IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL STEINHARDT, HERBERT CHEN, DEREK SHEELER, STEINHARDT OVERSEAS MANAGEMENT, L.P. and ILEX PARTNERS, L.L.C., individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 5878-VCL
ROBERT HOWARD-ANDERSON, STEVEN KRAUSZ, ROBERT ABBOTT, ROBERT BYLIN, THOMAS PARDUN, BRIAN STROM, ALBERT MOYER and OCCAM NETWORKS, INC.,	:	
Defendants.	:	

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Chancery Courtroom 12B
New Castle County Courthouse
Wilmington, Delaware
Monday, January 24, 2011
10:00 a.m.

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BEFORE: HON. J. TRAVIS LASTER, VICE CHANCELLOR.

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RULING OF THE COURT
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

- - -

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(At this time a recess was taken until 12:00 noon)

THE COURT: Thank you all for giving me a chance to collect my thoughts. I have thought about writing on this; in particular the enhanced scrutiny trigger, as something that I think somebody, at some point, probably several of us at some point, are going to have to do more work on.

But in honor of the name of the target company, I thought the simplest thing to do was to give you an answer right away. So here is what I am going to do.

There are two theories on which the injunctions have been sought: Process and disclosure. I am going to deny the injunction based on process. I am going to grant a limited injunction based on disclosure.

First, on process. There was a lot of debate in the briefing over whether this was an enhanced scrutiny transaction or business judgment rule analysis. This is a deal where the consideration was approximately 50 percent cash floating based on the market price. It was priced as up to 19.9 percent

of the acquirer's share plus enough cash to make the total value number.

But the problem is it actually doesn't receive the 19.9 because of their employee options and awards that are rolling, and so the public will end up holding approximately 15 percent of the post-transaction entity after the fact.

We tend to focus, in our juris prudence, on change of control and the change of control test. So there was a lot of debate over whether this, in fact, was sufficient cash to merit a change of control. I think what people need to remember is that the change of control test is ultimately a derivative test.

The point is that when enhanced scrutiny applies is when you have a final stage transaction. The reason enhanced scrutiny applies to a change of control is because it's a constructive final stage transaction. You're giving up control to a person who could then cash you out because he's the new controller.

This is a situation where the target stockholders are in the end stage in terms of their interest in Occam. This is the only chance they have

to have their fiduciaries bargain for a premium for their shares as the holders of equity interests in that entity.

It's easy to see here in two ways. First, it's easy to see in terms of the amount of cash. If you want more cash for your shares, this is the only time you have to get it. But it's also easy to see in terms of the amount of interest you're going to have in the post-transaction entity.

We often talk about, oh, well, but the stockholders can get a future control premium. That's all well and good for the future entity, but what you're bargaining over now is how much of that future premium you're going to get.

So let's say that Calix is some day sold, and let's all hope that it does very well and becomes an attractive acquisition target, and that one of the big boys picks it up at some point for a healthy premium.

The target stockholders today are bargaining for what their share of that premium will be. They're going to only get 15 percent, and obviously there could be more acquisitions that dilute everybody, et cetera. I get that.

But as between the Calix stockholders and the Occam stockholders, now is the time; when the target fiduciaries are bargaining for how much of that future control premium their folks will get. This is it. This is the end. This is the only opportunity where you can depend upon your fiduciaries to maximize your share of that value.

I think back in 1989, it made sense for people to be worried over the line between Revlon and non-Revlon. It was three years after that landmark case. That case was a Cunian paradigm shift if there ever was one. We had language in there like "auction duty, radically altered state," really seemingly heavy duty stuff.

We now know it's a reasonableness standard. There's no single blueprint. A target board doesn't have to take the facially higher cash price. It can consider the strength of the currency. It can take a stock deal if it believes that the stock offers better long-term appreciation and more potential synergies.

That's why I said at the outset in this case it's just not worth having the dance on the head of a pin as to whether it's 49 percent cash or

51 percent cash or where the line is. This is the only chance that Occam stockholders have to extract a premium, both in the sense of maximizing cash now, and in the sense of maximizing their relative share of the future entity's control premium. This is it.

So I think it makes complete sense that you would apply a reasonableness review, enhanced scrutiny to this type of transaction.

Now, there are some decisions during the process where one could debate reasonableness; particularly how Adtran was handled and how the July limited market check was conducted.

If Adtran, Juniper or a topping bidder were here, you could well think about an injunction, assuming they came in with a materially higher bid and there was a proven reason to show why, or sufficient reason to show why they hadn't shown up earlier or had been shut out of the process.

I think it's debatable. I'm not saying that there is a clear reasonableness problem here. The point was made that Adtran is subject to a standstill, but I don't think that's absolute. I think they could have asked to come in. They could now be sent a copy of this ruling, or if they are

sufficiently interested in this target to be monitoring things, they will have heard my statement.

Frankly, my impression is that they were a cautious acquirer, that they couldn't commit, that they went looking elsewhere, and if I was forced to make a decision today as to that aspect of the process, I think this board acted reasonably and was within the range of reasonableness in preferring to pursue Calix rather than Adtran, both because of Adtran's historic coquettishness in the process, and because this board reasonably could look at Calix and say, "This is the best fit for us, and if we can get a deal that is stock or largely stock, that is a superior currency to cash. We have the two largest players in this market, yes, that creates anti-trust risks we have to bargain over, but this is a transaction that creates a company that then can be a really good player and an attractive acquisition target for one of the big boys on down the road."

Frankly, I think that's what the VCs were thinking. I don't know for sure, but I wouldn't be surprised if that was what was on their mind.

The only reason that I could think of and that has been argued for why the VCs might have

some issue that would not align their interests with those of the stockholders as a whole is if there was some timing problem that they faced; in other words, they had a unique and personal interest that required them to sell now when stockholders, as a whole, in Occam, would have preferred a year later or two years later after some things came to fruition, perhaps after Mercury was in the works, perhaps after the performance of the federal spending was better known.

It's really not borne out by the record. You can speculate based on some decisions that were made that maybe there was some personal interest going on here, but it isn't there to a degree that an injunction could be based on, and I think Mr. Jenkins was quite responsible in candidly admitting that fact.

Given where we are, therefore, under the present circumstances, with no topping bidder, I think it's up to the stockholders to decide whether this is the price and the mix of consideration that they want for their shares. But they have to be able to do that on a fully informed basis, and that brings me to the disclosure issues.

A number of them have been raised. I

am going to deal with the ones that I think are most pertinent and in several cases warrant relief. The first is the discussion of the road show and Jefferies analyst's involvement on that. There isn't any evidence of banker conflict at this stage of the proceeding. There isn't any evidence that the wall between the analyst's side and the investment house side was breached at this stage of the proceeding.

So I don't think disclosure is required based on a perception or a concern about banker conflict.

I also don't think disclosure is required because of any problem at the Occam director level. They appeared to have acted quite responsibly. They were presented with an unforeseen situation. It was certainly something that they didn't like. The VCs had just as much economic interest not to like it as anyone else. And they tried to deal with it. But Calix said no.

The only problem I see here is that the impact of the road show did change the mix of the consideration. I do think that right now the proxy has a partial disclosure issue, because while it explains the events, it doesn't explain the impact

which the record seems to suggest was a reduction in the cash value of approximately 25 million.

Some stockholders might be cash players, and it would be material to them that that happened, and they are now getting less cash than they otherwise would have been.

So because there has been partial disclosure of the road show and the road show issue, I will also require the defendants to disclose how it changed the price mix.

Now, you don't have to be exact in that. You just have to say what the board knew and describe it in the same manner that it's described in the board presentations. Nobody is expecting you to reach a level of scientific exactitude about the precise impact that this had, but it was presented to the board, it was comprehended at the board level. The order of magnitude I've already mentioned, or at least that's what the record seems to indicate, and so I will require that.

The second issue that wasn't discussed this morning, but I think it's another pretty clean partial disclosure, is the accretion/dilution analysis. It's an analysis that was in the final

book. It's summarized incompletely and partially in the proxy.

You need to give the range. You gave the ranges for all the others, but for some reason, on accretion/dilution, you just said accretive or not accretive. So that's an incomplete summary. Stockholders are entitled to a fair summary.

The accretion/dilution analysis was one of the analyses that Jefferies performed in its final book. You need to summarize it accurately and give the same type of range that you have appropriately given in terms of your other analyses.

Third, Mr. Pardun. The record reflects that there is an agreement in principle that he will be the director on the surviving company board. I understand that there hasn't been yet any vote to make him that director and that the deal hasn't closed. But what was established in discovery is that he's going to be the guy.

It is, therefore, incorrect for the proxy to say that nobody has any clue who the guy is going to be. So the defendants need to disclose that it is currently anticipated, or there is an agreement in principle, or whatever the apt view of it is, and

is consistent with the deposition testimony that Pardun will be the director. That could be material to the stockholders' view of his interest in supporting the merger.

It doesn't make him interested in an entire fairness context, and that's in an entire fairness sense, and that's what our cases have repeatedly said. But it does potentially weigh in on the reasonableness analysis, and it's something that I think is material to stockholders.

Fourth, the July 2nd contacts. I think these are misleadingly described. The information was clearly material in terms of how much of a shopping process was done and how the calls were made. It was relied on by both ISS and Glass-Lewis. It's mentioned repeatedly in the proxy.

Based on my review of the record, I think the proposed disclosure that the plaintiffs have offered on pages 27 through 28 of their reply brief is accurate. That needs to be disclosed.

You also need to fix the references to the July 2nd contacts that appear elsewhere in the proxy that are framed off what I think is a misleading description that currently exists in there. I may not

have found them all, but pages 86, 88 and 91 all cross reference this concept of there being no interest on July 2nd.

As I say, I think the plaintiffs have correctly pointed out there was interest. There was an interest on the immediate time frame that was discussed, and as I say, I think the plaintiffs have framed an accurate disclosure that correctly describes that issue.

This brings me to the last disclosure claim that I plan to dwell on this morning, and that's the disagreements over the fairness opinion. I think most of these -- I don't know whether they're quibbles or not. They actually seem to me to be serious debates.

But nevertheless, I think most of Mr. Chen's and counsel's disagreements with the Jefferies' fairness opinion are great arguments to put in front of stockholders to convince them that this deal really isn't the right deal, or in front of ISS or Glass-Lewis to tell them to recommend against.

If Jefferies did the analysis that is accurately disclosed in the proxy, that's what they did, and I have compared the Jefferies book, the final

book, with the proxy summary, and I think it is accurate. There is the one issue of the accretion/dilution issue that I've already discussed.

So I am not concerned, and I won't require any disclosure as to those issues.

Now, I am concerned about what appear to be longitudinal changes from previous Jefferies' books that resulted in the final book making the deal look better than it would have had the same metrics been used that were used in prior books.

This is an issue that comes up with some regularity. You often have a pitch book or a third party negotiating book that goes over the transom to the other side. But then you have the real internal books.

Our courts have understandably said we understand that when you're negotiating, you're going to push for a higher value, so we're not going to require some type of longitudinal disclosure to contrast your negotiation book with your real internal book. These are all internal books.

And this links to the discovery problems with the Jefferies Rule 30(b)6 witness where a witness was not presented who was knowledgeable,

sufficiently knowledgeable about what Jefferies did in this deal.

I don't know, and I don't have to decide whether I would hold up a deal because of this independently. But because I am already granting a limited disclosure-based injunction, this provides time for a remedial deposition.

Therefore, I am ruling as follows. This transaction is enjoined until ten business days following, first, curative disclosures on the issues I have listed, and second, the lodging with the Court of a deposition of Mr. Jackman or Mr. Berkowitz.

Now, that deposition can happen before the curative disclosures go out. That's not a sequencing thing, but this is an "and." Both of these things have to happen for the injunction to lift.

The defense of that deposition has to be handled by someone other than the lawyer who defended Mr. Snyder's deposition. Delaware counsel from both sides will be present to provide adult supervision.

With the deposition transcript, the plaintiffs can submit a three-page letter to me as to any additional disclosure relief that is truly

warranted based on the deposition.

I want you all to be responsible about this. If you take this deposition, and there are good explanations as to why the longitudinal changes were made, I will not criticize you at all. I will praise you if you write me a letter saying, "Vice Chancellor Laster, we took this deposition and it didn't play out. We're satisfied that there are no additional disclosures that are required." I'm going to read it regardless. But I will be happy if you tell me that.

If you tell me that actually it has turned out that they lowered the ranges because of X, Y or Z, then perhaps some additional relief will be warranted.

The defendants can respond 24 hours later with a three-page letter of their own. I will let you know promptly whether, having reviewed the deposition, I intend to grant any more relief.

I do think, in an ideal world, that will happen very quickly, and that between that and the other, between the short time frames, that that should be able to be accomplished in, and the time I have allowed for the disclosures to be made and hit the market, I think there is ample time to get all

this done.

Frankly, if it turns out it is prolonging the length of the injunction, blame your bankers. The managing directors who quarterbacked the process need to do so with the expectation that when there is expedited litigation challenging the deal, that they will respond and be available for a deposition and testimony if warranted about what happened in the deal.

It is not acceptable to send a fifth year junior banker who has only done six fairness opinions, and who came into the process late in the game with only three months left, as your 30(b)(6) witness.

This Court has to decide these things on an expedited basis. I have said a lot of times that that requires cooperation from the parties. That's why we don't expect parties to fight about things like, oh, we insist on a formal commission process to get the banker. They're your banker. You hired them for the deal. You may not control them in the literal sense, but you have substantial influence over them.

That's why we, as a Court, have long

expected people to make their bankers available and to facilitate document production from their bankers.

It would not allow these cases to be adjudicated responsibly if managing directors could decide that they are simply too busy to play a role in terms of the actual adjudication of the deals for which their investment banks are making seven-figure fees, and that they instead have better things to do, and therefore, they will send one of their junior members instead to answer non-responsively the questions that are put to them in deposition, and to have a defense lawyer be obstructionist and, indeed, to insult the questioner on, I think I counted three occasions.

If this is a problem for the deal, blame your bankers.

I will not require any bond to be posted.

The plaintiffs have sued in a fiduciary capacity. It's a disclosure-based injunction. While there is certainly some risk of some negative impact that might occur to the deal because of the delay that I have imposed, that is more than counter-balanced by the benefit to the

stockholders of this additional information, and I don't think, regardless, that it would be priced off the total deal value or premium. I think it would be, in any event, priced off some type of time value of money concept which here, as I say, I think would be relatively minimal, and because the plaintiffs have sued in a fiduciary capacity, I don't impose a bond on them.

Any questions from anyone?

MR. JENKINS: None from plaintiffs, Your Honor.

THE COURT: Defendants, any questions?

MR. BIRN: No, Your Honor.

I think just thinking logistically it probably will make sense that we do one disclosure following the deposition rather than seriatim, but we'll think about that.

THE COURT: That makes a lot of sense to me too, but I leave that up to you all. And you obviously have securities gurus at your firm who will know, certainly from Delaware's standpoint, and I think that makes a lot of sense.

I will not speak to, and I would defer to the securities laws jocks as to what, if anything,

is required of the federal law matter.

Thank you, everyone, for your time today.

We stand in recess.

(The Court adjourned at 12:30 p.m.)

CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 21 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.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 25th day of January, 2011.

/s/Maureen M. McCaffery

Maureen M. McCaffery
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 201-RPR
Expiration: 1/31/11