not capable
16 of working quite yet.

17 THE COURT: That's perfectly
18 understandable. And, please, as I say, convey my
19 sympathies, because last July I did the exact same
20 thing but not in karate.

21 MR. ENRIGHT: How did you do it, Your
22 Honor?

23 THE COURT: I was playing Ultimate
24 Frisbee. Not nearly -- not nearly as impressive as

1 karate class. Karate class is much tougher.

2 MR. ENRIGHT: Maybe more fun.

3 THE COURT: Yeah.

4 MR. ENRIGHT: So yes, Your Honor. I
5 come before the Court today in the odd position of
6 asking the Court to approve a settlement that I had no
7 role in negotiating in a case that I had no role in
8 litigating.

9 THE COURT: But other than that --

10 MR. ENRIGHT: I'm afraid that because
11 I didn't actively litigate the case, my familiarity
12 with all the ins and outs may not be up to what I
13 would normally expect of myself. And for that, if I
14 have any gaps in my knowledge, I apologize in advance.

15 That said, I have reviewed the -- the
16 docket and the -- the key documents, to the extent
17 that I've been able to, and have prepared as best as I
18 can.

19 And just by way of background,
20 Gen-Probe is a Delaware corporation headquartered --
21 or was a Delaware corporation headquartered in San
22 Diego. It developed, manufactured, and marketed
23 molecular diagnostic products and services related to
24 diagnosing diseases and screening blood donations and

1 organ transplants. So it's a biotech company.

2 Its stock was traded on the NASDAQ and
3 had approximately 46 million shares issued and
4 outstanding on the record date for the shareholder
5 vote.

6 THE COURT: How many did Mr. Coyne
7 have?

8 MR. ENRIGHT: Mr. Klein -- I don't
9 know about Mr. Coyne. That would have been the Gardy
10 & Notis firm's client. My client, Mr. Klein, had 500
11 shares. I can tell you Mr. Klein is a facilities
12 engineer with the Cobra Puma Golf Company in Carlsbad,
13 California. He's a -- he lives in Escondido,
14 California. This is the first matter in which my firm
15 has represented him.

16 I don't know if you want Ms. German to
17 address the Court with regard to --

18 THE COURT: Ms. German, what do you
19 know about Mr. Coyne?

20 MS. GERMAN: Your Honor, Mr. Coyne --

21 THE COURT CLERK: I'm sorry.

22 THE COURT: Why don't you come up to
23 the podium.

24 You actually took some depositions in

1 this case, two of them; right?

2 MS. GERMAN: Yes.

3 THE COURT: That's what it looks like.

4 MS. GERMAN: Mr. Coyne had two shares.

5 THE COURT: Two?

6 MS. GERMAN: Yes.

7 THE COURT: How did you find

8 Mr. Coyne?

9 MS. GERMAN: How -- oh, he approached
10 our firm regarding this -- the transaction.

11 THE COURT: And what was his rationale
12 for wanting to litigate the transaction while holding
13 two shares?

14 MS. GERMAN: He felt that the price
15 was too low.

16 THE COURT: Did you suggest you might
17 toss him a fiver, since, basically, the value of his
18 stake was \$160 at the deal price and that if he was
19 that frustrated about it, you could probably, you
20 know, throw in some lunch money for him and take care
21 of his concerns?

22 MS. GERMAN: No.

23 THE COURT: All right. Thank you.

24 MR. ENRIGHT: Okay. So between 2007

1 and 2010 the company had been in persistent
2 on-again/off-again merger discussions with a company
3 that is referred to in the proxy as Party A. Between
4 November 10 -- November of 2010 and March of 2011,
5 Party A made a couple indications of interest in the
6 range of \$68 to \$74 per share, to be paid 60 percent
7 in cash and 40 percent in stock.

8 While this wasn't exactly compelling
9 stuff, it did prompt the board to hire Morgan Stanley
10 as its financial advisor in March of 2011.

11 Morgan Stanley then commenced a market
12 check process, contacted seven potential strategic
13 acquirers on a confidential basis.

14 Then late April of 2011 Bloomberg
15 published an article stating that the company had
16 engaged Morgan Stanley and was seeking buyers. So the
17 cat was, sort of, out of the bag after that.

18 This prompted six other potential
19 bidders to -- to initiate or try to initiate
20 discussions with the company in addition to Party A
21 and the seven that Morgan Stanley had contacted. So
22 at that point the company was in contact with -- with
23 14 potential purchasers.

24 Seven of those 14 signed

1 confidentiality agreements. Three of them submitted
2 indications of interest which ranged from 75 to \$85
3 per share. However, after due diligence, all three of
4 them backed out, terminated discussions; and the sale
5 process itself ended and was terminated in July of
6 2011.

7 The company resumed its -- its
8 business and pursuing its strategic plan for -- for
9 its own growth. But then in September 2011
10 Gen-Probe's CEO, Mr. Hull, contacted Hologic, who
11 ended up being the buyer here, to discuss a potential
12 technology-sharing relationship, some sort of
13 technology licensing. This overture was rebuffed for
14 competitive reasons by Mr. Cascella, the CEO of
15 Hologic; but this, sort of, started the wheels
16 grinding and some analytical work being done at
17 Hologic concerning a potential combination with
18 Gen-Probe.

19 There were some contacts between
20 September of 2011 and March of 2012 between
21 Mr. Cascella and Mr. Hull concerning, you know, when
22 they could meet and talk again. And then on
23 March 7th of 2012, they actually met again. And at
24 that point Mr. Cascella made an indication of interest

1 verbally in the range of 80 to \$85 per share.

2 There were further meetings over the
3 next couple weeks thereafter. And Mr. Hull, in
4 consultation with the special committee, which had
5 been appointed during the 2011 process, requested that
6 they make their indications of interest in writing.
7 The first one was made at \$80 per share. There were
8 further discussions, and then an indication of
9 interest in the range of 80 to \$85 per share was made.

10 The first time that this was reported
11 to the full special committee formally was at the
12 April 3rd meeting of the special committee. First
13 time it was reported to the full board was on
14 April 5th.

15 Mr. Hull led negotiations for
16 Gen-Probe and eventually negotiated a deal at 82.75
17 per share, which is close to the top of the end of the
18 range of indications of interest that the company had
19 received during that 2011 process.

20 The deal was approved by the board on
21 April 29th, 2012.

22 Following the announcement of the
23 deal, Mr. Coyne and Mr. Klein filed complaints.
24 Again, my firm represents Mr. Klein. Mr. Klein

1 verified each complaint that was filed and executed a
2 settlement affidavit. He felt that the price was too
3 low, primarily in relation to the public share price
4 before the deal was announced, to which the deal was
5 only a 20 percent premium which he felt to be low.
6 However, it's important to realize that this was not
7 an unaffected share price and this was not necessarily
8 something that Mr. Klein had fully thought through or,
9 frankly, that -- that we had fully appreciated before
10 we went through the litigation process ourselves.

11 There had not only been that Bloomberg
12 article, Your Honor, but there had been a couple of
13 Wall Street Journal articles that had come out every
14 month or two following that April Bloomberg article up
15 until that -- around the time that the process ended.
16 And it had a significant inflating effect on the share
17 price.

18 THE COURT: Why is that not something
19 you had perceived before you filed suit?

20 MR. ENRIGHT: Because, Your Honor, it
21 had been a year beforehand. So we must not have
22 picked it up for whatever reason.

23 Again, Your Honor, I didn't
24 participate in -- in the actual litigation of the

1 case. So I -- I can't really speak directly to that.

2 THE COURT: No. Look, I understand
3 there are gaps in your knowledge, Mr. Enright, and I
4 think it's wonderful of you to step into the breach
5 for your partner. I mean, the -- the problem is that
6 you have built up some credibility in terms of pushing
7 these cases and bringing decent cases, and you're now
8 here arguing for a pretty weak settlement.

9 MR. ENRIGHT: Well, there's a couple
10 things to consider here, Your Honor. First, that 2011
11 process had been nearly a year -- had been something
12 like nine months before this deal was announced. So
13 it's hard to really figure -- or was hard to figure
14 how much credit to give that, how stale the
15 information was until we got a look under the hood.

16 The company's results seemed to be
17 broadly consistent with what it had projected. It was
18 coming in slightly higher than projected but not --
19 not -- I don't think materially so. And so that
20 information, while stale, I think was still a very
21 relevant data point.

22 Moreover, the fact that it had turned
23 out the way it did, with the information becoming
24 public and -- and creating a bit of havoc with the

1 company's share price and with speculation, that
2 clearly affected the board's approach to things in
3 2012, and I think reasonably so, frankly.

4 And Hologic also, based on
5 Mr. Cascella's deposition and Mr. Hull's deposition,
6 they made it very clear that they were not interested
7 in participating in any broader process after the
8 circus had taken place the year before.

9 So there's this ... this disconnect
10 between what appeared to be the case at that time
11 where they signed a deal for a pretty small premium
12 after a essentially minimal process in 2012; but when
13 you look further back into that 2011 process, it
14 starts to make sense, okay? And that's apparently
15 what -- what the litigation process revealed to my --
16 to my colleagues at the Gardy & Notis firm and my New
17 York office.

18 So there's all of that.

19 The -- the litigation was -- was
20 initially filed in, I guess -- I'm not sure exactly
21 when -- it was shortly after the -- the deal was
22 announced on, I think, April 29th. So it would have
23 been in early May.

24 THE COURT: May 4th is when Mr. Coyne

1 filed. April 30th is when the deal was announced.

2 So --

3 MR. ENRIGHT: Okay.

4 THE COURT: -- four-day clock.

5 MR. ENRIGHT: Okay. And then I think
6 my firm filed a week or so after that.

7 THE COURT: And then -- right,
8 exactly.

9 MR. ENRIGHT: Okay. And then on
10 May 18 the Court appointed the two firms as colead
11 counsel and --

12 THE COURT: Who are the Californians?

13 MR. ENRIGHT: You know, Your Honor, I
14 don't know. I know that there was something out
15 there, but I -- I'll be honest with you, I haven't
16 really concerned myself with that in the limited time
17 I had to prepare myself for this.

18 THE COURT: Mr. Micheletti, off the
19 top of your head, do you know who the Californians
20 were?

21 MR. MICHELETTI: I do not know the
22 names of the individuals, but I do know the result of
23 the action. It was briefed as a motion to stay or
24 dismiss in deference to this Delaware proceeding. And

1 rather than take that motion on, the plaintiffs there
2 dismissed their case without prejudice.

3 THE COURT: Thank you.

4 MR. MICHELETTI: You're welcome, Your
5 Honor.

6 MR. ENRIGHT: So on May 18th the Court
7 also certified a class, which I assume was -- was --
8 which I believe was by stipulation or by agreed
9 motion.

10 THE COURT: It was.

11 MR. ENRIGHT: The preliminary proxy
12 was filed that same day, and then plaintiffs filed an
13 amended complaint on May 24th. Thereafter the parties
14 negotiated expedited proceedings, and agreed upon --
15 obviously removing the need for any motion practice on
16 that -- and agreed on the terms of a confidentiality
17 stipulation.

18 On May 30th document production
19 commenced. It ultimately included over 154,000 pages
20 of nonpublic documents. And, Your Honor, I would be
21 remiss if I didn't tell you I have not looked through
22 even a fraction of those, given my --

23 THE COURT: Understood.

24 MR. ENRIGHT: -- limited time in

1 preparing for today. But my understanding is that
2 they contained nonpublic documents, including minutes,
3 presentations, forecasts, budgets, e-mails, and work
4 papers prepared by Morgan Stanley, which had
5 previously not even been shown to Gen-Probe.

6 Plaintiffs took three contested
7 depositions, Mr. Hull; Jeffrey Hogan, who was the
8 person most knowledgeable designated by Morgan
9 Stanley; and Mr. --

10 THE COURT: I read them. I mean,
11 that's how I know that they were defended in a
12 California-esque fashion rather than in a Delaware
13 fashion, and that I knew that Ms. German took two of
14 them.

15 MR. ENRIGHT: Okay. Thank you, Your
16 Honor.

17 (Continuing) -- Mr. Sofaer, who's an
18 outside director of Gen-Probe.

19 THE COURT: I mean, half the
20 transcripts were the defense attorney talking. It was
21 not a -- it was not a Delaware defense of a
22 deposition. It was an obstructive defense.

23 MR. ENRIGHT: Actually, Your Honor,
24 speaking objections are not permitted in California,

1 either, actually.

2 THE COURT: I guess it wasn't in
3 California. But I don't know what the custom is out
4 there. It certainly wasn't a -- a -- I can -- I can
5 say it wasn't a Delaware defense. I can't say whether
6 or not it was in accordance with the California
7 custom. Perhaps the rules are one thing and custom is
8 the other.

9 MR. ENRIGHT: My experience is, in
10 California, which are not all that recent -- I used to
11 do a lot of 10b-5 litigation out in the Ninth Circuit,
12 Your Honor. And my experience with that was that --
13 that they were usually pretty observant of that rule
14 out there as well. I don't know what to say about
15 this particular instance, Your Honor. Regardless --

16 THE COURT: I was just letting you
17 know I was familiar with the depositions.

18 MR. ENRIGHT: And I appreciate it,
19 Your Honor. Thank you.

20 During discovery and -- and prior to
21 the due date for plaintiffs' opening brief for
22 preliminary injunction, the parties engaged in
23 discussions, arm's-length negotiations, and discussed
24 potential resolution of the case.

1 While that was going on, plaintiffs
2 obviously were assessing the claims. And based on
3 what I've been able to -- to educate myself on and
4 familiarizing myself for today's -- for today's
5 hearing, the plaintiffs concluded that -- that that
6 2011 process, while somewhat stale, was -- was not so
7 out of touch that it was going to be held to be an
8 insufficient process, particularly given the fact that
9 the deal protections were not so out of whack as to be
10 preclusive; and also concluded that if you looked at
11 the price, both compared to the theoretical analyses
12 of that -- that Morgan Stanley and our own financial
13 experts performed, and also in relation to -- to the
14 unaffected share price prior to that Bloomberg article
15 in April of 2011, if you took all that together, it
16 didn't look like this was going to be a price that we
17 were going to be able to argue was outside the range
18 of fairness. And our own experts informed us of that.

19 So this didn't look like something we
20 were going to be able to win a process PI on, and it
21 didn't look like something that we were going to be
22 able to establish damages on. And even if we could
23 establish damages, Your Honor, this didn't appear to
24 be a situation where the defendants were so remiss as

1 to be able to satisfy Lyondell or otherwise establish
2 a breach of duty of loyalty.

3 THE COURT: I can tell you on all
4 those things, I agree.

5 MR. ENRIGHT: Well, I thank you, Your
6 Honor. If I'm going down the wrong road, you let me
7 know, because, I'll be honest with you, I'm kind of
8 feeling my way through.

9 THE COURT: No. You're doing fine.
10 Your partner should appreciate you stepping into the
11 breach.

12 MR. ENRIGHT: I hope so. I'm doing my
13 best.

14 So at \$82.75, the deal price was at
15 the top end of the range of the indications of
16 interest that had been received during that 2011
17 process. And it was also a little bit above the
18 midpoint of the range of indications of interest that
19 Hologic had originally made. So they -- it appeared
20 that Mr. Hull and the committee did negotiate this in
21 a fairly robust fashion.

22 So we -- we -- or my firm, and the
23 Gardy & Notis firm, concluded that it did not appear
24 that we were really going to have any realistic

1 possibility of success on those elements or of those
2 claims.

3 So as is not uncommonly the case,
4 plaintiffs' counsel turned to -- to the disclosure
5 issues to see what good could be done there and
6 apparently did find some -- some things that I think,
7 at least -- at least one thing that appeared to really
8 have a material problem with it and a couple other
9 things that -- that, if not rising to the level of PI
10 level materiality, at least they are, I think, helpful
11 for the shareholders to understand the -- the dynamics
12 that were involved here.

13 The most important supplemental
14 disclosures that were obtained here related to the --
15 the cash flow projections and the DCF analysis. In
16 discovery, plaintiffs' counsel found that the total
17 free cash flows that were -- that were set forth in
18 the projections in the proxy statement were different
19 from and actually much higher than the unlevered free
20 cash flow projections that were actually used in
21 Morgan Stanley's DCF analysis. And apparently what
22 happened was management gave Morgan Stanley its
23 financial projections. Morgan Stanley took those,
24 deconstructed them, and then calculated their own

1 unlevered free cash flow projections.

2 But when the -- the proxy didn't
3 disclose any of that. And it also -- by disclosing
4 total free cash flows in this context, I think it --
5 it was highly likely to mislead the reader into
6 thinking that those were the cash flows that were used
7 in Morgan Stanley's DCF analysis. And they very much
8 were not. The unlevered free cash flows that were
9 used were actually significantly lower. And the --
10 the numbers are laid out in the supplement. So you
11 can see the difference. And it's significant.

12 Additionally, discovery showed that
13 when calculating those unlevered free cash flows, the
14 EBITDA that they used as, sort of, the starting point
15 for calculating those unlevered free cash flows, the
16 EBITDA numbers they used were the non-GAAP EBITDA
17 numbers that had been provided by management rather
18 than the higher adjusted EBITDA numbers, which were
19 much higher and which, if they had used those instead,
20 again, that would have produced significantly higher
21 unlevered free cash flows than those that were
22 actually calculated and used in the DCF. And that
23 would have, in turn, resulted in a higher implied
24 range of value in the DCF analysis.

1 Discovery also revealed that the DCF
2 analysis that Morgan Stanley performed only took into
3 account or -- or used or -- or included \$16 million of
4 the 2012 projected unlevered free cash flows for 2012
5 rather than the -- the full 93 million that was
6 projected for that year, in part, because they were
7 projecting an October consummation date for the -- for
8 the transaction, which, No. 1, turns out to have been
9 off by a couple months, and, No. 2, is unusual, at
10 least in my experience in terms of how that -- that is
11 generally performed.

12 So as part of -- of the negotiated
13 resolution with defendants here, plaintiffs obtained
14 corrective disclosures on all these points. And I
15 actually do think, Your Honor, that that's the -- the
16 proper term, "corrective disclosures" at this point,
17 not "supplemental," because I think what was there
18 before -- I'm sure it was not by design, but -- but I
19 think it was actively misleading, because you would
20 never guess any of this stuff from -- from reading it
21 before. And you would just look at those total free
22 cash flows listed there and think those are the cash
23 flows listed there. And if you applied those total
24 free cash flows to a reasonable DCF analysis, you

1 would get a range very, very different, a range of
2 implied values very different from those that Morgan
3 Stanley actually produced.

4 So it -- there was a fairly
5 significant disconnect there. And I think fixing that
6 was significant. And what we -- the way we fixed that
7 was by obtaining the corrective disclosures from,
8 No. 1, the total free cash flow -- revealing that
9 there was -- total free cash flows that had been set
10 forth in the proxy were not the cash flows that Morgan
11 Stanley used; got the -- the actual unlevered free
12 cash flows that Morgan Stanley used disclosed;
13 disclosed that the free cash flow projections that
14 Morgan Stanley calculated and used were derived from
15 non-GAAP EBITDA rather than the higher-adjusted
16 EBITDA; and disclosed that only the -- that 16 million
17 portion of the 2012 cash flows were applied to the
18 analysis.

19 And when you take all that into
20 account, Your Honor, I think it provides shareholders
21 with an overall picture that Morgan Stanley was using
22 its judgment here in a way that tended to minimize the
23 value of the DCF analysis. You know, I don't want to
24 go so far as to say they put the thumb on the scale,

1 because that would -- that would apply -- imply this,
2 sort of, nefarious intent, which I don't have any
3 evidence for; but it does appear to create an
4 inference that Morgan Stanley exercised its judgment,
5 in several respects intended, to minimize the value
6 range for that DCF analysis.

7 And I think, taken in context with
8 that \$24 million contingent fee structure that Morgan
9 Stanley had in connection with this transaction, you
10 know, I think it had good reason to give shareholders
11 some actual pause in considering this and in
12 considering whether or not to exercise appraisal
13 rights.

14 So I think that those disclosures,
15 Your Honor, regardless of anything else in the -- in
16 the supplement, I think those are actually
17 significantly importantly material and justify
18 approval of the settlement. I think everything else
19 that comes after that is, essentially, gravy.

20 With regard to the employment
21 discussions that took place, Mr. Hull, in that initial
22 March 7th discussion with Mr. Cascella, apparently was
23 provided with the -- the knowledge that his continued
24 services would be desired and that he would be a

1 valued part of the package going forward for the
2 company, for the combined company.

3 Now, they disclosed that -- that had
4 taken place in that March time frame in the original
5 proxy, and they disclosed that he told the board that;
6 but they didn't disclose a couple things. I don't
7 think they disclosed that the -- the way that the
8 board considered that in the context of determining
9 whether or not he should continue to be the point
10 person for the negotiations and how they -- they
11 determined that, and also didn't disclose the fact
12 that there was a second approach from Hologic in which
13 they raised this issue with him again after he had
14 committed to the board not to discuss this with them.

15 And I think that that second approach,
16 the materiality of that, is certainly attenuated or --
17 or reduced by the fact that that first contact was --
18 was made; but I think the fact that -- that even after
19 he, sort of, stepped back from the table on that
20 issue, they continued -- they continued to press the
21 issue, tends, to me, anyway, to -- to indicate that
22 they were using this as a point of leverage in -- in
23 the negotiations and something that -- that the
24 shareholders had a right to draw inferences from in

1 terms of the dynamics that took place here, and the
2 fact that it was Mr. Hull who was the point person in
3 these negotiations.

4 Is this earth-shattering,
5 game-changing news? I don't think so, Your Honor,
6 given the fact that the first disclosure had been
7 made; but does it add some useful color from which
8 additional inferences can be drawn? Yeah, I think it
9 does.

10 So as I said, it's gravy, and I think
11 it's -- it's actually useful gravy, but it's not --
12 it's not game-changing stuff.

13 And lastly, the -- the issues relating
14 to the timing of the disclosure. The supplement
15 included a long recitation concerning why they timed
16 their first-quarter results disclosure in relation to
17 the -- the signing and disclosure of the transaction.
18 Whether or not I or even the Court find those
19 explanations to be particularly availing or credible,
20 I'm not sure is the point. The point is that the
21 record here actually reflected that that was what they
22 discussed and that -- that they are telling the
23 shareholders that they had a -- a concern in their
24 business judgment that -- that disclosing those prior

1 to disclosing a merger transaction that they were on
2 the cusp of agreeing to would potentially expose them
3 and the company to liability.

4 And I don't think that that is a
5 facially, you know, implausible explanation. Again,
6 is this game-changing stuff? I -- I don't think so,
7 Your Honor; but I do think that it does go to how the
8 shareholders weigh the credibility and candor of the
9 board in conducting this process, which, again, you
10 know, as is not uncommonly the case, after you really
11 get a look at some things that are really hard to
12 figure out or look fishy or suspicious before you --
13 you get in there and -- and get a look at the
14 documents and, you know, talk to the people involved,
15 often have honest explanations, but the shareholders
16 should -- should have a chance to weigh for themselves
17 the credibility and candor of the people involved.
18 And because of this disclosure, they had that
19 opportunity.

20 Now, this disclosure -- and there were
21 a few other minor things in the supplemental
22 disclosures. These disclosures were filed with the
23 SEC on July 19th of 2012, and the shareholder vote was
24 held 12 days later, on July 31st. So I think that

1 this was given ample time to percolate and be digested
2 by the market. And the vote approved the transaction,
3 which closed on August 1st of 2012.

4 And so it's also important to weigh
5 the give and the get here and determine whether or not
6 the settlement is fair, reasonable, and adequate.
7 Plaintiffs' counsel and plaintiffs themselves have
8 weighed in and said they think it is. To me, Your
9 Honor, it looks like the give here was fairly
10 negligible in value. I don't think the release that
11 was given up here had much value, honestly.

12 The -- the prospect of obtaining
13 damages here seems sufficiently remote to me to -- to
14 justify approving the settlement; whereas I do believe
15 that those DCF and cash flow-related disclosures
16 actually provided meaningful, important information
17 for the shareholders with regard to not only the
18 voting decision, but I also think specifically with
19 regard to a potential appraisal decision. To the
20 extent that this Court, in -- in conducting appraisal
21 actions, tends to give strong credit to the discounted
22 cash flow analysis, which is frequently referred to as
23 the gold standard, I think that -- that -- that if you
24 take -- take these -- this additional information that

1 was obtained here and given to the shareholders, it
2 could very well prompt somebody to -- to seek
3 appraisal who otherwise might not have. I don't
4 actually know the answer as to whether or not
5 anybody --

6 THE COURT: I'm going to ask.
7 Mr. Micheletti, do you know if anybody sought
8 appraisal?

9 MR. MICHELETTI: To my knowledge, no
10 one sought appraisal, Your Honor.

11 MR. ENRIGHT: Oh, well. I didn't know
12 the answer to that.

13 THE COURT: Could have.

14 MR. ENRIGHT: Could have. You know,
15 Your Honor, you know, our job is not to make those
16 decisions for the shareholders, obviously. Our job is
17 to give them the information and let them make their
18 decisions. And they voted to approve the transaction,
19 despite, Your Honor, I think some things here that did
20 raise some reasonable questions. They voted for the
21 transaction. In the absence of -- of glaring
22 problems, they often do. And people like to get a
23 premium. It's -- it's the reality of the world.

24 So weighing the give and get, Your

1 Honor, I think this does fall squarely in the zone of
2 fair, reasonable, and adequate. And this assessment
3 on plaintiffs' counsel's part was, again, supported by
4 extensive discovery; that review and analysis of over
5 150,000 pages of documents; four depositions,
6 including three of which that were contested,
7 apparently contested very nastily --

8 THE COURT: I don't know how nasty it
9 was, but it was vociferous.

10 MR. ENRIGHT: Vociferous, okay. Thank
11 you. Verbosely.

12 THE COURT: Verbosely.

13 MR. ENRIGHT: -- and our
14 consultations -- or plaintiffs' counsel's
15 consultations with financial experts. So I believe
16 this settlement should be approved.

17 With regard to the class certification
18 issue, first, that -- you know, I won't bore the Court
19 with a lengthy Rule 23 recitation. The notice issue
20 obviously was one that -- that the Court noted an
21 error in the original notice that was sent to the
22 shareholders. A corrected notice was prepared and was
23 sent to the shareholders. Over 18,000 of them were
24 mailed. The -- the affidavit of Jose Fraga attests to

1 that and to the fact that at this time it did not
2 contain any omissions of important information.

3 So I believe that we cured that
4 problem, and I apologize for -- for plaintiffs'
5 counsel for that error having taken place in the first
6 place.

7 After two notices, we received no
8 objections whatever. The -- the class period is -- is
9 narrowly drawn. It's April 29 to August 1, 2012.
10 It's the date of the -- the merger agreement to the --
11 and announcement to the date of the consummation. I
12 think that that is a -- an appropriate class to be
13 certified and should be.

14 And then we turn, Your Honor, to -- to
15 the issue of attorneys' fees and expenses.
16 Plaintiffs' counsel are requesting \$450,000 in fees
17 and expenses. Plaintiffs' counsel had \$28,000 in
18 expenses, and the time and expenses affidavits
19 submitted to the Court reflect that roughly a thousand
20 hours of time were devoted to this litigation. So
21 when you net out that \$28,000 in expenses, you're
22 talking about \$422,000 in requested fees. Apply that
23 to the -- to the time reflected in those time and
24 expenses affidavits, and you're talking about

1 something in the \$422 per-hour range, which is a
2 blended rate that would be below what this Court often
3 approves in this type of case.

4 So under Sugarland, the real question
5 is does the benefit obtained justify the requested
6 fees and expenses? Even ignoring the disclosure
7 timing and employment discussions disclosures, which I
8 think have some value, but even ignoring them
9 altogether, Your Honor, I think just the -- the DCF
10 and cash flow-related projections here would merit the
11 -- the requested fees.

12 This Court has often held that -- that
13 where one or two truly material supplemental or
14 corrective disclosures are obtained, that will merit a
15 fee in the range of 400 to 500, which can be dialed up
16 or dialed down based on a variety of factors. Since
17 Your Honor developed them, I don't need to tell the
18 Court.

19 In Hawk, the Hawk case, Your Honor,
20 you held that -- or -- I don't know if "held" is the
21 right word. You discussed the fact on the record that
22 fee awards in cases where free cash flow projections
23 are obtained as part of the settlement, that those
24 fees cluster in the range of 400 to \$500,000. And in

1 the Hawk case, where that was the only material
2 disclosure that was obtained, the Court awarded a fee
3 of \$450,000.

4 And I didn't participate in
5 negotiations of any element to this case, let alone
6 the fee; but it would be surprising to me if that was
7 not considered as a relevant data point by -- by
8 everybody involved in arriving at the same number
9 here.

10 So I think that that's an appropriate
11 number to -- to reach out to. The -- there was --
12 based on the affidavits, there appears to have been an
13 extraordinary amount of time spent on this case. So
14 that does not seem to me to be a reason to -- to
15 reduce the fee.

16 So -- and I also think, Your Honor,
17 that it's very -- this was not low-hanging fruit that
18 was intentionally omitted from the proxy for the
19 purposes of providing consideration for a quickie
20 settlement. I think that this was stuff that they
21 genuinely were reluctant to tell the shareholders and
22 perhaps more on the part of Morgan Stanley than on the
23 part of Gen-Probe. And getting them -- getting this
24 information to shareholders in that regard,

1 particularly -- again, particularly with regard to the
2 DCF analysis and those cash flow projections -- that
3 seems to me to be something of a significant result
4 here and seems to me that it would merit that -- a fee
5 in that range.

6 Thank you for your time and for
7 permitting me to pinch-hit for Ms. Hopkins. Unless
8 you have any questions, Your Honor, I have nothing
9 further.

10 THE COURT: I don't. Thank you.

11 MR. ENRIGHT: Thank you, Your Honor.

12 THE COURT: Do the defendants have
13 anything to add?

14 MR. MICHELETTI: Your Honor, Ed
15 Micheletti on behalf of the Gen-Probe defendants. We
16 submitted a brief on --

17 THE COURT CLERK: I'm sorry. Could
18 you come to the podium, please?

19 MR. MICHELETTI: Oh, sure. Sorry.

20 I was just going to briefly rise to
21 state that we submitted a brief on January 7, 2013, in
22 support of the settlement that outlines our views, I
23 would say definitively, in support of the settlement
24 and why we think it makes sense.

1 Unless Your Honor has any questions of
2 me, we're happy to stand on that brief.

3 THE COURT: No. I don't. I
4 appreciate it, and I appreciate your answering the
5 questions I had during the presentation of
6 Mr. Enright.

7 MR. MICHELETTI: Thank you, Your
8 Honor.

9 THE COURT: The issue today for me is
10 to consider the proposed settlement in the Gen-Probe
11 Shareholders Litigation. I will think of it as
12 Stockholders Litigation, C.A. 7495. This litigation
13 concerns the acquisition of Gen-Probe by Hologic in
14 which Hologic purchased all shares of Gen-Probe
15 through a wholly owned subsidiary for \$82.75 per
16 share.

17 I think this is a difficult settlement
18 to approve because it's, frankly, terribly thin. I
19 think if there's one thing that comes through from the
20 record -- and I appreciate Mr. Enright's candor in
21 this regard -- is that there really wasn't anything
22 here on any process claims. There is one somewhat
23 oblique disclosure claim scraped together based on the
24 disclosure of the unlevered free cash flows. Given

1 that the 10-Q was disclosed relatively
2 simultaneously -- and, indeed, that's a major subject
3 of the supplement -- it's not clear to me that that
4 actually provided any incremental information to the
5 stockholders at all. The rest of the disclosures that
6 were provided are very soft, of the tell-me-more
7 variety, and don't even tell me that much more.

8 So, really, I come in -- I came into
9 this on the fence as to whether the more appropriate
10 course was to reject the settlement, recognizing that
11 I'd already certified a class, recognizing that we
12 were postclosing, and recognizing the defendants then
13 would have what looks, to me, like a lay-down motion
14 to dismiss under Malpiede. That would be Option 1.
15 Or Option 2 would be to approve the settlement and
16 take into account the underwhelming nature of it in
17 terms of the fee.

18 The outcome for the class, because the
19 class has already been certified, unless I were to
20 decertify it, is effectively the same. A dismissal
21 under Malpiede would have the same kind of res
22 judicata effect as would the approval of this
23 settlement. The scope of the res judicata effect
24 would include any claims that were raised or could

1 have been raised in this litigation, which is,
2 effectively, the scope of the release, except for
3 some, perhaps, unknown claims that might add in
4 something, but they would still have to be related to
5 this litigation. And under the Malpiede alternative,
6 the plaintiffs still could, I guess, in theory, come
7 back and make a fee petition based on the disclosures
8 that the defendants actually made and argue that they
9 should get a benefit for conferring those under the
10 mootness doctrine.

11 At that point, as I've suggested --
12 and I know the Chancellor suggested -- it becomes a
13 little awkward for the defendants to walk away from
14 the fact that they agreed to value these disclosures
15 at \$450,000. If they come back at that point and say
16 "No, no. These disclosures actually were worth
17 materially less," well, then, the natural inference is
18 the defendants are not paying for the benefits
19 conferred; they were, in fact, paying for the release.
20 So that adds in a complication.

21 Since I don't think this settlement is
22 worth \$450,000 to the plaintiffs, I actually think,
23 all in all, it's better for me to rule on the
24 settlement today, to approve it, and then award a

1 suitable fee as opposed to rejecting the settlement,
2 receiving a Malpiede motion -- by all indications, as
3 I say, I think the Malpiede motion is a laydown -- and
4 then having to deal with the fee motion in a mootness
5 posture.

6 So with that background, I am going to
7 approve the settlement, and then I will turn to the
8 fee. But I can tell you that this was a very close
9 call that I went back and forth on. It's really hard
10 for me to see these disclosures as terribly distinct
11 from what the Chancellor decided were insufficient to
12 support the settlement in Transatlantic. Essentially
13 it comes down to whether the unlevered free cash flows
14 -- as I say, because of the 10-Q, it's not really
15 clear to me whether they were incremental adds -- are
16 worth more than the additional financial information
17 concerning loss ratios and expense ratios.

18 But perhaps you're catching me on a
19 good day. Perhaps I reasoned through this improperly
20 in terms of a Malpiede issue; but since I do think
21 that what effectively would happen here is we'd be at
22 a postclosing motion to dismiss on 102(b)(7), that it
23 is confirmatory that the give here was essentially
24 minimal. And so a vapor-density get for a

1 vapor-density give is not, all in all, an unfair
2 trade.

3 So with those comments and with that
4 preview of the bottom line, first, I will confirm
5 class certification as had been previously done by
6 stipulation, and I reviewed and approved that
7 stipulation. To confirm, the class is appropriately
8 defined as stockholders broadly defined between April
9 29, 2012, and August 1, 2012, which represents the
10 time period at the start date when the board approved
11 the merger agreement and the end date when the merger
12 was completed. That is a coherent class and an
13 appropriate definition.

14 In terms of the 23(a) requirement,
15 numerosity is met. Gen-Probe had over 45 million
16 shares outstanding. It was publicly traded on NASDAQ.
17 Numerosity is satisfied.

18 Commonality is satisfied for a case
19 like this because it is an injury to the stockholders'
20 interest in his shares. All stockholders are affected
21 equally by that alleged breach of fiduciary duty and,
22 therefore, the claims are held in common across the
23 class.

24 The class members' claims here are

1 typical in that they are stockholders and do not have
2 any separate, individual, or different harms other
3 than in their capacity as stockholders.

4 The stockholders satisfy the minimal
5 requirement of adequacy. At least Mr. Klein does. I,
6 frankly, think Mr. Coyne is not a rational suer with
7 only two shares, which is also a fact that is similar
8 to the Transatlantic case. Nevertheless, since
9 Mr. Klein is adequate and holds a -- I don't know if
10 it's a token stake or not, but it's at least a
11 noninfinitesimal stake, at 500 shares, I think that
12 there's adequate representation at least for
13 Mr. Klein. Both have filed Rule 23(aa) affidavits.
14 Both have filed Rule 23 affidavits.

15 And counsel, which are known to the
16 Court, was hired and retained, who are experienced in
17 these matters.

18 Certification under Rule 23(b)(1) is
19 appropriate. The prosecution of separate actions by
20 individual class members who, because of their
21 stockholder status, are identically situated, would
22 risk inconsistent or varying results. Adjudication
23 with respect to one class member would, therefore, be
24 dispositive to the class' interest.

1 This is a classic, historic (b)(1)
2 true class action. It also could be certified under
3 (b)(2), as the Supreme Court noted in Celera. For all
4 these reasons and having specifically found that
5 adequacy is satisfied, I will certify the nonopt-out
6 class as defined under Rule 23(a) and Rules 23(b)(1)
7 and (b)(2).

8 Adequacy of notice was initially
9 inadequately given. The time of the settlement
10 hearing wasn't included. Time is required under the
11 Delaware Supreme Court's decision in Philadelphia
12 Stock Exchange. A revised notice was mailed out that
13 adequately described the lawsuit. It adequately
14 provided the location, date, and time of the
15 settlement. Notably, it did so in three places, pages
16 1, 3, and 6, not just in the usual one. And it
17 informed the class members whom to contact for further
18 information.

19 Notice was adequately delivered. The
20 affidavit of Mr. Jose C. Fraga, Sr., director of The
21 Garden City Group, attests both to the mailing of the
22 original notice and the revised notice to record and
23 beneficial holders. In all, 19,130 copies of the
24 original notice went out; 17,196 copies of the revised

1 notice went out. It is an interesting discrepancy in
2 the numbers, but I suspect it's because there was
3 already information about the ultimate beneficial
4 holders that was gained and could be narrowed for the
5 second -- gained from the first mailing and could be
6 narrowed for the second mailing.

7 In terms of the merits of the
8 settlement, as I say, I think this is a really close
9 one. I thought long and hard about whether I would
10 even approve this one. But, frankly, I think it puts
11 the defendants unnecessarily in a worse position
12 should I not approve it, and the plaintiffs,
13 ironically, in a better position should I not approve
14 it, when the equities here really are on the side of
15 defendants for having done a transaction that really
16 didn't merit challenging, or at least once it was
17 shown to have been a transaction where perhaps the few
18 wisps of fiduciary wrongdoing were not borne out. It
19 was a transaction where perhaps the challenges merited
20 abandoning. So, as I say, I actually think that it's
21 better, on balance, to approve the settlement and
22 address fees.

23 The so-called Revlon claims for breach
24 of fiduciary duty might have had some initial

1 attraction, however weak; but certainly once it became
2 clear how quickly Mr. Hull reported his initial
3 inquiries to the lead director and two other directors
4 on the board, how the process proceeded from that
5 point on and the various negotiating positions that
6 were taken, it did, I think, rapidly become clear, as
7 Mr. Enright acknowledged, that there was no meaningful
8 Revlon claim here.

9 In terms of the disclosures, as I've
10 already said in my preliminary comments and won't
11 repeat, I think that they are very slight
12 consideration. Were the claims marginally stronger, I
13 would not have approved this settlement. Were this a
14 stock deal rather than a cash deal, and had someone
15 like Mr. Enright not carefully carved out federal
16 securities law claims, as he's done in other cases, I
17 would not have approved this settlement. But on these
18 facts, I am going to approve the settlement.

19 So then the question becomes how much
20 of an attorneys' fee award. I recognize that the
21 policy is to encourage stockholder champions to bring
22 meritorious litigation but not to confer unwholesome
23 windfalls that result in excessive and unwarranted
24 lawsuits. The pertinent factors are set forth in

1 Sugarland and, in turn, include the time and effort
2 spent by counsel, relative complexity of the
3 litigation, standing and ability of counsel, the
4 contingent nature of the litigation, the stage at
5 which it ended, the degree of credit for the benefit
6 that goes to the plaintiff, and the size of the
7 benefit conferred.

8 The amount of time and effort was not
9 atypical. Nobody claimed a ridiculous amount of
10 hours, which I appreciate. And so there's no reason,
11 in terms of the crosscheck, to give unique or special
12 weight to that factor.

13 The litigation was not materially more
14 complex than other deal litigation. This is a
15 standard deal litigation case.

16 In terms of the standing and ability
17 of counsel, there's no reason for a departure there.

18 I don't view this litigation as
19 terribly contingent. Now that we're at a stage in
20 life where 95 percent of deals get sued on and
21 virtually all of them settle, I really think that we
22 can start radically discounting under the
23 contingent-nature-of-the-litigation factor.

24 In terms of the stage at which the

1 litigation ended, it ended after three depositions,
2 but, still, it ended before the PI hearing. So maybe
3 that's slightly better than a quick harvest. And then
4 the size of the benefit conferred, as I've suggested,
5 was slight.

6 Now, as I know -- or I know that I
7 have been a fan of trying to standardize or at
8 least -- not standardize -- at least be consistent in
9 how I've approached these, how I perceive myself to
10 approach these in terms of fee amounts. I do think
11 that, generally speaking, the -- I try to stick to the
12 ranges, and I have said repeatedly about the 450 to
13 \$500,000 range as being something that I start on.

14 I am starting to think that range is
15 too high, and I'm starting to think of that range as
16 too high because over the past couple of years -- I
17 haven't been on the bench that long. So it really is
18 -- when I say a couple years, I mean two years. I've
19 been on the bench three years. But over the past two
20 years I've actually seen people get some money. And
21 what's striking to me is how you compare the amount of
22 fees that are given out in these disclosure cases to
23 the amount of fees that actually go out when people
24 get money.

1 So, for example, I have had within the
2 past couple months situations where people fought
3 hard, outside the injunction context, and got
4 basically 10 to 12 million bucks' worth of hard cash.
5 Well, that equates to a fee of, you know, \$2 million.
6 And relative to that, the idea that, left and right,
7 we would be giving out 400, \$500,000 for a -- a
8 settlement based on five numbers really just strikes
9 me -- as I say, I'm starting to think that it's
10 excessive, I really am, particularly when 95 percent
11 of deals get sued on.

12 Here, in particular, I think it's
13 excessive because, as I say, all that really happened
14 was we went from free cash flow numbers to unlevered
15 free cash flow numbers. I do credit the point that
16 Mr. Enright made about it suggesting a degree of
17 analytical discretion by Morgan Stanley, but that
18 really suggests that the burden of the fee ought to be
19 on them. Unfortunately, it's on the company.

20 What I am going to do ultimately in
21 this case is award a fee of a hundred thousand
22 dollars. And I'm going to do that because I do think
23 the case was very weak. I think the benefits were
24 very weak, and I think that is a fee which --

1 hopefully, you-all will hear me saying this was very
2 weak.

3 I will continue to ponder whether, in
4 light of the fact that we now have people who are
5 actually willing to litigate and get money, we now
6 have a sample, which, frankly, didn't exist, really,
7 five years ago to compare these disclosure cases
8 against. And I think the idea that we're giving out,
9 left and right, 500 grand for five numbers, when you
10 now see what people get when they actually get real
11 money, there may need to be a recalibrating of the
12 market. But all that's for another day.

13 So do you have a copy of the order,
14 Mr. Enright?

15 MR. ENRIGHT: I do, Your Honor.

16 THE COURT: Thank you.

17 MR. ENRIGHT: And I took the liberty
18 of inserting the dates for the settlement --

19 THE COURT: Thank you. That's very
20 helpful.

21 MR. ENRIGHT: -- for the hearing and
22 for the scheduling order, et cetera.

23 THE COURT CLERK: Just one.

24 MR. ENRIGHT: Just one?

1 THE COURT: All right. I've written
2 in the fee award of \$100,000 inclusive of expenses. I
3 have signed the order. I'll hand it to my clerk.
4 Thank you very much.

5 I appreciate everyone coming in today.
6 Mr. Enright, thank you for pinch-hitting. As I say, I
7 was a little bit confused but -- as to why you would
8 be here, but that's a good explanation. I appreciate
9 it. As I say, your partner should appreciate it as
10 well.

11 So thank you, everyone. Have a good
12 afternoon.

13 MR. ENRIGHT: Thank you, Your Honor.

14 (Court adjourned at 3 p.m.)

15 - - -

16

17

18

19

20

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 49 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 36 through 49, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 16th day of April 2013.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent