IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

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

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

- - -

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

CHANCERY COURT REPORTERS
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THE COURT: Good afternoon, Mr. Fioravanti.

MR. FIORAVANTI: Good afternoon, Your Honor.

For purposes of introduction, seated with me at counsel table today are Mr. Shane Rowley and Ms. Emily Komlossy from the Faruqi firm --

THE COURT: Good afternoon.

MR. FIORAVANTI: -- plaintiffs' co-lead counsel. Back counsel table, Mr. Marcus Montejo from my office. Your Honor knows Ms. Herbert from my office. Seated in the front row in the back is Glenn Freedman, who is the president and CEO of plaintiff L.I.S.T., Inc.

Mr. Lessner wants to make some introductions.

THE COURT: Oh.

MR. LESSNER: If you wish, Your Honor. Otherwise I can make introductions later.

THE COURT: No; that -- that's fine.

I did have a question, Mr. Fioravanti. I noticed this afternoon that a notice of withdrawal had been filed by Mr. Rigrodsky's firm?

MR. FIORAVANTI: That's correct, Your

Honor.

THE COURT: What was it that prompted that?

MR. FIORAVANTI: I do not know that, Your Honor. My -- I attempted to inquire and was unable to get a response. But it -- in light of the fast-moving events in this case and getting prepared for a preliminary injunction hearing, I took it on face value based on the -- the motion for withdrawal that there was Delaware counsel in the case, that we were prepared to move forward.

I can represent to Your Honor that there was not substantive work done by the Rigrodsky firm as far as litigating the preliminary injunction hearing as far as depositions and drafting, things along those lines.

THE COURT: Which complaint had they filed?

MR. FIORAVANTI: They were local counsel for both the Freedman complaint as well as the Blaz complaint.

THE COURT: All right. And both of those were filed by Mr. Rowley's firm?

MR. ROWLEY: By the Faruqi firm and

the Brower Piven firm, Your Honor.

THE COURT: All right. Thank you.

Mr. Lessner.

MR. LESSNER: Good afternoon, Your Honor. On behalf of BEA Systems, I'd like to introduce at counsel table, we have Bill Savitt from Wachtell Lipton, Adam Gogolak, Michael Gerber, Ellaine Golin, and Christian Wright from Young Conaway. And Mr. Savitt will be making the argument on behalf of defendants.

THE COURT: Thank you.

Good afternoon, everyone.

MR. FIORAVANTI: May it please the Court. Your Honor, the issues are set forth and are covered in our briefs. I want to focus today's argument on additional points that the Court might want to consider in connection with the preliminary injunction motion. We obviously are not waiving our other arguments, and we rely on our briefs for those issues to the extent that I don't address them here today. Of course, I'm prepared to respond to any questions that Your Honor may have.

Your Honor, this is an unusual case. In this case we have a short-term stockholder

negotiating the final merger price with the threat of litigation and a proxy contest. It's not just any stockholder. It's Carl Icahn. The defendants claim it's not unusual to have a majority stockholder in the role of negotiating a merger.

THE COURT: You said "majority stockholder"?

MR. FIORAVANTI: Yes, Your Honor. The cases that the defendants relied on in their brief --

THE COURT: All right. You're not equating Mr. Icahn to a majority shareholder.

MR. FIORAVANTI: Exactly not.

THE COURT: You're saying they do. All right.

MR. FIORAVANTI: My point, Your Honor, is that we're not in the situation that the defendants cite in their cases where there's either a director who is also a controlling stockholder in a case negotiating a merger.

In short, in the cases that the defendants rely, the person negotiating the merger is a fiduciary, whether it's a director or controlling stockholder holding more than 50 percent of the company. And in the cases that the defendants cite,

the situation was with -- the two situations where there were controlling stockholders, they owned over 70 percent of the stock, I believe.

We don't have a situation here with a fiduciary negotiating a merger price. We have Mr. Icahn negotiating the merger price. He didn't own a controlling interest in BEA. He certainly was not a director.

There's little substantive disclosure about Mr. Icahn's role in the merger negotiations contained in the proxy statement. In fact, his role was significant and material. It's detailed in our briefs, but here are some of the more important points that are misleading in the proxy statement: Mr. Icahn sends a letter to the board on November 19th threatening litigation for breach of fiduciary duty, not unlike the original complaints filed in this action. He accused the board of adopting an entrenching severance plan and threatening the board with personal liability. And that is PX-47.

That letter was not disclosed. In fact, Mr. Icahn and BEA have designated it confidential for reasons that they have been unable to explain.

The proxy statement discloses that Mr. Icahn's Section 211 litigation was settled in this Court on December 20th, and that BEA had agreed on extending the annual meeting date, record date, and the nomination deadline.

The next paragraph in the proxy statement says that BEA sent draft sections of the merger agreement to Oracle's counsel and that BEA proposed a reverse termination fee of 10 percent. And that's at PX-1, page 25.

The proxy statement fails to disclose how these two events were related. Mr. Icahn testified that he agreed to an extension of the annual meeting date because BEA had finally put on the table a reverse termination fee amount. And that's at Mr. Icahn's deposition at pages 41 and 42.

The proxy statement doesn't connect these two events, which are part of the overall failure to disclose Mr. Icahn's role in the merger negotiations.

Mr. Icahn's negotiation of the final merger price is material. The proxy statement merely states that Icahn told Goldman on January 11th that Oracle would pay 19.37 1/2 and that Icahn would

support it.

THE COURT: Let me -- some of these things you're telling me you learned, as I understand it, in Mr. Icahn's deposition; is that correct?

MR. FIORAVANTI: That's correct, Your Honor.

THE COURT: And what evidence is there that the people preparing the proxy statement or who were responsible for preparing the proxy statement knew --

MR. FIORAVANTI: Mr. --

THE COURT: -- for example, that Mr. Icahn connected the willingness to pay a reverse break-up fee with his decision to settle the 211 case? Is there evidence that -- that someone in management knew that?

MR. FIORAVANTI: Mr. Icahn testified that there -- in his deposition about the issue of the reverse termination fee. And when he finally disclosed to Oracle that he had agreed to settle his action, Oracle was furious. So the suggestion that BEA didn't know that Icahn had agreed to a settlement --

THE COURT: It's not a suggestion.

It's a question. Is there some evidence that BEA did know? You're the one who took the discovery.

MR. FIORAVANTI: Other than Mr. Icahn's deposition, no.

THE COURT: Well -- and you just made the point that Mr. Icahn isn't a fiduciary. So the proxy material is not his responsibility.

MR. FIORAVANTI: No. But certainly Oracle -- or BEA knew the events that had been going on with respect to his litigation and with respect to the proposal of the reverse termination fee.

THE COURT: And they disclosed the things that they -- that, so far as you know, all they knew in two paragraphs that follow each other.

Now, you want -- what you want them to disclose is some connection between the two that you learned from -- about what Mr. Icahn put together. And my question to you is simply, is there evidence that supported -- would support any inference that the -- it was a breach of fiduciary duty for the directors to fail to include in their -- in their proxy material a statement about how Mr. Icahn connected two things?

MR. FIORAVANTI: Well, they certainly

settled the litigation with Mr. Icahn.

THE COURT: Which they say.

MR. FIORAVANTI: That's correct. And I can go back and -- and look, Your Honor, at the testimony from Mr. Icahn, but I think it was a little bit more detailed.

THE COURT: Well --

MR. FIORAVANTI: But --

THE COURT: -- was there any testimony from anyone at the company on this point?

MR. FIORAVANTI: No, Your Honor. Mr. Icahn was the last witness who was deposed as far as defense witnesses, and we just didn't get a chance to -- we didn't have the opportunity to --

THE COURT: Well, but you understand my point, don't you?

MR. FIORAVANTI: I do.

THE COURT: He isn't responsible for disclosing what you learned from Mr. Icahn in his deposition. That's not a fiduciary duty violation.

MR. FIORAVANTI: Understand. But there are other points, Your Honor, with respect to the negotiation of the merger price that they did know. And Mr. Icahn testified that they did know.

THE COURT: Well, let's focus on those.

MR. FIORAVANTI: Okay. The proxy statement fails to disclose that Icahn told BEA that he had made a deal with Oracle, that he would support Oracle in a proxy fight if BEA rejected 19.37 1/2. And that's at his deposition at page 89.

THE COURT: Well, all right. I looked at his deposition and what is it you draw from 87 -- I mean, 88-89?

MR. FIORAVANTI: "... Oracle now knew that I'm supporting 19 and three-eighths, so they didn't care, you couldn't go back to them anymore, and I said I'm not going to back to them and try to renegotiate."

THE COURT: He said, "I said I made a deal with them, I'm sticking with it."

MR. FIORAVANTI: That's correct.

THE COURT: Now, what is it I'm supposed to draw from that?

MR. FIORAVANTI: Your Honor, that he had told BEA that he had made a deal with Oracle.

THE COURT: Speak -- in negotiating on behalf of BEA or that he, Carl Icahn, got BEA or

Oracle to offer 19 and 3/8?

MR. FIORAVANTI: And he --

THE COURT: And he thought -- he had told Oracle that that was a price that was acceptable to him.

MR. FIORAVANTI: Correct. And he said -- he -- he told BEA that "... I'm not going back ... again." "... I told Oracle I support 19 and three-eighths," and "I'm not going to change my view on that ..."

THE COURT: So -- but does that mean that BEA was bludgeoned into accepting 19 and 3/8, as you suggest?

MR. FIORAVANTI: Yes.

THE COURT: They were threatened somehow? What was the --

MR. FIORAVANTI: Yes. And, in fact, he said -- he said it was a threat

THE COURT: Where?

MR. FIORAVANTI: Page 80.

THE COURT: What does he say?

MR. FIORAVANTI: "So what happened was ... I would tell BEA at that point I have been" --

THE COURT: I'm sorry. What line are

you on?

MR. FIORAVANTI: 6. "I would tell BEA at that point I've been with you up until now, but basically if you don't do this, then I'm telling Oracle, you know, what I told Oracle was I don't think I could ever deliver it, but I'm going to tell you something, you know, if we can get somewhere between 19 and 20, the shareholders are going to go for it and I'm [just] going to ... go into the proxy mode again ... I don't think I really needed to threaten them."

Those were Mr. Icahn's words.

Pardon me, Your Honor.

THE COURT: And you read this as things he told BEA.

MR. FIORAVANTI: Yes.

THE COURT: Even though right in the middle he starts talking about what he told Oracle.

MR. FIORAVANTI: Well, there was no need to threaten Oracle.

THE COURT: I don't -- there may not be a need to threaten them. And he says at the end "I didn't" -- "I don't really think I needed to threaten them."

MR. FIORAVANTI: But he did. He said

he was going to go back into proxy mode. There was no need for him to tell Oracle --

THE COURT: Was this after the 19 and 3/8 was arrived at?

MR. FIORAVANTI: No. This was during the day of those negotiations, Your Honor. The minutes of the meeting of the 11th made clear that he told Goldman, which was reflected to the board, that he would reconsider his options.

On page 89, Mr. Icahn said "... I made a deal with them, I'm sticking with it."

THE COURT: Which means "I'm not" -- "I'm not going back to them." That's what it says; right?

MR. FIORAVANTI: Right. He made a deal with Oracle, and he wasn't going back to them.

THE COURT: "So don't expect me to go back and try to get more than 19 and 3/8."

MR. FIORAVANTI: Right, because he had made a deal with Oracle that that's what he was going to support. That's not reflected in the proxy statement.

THE COURT: He agreed with Oracle. Now, what is it reflected in the proxy statement?

MR. FIORAVANTI: All the proxy statement says, Your Honor --

THE COURT: The words that are missing, in your view, are that even though he told them he arrived at 19 and 3/8 and it was a price that he was prepared to support and he was prepared to give a -- a written voting agreement in favor of, they didn't put in here that he had made a deal with Oracle?

MR. FIORAVANTI: That he had told BEA that he made a deal with Oracle and that he had threatened to go into proxy mode again. And the circumstances are such that the deadline for nominating directors is about 11 days away. So that's the context here with Mr. Icahn's testimony of what he told BEA with respect to the negotiations.

And when I asked him did they go back, he said, "They couldn't go back because they knew that Oracle knew that I supported 19 and 3/8. They weren't going to get any more money."

THE COURT: Well, I find that part a little hard to understand.

Now, is the evidence from the company that after this 19 and 3/8 was reached between --

after it was communicated by Icahn to BEA, that no one from BEA and no one from Goldman Sachs went back to Oracle and asked for anything else?

MR. FIORAVANTI: That's correct, Your Honor.

THE COURT: And where is all that evidence?

MR. FIORAVANTI: There's -- the defendants don't put anything forward to the contrary, and there is evidence in the record that they didn't go back. I believe it's in the deposition testimony. I will get that for you. But they did not go back. And there's nothing -- and there's nothing in the proxy statement that indicates that the board went back to Oracle to negotiate additional consideration -- merger consideration.

So a reasonable stockholder would want to know Mr. Icahn's role in negotiating the -- the merger price. It's an unusual situation where you have a nonfiduciary negotiating the merger agreement.

THE COURT: There certainly is a reason. The proxy material discloses that he had a role in the negotiation; and, indeed, it discloses that he is the one who struck agreement at 19 and 3/8

and told BEA that; right?

MR. FIORAVANTI: I don't think the proxy statement is that explicit, Your Honor. On page 25, "On January 11, 2008, Mr. Icahn called a representative of Goldman Sachs and conveyed that, as a result of the discussions and negotiations that had occurred between ... Icahn and Oracle, Oracle would be prepared to pay 19.37 [1/2] per ... share and ... include a $500 million reverse termination fee in the event regulatory approval was not received. Based on those terms, ... Icahn said that he would agree to vote in favor of a transaction, and that he would be prepared to announce publicly his support of such an offer ..."

THE COURT: "... by Oracle."

MR. FIORAVANTI: "... by Oracle," and that's it.

THE COURT: All right. And you think missing from that is some flavor that Mr. Icahn had shook hands with Oracle and -- and said -- told the company "This is the deal I'm prepared to do."

MR. FIORAVANTI: That's what he said.

THE COURT: Well, go ahead.

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

that I'm supporting 19 and three-eighths, so they didn't care, you couldn't go back to them anymore ..." "I said I made a deal with them, I'm sticking with it."

So in the unusual circumstance with respect to Mr. Icahn's role --

THE COURT: When he says he couldn't go back to them anymore, who did you think he meant?

MR. FIORAVANTI: BEA.

THE COURT: Did you ask him?

MR. FIORAVANTI: No, I didn't. But it was clear he was talking in the context of BEA.

THE COURT: Well, it seems to me he might well be saying "I'm not going back to them anymore."

MR. FIORAVANTI: Well, he had said that earlier.

THE COURT: He says that next; right?

MR. FIORAVANTI: Right. He had said that --

THE COURT: Perhaps as by way of clarification he says "... and I said I'm not going back to them [to] try to renegotiate."

MR. FIORAVANTI: Well, if you look at

page 85, Your Honor, Icahn said "Then I said" -- this is with BEA --

THE COURT: When is this?

MR. FIORAVANTI: This is on the day of when he's negotiating the merger price --

THE COURT: Okay.

MR. FIORAVANTI: -- on the 11th. "Then I said I'm not going back to them again. I said" -- "I'm not going, I told Oracle I support 19 and three-eighths, I'm not going to change my view on that ..."

That's what he told BEA.

THE COURT: And, again, it says "... I'm not going back to them again."

MR. FIORAVANTI: Not going back to Oracle.

THE COURT: All right.

MR. FIORAVANTI: And with respect to the financial disclosures, Your Honor, there's misleading partial disclosure regarding the present value of future share price analysis. The stockholders are entitled to a fair summary of the substantive work provided by Goldman Sachs, and that's supported by Pure Resources and Netsmart.

The proxy statement's description of Goldman's present value of future share price analysis is not a fair summary. As the Court explained in Netsmart, "The cursory nature of the banker's fairness opinion is a reason why the disclosure of the bank's actual analyses are important to stockholders. Otherwise they can make no sense of what the bank's opinion conveys other than as a stamp of approval.

"Therefore," as the Netsmart Court says, "the range of ultimate values generated by those analyses must also be fairly disclosed."

The range of ultimate values generated by Goldman's present value of future share price analysis are not disclosed in the proxy statement.

The defendants touted to this Court in their March 4th letter opposing expedited proceedings that the present value of future share price analysis was "fully disclosed," their words, not mine, fully disclosed in the preliminary proxy statement. That statement is false. It wasn't disclosed in the preliminary proxy and it wasn't disclosed in the final proxy.

The defendants never corrected that representation, which is publicly filed as opposed to

the briefs, which are not.

They say it's similar to a DCF, which is misleading, because the present value of future stock price analysis is a measure of the stock price that contains an inherent minority discount.

The present value of future share price analysis is disclosed on page 33 of PX-1, which is the proxy statement. Your Honor, if you compare the final presentation by the banker, which is PX-2, to what's in the proxy statement, it's clear that the ranges under Sensitivity Case 2 are higher than the street case and the base case. And that's at Bates number 465.

THE COURT: I didn't bring your -- I only brought one set of exhibits with me.

MR. FIORAVANTI: Exhibits 1 and 2 I think is what we're dealing with here, Your Honor, from the plaintiffs.

THE COURT: I'm pretty sure it's -- no. I have Mr. Wright's books, not your books. Do you --

MR. FIORAVANTI: I think -- I think Defense Exhibit 1 is the proxy statement.

THE COURT: No. 1 is the proxy

statement. No. 2 is not what you're talking about.

MR. SAVITT: What are you talking about?

MR. FIORAVANTI: The January 15th Goldman analysis, the banker analysis.

LAW CLERK: It's 21.

THE COURT: All right. I have it. What page are you on?

MR. FIORAVANTI: It's 24 of the presentation materials. The Bates number is 465 and then also on 467, both of them. Probably 467 is the best one to look at.

This is the one based on free cash flow multiples. What's disclosed in the proxy statement, Your Honor, is the street case and the base case, and the Sensitivity Case 1 and Sensitivity Case 2 are not disclosed.

The defendants cite no case where the actual analysis presented to the board was deemed immaterial and not required to be disclosed. They cite no documents, no minutes, no e-mails, no notes where the board told Goldman Sachs to ignore the sensitivity cases or where Goldman told the board it never considered the sensitivity cases.

The sensitivity analyses are contained in the board presentation. The board received the board presentation. The board relied on the board presentation. The proxy statement does not disclose the ranges in those analyses.

It's important to note that Goldman presented the BEA board with similar analyses complete within sensitivity cases throughout this process. On October 17th, again on October 24th the board concluded that $21 per share was a "reasonable value and a realistic valuation of the BEA stock," which is contained in the board minutes of the meeting on the 24th.

It's also contained in the January 11th presentation to the board. Nowhere in any of the board minutes does it say that the board wanted Goldman Sachs to ignore the sensitivity cases, which the started out as Case A and Case C, and only for the last report they turned into sensitivity cases.

In fact, the minutes of the January 15th presentation, Your Honor, which is PX-50 --

THE COURT: Let's go back, if you

would, Mr. Fioravanti, to page 26, BEA 467.

MR. FIORAVANTI: Yes, Your Honor.

THE COURT: What's left off? --just -- just --

MR. FIORAVANTI: The -- the ranges in Sensitivity Case 1 --

THE COURT: Well, I shouldn't ask it that way. What I mean, there are -- on this page there are only four numbers both of which are at the 19x -- 6x and 19.7x, which are the two highest multiples or whatever that multiplier is. And the -- those two cases yield numbers in the high sensitivity case that are higher than the deal price.

MR. FIORAVANTI: Correct.

THE COURT: But only a little bit; right?

MR. FIORAVANTI: Correct.

THE COURT: Every other number on the page is lower than the deal -- every other number on the page is lower than the deal price.

MR. FIORAVANTI: Well, Sensitivity Case 2 at 19, 6, and 7 in the -- in FY2009 are higher as well, Your Honor.

THE COURT: Would you say that again?

And what are you talking about?

MR. FIORAVANTI: Sure. There's FY09 and FY10. In Sensitivity Case 2, both of those are higher than the merger price.

THE COURT: Right. And both of them --

MR. FIORAVANTI: Right.

THE COURT: -- in this grid, the sensitivity analysis, you get -- certainly in the second one you get two prices that are $2 a share higher than --

MR. FIORAVANTI: Correct.

THE COURT: -- than the deal price, and the other ones you get two prices that are 75 or 80 cents higher.

MR. FIORAVANTI: Correct.

THE COURT: Or even less, 65 to 70 cents higher.

MR. FIORAVANTI: That's right.

THE COURT: And this is a material omission?

MR. FIORAVANTI: Yes, Your Honor, because it does not disclose the full range of values --

THE COURT: You know, to say that is one thing. To explain why in this particular case it's a material omission of information is another. I mean, tell me what's -- why that -- why it would be so material -- material at all to anyone to understand that the board saw sensitivity analyses that in the high case yielded prices in -- only -- only at the highest multiples that were somewhat -- slightly to somewhat higher than the deal.

MR. FIORAVANTI: Because they disclosed multiples ranges with respect to the base case and the street case that were lower. It's a partial disclosure. They disclosed the base case and the street case. They did not disclose the sensitivity case, and those analyses were presented to the board. This is not as if we're in a situation where they presented something six months ago and then didn't present it. This was presented to the board at the time the board adopted the merger price.

A reasonable stockholder would want to know that the ranges that were presented were higher than the merger price because it's not a stock-for-stock merger. They need to consider whether they're going to seek appraisal.

THE COURT: All right.

MR. FIORAVANTI: There's nowhere in any of the documents in the record where Goldman was told to ignore the sensitivity cases. In fact, the minutes of the January 15th meeting expressly state that Mr. Woodruff reviewed the transaction economics, including implied premium analysis, illustrative price per share, implied multiple analysis, equity value, enterprise value, and sensitivity under certain assumptions. So the record reflects that the board did consider the sensitivity analyses.

And it's also clear in Goldman's fairness opinion that it reviewed internal financial analyses and forecasts prepared by the company. Goldman relied upon and assumed the accuracy and completeness of all of the financial and other information provided to and discussed with Goldman.

Goldman assumed that BEA's -- with BEA's consent, that the forecasts have been reasonably prepared on a basis reflecting the best currently-available estimates and judgment of the management. The proxy says Goldman's January 15th presentation was a material factor that the board considered. It doesn't say that only

certain parts of that presentation were considered a material factor.

Goldman's letter doesn't say that Goldman ignored the sensitivity cases provided by management. It says Goldman reviewed them, assumed that they were accurate and complete and reflected management's best currently-available estimates and judgments.

THE COURT: Mr. Fioravanti, is there case law that says that it's necessary to disclose the -- a sensitivity analysis, not just that there was one but, you know, what it -- what the actual sensitivity analysis looks like in circumstances where the management and the board do not consider it to be reliable?

MR. FIORAVANTI: Your Honor, the Netsmart case --

THE COURT: Either the high or the low.

MR. FIORAVANTI: Well, the Netsmart case, Your Honor, says "the range of ultimate values generated by those analyses must also be fairly disclosed."

THE COURT: But they did disclose a

range of values, and the question is do they have to disclose the -- every element of the range, including those aspects of it that they believe are not reliable.

MR. FIORAVANTI: They do, Your Honor. And if they don't --

THE COURT: Who said so?

MR. FIORAVANTI: The Netsmart case we rely on, Your Honor, says that they have to disclose the range of values that are presented. It's a partial disclosure in this case. They presented the other ranges.

THE COURT: Right, which is exactly why in order to get -- to get a judgment from me that it's a material omission, you can't just say it's a partial disclosure. They have to disclose the rest of it. You have to give me some reason to believe both that the -- that the omission of the rest of what there was to disclose is material.

MR. FIORAVANTI: It was --

THE COURT: Part of the materiality is reliability.

MR. FIORAVANTI: It was provided to Goldman Sachs on the day of its opinion. Goldman

Sachs relied on it. It's -- if the board -- if the management didn't want Goldman Sachs to use it to rely on it, they wouldn't have given to it them.

THE COURT: You're just arguing that whenever anyone says to a banker, "Give me a sensitivity analysis," so you have to expand what you're looking at and come up with a larger set of parameters, that in every case when you do that, that, therefore, obviously every number on the grid is material.

MR. FIORAVANTI: When it's included in the final presentation, Your Honor, it needs to be disclosed.

THE COURT: Who said so?

MR. FIORAVANTI: It's part of the analysis that Goldman did in -- and they put it in the proxy statement. They put ranges --

THE COURT: What law tells me or you that every time there is a grid in a banker's book, the whole grid has to be reproduced?

MR. FIORAVANTI: That's not what I'm saying, Your Honor.

THE COURT: Well, it's pretty close to what you're saying.

MR. FIORAVANTI: No, it's not. With all due respect, Your Honor, it's not what I'm saying. It's not like in the MONY situation where there was something in an appendix that wasn't disclosed. These were ranges -- remember, the context here is that Goldman didn't do a DCF analysis.

THE COURT: Well, this is a sensitivity analysis, isn't it?

MR. FIORAVANTI: Yes.

THE COURT: All right.

MR. FIORAVANTI: Well, that's what they --

THE COURT: Now you're conceding they didn't do a DCF analysis; is that right?

MR. FIORAVANTI: They did not do a DCF analysis.

THE COURT: So the failure to disclose the DCF analysis is not a problem, right; isn't that right?

MR. FIORAVANTI: The fact that they didn't --

THE COURT: Well, you wrote briefs suggesting that the absence of the DCF was -- was a material omission.

MR. FIORAVANTI: Yes, Your Honor. That's -- that's also part of our argument.

THE COURT: And what's the basis for that argument?

MR. FIORAVANTI: They -- Goldman had prepared DCF analyses for this company with respect to Oracle's overture and then stopped.

THE COURT: So what?

MR. FIORAVANTI: It's unusual that a company that does fairness opinions, including DCF analyses, suddenly stops doing -- does not provide a DCF analysis.

THE COURT: But the absence is explained in the papers I read --

MR. FIORAVANTI: The absence is not explained --

THE COURT: -- that say they were not reliable projections.

MR. FIORAVANTI: That's not explained in the proxy statement.

THE COURT: They don't have to explain in the proxy statement why they didn't do a form of analysis.

MR. FIORAVANTI: But --

THE COURT: There's nothing talismanic about a discounted cash flow statement. If you don't have reliable projections, it would be an error to prepare one.

MR. FIORAVANTI: Goldman Sachs provided DCF analyses for BEA in July and in September. And they didn't prepare -- they stopped when they asked management for projections to do a DCF in the context of a specific offer.

THE COURT: And what am I supposed to take from that?

MR. FIORAVANTI: That as in the JCC case and as in the Globis case, where it was disclosed that the banker had performed DCF analyses in the past and that they didn't have reliable long-term projections to provide them here.

THE COURT: And that's a material omission, to omit -- to not disclose that, although it once did DCFs based on unreliable projections, that when it came to the final preparation of -- of its materials, that Goldman didn't do a DCF, so they have to explain why?

MR. FIORAVANTI: I don't think --

THE COURT: Even though they -- you

know, they prepared six other forms of analyses that are all disclosed.

MR. FIORAVANTI: I don't think the record shows that the projections that were used in the earlier DCFs were unreliable.

THE COURT: Well, I think -- that's how I read it. I mean, if it's the same -- if you're talking about the same projections they were given by the management in the summer and the fall which apparently they simply extrapolated, they took two years and extrapolated another three.

MR. FIORAVANTI: The record is not that Goldman extrapolated.

THE COURT: That is how I understood the record.

MR. FIORAVANTI: No.

THE COURT: Maybe I'm wrong.

MR. FIORAVANTI: No, Your Honor. If you look at Mr. Woodruff's declaration and if you look at Mr. Chuang's explanation, they do not say that Goldman extrapolated the projections. In fact, I think the record is that Goldman does not do DCF analyses without five years of projections. I think that's what the record shows.

THE COURT: Well, paragraph 5 of Mr. Woodruff's affidavit says that "It['s] my understanding that BEA's management did not prepare long-term management projections because they believed the projections beyond fiscal year 2010 would not have been sufficiently reliable for use by Goldman Sachs in its analys[i]s. Because Goldman Sachs was only provided with two years of management projections by BEA, Goldman Sachs determined that a DCF would not be an appropriate analytical tool to use in connection with its Fairness Opinion work on this matter."

Now, somewhere in here, I think, they talk about ... paragraph 9, "The July [8], 2007 presentation also included a preliminary LBO Analysis. This analysis included assumptions with respect to BEA's future revenue growth, operating margins, expenses and other metrics for fiscal years 2011-2014. Those figures for fiscal years 2011-2014 were not management projections but were, rather" -- "rather were assumptions (or extrapolations) based on BEA's past results and on management" -- "and on the management projections for 2009 and 2010."

Now, I agree, it doesn't say who made the extrapolations. But maybe there's somewhere else

where it says who does, but you can infer from that that it was done by Goldman. And whatever you infer --

MR. FIORAVANTI: Your Honor --

THE COURT: -- the record is that they're simply extrapolations, so they're not regarded as reliable projections.

MR. FIORAVANTI: Mr. Woodruff's deposition at page 42 says, "This page seems to indicate that the projected information goes out to 2014; is that correct?

"Answer: Yeah. We have financial information through fiscal year 2014.

"Question: And where did Goldman Sachs get that projected information through 2014?

"Answer: It looks like we got that information from management."

THE COURT: Well, his affidavit -- his affidavit was given later.

MR. FIORAVANTI: And the -- and the affidavit doesn't say they didn't get it from management.

THE COURT: I agree, it doesn't. I don't understand why it's important who did the

extrapolation.

MR. FIORAVANTI: It's important for the fact that -- that Goldman Sachs had done DCF analyses for this company based on management figures.

THE COURT: Based on what are now called three years' worth of extrapolations on top of two years' worth of projections.

MR. FIORAVANTI: That's what they're calling them.

THE COURT: I can't imagine that's material to anybody to know that.

MR. FIORAVANTI: Your Honor, with respect to the present value of future cash flow analyses, we believe that those ranges need to be disclosed.

With respect to Goldman's fee --

THE COURT: The first thing is what we just looked at and spoken about? That's just what we've been talking about, the present value of the future cash flows?

MR. FIORAVANTI: Right, the ranges, Your Honor.

THE COURT: Goldman's fee, all right.

MR. FIORAVANTI: The proxy statement

contains a single-paragraph description of Goldman's fee, which is PX-1 at page 37. It does not quantify the contingent part of the fee, and it's impossible to discern from the proxy statement. In fact, about 25 million, or 75 percent, of the Goldman's fee is contingent.

THE COURT: Well, you have a fight on that point.

MR. FIORAVANTI: Yes, we do. The defendants contend that only 8 million, or 25 percent, is contingent; but that's not what the fee agreement provides. The fee agreement provides that Goldman gets $4 million per quarter in advisory fees beginning November 15th, 2007, for 18 months. Goldman gets $3 million in an initial fee that's contingent upon execution of the merger agreement. Goldman would then be entitled to 33 million contingent upon consummation of the merger, and they would get a credit for amounts received to date for the advisory fee and the initial fee.

Thus, as of the stockholders' meeting, it appears Goldman will have received 8 million in quarterly advisory fees and 3 million in that contingent fee -- contingent initial fee.

THE COURT: So you're -- you're calling the sort of quarterly -- the quarterly advisory fee in the out periods a contingent fee? Is that how you're doing this?

MR. FIORAVANTI: Yes.

THE COURT: And in what sense is it contingent?

MR. FIORAVANTI: Well, I guess I don't understand what Your Honor means. Maybe I don't understand the question.

THE COURT: Why don't you explain it to me again.

MR. FIORAVANTI: Sure. Goldman --

THE COURT: How much -- how much -- you say they got $4 million a quarter.

MR. FIORAVANTI: Right, beginning November 15th. So presumably they've gotten two.

THE COURT: 2007?

MR. FIORAVANTI: 2007.

THE COURT: And were they paid nothing for the earlier retention?

MR. FIORAVANTI: I think they got a million. I think they got a million, which is --

THE COURT: How many quarters are

there in which they get this quarterly fee?

MR. FIORAVANTI: Six, 18 months.

THE COURT: So six quarters at 4 million a quarter is --

MR. FIORAVANTI: 24.

THE COURT: -- $24 million.

MR. FIORAVANTI: Right.

THE COURT: And they have another million they already got paid.

MR. FIORAVANTI: Right. Then --

THE COURT: Why is any part of that contingent?

MR. FIORAVANTI: The -- it's not.

THE COURT: Other than on the passage of time.

MR. FIORAVANTI: That's right. It's not contingent.

THE COURT: So 24 isn't contingent.

MR. FIORAVANTI: Right. I'm sorry.

THE COURT: So there's only 8 left out of the 33; right?

MR. FIORAVANTI: No. The 24 million is for advisory fees that they have to perform services for. They get a $33 million contingent fee

upon consummation of the merger.

THE COURT: All right. You've lost me.

MR. FIORAVANTI: I'm sorry.

THE COURT: Now, they get paid $33 million in total, which includes the $24 million they would have been paid over the period of time in quarterly advisory fees had there been no deal. So had there been no deal at all, they would have gotten over time $25 million. Is that right?

MR. FIORAVANTI: Yes, that's right.

THE COURT: And then they got 4 million when the merger was signed.

MR. FIORAVANTI: 3.

THE COURT: And I guess there's another payment -- 3 million when it was signed?

MR. FIORAVANTI: Yes.

THE COURT: And 5 million when it's complete?

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

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

MR. FIORAVANTI: But they haven't received the --

THE COURT: All right.

MR. FIORAVANTI: -- 24.

THE COURT: Well, the -- the -- the issue is simply whether one would properly characterize the 4 million a quarter for six quarters as a contingent fee, which you do. At least you're characterizing all but maybe the first quarter as contingent. I don't understand why it's contingent.

MR. FIORAVANTI: Your Honor, I don't think we're characterizing it as contingent. What we're arguing is --

THE COURT: How much of the 33 million is contingent?

MR. FIORAVANTI: All of it.

THE COURT: All of it.

MR. FIORAVANTI: Yes. They get -- the way the agreement reads, they get --

THE COURT: So you are characterizing the 4 million a quarter for 18 months as contingent.

MR. FIORAVANTI: They get a credit for it.

THE COURT: It counts against the 33 million; right?

MR. FIORAVANTI: Correct.

THE COURT: I mean, they're going to get paid 33 million. They would have been paid 25 had there been no deal.

MR. FIORAVANTI: Right, if -- if --

THE COURT: So you credit all that they've either been paid or are obligated to be paid against the 33 million and you pay them the whole thing at once.

MR. FIORAVANTI: Correct.

THE COURT: So I ask again: Why is the quarterly $4 million fee a contingent fee?

MR. FIORAVANTI: Because they don't have to perform services for it after the consummation of the transaction.

THE COURT: Well, that doesn't make it contingent.

MR. FIORAVANTI: Well -- and 8 million --

THE COURT: They were -- they were entitled to get it over a period of 18 months by performing services.

MR. FIORAVANTI: Correct.

THE COURT: All right. So you -- you would agree with me had there been no deal, that would

not be a contingent fee.

MR. FIORAVANTI: That's correct.

THE COURT: That's a retainer of some sort.

MR. FIORAVANTI: That's correct.

THE COURT: The fact that that converts into -- they get paid it all at once when the deal is done, how does that make it contingent?

MR. FIORAVANTI: It's a credit for the $33 million contingent part of the fee.

THE COURT: Well, it's -- you're only saying it because you're calling the $33 million contingent. The $33 million is just a payment that they receive at the end of the deal, which I gather includes the 25 million they otherwise would have gotten, plus 3 million for the signing and 5 million for the completion, altogether $33 million.

MR. FIORAVANTI: Well, and 8 --

THE COURT: I really, frankly, Mr. Fioravanti, I don't understand how the 25 million can be possibly be considered contingent.

MR. FIORAVANTI: Well, we certainly have at least 8 million that's contingent. I don't think there's any dispute about that. Just

25 percent.

THE COURT: That's what they say is contingent.

MR. FIORAVANTI: It's not clear from the proxy disclosure how you could figure it out.

THE COURT: Well, the proxy does disclose that a part of it is contingent, doesn't it?

MR. FIORAVANTI: Yes.

THE COURT: So how is it materially misleading by omitting to say of the 33 million, 8 million is contingent? How is that materially misleading? Not whether it would be nice to know, but how is it misleading when it's characterized as partially contingent?

MR. FIORAVANTI: It's misleading without the amount, because the stockholders need -- a reasonable stockholder would want to know how much the contingent part of the fee is.

THE COURT: Well, if -- if a million was contingent and 32 million was not contingent, would it be materially misleading to say simply a portion of this is contingent and not disclose that it's a million dollars that's contingent? Would that be materially misleading?

MR. FIORAVANTI: Perhaps not. But I expect that Your Honor is taking me down the slippery slope. In this case --

THE COURT: Slippery -- we're not going very far. We're only going to 8 million out of 33. And I just need to understand how it can be materially misleading, material information that needs to be disclosed when the stockholders are told the fee in part is contingent, that the exact amount of the contingent fee is $8 million.

MR. FIORAVANTI: It's -- Your Honor, the stockholders don't know based on the disclosure in the proxy statement.

THE COURT: All right.

MR. FIORAVANTI: With respect to synergy values, Your Honor, in rejecting Oracle's $17-per-share offer and telling Oracle it would authorize negotiations at $21, the board relied on synergy value to Oracle. And the defendants made those disclosures in the press. The board minutes reflect the board's reliance on synergy value in determining $21 per share. The synergy value estimates are also reflected in Goldman's presentations to BEA and the board and the

November 6th presentation to Mr. Icahn. As we explained in our reply brief, that presentation should be disclosed.

THE COURT: Why should that -- I mean, what is it about that presentation that should be disclosed? I mean, is it simply because it had -- Icahn agreed that -- Icahn made them agree that they would disclose the information by some date, that somehow that makes it material?

MR. FIORAVANTI: They also provided it to a stockholder. Mr. Icahn got that information. The rest of the stockholders did not.

THE COURT: He got it pursuant to some confidentiality agreement he signed, didn't he?

MR. FIORAVANTI: Right. Pursuant to that confidentiality agreement, if it's material, it needs to be disclosed.

THE COURT: If it's material. But the fact -- how do I know it's material? It isn't material just because it was given to him in November and it isn't material just because he, I assume, obtained the company's agreement that they would disclose at some future date, no doubt so that he then would be free of sort of insider information

restrictions. Why does that make it material?

MR. FIORAVANTI: Because it discloses the synergy values that the company considered with respect to --

THE COURT: All right. So that just gets back to the question of whether the company's estimates of what -- what they're able to piece together from other deals or other sources but not from Oracle about what they estimate the synergy values to be so that they can make some judgment whether that's material information. Now, why is that material information to a stockholder?

MR. FIORAVANTI: Because a stockholder, in considering a share price from Oracle, would want to know whether they are getting a fair portion of the synergies.

THE COURT: Well, how -- but, really, what you want to know is what Oracle thinks the synergies are.

MR. FIORAVANTI: No, because that -- that's not the case, because BEA and the board determined what it believed to be a reasonable price, a realistic valuation of $21 based on Goldman's presentations and synergies. So the board had made a

determination in coming up with the $21 number that it included synergy values. And that's what needs to be disclosed. And they've provided it in their materials that they gave to Mr. Icahn.

THE COURT: Which doesn't -- I mean, that -- that doesn't make it material. The fact that they gave it to Carl Icahn and the fact that they agreed with him to disclose it and never did so doesn't make it material.

So the question is, is it somehow -- for some reason material when the company says "These are just our estimates and it would be misleading to disclose them to stockholders because they are not" -- "there's no" -- "there's no sense in which they're accurate"?

MR. FIORAVANTI: Well, that's not what the company said in the board minutes, and it's not what the company told the stockholders when they said that they would initiate negotiations at $21 a share.

THE COURT: Well, they didn't say otherwise. They just said "Based on our view of, among other things, what the synergy values are."

THE COURT: And a reasonable stockholder would want to know that in determining

whether the ultimate price that was agreed to by the board reflected an appropriate share of the synergy values that the board had considered in coming up with the $21 price.

THE COURT: Now, you concede that's not something at all of interest to somebody seeking appraisal, is it?

MR. FIORAVANTI: Well, it could be, because if someone believed that they were receiving a pretty large share of the synergies, they may not want to seek appraisal, because under an appraisal analysis, you don't count synergies.

With respect to the November 6 presentation, Mr. Icahn -- I do want to note that the company provided ranges to Mr. Icahn with respect to, for example, margins, operating growth, which are similar to the sensitivity analyses that are included in the present value of future share price analysis. And that's on BEA 067.

THE COURT: Not -- not -- not in terms of -- you're talking about in percentages, they're revealing to him information that --

MR. FIORAVANTI: Margins.

THE COURT: -- expressed in terms of

margins as a percentage of --

MR. FIORAVANTI: Yes.

THE COURT: -- total --

MR. FIORAVANTI: Of income.

THE COURT: -- revenue or something?

MR. FIORAVANTI: Of income, yes. And that's on page BEA 067.

THE COURT: And what do I gather from that? You're not saying they gave him --

MR. FIORAVANTI: They gave him the same margins that are essentially represented in the sensitivity analyses.

THE COURT: Well, it's not surprising. It's sort of where they came from, I guess; but why does it matter that they gave them to Mr. Icahn?

MR. FIORAVANTI: They gave it to Mr. Icahn so that they could get him to support --

THE COURT: But my point -- it doesn't make it material that they gave it to him, does it?

MR. FIORAVANTI: No, but they disclosed information to another stockholder that the -- that the rest of the stockholders don't get. He -- they give him an informational advantage.

THE COURT: And how did he use that

advantage?

MR. FIORAVANTI: In agreeing to 19.37 1/2.

THE COURT: Instead of the 17 that your clients were urging the company to take back in the fall, huh?

MR. FIORAVANTI: That's not correct, Your Honor. We -- the complaints [sic] urged the company to negotiate with Oracle, and they didn't. They indicated that they weren't.

Finally, with respect to the street estimates, I think we've covered that in the reply brief, Your Honor. The defendants contend that somehow the street estimates were considered to be accurate after BEA had filed its financials in November; but the testimony from Mr. Chuang is very clear on that point, that he did not believe that the street properly valued BEA after the financials were filed.

THE COURT: The question is, are the street estimates that are used -- I mean, have you -- have you looked and is there a record in which I could look at say oh, these are all taken from analysis performed in September or October?

MR. FIORAVANTI: No.

THE COURT: And the point is made by the defendants that after they became current in their filings, that the street estimates changed. So the question, then, would seem to me to be, do these street estimates reflect the revised estimates or are these the old stale estimates?

MR. FIORAVANTI: No. These are revised estimates, but the point is --

THE COURT: No. Your point is that Mr. Chuang still thought they didn't reflect full value; right?

MR. FIORAVANTI: Correct, and based on the fourth-quarter financial information that the company knew, which turned out to be a record.

THE COURT: But these were the street estimates that people apparently believed were not unfairly influenced by the company's failure to have current financial statements that were publicly available.

MR. FIORAVANTI: Well, the street estimates are the street estimates.

THE COURT: No, that's not what the record before me suggests. It's that there were

street estimates before, whatever the date was, November 15th --

MR. FIORAVANTI: Right.

THE COURT: -- and street estimates after November 15th.

MR. FIORAVANTI: Correct.

THE COURT: After the fact, when the company's financial disclosures became up-to-date, that the street estimates, in fact, changed and became higher.

MR. FIORAVANTI: Right.

THE COURT: So street estimates are not street estimates. And these are the current -- the more current ones. Now, the fact that Mr. -- is it --

MR. FIORAVANTI: My understanding, the pronunciation is Chuang.

THE COURT: -- Chuang still felt that they didn't fully reflect the value of the company's business is a different point.

MR. FIORAVANTI: And that's based on his knowledge of the fourth-quarter financial information and the company's process, which he knew about at the time and were ultimately released at the

end of February --

THE COURT: And which are now available to everyone.

MR. FIORAVANTI: That's correct, it's now available.

THE COURT: All right.

MR. FIORAVANTI: Thank you, Your Honor.

THE COURT: Thank you, Mr. Fioravanti.

Mr. Savitt.

MR. SAVITT: Good afternoon, Your Honor. And thank you for -- for hearing us this afternoon.

What -- what I hope to do is hit the substantial points of our argument and substantially in our briefs and, of course, be available to clarify any issues with respect to which the Court would have questions.

I'd wanted at the outset to make a few fundamental points about the deal that's on the table and the transaction that is set to be evaluated by BEA stockholders next week.

The transaction that the plaintiffs seek to have blocked -- and all of this is conceded, I

think -- was approved by a disinterested and well-advised board. It is a third-party merger proposal with no suggestion of conflict, no suggestion of control. It offers a very substantial premium to BEA stockholders. The company was fully shopped before the transaction was entered into. The deal contains no onerous deal protections; but notwithstanding that, no other bidder has arrived at any time offering any price still less the sort of premium that is available on the transaction on the table.

It is entirely clear that the BEA board arrived at the decision to recommend this transaction only at the end of a long and careful process. It's clear as well that BEA stockholders and the investment community generally enormously support the transaction. The plaintiffs join issue on none of these points. They are all effectively conceded. And what we have before us is a claim based on eight alleged omissions. There are no misrepresentation claims here. Just eight alleged omissions.

I won't belabor the standards relevant for preliminary injunction. I, of course, understand that the Court's familiar with them. I did want to

emphasize that as the Court has done, that there is a materiality standard here, and the burden to show materiality rests on the plaintiffs. And it's not enough to say, as the plaintiffs' papers have done so frequently, that having gone down the path of saying something about a subject, every detail imaginable must be disclosed. The key is the demonstration that something about what is disclosed is rendered materially misleading by virtue of what has not been disclosed. And we would submit to the Court that that is precisely what has not happened in the papers that have been submitted by plaintiffs or, indeed, that is evident in any sense from the evidentiary record that has been compiled.

I'd want to emphasize as well that there's a very full evidentiary record that has been made available to plaintiffs here. Plaintiffs received every document they asked for, and there were tens of thousands of them. They got every deposition they wanted, and there were a lot of them. There is no question but that there was a very substantial evidentiary record. The plaintiffs had every opportunity to bear their burden of materiality, and -- and they have not.

THE COURT: Mr. Savitt, a curious aspect of this transaction is Mr. Icahn's involvement. And on that score, there are a couple of points.

This November 19th letter, I gather even though Mr. Icahn sent it to the board, it wasn't included as an exhibit to his 13D, never publicly disclosed it.

MR. SAVITT: It appears Mr. Icahn did not disclose it as a 13D.

THE COURT: Shouldn't he have?

MR. SAVITT: Mr. Icahn? Well, that's a good question. And I'm not in a position to give him counsel. It's a good question. I don't know the answer to it.

THE COURT: I thought when you had contacts and communications with the company, you were required to disclose them.

MR. SAVITT: I -- I appreciate the Court's question. All I can say, and I appreciate it's not an entirely satisfactory answer, is that BEA isn't responsible for that. But -- but --

THE COURT: No; but it points, I suppose in some sense, at least in a very general way to an idea that the SEC, in framing 13D, thought such

communications were important and -- and should -- and are the sort of communication that should be disclosed.

Now, there is this letter. It just isn't in your proxy material.

MR. SAVITT: Well, let me say a couple of words about the November 19th letter.

First of all, just so the record is clear on it, this point was for some reason not raised in the plaintiffs' moving papers, their opening brief. Wasn't raised at all. There's no excuse for that. It's not as if this is something that came up in Mr. Icahn's deposition. Not at all. Therefore, the issue as a matter of Delaware law is waived.

Putting that to the side, the standard, as I tried to emphasize here, is one of materiality. Is the law that every single communication from Mr. Icahn, every utterance he may have made with respect to BEA need to be disclosed? The answer is, of course, no. And it's important in this context, because Mr. Icahn was saying a great deal of things about a great many things about a whole lot of subjects during this period, including BEA. The press is rife with his utterances about what he

may or may not do with respect to BEA.

And the fact that he wrote a letter in November 19th, in mid-November, which is a full two months before the deal was -- deal was considered, a letter that begins by saying "As I have already told you" in respect of communications that were disclosed can't reasonably be said to be material to a BEA stockholder now confronted with the choice months later to decide whether to take -- to accept a merger proposal or not. It is not as if Mr. Icahn is a shrinking violet. It's not as if what he may or may not have intended to do was in any way not disclosed either by Mr. Icahn or anyone else.

THE COURT: All right.

MR. SAVITT: So it's a matter of complete public record, and it fails the materiality test.

THE COURT: There -- there's that issue. And then there is some issue of -- I mean, it is sort of stark when one reads the proxy material -- page 25, I guess it is -- the best I could understand it, anyway, there's no talk, nothing has been discussed between BEA and Oracle, at least that's disclosed in the proxy material, about financial terms

of the transaction other than break-up fees, but no -- no -- no price per share. There's been no talk, and then suddenly out of the blue we hear Mr. Icahn tells Goldman Sachs that he's made a deal. Now, I mean -- is that all there is to say?

MR. SAVITT: Well, Mr. Fioravanti made the point that this is an unusual case. I'm not sure it's an unusual legal case. From a transactional perspective, there was, as we tried to lay out in our briefs, a delicate and very difficult problem that the BEA board was seeking to navigate between having on the one hand Icahn calling for an immediate sale of the company starting from September forward, Oracle making an opportunistic bid from October forward and refusing to move on price, the restatement relative to the -- to -- to the SEC problem, blacking out financial information until mid-November. And what BEA did was deploy Icahn, successfully deploy Icahn to be a leverage agent for good for BEA stockholders and avoided the very substantial problem that he would become a leverage agent on Oracle's behalf that would -- would create pressure for a more prompt sale of the company.

There is no evidence at all, not a bit

of evidence has been developed on this record to suggest that there were any undisclosed conversations or communications relative to the price issue that aren't -- that aren't in the proxy. There aren't any.

Now, if -- if what is being alleged here is that there was an un -- that Mr. Icahn's role was inappropriate, that's not a disclosure claim. We would suggest it's clearly not a -- not a valid legal claim, either. When one reads Mr. Icahn's deposition transcript, it becomes very clear that BEA was exceedingly engaged with him, that the BEA board was monitoring his activities. The deposition transcripts of the BEA directors is of a piece as is the deposition transcript of Mr. Woodruff; that Mr. Icahn had a central role in ultimately striking the price is quite clear from the proxy, and this is not anything that ought be the subject of criticism by the courts.

There isn't any allegation here, nor could there be, that the BEA board failed to consider deliberately, with the detailed advice of its legal and financial advisors, the advisability of the 19 and 3/8 price on three occasions before ultimately undertaking to recommend that transaction to stockholders.

And on the subject of -- of -- of Icahn, I wanted to respond to the colloquy between the Court and Mr. Fioravanti and try and put a little bit of -- of color on that.

It is -- it is simply -- it is simply not so to allege that there was any sort of undisclosed threat here. It -- Mr. Icahn's deposition is -- well, it makes for an interesting read; but on this point it seems quite clear. In the midst of an extremely long answer, at one point Icahn says "... what I told Oracle was [that] I don't think you could deliver it" -- I'm sorry. I'm on page 80, Your Honor.

"... I told Oracle" -- "... what I told Oracle [is] I don't think I could deliver it, but I'm going to tell you something, you know, if we can get somewhere between 19 and 20, the shareholders are going to go for it and I'm [just] going to ... go into proxy mode again, but I don't think I ... needed to threaten them."

A number of observations about this bit of testimony as the star witness for the plaintiffs here. First of all, the evidence -- the -- the testimony suggests that Icahn was -- was reciting a conversation he had with Oracle. There's also no

evidence to suggest that this was exactly in the time period when the 19 and 3/8 price was on the table. Notice, he doesn't talk about a 19 and 3/8 price. Then he goes on and talks about the letter. Candidly, Your Honor, I'm not sure which letter he's talking about. The question at issue is a question that goes back to conversations I believe in late November. There is simply nothing to suggest that any sort of -- of remark here was made that BEA could have possibly known about that would have been fit for disclosure.

The testimony ultimately becomes quite clear, because at the end of the deposition, the question is asked really quite directly to Mr. Icahn on page 88 of his transcript: "Did you tell BEA when you delivered 19 and three-eighths that if they didn't take it, you would reconsider your options?" So now we're right on the timeline. "When you delivered 19 and 3/8, what did you say?"

And he said, "I think I told you what I said. I think I told them hey look, because I mean BEA did really such a good job of saying they're not going to come off 21 that I was starting to wonder. So I said come on, that's it. I'm going with Oracle now, if you don't do it" -- "I'm going to go with

Oracle now if you don't do it, and I did say that, but it wasn't like a right. It was almost like come on, let's get it done."

And I'd submit, Your Honor, that's virtually what the proxy says. The proxy delivers the concrete information that Icahn said "I'm going to support this deal and I'm going to support any offer publicly." And the suggestion that there was anything more concrete that could be disclosed is entirely belied by the record and, moreover, would be immaterial in the context of a situation such as this where Mr. Icahn's potential for seeking to run a proxy fight couldn't help but be known by anyone paying remote attention.

A word as well on the plaintiffs' claim with respect to the Section -- the settlement of the Section 211 action that Mr. Icahn filed. This argument, too, we would observe, was waived. It was not made the mention of any -- it was not mentioned at all in the opening brief, and there's no reason for that. It's not something that even remotely turned on Mr. Icahn's testimony.

There -- Icahn's testimony, when studied, does not support that -- the conclusion that

the Section 211 case was settled in exchange for BEA's willingness to go for a $500 million termination fee. In fact, it's entirely unclear which of the two events came first. Mr. Icahn's explicit on the point. BEA couldn't have known the contents of Mr. Icahn's mind, at any rate, as I believe the Court properly pointed out. And at any rate, here again, how could the basis of a settlement of this 211 action back in December, when BEA suggested a $500 million termination fee, be relevant or material, I should say, to a stockholder now seeking to make a decision about -- about whether to accept the 19 and 3/8 price at this point?

Let me, Your Honor, discuss briefly some of the additional disclosure claims that plaintiffs have made, particularly with respect to the Goldman Sachs analysis.

The idea that Delaware law requires the disclosure of a discounted cash flow analysis is simply false. We cite a lot of cases in our briefing and stand on them. No court has ever announced such a rule. The Delaware courts have repeatedly recognized that a DCF analysis is only as reliable as its inputs. The record here is clear that BEA provided forecasts for two years and that Goldman thought them an

inadequate basis for a DCF.

The DCF analyses that were run back in July were very prominently stamped preliminary and, of course, they were prepared long before Oracle turned up with its offer. No nonpreliminary discounted cash flow analysis was prepared in this case at any time, and that's because the projections necessary to run a useful discounted cash flow analysis were not available at any time. No DCF was run at any time after the Oracle offer for $17 was received. No reliable DCF was prepared at any time, period.

And the evidence is of a piece on that subject. It's undisputed that neither the board nor Goldman considered a DCF in evaluating the proposal now put to stockholders. And given the lack of all this -- and forgive me if I'm simply parroting the Court's remarks from the initial colloquy -- what is really being sponsored here is a per se rule. If you have a deal, you either have to do a DCF and disclose it or you have to say you didn't do a DCF and say why. And that is effectively rewriting the basic idea of materiality that has been and remains the touchstone for disclosure.

Next up is the synergies point. The

plaintiffs spent a great deal of effort on this issue in discovery. The claim seems to be that -- that BEA should disclose what plaintiffs would characterize as synergy values that Goldman allegedly prepared showing the synergies Oracle expected to receive in a BEA deal. Analyses of this sort can't be disclosed because they don't exist. Goldman never prepared any such analysis. They never had any basis to prepare any such analysis because they never got any information from Oracle on the subject.

Goldman did prepare two slides related to synergies. One of them -- and this is -- should be undisputed, if it's not. One of the slides relates publicly-available information about other deals in the past. The other slide is nothing -- literally plug numbers. It takes various financial metrics of publicly available for Oracle on the left side, various potential price points on the topside, and fills in what synergies would have to be -- would have to exist to allow Oracle to complete a deal on a -- on a EPS break-even basis.

It bears emphasis, the document does not show what synergies were thought to exist. That information just isn't out there. The information is

only what synergies would have to exist in order for Oracle to achieve the deal on -- on a nondilutive basis. This was a consideration for BEA's board because it was seeking to understand how far to push Oracle in negotiations. The suggestion that that concern, which is properly disclosed in the -- in the proxy statement, translates into the requirement to disclose data that is plainly immaterial, is simply -- is simply far-fetched. And there is no evidence in the record to support the idea that these numbers are in any way material to any stockholder.

THE COURT: So this is -- it's an accretion/dilution table; is that what it is?

MR. SAVITT: Effectively. Your Honor, it appears on Exhibit 18 of the exhibit book I think that the Court has, and it's page 44 of the Goldman analysis. And it states quite clearly that what it is showing is are the synergies that would be required for EPS break-even by Oracle in the event of a transaction at price points ranging in the $20 range. That's all it is. They are plug numbers, nothing more.

THE COURT: All right.

MR. SAVITT: A few words quickly, Your

Honor, on the sensitivity cases that plaintiffs spoke about earlier this afternoon.

The proxy discloses the management projections that BEA thought reliable and which Goldman used in its fairness analyses. The sensitivity cases that plaintiffs have spoken about were not thought reliable and they were not used by Goldman in its fairness analysis. All of the evidence -- and there's a lot of it. All of the evidence in the record confirms this point. It's what BEA's directors said. It's what BEA's CEO said. It's what Woodruff said, the Goldman Sachs banker. It is of a piece.

Both sets of sensitivity cases, accordingly, were excluded. And we wanted to draw emphasis to the fact that it's not as if one set of the sensitivity cases were excluded. Both of them were, the gloomy side and the sunny side. There was no attempt to mislead the public here. And that's the reason that this case is just miles away from the Netsmart case on which plaintiffs seek to rely.

The issue there was the selective disclosure of information that gave rise to a concern in the Court's mind that the disclosing entity was

hiding reliable estimates in order to make a deal appear more attractive. Here, what was disclosed -- evidence is conclusive -- only the reliable estimates and all of the reliable estimates. What was excluded, only the -- the information that was thought unreliable. And as I mentioned, it was the middle case. There's no showing under this set of circumstances that the material would take on significance for reasonable stockholders seeking to decide how to cast his or her vote. There's just no showing here that -- that this exceedingly soft issue would be material; and, indeed, there is some reason to be concerned that it could be per se immaterial in the sense that soft information that is unreliable ought not be disclosed.

And, I mean, here again, what's being put before the Court is the idea that there's a per se rule. I think the Court asked my -- my adversary why is this information material, and the answer was because it was shown to the board. Well, that's not the law. Something is material because it will significantly alter the total mix of information available to a stockholder. The McMillan case is quite clear on the point, that something that bankers

get needn't be disclosed for that very reason. There are other cases to the same effect, and it would be rewriting the law of materiality with a per se rule that is simply not consistent with Delaware jurisprudence.

As to the Goldman fee issue, I believe that the colloquy of earlier this afternoon established the appropriate factual baseline, which is without a transaction, had no transaction occurred, Goldman's fee for this engagement would have been $25 million. Because a fee did occur -- I'm sorry; because a transaction did occur, the fee was $33 million. 25 million, therefore, is noncontingent, $8 million is contingent.

That's what defendants have been saying all along. There is no evidence offered, no argument at all to show that a principally noncontingent fee of this matter would be material, certainly nothing to show that the disclosure in the proxy statement as to the fee was in any way misleading or inaccurate. This case is just miles away from the LAMPERS case where the fee disclosure was thought to fail to alert investors that the fee could incentivize the banker to favor one suitor over

another. There's just no record of it at all.

And I would -- to the extent plaintiffs continue to sponsor this argument, I think it bears emphasis that, for example, the Goldman deponent in this case was not asked a single question about the contingent fee. It's no wonder it wasn't fully understood in the papers here. It wasn't even thought important enough to explore with the Goldman banker or, for that matter, any of the other deponents in the case.

Your Honor, I think the -- the -- I think that covers all of the matters that were the subject of the colloquy between Mr. Fioravanti and the Court. We'd, of course, be delighted to take any questions that the Court might have or offer any clarification that --

THE COURT: I have --

MR. SAVITT: -- the Court --

THE COURT: -- nothing else at the moment, Mr. Savitt. Thank you.

MR. SAVITT: Thank you, Your Honor.

THE COURT: Mr. Fioravanti.

MR. FIORAVANTI: Your Honor had asked the question earlier about whether there's any

evidence in the record as to whether BEA went back to Oracle after receiving the 19 and 3/8 price from Mr. Icahn. The answer is there is evidence in the record. It's Ms. Abrams' deposition testimony on page 111 where she said that there was no authorization to go back to seek a price other than 19.37 1/2.

Mr. Icahn's letter, as Your Honor pointed out, of November 19th was not disclosed.

THE COURT: Well, I did point that out, but why is it material?

MR. FIORAVANTI: Because it's part of the background of this case and the pressure that Mr. Icahn was putting on this board --

THE COURT: Why -- why is its omission in the context of what else is disclosed and what else, frankly, was known publicly and as part of the total mix, why is the omission of that letter from this proxy material a material omission?

MR. FIORAVANTI: Mr. Icahn had threatened personal liability to the board of directors with respect to their negotiation with Oracle or lack of negotiation with Oracle, and he also threatened personal liability with respect to a severance plan that had been recently adopted by the

board in the context of this negotiation.

A stockholder would consider it important that the person who negotiated the merger price was also threatening litigation against the board of directors not to do a deal.

Mr. Icahn told --

THE COURT: Oh, the other point on that subject, Mr. Fioravanti, is, why isn't this argument waived?

MR. FIORAVANTI: We deposed Mr. Icahn on Saturday after --

THE COURT: You didn't raise this argument in your opening brief.

MR. FIORAVANTI: Mr. Icahn --

THE COURT: You raised it in your -- in your reply brief.

MR. FIORAVANTI: Mr. Icahn was not deposed until after we filed our opening brief. Mr. Icahn was deposed on Friday, Good Friday, at -- it was supposed to start at 2 o'clock -- at 2:45 in his office. Our brief was due the day before at 5 p.m.

So all the -- with respect to Mr. Icahn --

THE COURT: Well -- but you had the --

certainly you had the letter before you deposed Mr. Icahn.

MR. FIORAVANTI: We did have the letter, but we didn't have --

THE COURT: And you didn't raise any question about it in your brief.

MR. FIORAVANTI: That's correct.

THE COURT: What did you learn from Mr. Icahn about the letter that you didn't -- that made it now a live claim; you didn't know just from the fact that you had the letter?

MR. FIORAVANTI: We didn't know the basis for the confidentiality designation and --

THE COURT: So what?

MR. FIORAVANTI: And it was -- quite frankly, it was in the rush of expedited litigation. We had the opportunity to finally depose Mr. Icahn about it, and that's when we put it in our reply brief. It's part of the total mix of information we think is material. We don't think the argument's been waived.

Mr. Icahn said on page -- oh, Mr. Woodruff, by the way, was asked about what Mr. Icahn said when he delivered the 19 and 3/8 price.

And Mr. Woodruff from Goldman Sachs said, "I don't recall the specifics, but it was clear he was basically saying at this point 'I'm moving over. I'm supporting the 19.375, and if you guys don't support it, I'll fight you and endorse it with them.'"

Mr. Icahn at page 85 -- this is Mr. Icahn saying with respect to BEA -- he was talking about the back-and-forth. He said, "Then BEA was still saying why couldn't we get at least 20, I think that's what happened, we should have held out. You should hold out for at least 20. I think Goldman said it. I said come on, just get it over with. Then I said I'm not going back to them again. I'm not going, I told Oracle" -- this is in response -- this is what he told Goldman Sachs. "... I told Oracle" --

THE COURT: Are you on page 80?

MR. FIORAVANTI: 85.

THE COURT: 85, all right. So all good things come in the last 10 pages of Mr. Icahn's deposition.

MR. FIORAVANTI: He said, "I think Goldman said it. I said come on, just get it over with. Then I said" -- it's line 18. "Then I said I'm not going back to them again. I'm not going, I told

Oracle" -- "I told Oracle I support 19 and three-eighths, I'm not going to change my view on that and let's do it."

THE COURT: Why -- why isn't the sense of that information conveyed on page 25 of the proxy material in the middle paragraph?

MR. FIORAVANTI: Because it doesn't say that Mr. Icahn told Oracle -- it doesn't say that Mr. Icahn told BEA that he was going to support Oracle.

THE COURT: I think it does.

MR. FIORAVANTI: No. It's -- what it says --

THE COURT: It says, he, Icahn said that he would be prepared to announce publicly his support of such an offer by Oracle.

MR. FIORAVANTI: Right. And that's misleading, because it could be interpreted as "If you accept it, I will publicly endorse it."

THE COURT: I mean, you might think that -- you might read that, if you leave out the last couple of words. It doesn't say "I'll publicly announce my support of a transaction with Oracle or of a merger agreement." It says "a proposal by Oracle."

That's quite different.

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

With respect to the settlement of the --

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

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

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

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

they didn't care" -- Oracle didn't care -- "you couldn't go back to them anymore ..." That was his testimony.

With respect to the settlement of the 211 litigation, Your Honor, I think that's discussed on Mr. Icahn's deposition at 42 and 43.

THE COURT: This is another claim you didn't raise in your opening brief.

MR. FIORAVANTI: Your Honor, we deposed Mr. Icahn after our opening brief.

THE COURT: I -- I did hear you say that. Now -- but you had information about the settlement in the 211 case.

MR. FIORAVANTI: But there was nothing that indicated the connection between the settlement of the 211 action and the -- and then BEA putting on the table a -- a reverse termination fee number.

THE COURT: It's not the $500 million number, is it?

MR. FIORAVANTI: Well, it's 10 percent of a deal price is what -- is what --

THE COURT: This is BEA putting it on the table?

MR. FIORAVANTI: Yes. Bottom of page

41, line 25. It says --

THE COURT: Of what?

MR. FIORAVANTI: Mr. Icahn's deposition, at page 40. It says -- and there's a long discussion before that about negotiating with Oracle. But here's what he says. At the bottom of page 41, it says, "So BEA, I think, had a meeting and comes up with 500 million. They [say] okay, we'll take 500 million as the penalty. So I thought that was pretty good because I said hey look, now Oracle should do that. [So] I said to Oracle look, from my way of looking at it, if you believe you're going to get HSR," Hart-Scott-Rodino, "you've got to put out good-faith numbers that you'll pay."

And then he says at the bottom of page 42 on line 22, he says, "Yes, so let me finish. So what happened was I was very pleased that BEA now had come up with a number and I felt we were negotiating really in good faith, and to my surprise, so we made the deal, so I made the deal with them and said great, [I've] got the number, this is really moving ahead here."

And then he says, "So" -- "I also agreed to put off the meeting and the representative

from Oracle was very angry, to my surprise ..." And he talks about Mr. Icahn getting angry at her.

So it's that connection with respect to the $500 million -- putting a number on the table regarding the reverse termination fee in the settlement of the 211 litigation that's not reflected in the proxy statement. And, again --

THE COURT: What's the materiality of this connection?

MR. FIORAVANTI: It's -- it's part of the piece with Mr. Icahn's pressure to force BEA to accept a price that was acceptable to Mr. Icahn, which was in this case 19.37 1/2. And that disclosure --

THE COURT: Well, this is long before the 19.37 1/2. So --

MR. FIORAVANTI: No. But it's leading -- it's the background of the merger.

THE COURT: Okay.

MR. FIORAVANTI: And -- and the disclosure with respect to Mr. Icahn.

I have one other point about the issue about the sensitivity cases. Your Honor asked me earlier, Mr. Savitt raised it about the sensitivity analyses. And Your Honor said well, the sensitivity

analysis only goes up to $20 or $21 based on the Case 2. But what's important to keep in mind is, this is a -- not a DCF. This is a present value of future stock price analysis which is -- measures the value of equity and contains an inherent minority discount and is not a fair value determination as a DCF analysis. So that fair value, you'd have to take the numbers and add back -- you'd have to correct for minority discount, which -- which I think is important in this circumstance.

Unless your Honor has any other questions --

THE COURT: When you say you'd have to do that, it's not done in the analysis, is it? I mean, you'd have to do that in what context?

MR. FIORAVANTI: Well, the present value of future share price analysis contains an inherent minority discount. So ...

THE COURT: And what is it that says that's true? --some -- some appraisal cases?

MR. FIORAVANTI: Mr. -- no. It's in our brief. Mr. Woodruff --

THE COURT: I know it's in your brief, but ...

MR. FIORAVANTI: No. Mr. Woodruff -- Mr. Woodruff was asked and he was asked about the difference between the two, and he said that -- that the present value of future share price analysis is a measure of the value of the equity and that a discounted cash flow analysis is a valuation of the company. And as we pointed out -- and the defendants didn't dispute it in their answering brief -- that they're different, that the present value of future share price analysis reflects a minority discount. So that --

THE COURT: Well, if you -- if you accept the premise that's -- I mean, there are some Delaware cases that say this -- I don't know that there's any Supreme Court authority -- the idea that shares trading or always trading on a discount, minority discount basis, I think there's a fair number of people in the finance world who take issue with that. I know there are, because I was recently -- I was in a conference in Philadelphia not long ago where the idea was made fun of.

MR. FIORAVANTI: Well, this Court certainly in the appraisal context adds back, corrects for minority discount with respect to an equity value.

THE COURT: It happens sometimes.

MR. FIORAVANTI: And that is not what happens --

THE COURT: That's what you're talking about. But you don't do it -- when you're preparing this analysis, you don't -- at the bottom line you don't add in a premium.

MR. FIORAVANTI: No. No. What I'm suggesting, Your Honor, is in the context of the ranges that are produced there, that that's an equity value and that a stockholder might want to -- it's important for a stockholder to consider adding back a correction for a minority discount.

THE COURT: All right. Is there anything else?

MR. FIORAVANTI: That's it, Your Honor.

THE COURT: You know, I'm going to take a recess and come back and let you know what I'm going to do.

(A short recess was taken from 3:06 p.m. until 3:20 p.m.)

THE COURT: Ordinarily I would reserve decision and give you my opinion in writing because

it's generally useful to have the opportunity to collect one's thoughts clearly and express the opinion in ways that later can be cited to and relied upon. In this case, however, there are circumstances that lead me to believe that the best thing to do here is to proceed to give you my opinion orally. It's really my ruling. I wouldn't consider this an opinion. And those circumstances have mostly to do with the press of time in both the time left in this matter to issue a written opinion and other obligations that are occupying my attention at the moment.

So I will, in what should be a relatively short oral presentation, give you the answers to the questions you have posed.

The motion for preliminary injunction will be denied. I will begin by commenting that the circumstance presented in this transaction and the circumstances that exist in the markets today that we've all been living through for the last several months suggest that the opportunity to take this premium offer is a valuable one. I refer to the fact that this transaction has been known for some time. The company was shopped before it reached its agreement with Oracle. There is an opportunity in the

merger agreement for the company to accept a better proposal if one comes along, but none has. The transaction is a third-party, arms-length negotiated transaction. The board of directors are, with the exception of Mr. Chuang, who is a large shareholder himself and one of the founders, independent and highly-distinguished individuals. The board was advised by highly-reputable bankers and lawyers. And so the transaction on the table and which the shareholders are expected to vote on next week is the only available transaction at this time.

It is also a transaction that is priced at a significant premium. I won't try to express what those premiums are; but I know from looking at the materials, that the premiums over trading prices before the negotiations began or before Mr. Icahn emerged or before whatever one looks at are quite substantial.

To that let me add, as I observed at the beginning, the disruptions in the marketplace that exist that make it more risky certainly for the court to undertake to interfere with the completion of a transaction in the time frame that is set forth by the parties and agreed to in the deal, that those risks

give me -- would give any judge even greater pause before moving to restrain a transaction unless very substantial grounds existed that required such action.

What I mean to express is the fact that given a great many factors that are in either part of this transaction or part of the current market environment in which we all live, this Court would hesitate before interfering with the completion of this transaction on less than a compelling record.

Now turning to the merits of the claims that the plaintiffs make, I have to begin by observing, as the defendants have done repeatedly, that this is, No. 1, entirely a disclosure-oriented application and, No. 2, there are no allegations that the proxy materials made available to shareholders to make their decisions omit any material fact. Rather, the claim is that the proxy material isn't complete in certain respects in that it discloses some things but not all of what the plaintiffs regard to be the full story surrounding those various items that are challenged.

I would observe that something that makes this case unusual is the presence of Mr. Icahn and the role that he played in the transaction. I

think I agree with Mr. Savitt that it doesn't really create novel legal issues, but it's an unusual circumstance that the plaintiffs rely upon in large part to support their demand for additional disclosure. Certainly that's true with respect to Mr. Icahn's involvement in the transaction.

Turning to the particular claims that the plaintiff has made in briefs or argued today. First, the DCF analysis. There is a claim that the proxy materials are misleading because they don't explain the absence of a DCF analysis in Goldman's final valuation material.

Now, the facts seem fairly well-established that when Goldman was doing preliminary work before the Oracle transaction emerged, doing some preliminary valuation work in the summer of 2007, that Goldman did prepare some preliminary discounted cash flow analyses and did so using a five-year set of projections, for want of a better term. But the record is that those projections consisted only of two years of actual management projections and three years of extrapolations taken from them. I can't tell at this point whether the extrapolation was done by Goldman or done by

management; but in any event, the record is clear and not controverted that none of Goldman's analysis done after the Oracle transaction emerged contained a discounted cash flow analysis or relied on that early set of projections. And the record also is, from the company, that the company does not as a matter of practice prepare five-year projections because they don't believe that any projections beyond two years are reliable.

And so from that, when you put it together, you would have to conclude that the five-year numbers that were used in these preliminary DCF analyses consisted of unreliable information. There is nothing in the law that suggests that it's necessary for the proxy material to explain why in its final -- and, indeed, in the work that it did after the Oracle bid emerged and in its final work, Goldman didn't use a DCF model. The proxy material discloses accurately the analyses that Goldman Sachs did rely upon, and there is no reason whatsoever to believe that there's any materiality to some possible disclosure about why Goldman didn't use a DCF analysis. Certainly, the omission of that information, in the context of the disclosure made

about Goldman's work, is not material.

There is another claim about whether or not the proxy material should disclose the particulars of synergy estimates that the board of directors saw or that Goldman prepared for the company to look at in some presentations. The record is that the company had no information from, and has no information from Oracle, and Goldman had no such information from Oracle, about the actual synergies that Oracle expects to achieve in this transaction. Instead, the information that Goldman compiled for presentation to the board of directors apparently consisted of publicly-available information about other transactions.

While there are some uses to which shareholders can put synergy information -- oh, and I should add that the record in front of me is, from the company, is that the information available is certainly not considered in any way to be a reliable indication of the synergies that would actually be achieved in this transaction. For that reason alone, I think there's clear precedent that such information does not need to be disclosed.

Along the same line is the claim

that -- that the proxy material should have included both a high case and a low case sensitivity analysis. There is a chart in the Goldman presentations that has to do with the present value of future stock value, something like that. And in the chart there's a series of numbers that are based on both a base case, street estimates, and then a high and low sensitivity case. In the proxy material, as I understand things, what is disclosed is the range that is bracketed by the base case and the street estimates. And the proxy material does not disclose the other two sets of numbers that were the low case and the high case. And I guess the high case obviously is higher than the base case. As I looked at it, when I studied it, it seemed that the low case was in most instances lower than the street estimates.

In any event, the record reflects that while that analysis appears in a presentation that Goldman made to the board of directors, Goldman did not regard, and management did not regard, the high case or the low case to be reliable. It is also the case that Goldman did not rely on either of them in forming its valuation opinion.

I don't understand why it would have

been material to disclose that information, as it is considered to be unreliable and could well mislead shareholders rather than inform them.

I'll also note in this connection, as I discussed with Mr. Fioravanti, that only in the two most extreme high cases do any of the numbers produced by the Sensitivity Case 2, those found in the two right-hand columns exceed or even equal the transaction price, and then only by relatively modest amounts.

And while I note Mr. Fioravanti's observation that those numbers do not necessarily involve any transaction premium, nevertheless, as I understand things, when bankers prepare something like this, it isn't their practice to include premiums in that analysis. So, anyway, leave that as it is.

For the reasons I've discussed, it is not a material omission of fact to have omitted both the high sensitivity case and the low sensitivity case. And as Mr. Savitt pointed out, this is not a case where they've taken out the high case and left in the low case. They've, in fact, taken them both out.

Next there is a claim about the street estimates that appear, I guess, in that same analysis.

That claim evaporates based on my understanding of the record, which is that while there was testimony that street estimates before November 15th were misleadingly low -- and I can be wrong about that date, but I refer to the date on which the company was able to publish the financial information that was in arrears. So when the company was able to bring itself up-to-date in making its public filings, which I believe is November 15th, from that time forward the street analysts were able to base their work on fully-disclosed company information. And before that date, quite obviously, they were not. But once the company got its filings up-to-date, those analyst estimates were changed and more accurately reflected the company's value.

Now, Mr. Fioravanti argues that even after that, Mr. Chuang's testimony is that he believed, based on undisclosed fourth-quarter results, that the analyst estimates were still low, but that's quite a different point. The record reflects that the street estimates used in the Goldman presentation were the ones taken from after the November 15th date on which the company brought its financial statements up-to-date and the analysts revised their estimates.

Since those were based on complete information, their inclusion in the Goldman presentation could not have been misleading.

There is a claim about Goldman's fee, and the issue is that the proxy statement discloses the total fee and discloses that the fee is at least in part contingent but doesn't disclose which part of the fee was contingent and which part wasn't.

This might be a good claim if some very large part of the fee was in fact contingent. And that's the argument that the plaintiffs try to make, that, in fact, the whole fee was contingent; but I believe that's a mischaracterization of the fee range. And at least as I understand things, of the $33 million that Goldman will be paid, only $8 million is contingent. And given that it's only 8 out of 33, I can't see it's materially misleading to have merely stated that a part of the fee was contingent without saying how much.

There are some other claims that relate more directly to Mr. Icahn's involvement in the transaction. Now, the first is the argument that the proxy statement should have disclosed the content of a November 19th letter that Mr. Icahn sent to the

board of directors. And the reasons that it should have been disclosed, according to plaintiffs, are that in the letter, Mr. Icahn threatens a proxy contest if the management doesn't behave to his liking and also that he threatens litigation against management for various actions they were taking.

The response to this is, No. 1, that the claim was waived since it wasn't included in the plaintiffs' initial moving papers. And that's a view that, I must say, I'm sympathetic with.

Mr. Fioravanti argues that he didn't include it because he hadn't had a chance yet to depose Mr. Icahn and that deposition took place the day after the brief was filed; but, nevertheless, the letter itself was available in the production before the brief was filed. And I think, in fairness, that the argument should have been made then so that the defendants could have had a full opportunity to respond to it.

Leaving that aside, I'm convinced, nevertheless, that at least at this stage and on this record that the failure to disclose that letter is not a material omission in the proxy material. Very briefly, the facts are that Mr. Icahn had publicly filed an aggressive 13D not long before, that the

company understood from his 13D filing that a proxy contest was a possibility - a fact that is disclosed in the proxy statement. And beyond that, before this letter was sent, Mr. Icahn had actually sued the company in this court under Section 211 trying to get the annual meeting held on an expedited basis.

Now, that obviously signaled that Mr. Icahn was at least considering running a proxy contest. So the fact that the letter reiterates that I think is not material. And the facts of the 211 case -- the fact that it was filed and the relief that it sought are disclosed.

Now, that 211 case -- and I have to say, I haven't looked at the complaint again recently. According to the proxy material, that complaint also made claims against the board seeking to enjoin certain other actions. I think that was a claim where Icahn was trying to prevent the company from taking strong defensive measures, very much like the sorts of things that he was complaining about in the November 11th letter. So I don't regard the omission of that letter as material, either.

I have to say it's curious that the letter never became a matter of public record. And it

is curious, as plaintiffs point out, that it was stamped confidential apparently by Mr. Icahn when he first sent it to the board. That is hard to understand, but that seems to be the case. But those facts don't make its omission from the proxy statement a material omission.

There is a claim -- discussed at length today -- and this is on page 25 in particular -- the proxy material doesn't really convey the fact that when Mr. Icahn negotiated the 19 and 3/8 price, that he brought it back to the company and to Goldman Sachs and conveyed a threat, essentially, that if the company didn't agree to this price, that he would take action.

Now, I don't really read Mr. Icahn's deposition as saying that he threatened the company. I've read different parts of it, including sitting up here today with counsel; and I think the fair reading of it is it doesn't say that he conveyed a threat. Nevertheless, it's quite clear from what he says and from the company's proxy material that he told BEA and told Goldman Sachs that this was the deal that he was prepared to support and, more than just a deal, it was an offer by Oracle that he was prepared to support

publicly.

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

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

material would find it important in deciding how to vote to know this particular omitted fact. And while I understand the difficulty plaintiffs encounter in bringing proceedings like this and proving cases, I have to conclude from my review of the briefs and the record that there isn't anything in the claims that have been made that amounts to a material omission, that is, one that would render the proxy material materially misleading by its absence.

So essentially, even though I started out saying that it would take a strong case to lead me to enter relief in the context of this transaction and the current marketplace, what I think I find instead is that the claims the plaintiffs advance are not strong but weak. Therefore, even if I thought there was some colorable merit to them, there's no question in my mind the threat of injury that could flow from the entry of an injunction is much more powerful and immediate than any injury that an injunction might remedy.

So for those reasons I'm going to deny the application.

We'll stand in recess.

(Court adjourned at 3:49 p.m.)

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 101 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 86 through 101, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 28th day of March 2008.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent