IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TOVE FORGO, individually and on behalf of all others similarly situated, Plaintiff, v HEALTH GRADES, INC., KERRY R. HICKS, MATS WAHLSTROM, MARY BOLAND, LESLIE S. MATTHEWS, JOHN QUATTRONE, DAVID G. HICKS, WES CREWS, ALLEN DODGE, MOUNTAIN ACQUISITION CORP., MOUNTAIN MERGER SUB CORP., MOUNTAIN ACQUISITION HOLDINGS, LLC, and VESTAR CAPITAL PARTNERS, V, L.P., Defendants.	:	Civil Action No. 5716-VCS
PETER P. WEIGARD, individually and on behalf of all others similarly situated, Plaintiff, v KERRY HICKS, LESLIE MATTHEWS, MATS WAHLSTROM, JOHN QUATTRONE, MARY BOLAND, and HEALTH GRADES, INC., Defendants.	:	Civil Action No. 5732-VCS

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, September 3, 2010
9:35 a.m.

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

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

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THE COURT: Good morning, everyone.

Good morning, Mr. Jenkins.

MR. JENKINS: Good morning, Your Honor. May I do some introductions first, Your Honor?

THE COURT: Sure.

MR. JENKINS: At front counsel table, Your Honor, are Michael Rosner and Ed Korsinsky of the Levi & Korsinsky firm in New York. From my firm is Stephanie Habelow, Robert Katzenstein, and Mr. Beste. Your Honor knows Mr. Long, of course. And from the Weiser Law Firm is Pat Weiser and Loren Ungar, all on behalf of plaintiffs.

THE COURT: Good morning, Mr. Lafferty.

MR. LAFFERTY: Good morning, Your Honor. I wanted to introduce my colleagues at counsel table. I'm here on behalf of Health Grades and the directors; Stephen Hibbard from Sherman & Sterling; Mr. Wilensky and Mr. Measley from Morris Nichols.

And with Your Honor's permission, I will make the argument on behalf of the Health Grades defendants this morning unless, of course, Your Honor has any difficult questions, and then I'll cede the floor to Mr. Wilensky.

Thank you.

THE COURT: Mr. Wilensky's a litigator now, huh? He's become a real lawyer.

MR. WILLIAMS: Good morning, Your Honor.

THE COURT: Difficult mentoring project over at Morris Nichols.

MR. WILLIAMS: They transform people, Your Honor. They put them into -- you know, they make them into things over there.

MR. LAFFERTY: Your Honor, they give me all the tough jobs at Morris Nichols.

MR. WILLIAMS: Your Honor, I'm happy to introduce my colleague, Yosef Riemer from Kirkland & Ellis, who will make the argument on behalf of the Vestar defendants this morning.

THE COURT: Thank you, Mr. Williams.

MR. JENKINS: Good morning, Your Honor. May it please the Court. David Jenkins for plaintiffs.

We believe that most of the critical facts here are undisputed; and, from the plaintiffs' perspective, the question here is how little can a board do and still comply with its duties to get the

best price under Revlon when it is attempting to sell the company.

I don't think there's a lot of dispute over the legal standard. A board of directors, once it decides to sell the company, needs to obtain the highest price realistically available given the market for the company, and the board is required to use a logically-sound process to get that best price. This Court -- Your Honor knows this far better than I do -- looks at the adequacy of the decision-making process, including the information on which the board based its decision and the reasonableness of the directors' actions.

My take-away from all the cases I've read in the last couple of weeks is, there's no one model for getting the best price. There's not a checklist you go through, but you look at it based on the circumstances and you have to do something reasonable. Here, the Health Grades board did very little to ensure that they got the best price.

Let's start with the past. Your Honor is certainly aware of the decisions where a company over the period of time -- over the period of time prior to the events at issue had made clear to the

market that it was for sale. That did not occur here. When the company began negotiating the sale -- excuse me. When Health Grades began negotiating the sale of the company with Vestar, which we say began in November of 2009, it had a Not Open for Business sign up for everyone else.

THE COURT: Well, when a company doesn't have a rights plan in place, does it have a Not Open for Business sign?

MR. JENKINS: Well, if it has negotiated with one potential buyer, such as Vestar, and is telling the rest of the market "We're not for sale," yes, Your Honor, I think it does.

THE COURT: Well, how did they tell them they weren't for sale? Did they have, like, on the -- the web page "We're not for sale"? You know, what I'm trying to get at -- look, I'm not going to -- you know, unless -- if the defendants think that when they stand up I'm going to, like, encourage the room to rise and applaud that this is the world's best process or most impressive thing I've ever seen, they shouldn't, you know, be expecting such rapture. On the other hand, you know, we've gone to this world of, like I said, you know, teenagers who can't ask each

other out or something like that. That was not the era of Revlon.

And my understanding is, frankly, the CEO took meetings with private equity firms -- and I want you to give me your perspective -- that Citibank was the regular financial advisor to Health Grades and that it had that status when it talked about Health Grades. It wasn't like it was just talking about Health Grades as, like, a bunch of industry -- it was the financial advisor to Health Grades and it regularly talked about it with folks; that Mr. Hicks took meetings with people like he took with Vestar, but that nothing came in where somebody called him up after the meeting and said "Hey, not only did we kind of give you the slide show, but how about 7.25 a share and we start talking?" Right?

And so that's what I want your perspective on, because I don't know what it means to be not for sale when you don't have a pill. That means you're pretty much for sale. You're taking meetings from people who could buy. Is it that they have a duty to sit down at the meeting and say "By the way, we will entertain an offer"? So, you know, what's your perspective on that?

MR. JENKINS: Thank you, Your Honor. They don't have to do anything. When Vestar approached them, they could have told Vestar, as they told these 15 other inquiries over the past several years, "We're not for sale. We're not interested."

THE COURT: Wait a minute. How do you know they told them that?

MR. JENKINS: Because --

THE COURT: Where in the record -- I know there's deposition testimony where they say -- I mean, I get it -- that they say "We're not for sale until we sign the sale agreement." On the other hand, we've totally decontextualized Revlon cases; right?

It used to be that folks like your clients would complain when a board -- when someone like Vestar came to the board and expressed an interest in making a premium bid and the CEO said "Pound sand. We're not for sale." That's when we used to have cases. And you actually used to have cases because someone like Vestar actually was willing to make a bid even in that and kind of fight about it.

Now you have a situation where a board -- you know, unless you're going to take the notice that you actually have a For Sale sign on

companies, it seems a pretty good way to scare away your employees and other kinds of things. If you want boards to be open, they're going to have to strike a balance between listening receptively and in a nonentrenchment-oriented way to serious overtures of interest while not putting a classified out.

What evidence is there that the board actually said they weren't -- did anybody say they were not for sale to someone who actually made a serious expression of interest in actually buying a company?

MR. JENKINS: No, there is no evidence I'm aware of on that point.

THE COURT: And isn't it -- didn't Mr. Hicks testify that nondisclosure agreements had been signed with several parties in the recent past?

MR. JENKINS: I'd understood -- excuse me, Your Honor.

THE COURT: No. But, I mean, I thought he testified to that, which meant nonpublic information had been given to several other industry players in the recent past.

MR. JENKINS: I had read that as nondisclosure agreements but in the takeover context.

THE COURT: But that's the -- well, but that's another point I want to ask you about. When people make these kind of, you know, lunch sort of deals, lunch ... you read them as an expression of interest at buying the whole shebang.

MR. JENKINS: Yes, Your Honor.

THE COURT: What evidence do you have of the ability or wherewithal of these parties to actually buy the whole shebang?

MR. JENKINS: None. What we have is, we have expressions of interest that the board itself did not follow up on and that Citi followed up on in the most cursory way.

If this case -- if Vestar wasn't here, we wouldn't be coming in and saying you have -- the board has to go out and talk to these people. They can put a No -- they can put a Not Open for Business sign up. We agree with that. And they did it for everybody but Vestar. That's the confusing part of this case.

THE COURT: No. And, I mean, I'm not saying that you aren't right. I mean, there's a -- but one of the things is, the record -- what -- Vestar appears to have done something different than anyone

else did, which is after the first high-level meeting -- my understanding is Mr. Hicks took so-called high-level meetings a fair amount. He went to industry conferences. He did other things. Frankly, he let the bankers do the same. There was no rights plan in place. I take it there were several analysts that covered the company?

MR. JENKINS: That's my understanding, Your Honor.

THE COURT: Right. So this is, you know -- there are actually people out there with an interest in touting Health Grades.

That what happened with Vestar is that after a fair amount of time after one of these high-level meetings, Vestar actually specifically got back in touch with the company and said "We want to buy you and we want to go down that road"; right? Is there any evidence anybody else did?

MR. JENKINS: No, Your Honor. And that is a difference. But, still, if you're trying to sell the company -- I'm not an expert in this area. But just trying to sell an asset, you have someone coming to you and saying "We're seriously interested in buying the company." That's fine. You can either

decide to talk to them or not. They could have sent them away. They decided to talk to them. How do you really know that you're getting the best price? It's like selling your house. Someone comes to you and says "I want to buy your house." Normally most people put it out on an open market. You say, "That's nice. Let's see what others might be willing to bid." And that's what didn't happen here until a very late stage when there were a lot of restrictions in place.

THE COURT: No. I mean, I get that; but on the other hand, what your friends say is, you know, "We had talked" -- "We were not, like, in a situation where we had" -- "we've given nonpublic information to people. Our bankers had talked to people. We didn't see any other logical buyer out there for us, and none of these things where we had given them information had resulted in an overture."

I mean, it's my understanding of the dance that the person who actually -- you know, if you want to put it in Sadie Hawkins terms, the way the M and A thing works is, typically in this situation if -- in M and A, Sadie Hawkins, the buyer is the woman and the target is the man. And in this circumstance the woman has to be the one who

ultimately says "I want to take you to the dance" and that when you meet with somebody, the follow-up has got to be that no company says -- that very rarely -- maybe they do. Very rarely does a company that's not in distress, that doesn't already have some sort of firm bird in hand kind of solicit an offer. Now, it's not unusual -- I mean, I'm not saying it never happens. There are some times when you shop. When you do that, you do a strategic search. But a lot of times when the company's in good shape but not necessarily sure, you'll take meetings with people. You'll display a willingness to talk, but ultimately they have to make some sort of serious expression before you go forth. You don't sit there and say, "By the way, would you like to buy us?" Because that's seen as a sign of weakness; right?

MR. JENKINS: And that certainly can be. But it shouldn't have been here. If you're talking seriously with Vestar -- and they were getting pretty serious pretty quickly. By February you have firm offers on the table and you have the board doing some things to try to make those offers look better, which I'll get to in a minute. That's fairly far along.

Your Honor knows the investment bankers. All the Vestar board had to do was call up Citi and say "We're getting far along with Vestar. We had 15 other entities come in and talk about us. Give them a call. Tell them what's going on." The board was under no confidentiality provision at that point. They could have done this. Later there's a problem but not in this early period. They could have had Citi go out and contact these people --

THE COURT: I guess the only problem is Vestar gets wind of it; right?

MR. JENKINS: There are risks everywhere.

THE COURT: Uh-huh.

MR. JENKINS: But if the question is which is the worst risk, the company that was not for sale, was doing fine financially, it was not under distress, didn't need to sell is in a different situation. If Vestar was in financial problems, we wouldn't be here, because Your Honor's first question to me was "Don't you have to do this?" And the answer probably is yes, but Vestar didn't have to do that. That's a critical distinction here.

And why, at least until April, which

was the first time Vestar said "By the way, you're not shopping this," up until April there was nothing either explicit or implicit that prevented the Vestar board from doing that.

Yes -- I said Vestar board. The Health Grades board.

THE COURT: Right.

MR. JENKINS: Vestar could have walked away; but since its initial price was 7 and the eventual deal price was at 20 and the market price is shooting up in the meantime, something that is important for the board to consider, Vestar walking away --

THE COURT: Was the general overall market going up in that time of year?

MR. JENKINS: I'm trying to remember what month and what year this is, Your Honor.

THE COURT: I have to admit that I don't follow the, you know -- I tend -- I try not to read my 401(k) as it goes up and down because it scares me to think rational estimates of the future have changed so profoundly and so quickly. So I like to have it smoothed out over a period of years.

But was the market -- you don't know

whether it was going up?

MR. JENKINS: I know in general that the stock market since March of '09 has been going up.

THE COURT: So what you're saying is, there's a way to take the temperature of people. And Citi would have -- they could have made some -- they could have, like the one -- I guess there was one investment bank -- I mean, not investment bank; some sort of private equity shop that had actually had a slide, indicating at a prior meeting that they -- you know, one of the things they were interested in was, like, an MBO or something like that. That was the time to at least ring them up and say, you know, "Do you have any interest?" or whatever and that the other side would get it.

MR. JENKINS: Certainly. And Your Honor had earlier expressed the concern about putting yourself up -- a For Sale sign drives employees away. Yes, that can happen, but certainly an investment bankers know how to do -- make a phone call and keep it private and not public in order to get that -- test that sort of interest.

THE COURT: Well -- and here what you're saying, too, the key management group was not

going to go away. They -- they could control -- Mr. -- the -- the Hicks bros and Hodge [sic], the CFO were not going to get spooked by a discreet sale inquiry themselves, given that they themselves had these conversations over the years with other private equity buyers.

MR. JENKINS: Correct. And given their financial stake in the firm and what they could get, should there be a -- some sort of change of control, it's unlikely that they would have walked.

THE COURT: But you -- this is not a situation where you can point to some other logical buyer. I mean, you're talking about just, frankly, some -- I don't want to denigrate them, because they may -- they probably have -- I'm sure they have far more money than I have. But they're -- we're talking about private equity firms that are not KKR, Bain, and Blackstone; right?

MR. JENKINS: Right.

THE COURT: We're talking about the smaller tier of private equity shops that you're saying -- I mean, would be the other logical buyers?

MR. JENKINS: I would think so, "smaller" being a relative term. As Your Honor says,

all these people have a lot of money but not compared to the very big players.

THE COURT: Right, but they're not -- they are private equity portfolio firms, some of which may have portfolios in the health care space.

MR. JENKINS: Some of them may, yes.

THE COURT: But there's no -- you're not sitting here with some group of logical strategic buyers of public companies that say, you know, "Hey, we've been wanting to annex Health Grade to our portfolio for years; right?

MR. JENKINS: I do not have any such specific entity. What we have are the contacts.

THE COURT: Let me ask you a question about that, because, to me, motivational, you know -- Chancellor Allen wrote very interestingly, as he always did and does on everything. And as anyone who read his jurisprudence could tell, he had some real ambivalence about this -- the Revlon doctrine. I think he virtually had no ambivalence about Unocal.

And I think his reason -- well -- and I think it's easy to explain. He viewed Revlon as really an application of Unocal as an entrenchment case, that when -- when there's evidence of an

entrenchment motivation, duh, Delaware judges should be suspicious and should take a really hard look.

But just because you're selling -- when you're selling, absent some reason to be suspicious, why are we not in general giving some deference to the business judgment of the board in determining how to go about it?

And what I'm asking about the logical buyers is, as I understand the private equity firms, the way they compete largely is to say, you know, "However much that other firm loves you, management, we're going to love you just a little bit more." Kind of a takeoff on one of the very -- on a '70s song which has got to make you smile it's so bad and naughty, I might add. So, you know, if any of you is lightly offended, do not seek it out because it might shock you, might -- it actually in its own way as bad as any aggressive song on the market today.

But why is it that Mr. Hicks would, given that the other likely buyers in your scenario are also private equity buyers, and given that he, frankly, has more interest than anyone on earth in getting a higher price arguably, why would he not deal with other private equity firms?

MR. JENKINS: The short answer is I don't know. As we've been going through the briefing and as I've been preparing for this argument, I've been thinking of those questions. I don't have a good answer for that.

THE COURT: But, I mean, doesn't that matter to me? Because I'm -- I'm going to have some hard questions for your friends. One of the things that makes one more skeptical in the private equity context than in the ordinary -- than the strategic context, the strategic -- and then in the strategic context where, frankly, the strategic is coming in and making a cash acquisition, is going to put in place its own management, is that you always have to worry about whether someone like Mr. Hicks is doing the following: "I'm going to lock in my nut. This is a really good time to lock in my nut; but unlike everybody else, I get to continue" -- "I get the possibility of continuing and growing the nut again, which means I actually don't want the blow-out, the necessary blow-out price. I may want something that's a prospectively handsome price such that I know I can get the Chris-Craft boat I want and I can get the vacation house I want and I can afford" -- "if I do it

on an actuarially-sound basis, I am actually up to where I can afford one and a half more spouses and past relationships and -- with the prospect of, frankly, growing up to the possibility for three more spouses."

And so that's different than everybody else who's going to take the price; right?

But the story here, though, is, you know, why Vestar versus anyone else and especially when the way the board made him go about it was to actually leave them in a situation where he couldn't cut his deal, not to say -- I mean, I don't believe Mr. Hicks is lying awake at night wondering whether he can stay with Vestar -- with the company. I don't. On the other hand, he doesn't know exactly what the equity pool is. He doesn't know whether he'll be asked to buy in and exactly what the strike price is.

And, you know, arguably if he created competition among various private equity firms, he could have actually both got a price bump and bargained for an equity pool or, you know -- what's going to happen, whether they say talk or not, one of the first things is going to be on the table from the other private equity players is "Here's what we'll do

for management."

So I'm trying to get at why he wouldn't do that, you know.

MR. JENKINS: I don't have a clear answer. I can speculate. Let me start off by saying that under Revlon, I don't think I technically have to show that, but I recognize Your Honor's position. You're trying to figure out whether you enjoin the deal or not, and that's --

THE COURT: Well, no. And I understand -- see, there's all kinds of -- look, I'm going to admit, you can pick through Barkan and all kinds of cases; but there's a -- you know, even Revlon itself -- it's so funny when people talk about Revlon as an auction case. Revlon wasn't an auction case except in the standpoint of, Revlon was a case where they stiff-armed a hostile bidder. Then the board realized it couldn't stiff-arm then anymore and they got another bidder and decided to sell and then said "By the way, we're not really going to do an auction" with somebody who had already pretty publicly committed to bid.

And then we have -- but we've morphed -- transformed into this era where companies

now affirmatively know, without any kind of entrenchment, that we'll sell. But people are faulting them and saying well, if you go to sale, you actually have to do a kind of -- put yourself on eBay, expose everybody to the risk of that and -- because there's some language in some cases about auctioneers.

And what I'm pressing you, Mr. Jenkins, is when the board -- you don't lay a glove on the other directors; right?

MR. JENKINS: Right.

THE COURT: When there's no why for, like, why they would do something that would not maximize value, shouldn't the Court be hesitant to enjoin their actions?

MR. JENKINS: That's what I was getting at a minute ago. I don't think you technically need it under the Delaware jurisprudence, but I recognize as a practical matter Your Honor needs to have some reason to enjoin the transaction.

It would be easy here if, for example, Mr. Hicks had spurned all the strategic buyers and just talked to one private equity buyer. That I could make a good argument about and I wouldn't have to go very far. I don't really understand this one, because

the only thing I can speculate is, in his other conversations with the other private equity buyers, which had been going on for some years, he hadn't gotten a warm and fuzzy feeling and he did get that with Vestar concerning his future prospects. It's the only thing I can think of that makes any sense.

THE COURT: But the slide, for example, from the one -- the slide you cite -- maybe it's in your reply brief. I've read -- I've gone through a lot of the exhibits, but you cite to one slide I think where they expressly mention partnering with management. I mean, I'd be -- you know, if there's a -- if there's a private equity slide deck out there that says -- that doesn't have those words, I'd love to see it or, like, "replacing management, our modus operandi," you know, I don't think that's probably in there.

But couldn't it also be, frankly, no one ever mentioned a price or anything that was that attractive or was talking about "How about we put together our dumpy little health care company with your," you know, "vital little competitor and we'll go gangbusters" or ...

MR. JENKINS: That's a possibility,

but it seems unlikely that all 15 of the people who approached him would have had that same problem or similar problem.

THE COURT: But why would 15 -- why would none of them -- put aside Mr. Hicks, Citibank's talking to him. And you're -- you know, you rightly point out that Citibank's bread gets buttered when a transaction is done.

MR. JENKINS: Uh-huh.

THE COURT: But that means when Citibank talks to private equity firms, private equity firms know that Citibank's butter gets -- bread gets buttered or their butter gets breaded, depending on -- I assume butter needs it, too. I would like to think it's a mutually-beneficial relationship; that they know when Citigroup does that, that Citigroup has an interest. You know, put aside the client, but Citigroup has enough of an interest, frankly, I think to cook up the deal; it gets paid.

MR. JENKINS: Right.

THE COURT: And nothing ever came ...

MR. JENKINS: I don't have explanations for a lot of these. If the price had been a blow-out, I would understand it all, because I

understand the point --

THE COURT: And talk to me about the price. And I'm going to tell you, I -- I taught -- "taught" is probably the wrong word. I presided with someone who's an economist over a seminar on valuation in part to learn it myself, and I taught it for four years and I've done a presentation.

It had been my understanding that the comparable methods of valuation are a way -- are designed to do the same thing as the DCF model, which is to provide an insight into the value of the company based on its future earnings potential but by using a market multiple in -- as a proxy for an understanding of that future growth.

Here, what we seem to have is a transaction where, using comparable methods of valuation, the transaction looks quite attractive; but using a direct measure -- and I'm going to put aside what the board views as the more aggressive case, the sensitivity case. (Continuing) -- using the sensitivity case, it's just not that stunning a deal. It's in the lower end of fairness. It's just not.

And given what the company has to say about its future, your point is why take it. What's

funny going on here. I mean, what -- is the DCF model being driven by the out years and, therefore, the next-year's EBITDA and current-year EBITDA is so low that the market multiples are making the deal look -- I'm just having a hard time figuring out why one method of valuation is so starkly different than the other.

MR. JENKINS: I don't have an answer for that, Your Honor. I simply didn't look at the DCF model that closely to figure out -- it takes awhile, at least for me, to figure out why it's doing that. But there are enormous differences, which is itself unusual.

Normally, as Your Honor knows from your appraisal cases, if you're doing all this correctly and the market has an understanding -- it's a publicly-traded company. If the market has an understanding of what these cash flows are expected to be, you should have more conversions. And they're just way apart. I do not have an answer for that.

THE COURT: But, I mean, is that because -- you read the testimony of the board, that even with respect to the less -- that the sensitivity analysis, there was some concern -- I think your

friends, frankly, overstate it. When somebody says they have an 80 percent chance of meeting something, that's a fairly good case; and there's also the chance to -- of blowing it out, you know, in the other direction above. So of course there's a chance you miss it, but it sounds like it was a fairly -- it was asked for by the board to be a reliable case. And -- and so that is a confounding factor.

But these multiples, though, suggest that, in terms of how the market was viewing Health Grades, the company got a good deal. Right?

MR. JENKINS: Correct. Perhaps the thing to do, though, is look at the price and the premium that was -- excuse me; the premium that can be imputed on the day that the deal -- that the price was set, which is in May.

Now, defendants talk about the difference between these -- the significant 25 percent in round terms, premium between the market price and the deal price on the day the transaction was announced publicly in late July. But I don't think they can effectively rely upon that, because the price was set in early May. And as we point out in our reply brief, we didn't pick it up until then, that

the -- on that date the premium over the market price was 10.7 percent, I think --

THE COURT: Uh-huh.

MR. JENKINS: -- which -- it's a premium. Some company says "We're going to give a blow-out price. It's going to be a 10 percent premium," those two don't go together.

THE COURT: Well, doesn't that depend -- there is some notion of selling when an asset's fully valued rather than poorly valued. That's a sort of old-fashioned notion. I mean, you can get a great premium -- I mean, there were times in 2008 you could -- I mean, you could -- you know, killer premiums were available; right?

MR. JENKINS: Yes. But there's no evidence here that the company -- in fact, the evidence is to the contrary. The company thought it was going to continue to do well in the future. And it goes back to --

THE COURT: Well, there's evidence -- part of that is negotiating evidence, right, is Mr. Hicks telling Vestar, you know, "We're doing well," blah, blah, blah.

MR. JENKINS: And they were doing

well. And when the -- I guess it was the first-quarter results were released I think in February, the market shot upward. Vestar, I presume, had a suspicion that was coming, which is why it's only a $7 bid. The market got it and suddenly the market price is going up. So $7 is actually a negative premium at that point. One reason Vestar had to increase its price is because it wasn't going to get a deal done otherwise.

So what --

THE COURT: The price was set in May. The deal was not announced until the end of July?

MR. JENKINS: That's correct. So it was about a two and a half-month time break there, at which time, for whatever reason, the market was going -- the market price for Health Grades stock was going down during that two and a half-month period. I do not know why.

THE COURT: Uh-huh.

MR. JENKINS: But you have -- the premium is not a blow-out premium. The metrics you look at here tell you a confusing story. Some of the metrics are -- the price is not impressive; other metrics they are. But the body of evidence is not

such that that board would say "Wow. Look at what we're getting away with here." I just don't see that. And that's one of the confusing factors here.

THE COURT: Is there any coercive element to the termination fee? What I mean by that is, is the termination fee -- termination fee payable simply on a no vote or is it only payable if there's a higher-value transaction entered into within a period -- certain period of time?

MR. JENKINS: I believe it's only the latter. May I look at one of my cocounsel, Your Honor?

THE COURT: Uh-huh. No one in the room seems -- you're not the only one seeking cocounsel.

MR. JENKINS: Right. We'll see if we can get the answer to that --

THE COURT: Take your time.

MR. JENKINS: -- Your Honor. I try to think of Your Honor's question, but there's always one or two that I miss.

THE COURT: Well, the reason I'm getting at is -- you know, you're asking me ... Assume for a minute, the safe assumption that I'm not blown

away by their process, that, you know -- you know, that it's not something, if I were teaching, the way to go about value-maximizing behavior that I would say yeah, this is a great one. But I've got to enjoin the stockholders from being able to accept this thing.

I understand your point that the amount of time that has passed between July 28th and now is not considerable. Even the time of year, arguably, can be distracting. It's a time when people often are on vacation, they're trying to do other things. I understand the financing markets are still a little erratic. And that means if the principal set of alternative buyers or private equity buyers, that they may not have enough time to get their game on. It's not clear to me they couldn't write a letter.

I also -- I want to talk to the defendants about it, but I remain concerned about the extent to which private equity buyers really do vigorously come in when the management team seems to be happy and that they say "Well, there's no deals with management." Well, except management has agreed to vote their stock in favor of the deal -- and that's a pretty good signal of happiness -- and they've signed the deal and, you know, they seem to be all --

all enamored with each other. So I get all that.

But the reality is, depending on their -- the vigorous research being done on both sides of the courtroom now about the termination fee, the stockholders really get the chance to determine for themselves to take this or not. If I take that out of their hands and no one comes forward, it seems like there could be a good prospect that the share price drops. I don't know what it's trading at now; do you know?

MR. JENKINS: The share price as of two days ago was identical to the deal price --

THE COURT: Right. So --

MR. JENKINS: -- which you would expect under these circumstances.

THE COURT: Yeah. Well, I mean, what it -- I take it there's no discernible stockholder unrest.

MR. JENKINS: I'm not aware of any.

THE COURT: Well, I mean, these days, right, with Twitter and, you know, all that kind of good stuff -- I don't know what the difference between a twitter and a tweet is. Is a tweet when you write a twitter? I have no idea. But -- but I know that what

it is, is that, frankly, investors love this kind of stuff. They love creating rumors. They love doing stuff. It's often the case that institutional investors can use these new means of communication to express displeasure with the deal to try to create pressure for something else to emerge.

I take it that nothing like that is going on, to your knowledge.

MR. JENKINS: To my knowledge, none of that is going on, Your Honor.

THE COURT: If I enjoin this deal rather than let your clients -- and -- your clients -- the class you seek to represent accept it, why -- why -- I mean, why isn't the risk of that greater than the reward? especially when, frankly, if there are people who have the courage of their conviction and believe that this company is worth a lot more, they may have one of the world's better appraisal cases. I mean, it's not often you get to go in and basically just say, frankly, the board asked for a realistic assessment of fundamental value and, without shopping the deal, signed it up at a level below the midpoint of the resulting valuation analysis. I mean, you can almost put on the Citigroup DCF; right? I mean, right

there it's, like, a 30 -- what is it -- 34 percent -- 34 cents to midrange?

MR. JENKINS: (Nodding head)

THE COURT: I mean, what am I -- am I supposed to spend Labor Day weekend with this on my conscience, that the poor Health Grade stockholders have had the choice taken away from them by me?

MR. JENKINS: I have several responses, Your Honor. As Your Honor knows, the appraisal remedy is not the perfect remedy --

THE COURT: Uh-huh.

MR. JENKINS: -- because institutional investors in particular -- and there are a lot of them in this case -- have to keep their money in the deal, and that doesn't work for most of them. So yes, theoretically, appraisal would be a good remedy and it could be a better remedy. If it was a better remedy, you didn't have to leave your money in the deal, you could do it on a classwide basis, the argument has a lot more force than I think the current appraisal remedy.

As for a broader explanation, No. 1, this just isn't that attractive a price. That is, if this was, again, a blow-out price, we wouldn't be

here, or at least I wouldn't be here, because --

THE COURT: Well, how many shares -- how many shares do your clients have collectively?

MR. JENKINS: Collectively? I don't know. I'm presuming it's in the hundreds or thousands, Your Honor. They are not institutional investors.

THE COURT: So less than $20,000 at stake totally?

MR. JENKINS: I'm trying to think, do a multiplication. Probably. I'm not certain of that. Could I glance at my cocounsel?

THE COURT: Well, you can do that. Why don't you do that on the break. But I would like that.

MR. JENKINS: Okay. I will get that answer for Your Honor.

So the first -- first answer is, this isn't that great a price. I have two more institutional responses. And one is -- and this may be where the Court of Chancery goes. It occurred to me in reading the case law that we could have a change in Revlon that says "Unless you've got another investor" -- "another bidder out there in a situation

like this, we will not give an injunction ever." That's not, however, the current law. If you don't --

THE COURT: Well, what -- name some situations where this Court enjoined transactions in a situation where there was no apparent coerciveness to the vote or lack of informedness about the vote simply because it found a reasonable probability of success on the merits on the Revlon claim.

MR. JENKINS: I cannot do so.

THE COURT: I mean, Revlon itself, the interesting thing about Revlon is that the source of the irreparable injury, as you may recall, had nothing to do with the stockholders receiving the funds. It's a very odd situation because it's -- the reason that the bidder has standing, because it's a stockholder and you measure whether the bidder's claims are borne out by whether there's been an injury to the stockholder. But the reason formally why the Court sustained the injunction was because of the irreparable harm to the bidder of losing the unique opportunity of buying a company.

The equitable calculus -- as I said, defendants may leave here today, you know -- you know, I may rule today in a way where they're not

particularly comfortable. It is perfectly plausible for this Court to find a reasonable probability of success on the merits but not enjoin something where the risk of injury exceeds the possible risk of an injunction --

MR. JENKINS: Agreed.

THE COURT: -- right? And that's -- isn't that what you're saying about the case law? It seems to confound academics. "Wait a minute. How can you have a doctrine when the Court just doesn't enjoin things?" Well, because, frankly, the Court should be cautious about creating harm to people when they can protect themselves. It doesn't mean you applaud it. There are other remedies, like a damages claim later on. You don't even necessarily have to have an appraisal claim. Some of it, though, does depend on what is the courage, for example, of your clients' convictions, which is if they believe, for example, that this is wrong, will they refuse to tender and, you know, essentially say no and preserve their standing to complain later on.

Now, I take it, is there a 102(b)(7) clause in place?

MR. JENKINS: I believe so, Your

Honor.

THE COURT: Okay.

MR. JENKINS: For a public company, I would be shocked if wasn't these days.

Let me try to answer your question and segue into my third point. My second point was, this Court can decide that Revlon -- that no injunction will be granted except if there's another bidder out there. This Court could do that; but if it doesn't do that, if it doesn't, what I would say, change the current Delaware jurisprudence, then there's a question of okay. How far -- how little can a company do to get away with it?

My first remark was -- as Your Honor knows, I don't do this all the time. I'm not in here all the time trying to enjoin mergers. So some of the last two weeks is me getting up on the law and the facts.

One of the things that struck me was, when I'm reading jurisprudence, most of it Your Honor's, and comparing it to this case, there's no case out there that I'm aware of -- and defendants have cited none -- in which this little shopping -- this little shopping was okay.

THE COURT: Particularly with a private equity buyer.

MR. JENKINS: Yes. So, you know ...

THE COURT: Albeit one with such strategic ambitions.

MR. JENKINS: We're moving down the scale. If this is okay -- Your Honor knows that this transcript is going to go around the Internet by this afternoon or over the weekend or something, and Your Honor's decision will be read by everybody.

THE COURT: It will be fascinating, yes.

MR. JENKINS: And the investment bankers and the counsel who --

THE COURT: It will blow the most recent Paris Hilton story.

MR. JENKINS: The investment bankers and the deal counsel who read this are going to say "If we can get away with this, we can get with anything."

So my point on the -- maybe that's a little overstated. But as they bode, "Well, we're getting pretty close to the point where we're pretty confident the Court of Chancery will not enjoin the

merger no matter what you do," I don't think that's a good result. So we need to draw the line somewhere.

THE COURT: Well -- but -- but -- well, but ... One of the issues -- and this -- it isn't really in here. What the difference is, is, in the old days where -- you know, the good old days of injunctions, there was someone else present on the scene.

MR. JENKINS: Yes.

THE COURT: And that someone else would be, like, one of these players who said -- who actually came in here and said, you know, "I'm," you know -- "Enjoin this thing. They haven't even given us adequate time to put in" -- you know, "They're complaining we don't have" -- "we have a financing out. That's because they gave these dudes six months. They jammed us to put together a financing between July 28th and September 10th, and they won't entertain our offer. And we're serious about this. We're making serious efforts to get financing; and they, frankly, have just jammed us. I don't know why they never talked to us before. When they wanted to sell, we told them wanted to make a bid. They told us we weren't for sale."

I mean, that's what's sort of absent; right?

MR. JENKINS: Yes. From this case, that's correct, Your Honor.

THE COURT: But that was prevalent. You know, when people think about the great injunctions under Revlon, McMillan, competing bids; right? QVC, competing bids; Revlon, competing bids. I mean, it was in some ways a doctrine about people being able to not -- you know, being able to be -- have their offer considered, not a situation of ... Where's the interloper here?

MR. JENKINS: There is none in this case. If I had one -- this would be an easy case if there was a higher bid out there, given how little --

THE COURT: No, no. I mean, I understand the point where some people say "Well, if there was one, there wouldn't be a case because there would be one," except on this kind of thing, I mean, there actually is the plausible situation that someone's seriously interested, you know, couldn't get their financing together. On the other hand, if they were seriously interested, I guess the argument would be they could at least write a letter saying that and

saying, honestly, "We need more time. We need to put back the closing. We'd like the opportunity to" -- "to make a proposal."

And no one has done that; right?

MR. JENKINS: They haven't, but it's the usual -- the deal protection measures here are -- I don't want to say standard, but we certainly have seen them in other cases.

THE COURT: Uh-huh.

MR. JENKINS: It's in here that they have a special force, because you're talking about someone else coming in to jump the claim, knowing that -- I'm not an expert in the area, again; but the termination fee doesn't strike me as something that in itself is going to stop the deal.

The problem on the matching rights and the information rights, if I'm a private equity firm or a strategic buyer that thinks I have an interest in this deal, I don't have access to the private equity that Vestar does and Vestar had before it made the offer.

THE COURT: But can't they get the information if they make a proposal that's superior or reasonably likely to be a superior proposal?

MR. JENKINS: Yes, they have to make a superior proposal first. They have to do that based on only the public information, which puts them at an informational disadvantage.

THE COURT: They have to -- do they have to put something on that's reasonably likely to be a superior proposal or an actual superior proposal?

MR. JENKINS: I read it as an actual superior proposal; that is, they have to put dollars on the table, which, to my mind, means it better be above 8.20 a share.

THE COURT: Does it have to be financed?

MR. JENKINS: I'll find out, Your Honor. I don't know the answer to that.

THE COURT: Isn't one of the things, though, that's little different here about -- in terms of Vestar, to give them some credit, they did offer up closing certainty more typical of a strategic buyer than a traditional private equity buyer; right?

MR. JENKINS: Yes, Your Honor.

THE COURT: I mean, they're willing to be subject to a specific performance remedy. And there is no -- as I understand it, no financing

contingencies at all; right?

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

THE COURT: And, in fact, the target is a third-party beneficiary of the financing commitment papers?

MR. JENKINS: I believe that to be correct, Your Honor.

THE COURT: I mean, that -- that is different than a lot of the deals in the go-shop era which had a pretty weak -- often had a weak reverse termination fee kind of protection and no financing out, but you only pay the reverse termination fee and you weren't a beneficiary of the financing commitment. So you had to chase the banker somewhere.

MR. JENKINS: Right. But we have --

THE COURT: In one case the seller had to chase its own banker, which strategically advised to sign up a deal in which it would be the financing partner and then reneged on the financing commitment, which is an elegant ...

MR. JENKINS: And in addition to the informational disadvantage, somebody wanting to come in under the summer would know that Vestar has

matching -- matching rights, which, you know, in a typical situation, who would want to be a stalking horse for that? Because, again, Vestar has the better information right now. Why would you even want to get into this?

THE COURT: But the -- the stalking -- I mean, that's the argument for the first bidder getting something because they are actually promising to pay. My friends in academia are obsessed with this matching thing. They're just obsessed with it. And I've yet to see any real-world evidence indicating that it matters if you make a truly nonfractional topping bid. You may have a QVC when they -- you know, when you got the testosterone flowing, the irrational bids just kept coming; right?

MR. JENKINS: In an isolated -- in another case --

THE COURT: What you're saying, for example, this company ought to sell for 9-something.

MR. JENKINS: Yes, to be a premium above the 8.20, yes.

THE COURT: Well, right. But I'm assuming -- yeah. I mean -- well, what you're saying is that you believe -- I guess your clients believe

that the fair value of this company is something north of -- materially north of 8.20.

MR. JENKINS: I don't know about the fair value, but what you can get in an open auction, which might be more than fair value.

THE COURT: Well, it might be. But what I'm saying is, then -- you know, how is the matching right going to really chill that if somebody is going to make kind of a really big stretch -- you know, "Don't take this Vestar. Here's 9 bucks"?

MR. JENKINS: It's the combination of everything, the short time period, potential financing problems, the informational disadvantage, the matching rights. And I agree. In another situation you could have all of that; but if you shopped the company earlier, you had all that, you wouldn't have a problem.

Perhaps to put it more plainly, each one of the things that they did in isolation would be okay. It's the problem they did everything. It goes back to my point. There's no case I'm aware of -- and defendants cite none -- in which so little work was done to try to get the best price. Your Honor is asking why they did it. I don't have an answer. I've

given my best speculation.

THE COURT: Uh-huh.

MR. JENKINS: I don't think I have to get there to succeed under any of my points under Revlon. It's an unusual case, and I recognize that the Court -- I've been trying to think this through. I recognize that the Court has concerns about issuing an injunction.

My responses are, again, it just isn't that good a price, and there's no reason to think that Vestar is going to walk, really. If they like it at 8.20 and Your Honor issues an injunction to get a better price, maybe no one comes out. I don't know. If Revlon is to have any meaning here, some line has to be drawn. And it's difficult for me to see where the line can be drawn that doesn't include me but does include somebody else. What does the company have to do? --have a 10 percent termination fee or something, on top of no shopping, on top of not talking to people? I don't know where that line is, but we're getting either very close to it or, in my opinion, we've crossed it.

THE COURT: Well, I mean, there's -- there's 6.75 percent between 3.25 percent and

10 percent. So --

MR. JENKINS: There are, but I was -- I was giving --

THE COURT: No; I understand what you're saying.

MR. JENKINS: I don't know where we go if this is okay.

THE COURT: Okay. Thank you, Mr. Jenkins.

MR. JENKINS: Thank you, Your Honor. Unless you have any further questions, I believe I've made my entire presentation in response to Your Honor's questions.

THE COURT: No, no. You'll have adequate time to come back after your friends.

MR. JENKINS: Thank you.

My friend, Mr. Lafferty.

THE COURT: Mr. Lafferty.

MR. LAFFERTY: Your Honor, may it please the Court. Your Honor, I was puzzled when I read the plaintiffs' reply brief and their reliance on an Internet article touting advice about opening a dollar store and how to increase sales at that store. Plaintiffs apparently want the Court to analogize from

that article and its advice to make sure you put out a big Open sign to the present situation involving the sale of a public company. And as Your Honor I think already noted, plaintiffs' analogy is wide of the mark. Of course if you want to sell things for a dollar, you know -- and I say this maybe -- you put out an Open store -- an Open sign out front. I'm not an expert on dollar stores, but maybe that will help you with your sales. But selling things at a dollar store and selling a public company where you're trying to get the best price that you can are two very different things that raise very different concerns.

Your Honor raised one; for example, scaring away your employees. There are lots of other reasons why you don't go out and put a big Open sign or For Sale sign on a public company. But it's precisely because of those types of concerns and the many business judgments that a board has to make when they're selling a company under our law, the sales process is left to the discretion of the board. And I -- I know Your Honor maybe hates or maybe loves the term that there's no one blueprint -- and I'll try --

THE COURT: I think it's beautiful.

MR. LAFFERTY: -- not to use that --

THE COURT: It's just that --
MR. LAFFERTY: -- too often.
THE COURT: -- it's drilled into our head.
MR. LAFFERTY: But -- but -- but the point is, there is no one way --
THE COURT: Fairness cases often become a battle of the experts.
MR. LAFFERTY: True.
There is no one way about -- that Delaware law proscribes and sets in stone about how to achieve the highest price reasonably available under Revlon.
THE COURT: There isn't, that's true. What there is a concern about, though, obviously, is when a model that is more sensibly used -- you know, I want to hear from your friends at Vestar. But, you know, honestly, there's a big difference between a public company that has thousands of employees deciding to make an overture to another industry player and the risks that that entails compared to something like Vestar. Vestar may be growing into a strategic player. It is a private equity firm. Anyone who works for it ought to know it's a private

equity firm. They do deals. They're going to buy deals. They're not a public company; right?

MR. LAFFERTY: That's correct.

THE COURT: So the idea they're going to just walk away because the target's going to talk to any other private equity, I mean, frankly, it just doesn't have as much natural credibility. A real strategic saying, you know, frankly, "You're going to enmesh us. There's the chance by you doing a process, that it becomes revealed that we're having discussions with you"? That is a material risk, then, and they might not be willing to take it.

Similarly you got to be -- I had the idea -- there was some notion out there that in some public company acquisitions, that a strategic player, a publically-traded Fortune 200 company acquiring another industry player, why don't we have a go-shop. Why don't they let the target have a go-shop period. I mean, that's giggle. I get that; right?

So, I mean, I'm receptive to -- I mean, you heard these arguments over time. I've heard plaintiffs' arguments say why didn't the strategic give a go-shop. Well, it's duh, why don't you. You should never be invited to, you know, the Fortune 200

board of directors' meeting annual gala if you're dumb enough to buy another public company when you're a Fortune 200 company and subject yourself to a go-shop period where you could lose the target and end up a bait fish or weakened or whatever. I get it.

This is Vestar. So Vestar says "We're going to go away." I mean, is the magic words going to be now whenever anybody is a buyer, they just simply say "You got to understand we're leaving. If you talk to anybody else, we're leaving" and that's just a blank check for the target board to do nothing?

Because that's really what's on my mind here, which is why the heck couldn't Citigroup have made some discreet inquiries to four or five of the folks who had expressed an interest in the past and say, you know, "If you're" -- "If you're interested, let us know"? or however the banker does it. And they have ways. Why?

MR. LAFFERTY: Your Honor, may I -- may I answer?

THE COURT: Yeah.

MR. LAFFERTY: The answer is, obviously, the -- is always they could have, right. They could have done -- they could have done that.

But -- but you have to put it in the context of the situation. And I think, you know, the fact that Vestar informed Citi and informed the board that they would walk or substantially reduce their price if we either insisted on a go-shop or a presigning auction or -- or kicking the tires shopping period, that was but one factor that the board had before it. So --

THE COURT: And there was no -- there wasn't even an -- was there some obligation to tell Vestar what other discussions the company was having? Didn't the company actually have a meeting, take a meeting with some other player during this period?

MR. LAFFERTY: Yes. Yes, Your Honor, that did happen.

THE COURT: And what happened at that meeting?

MR. LAFFERTY: The private equity firm came in and -- and -- and made a presentation I think to the management people, and the discussions didn't go anywhere. That -- that party actually did sign an NDA, but nothing ever happened. Nothing -- they never came back. They never --

THE COURT: Was Citigroup there?

MR. LAFFERTY: No, I don't believe

they were.

THE COURT: That's another thing. What is this board doing letting the managers take a meeting with another private equity firm without Citigroup or an independent director there? What's the point? I mean, what is the thinking? Was there any thinking?

MR. LAFFERTY: Look, Your Honor, I -- I can't answer that question. I don't think that -- that's in the record anywhere. I can tell you --

THE COURT: Well, I mean, they were so proud of themselves that Hicks didn't discuss price, but Hicks discussed all kind of valuation ranges with them. And there's an e-mail from a very -- a very strange e-mail, honestly, from Mr. Hicks to Mr. Holstein in March talking about -- it's -- it's Plaintiffs' Exhibit 53 -- which Mr. Hicks talks about, you know, his prior meeting with Holstein and Alpert, who are the dudes from Vestar, right, and they're talking about -- they conveyed a number of strategic benefits which would "accrue to the benefit of Health Grades," and -- this is the important point -- "post Vestar's 'going private' transaction (and, therefore, should be duly considered in any indication of

interest)."

Now, I don't know if that's what got the price up; but it says, "While I have no doubt whatsoever in your and Vestar's ability to create strategic value working collaboratively with Health Grades' management, I wanted to give you an opportunity to expand upon the six principle areas you outlined at the meeting. I will keep these at the highest level ... and "They were as follows:"

And he goes through these things, you know. And it's basically "I have very high confidence that we can get the high revenue growth." And "Our question to you and Vestar would be: what incremental growth can you layer on top of this?"

Now, I don't get this. And I suppose I would be less troubled if it were cc'd to an independent director and to Citigroup and to outside counsel. But it sure as heck looks like if Mr. Hicks' wondering how he and -- was it Mr. Dodge and his brother, how they and Vestar together can just kick booty after the deal. And, you know, I'm just trying to sort of figure this out.

MR. LAFFERTY: Your Honor, may I address this?

THE COURT: Uh-huh.

MR. LAFFERTY: Because there were other things going on, and it is in the record. There -- there -- there was an effort by Citi -- and Citi is not cc'd on this e-mail, but Citi was involved in discussions right in that time frame with Vestar trying to get them to pump up their price. And they came up with a -- a set of, what they called a synergies type of a case, looking at it from the perspective of -- of Vestar, how they might increase the value of this business, trying to pump up -- pump them up as to get the price up as high as they could --

THE COURT: So that's what you're saying should be duly considered in any indication of interest, is, if you can do these things, then you ought to be paying for them and sharing them?

MR. LAFFERTY: Absolutely. And that's, frankly, when -- when Vestar got the communication, this sort of what had been put together by Citi, they threw up all over it. I mean, they said "This is ridiculous. These numbers are" -- "they don't make any sense. We're not even going to discuss that."

THE COURT: But were these things blind copied by Mr. Hicks to other members of the board or the Citigroup?

MR. LAFFERTY: The board was aware that this was going on. It's -- there are board meeting minutes where -- where this issue was discussed. And -- and so that -- that was definitely addressed at a board meeting. There's a board presentation on it that's in the record in the March time frame.

THE COURT: But you --

MR. LAFFERTY: That communication is not obviously cc'd to the board.

THE COURT: Well -- and what I meant, sometimes you could have a situation where the board might want Mr. Hicks and Mr. Holstein -- Mr. Holstein to be perceiving he's just talking to Mr. Hicks; but every time Mr. Hicks does this, he immediately forwards the e-mail to, you know, the directors and the Citigroup and F -- FYI any comment on this so that they are aware of the back-and-forth. I mean, because there is this goofy e-mail, frankly, from Vestar all buddy-buddy to Mr. Hicks about "Hey, here's some other deal with looks like a pretty weak shopping process

and" -- "and," you know, pretty good deal for the -- for the buyer. Maybe this will help you sell it with the board," which is the only way to read that e-mail. And it's just a little chummy; right?

MR. LAFFERTY: Your Honor, I don't -- I don't take that away from that e-mail. But I --

THE COURT: What would you take away from that e-mail?

MR. LAFFERTY: Well, I think it was Vestar's attempt to say "Look, this" -- "this" -- "this is FYI." At that point the deal was just about signed up. I mean, the issue of whether there was going to be a shopping and wasn't going to be a shopping period was already decided. That was in the final throes -- or maybe it might have come right after the deal had been inked. So I don't think it had any impact on the process whatsoever. Indeed, Mr. Hicks testified about it. He had no idea why it was that Vestar sent it to him, and he didn't even understand what it was about.

But, I mean, let me -- let me back up. I mean, the whole notion of the discussions that have been ongoing, this company -- and, again, it's -- it's been -- Mr. Hicks and -- had testified that he had had

repeated contacts throughout a period of years with all the private equity buyers that are identified in the Citi book with -- with the strategics. They were conversations that would come up where they would be approached -- where Mr. Hicks and the company would be approached by them. These folks weren't shy. They knew about the company. And they're not shy enough to say "We don't" -- "We don't know how to make an offer or an expression of interest" --

THE COURT: You're saying, also, several of them got confidential, nonpublic information?

MR. LAFFERTY: What is not clear -- and it's not in the record -- is whether or not -- there -- there certainly had been a couple of NDAs signed within the last couple years with some of these players. It's not clear whether or not they actually followed up to get any confidential information. If they did, it was at a high level.

THE COURT: But what you're saying, the company displayed a willingness to --

MR. LAFFERTY: Absolutely. And -- and evenhandedness. And if somebody else had come forward during that period -- and, again, the board wasn't out

in March, when -- when we took another meeting with a private equity firm, trying to sell the company. We weren't talking with someone who had actually come forward and put the bid for it.

THE COURT: I understand the -- and I -- I -- I have some empathy for the line that the board has to draw -- walk in this situation. On the other hand, that is the time to display maximal body language and other receptivity to the party you're meeting with, such that if they want to make an offer, they know that you will listen; right? And the question is, is the board saying "Oh, is Mr. Hicks out there?" We don't know, right, because the board let Mr. Hicks unsupervised take that management meeting; right?

MR. LAFFERTY: I believe that Citi was not involved in that, and no outside board members were there, to my knowledge. I -- you know, I can confirm that with Citi, but I don't believe -- I don't believe there were --

THE COURT: Tell me about Mr. Hicks, exactly his financial incentives as you understand them. I'm trying to get at this -- there's something like an additional 14 million bucks that he gets if

he's on board the day after the -- a merger closes or the tender offer closes?

MR. LAFFERTY: Your Honor, yeah, he's entitled, I believe, to a noncompetition payment if, you know, certain things happen.

THE COURT: Well, that's an additional -- you're saying that when this thing closes, he gets about 31 million bucks; right?

MR. LAFFERTY: It's over 30 million. I thought it was a little bit higher than 31, but -- but it's a big number.

THE COURT: It's almost -- it's 31, almost 145, according to your brief. Then you have a footnote where you say he'll get an additional 1.7 million shares if he remains employed at the completion of the offer.

MR. LAFFERTY: Correct.

THE COURT: Which would give him another almost 14 million following his sale of shares. Now, does that mean that he can -- he's going to for sure sell them to Vestar?

MR. LAFFERTY: Yes.

THE COURT: Okay. If he quits the day after, he gets to do that, or does he have to stay in?

As long as he's there the day after and honors the noncompetition, he can take the 14 million bucks and run?

MR. LAFFERTY: Your Honor, I -- I believe that's correct, but I would have to confirm. I don't -- I don't know as I stand here, but I believe that is correct.

THE COURT: So he doesn't have to remain employed.

MR. LAFFERTY: That -- I believe that is correct. And --

THE COURT: But that's also the sort of amount of money he could potentially roll into an equity pool; right, depending on what arrangements he made with Vestar?

MR. LAFFERTY: Your Honor, I -- I assume that he could roll any amount of money he has in his bank account into an equity pool if that were offered to him and he decided to take it at some point.

THE COURT: But, you know, what I'm trying -- and, again, there's nothing about -- I admit -- I understand what the board did what it did and said "Don't talk about your employment

arrangements."

MR. LAFFERTY: Right.

THE COURT: On the other hand -- you know, I'm -- I'll pick on your friend who's getting up next who told me about they don't, you know -- forget management -- they don't need -- they can do managementless transactions. They're just awesome. Well, maybe they can. Their pitch isn't that way. The loving embrace of the talking points was not that way. That's not the tenor of any of the previous communications.

You know, there's script involving Mr. -- what is it -- is it Holstein?

MR. LAFFERTY: Yes, Your Honor.

THE COURT: Right. (Continuing) -- where he's talking about how much he digs, you know -- and he actually said something sort of like this; right, this script?

MR. LAFFERTY: You know, he testified -- or someone testified to the effect that they don't know whether that he actually used it as a script or not.

THE COURT: But this is the tenor of what he's telling the people; right?

MR. LAFFERTY: I wasn't there but I assume that that is correct. Your Honor, my --

THE COURT: And they're "delighted to have the opportunity to partner with each and everyone of you.

"Without each and everyone of you, we would not be here today.

"As partners with management, we look forward to supporting you in every way we can as you and your team lead Healthgrades moving forward."

The "you" in that is referring to Mr. Hicks.

MR. LAFFERTY: I believe it is. I mean, Your Honor, I think we've been -- been very up-front with -- with the notion that I think Vestar has said that they -- they would like to retain management. They've got no arrangements to retain management.

THE COURT: They don't have any arrangement. But the thing I have to -- your -- the lead dude on this was Hicks and then the Citigroup bank. Hicks' financial interest, in one way he has more interest than anybody in the world. I mean, if he were saying today "I do not want to do this

anymore. I have been doing this since the Clinton era and like Clinton, I want to move on to other things. This is my final nut," I'd have -- you know, that would be -- "and my brother's doing the same," that would give me an enormous amount of confidence, right, that he had -- he really wanted to squeeze the best out of the market. But he's got another reload opportunity.

And one of the problems in these situations, frankly, with private equity if you set the mark for yourself, right -- I mean, you want to get enough so that, like I said, you can do all those things, your boat, your house, whatever your -- your amusements are and be financially secure; but you also know "Hey, I'm" -- "I'm still in the game." And if you push that up to 9.50, that's going to push your equity compensation target and all that kind of stuff up.

What I'm trying to figure out, you know, how I endorse in some way a model where you now move to basically single-bidder negotiations with private equity firms, because private equity firms, they have such a scary capacity to walk away, that you entrust to someone whose financial interests are

tremendously different from the stockholders the primary negotiating role. You allow them to go out and have unsupervised communications. The only expression of interest during the process is not supervised by the independent directors or the financial or legal advisors of the company. And then the Court is supposed to take assurance in a market test that is done at the height of summer vacation season, is only 30 to 40 days long, during a difficult financing period, when all the body language to the strategic -- to the private equity marketplace is the Hicks brothers and their pals are very happy with the deal they have. It's pretty low bar.

MR. LAFFERTY: Your Honor, may I respond --

THE COURT: Yes.

MR. LAFFERTY: -- to that? There was a lot --

THE COURT: No. And I want to -- I'm trying to give you, like I gave Mr. Jenkins, my concerns.

MR. LAFFERTY: And I think you have gotten them out on the record, and I'll try to address them.

I think one of the things I want to go back to, you raised the issue of noncompetition payments and other things Mr. Hicks may have received. Those agreements -- I think there are a couple important take-aways to them. One, they preexisted the situation. They were public. They'd been out there. So this is a --

THE COURT: They don't trouble me.

MR. LAFFERTY: Yeah. I know. So --

THE COURT: And what I'm saying is, is, if I knew, frankly, that he was -- that this was his last dip of the ladle, I would have more comfort. But it's not.

MR. LAFFERTY: I -- I understand.

THE COURT: You see my point?

MR. LAFFERTY: Yeah.

THE COURT: I'm not troubled by those agreements. And actually those agreements could give him -- you know, could give me more confidence in him than I have about his ardor to get the highest possible price if that was going to be the last way he would reap value from the company.

MR. LAFFERTY: Okay. Your Honor --

THE COURT: But it is absolutely clear

that he and Mr. Dodge and his brother have a fairly serious and likely interest in staying in as management at Health Grades and having a second chance to make a lot of money from this.

MR. LAFFERTY: And, Your Honor, my point is, one, they're preexisting; but, two, they're bidder neutral. And I understand Your Honor may be suspicious; but -- but from the perspective of folks who have this, that it's out there, I mean, his incentive with respect to his equity is to get the best price. He's talked -- I mean, they have talked with these folks, the PE firms over the years. These are not -- to -- to elevate the contact that we had with one particular private equity firm during this time period --

THE COURT: Uh-huh.

MR. LAFFERTY: -- to the point of an expression of interest in making a bid is probably saying too much about that. This was a routine contact. And so I don't want to -- I don't want to -- I don't want to blow that out of proportion. I don't want to blow it out of proportion --

THE COURT: But this is someone who --

MR. LAFFERTY: -- in the --

THE COURT: This is -- this is someone in a private equity firm with whom Mr. Hicks kind of clicked. You know, I'm not trying to exaggerate it. But he had a comfort -- a professional comfort -- I'm not -- you know, these guys aren't going on -- playing golf together or vacationing. I mean, they may have played golf, but that can be professional. I don't do that circuit, but I know people do.

But what I mean is, they're not vacationing with their families together. I'm not pretending that they're, you know -- they have season tickets together to a football team or something like that.

But this is someone -- these are people that have -- have gone along such that Mr. Hicks, frankly, asked Mr. Holstein to join the board.

MR. LAFFERTY: That's true.

THE COURT: Right? And that's a situation -- who you work for is important. You know, Mr. Hicks -- for Mr. Hicks, who he worked for might be more important than 10 cents a share, particularly; right?

MR. LAFFERTY: Your Honor, I guess it

could be; that there's no evidence of that in the record. I mean, the -- the contacts -- you know, Your Honor, I -- we can debate the point about the so-called warm relationship. There's a handful of e-mails over a period of a number of years that are business communications. Were they cordial, were they pleasant? Absolutely.

THE COURT: Yeah. I mean --

MR. LAFFERTY: Would you expect anything else?

THE COURT: The CEO's asking people on the board. I mean, that usually is a certain --

MR. LAFFERTY: Mr. -- Mr. Holstein had an impeccable record. He was in -- he was in the space. He was CEO or senior executive at WebMD. It was -- it was -- it was logical. You know, it was a logical approach.

THE COURT: That's actually my primary care physician, WebMD.

MR. LAFFERTY: Your Honor, one other thing about that. And I know Your Honor has addressed your concerns about Mr. Hicks and his involvement. But I do want to step back, because I think it's important.

You did point out to Mr. Jenkins, he's got -- I think you said -- you used the phrase haven't "laid a glove" on any of the other directors. They don't even make an argument that any of them are interested, conflicted.

THE COURT: But -- but they're -- they're kind of inactive. I don't mean that they didn't have meetings. And I'll put this down. I mean, I don't think this was the advisors' best day. I mean, you've decided to do, right -- but the board -- the board has decided to deal exclusively with Vestar. The board has -- you know, its advisors spotted that they don't want Mr. Hicks talking about his employment arrangement and that's their prophylactic to him getting into any kind of trouble. And he won't do formally the price, although, frankly, he got into the price later. He seems to have been in the price from the beginning. He seems to -- we saw the e-mail before. It's perfectly plausible the gloss you put on it, the e-mail about the expression of interest.

It also has another kind of connotation. In all of it, the independent directors and their advisors -- and I'll put it on the record --

let them go -- let him go around unsupervised, like no one knows -- you know, one of the most important things you do in a situation where you try to show a level playing field is to make sure if you have an actual auction going on, is to make sure that the due diligence meetings are conducted on the up-and-up among the various bidders and that there's no, like, lovey-dovey, you know, kind of nonverbal communication going on between management and the next and that every time a risk comes up next, the management's like wincing like it's nuclear winter coming. I mean, that's not exactly postgraduate M and A by now. It's pretty much probably, you know, early middle school.

And here, when the board makes the most narrow channel approach, the one opportunity to talk to a private equity firm because they're not going out and doing any more of these -- I'm assuming Citigroup stopped doing their ordinary prospecting -- all we know is Dodge and the Hicks brothers had -- took a meeting and nothing came of it; right?

MR. LAFFERTY: That's correct.

THE COURT: I have no idea what they might have said to Citigroup or the lawyers or what they might have said if an independent director was

there. Right?

MR. LAFFERTY: I -- I don't believe that's -- it's not in the record anywhere. That's correct. Again --

THE COURT: And the independent directors are pretty much relying on Mr. Hicks and Citigroup to tell them what the state of the market is; right?

MR. LAFFERTY: That's correct. I mean -- and they had their own knowledge of the business and --

THE COURT: Right. But none of these meetings or none of these things -- I mean, admittedly, Citigroup was involved in them. On the other hand, Citigroup, you know, I mean, a bird in hand for them is pretty good. Did they get credit for a higher bid?

MR. LAFFERTY: Your Honor, I don't know if it was a graduated fee for a higher bid. It was -- it was a transaction fee, I believe.

THE COURT: Right. If they got a transaction, they got 3 1/2 million. Otherwise they got a half million. But if they got a transaction that was a dollar more, did they get any more?

MR. LAFFERTY: I -- I have to look at the engagement agreement. It may be that they get a percent of -- of the higher deal price.

THE COURT: Of the topping?

I mean, what is the standard if this is okay? Is it just you can always do a single-bidder strategy?

MR. LAFFERTY: I don't -- I don't think there are any hard and fast rules here. I'm not suggesting that Your Honor ought to make one.

THE COURT: But why let the tender -- you know, why the tender offer route? Because even then -- you know, Shearman obviously was aware of this -- that the shortening of the process made it more difficult for an interloper. It's right in the board book. And nobody pushed back against Vestar. In other words, "We want to put the 8.20 back in the hands of the investors earlier."

I mean, yeah, you can always say that; but you have to weigh that against the fact you have really shortened the window; right? I mean, wouldn't a long-form merger -- when would a long-form merger have gone through?

MR. LAFFERTY: I think it would have

taken probably three months.

THE COURT: Which meant there could have been more room for the passive market check to actually work.

MR. LAFFERTY: There's no question it would have been a longer period of time if we had had a -- a shareholder meeting and a vote on the merger, no question.

THE COURT: Who pressed for the tender offer route? --Vestar?

MR. LAFFERTY: It was proposed by the buyer and the board looked at it. They considered it. They did get advice from their advisors that, you know, the time period you were looking at, which here it's roughly 44, 45 days from the date of the announcement to the date of the tender close, would be enough for another party to come forward and to put forth an acquisition proposal and get information that potentially -- you know, assuming the board determines that it could lead to a superior proposal. And it is standard, reasonably likely standard in the merger agreement.

THE COURT: So the board had the flexibility, in your view, under this to delay --

well, I mean, what discretion did the board have to delay the tender offerer's closing while considering a proposal that's reasonably likely to be superior?

MR. LAFFERTY: I don't believe that the board has the absolute right to -- to -- to terminate or hold up the tender offer under those circumstances. But I think the board has obviously its obligations of disclosure, and it's -- it's committed to that. This is not a sort of force-the-vote type situation. The board --

THE COURT: So that they couldn't actually extend the September 10th --

MR. LAFFERTY: I don't believe we could mandatorily do that without -- without consent of the buyer.

THE COURT: And without formally terminating the merger agreement.

MR. LAFFERTY: But there would also be issues, I believe, under the securities laws about whether or not this was material information that was put out and would likely lead to an extension of that period.

THE COURT: But in order to actually formulate a superior proposal, I'm sure the board

would have insisted that the interloper have secure financing; right?

MR. LAFFERTY: I -- I can't -- I can't speak for that, Your Honor.

THE COURT: Typically you do; right? I mean --

MR. LAFFERTY: Look, the size of this deal is such that -- and there's enough equity capital out there I believe in both private equity -- and obviously strategics are different -- that, you know, that that issue of financing I think is less -- less of a concern than it might be in some larger deals.

Obviously Vestar here has got a fully-funded deal. They're not, you know, doing a debt financing raise; and certainly there are a lot of other private equity buyers, probably including every one that's identified in that Citi book, that have the capability and the wherewithal to come in and pay the $300 million or -- or add a number on top --

THE COURT: What you're saying --

MR. LAFFERTY: -- to buy this company.

THE COURT: -- they have committed capital that they haven't --

MR. LAFFERTY: Absolutely. And that

is in the record. There is -- not with respect to these specific buyers, because obviously we haven't gotten discovery of their financial situations; but the testimony from Citi and from the Vestar representative who were out there doing this for a living was that there's a lot of PE firms with a lot of vetted capital to deploy. And any one of these players could have come in. And -- and not a one of them has come in to even kick the tires. Even -- even though they haven't been shy of picking up the phone and calling Mr. Hicks --

THE COURT: Well, to kick the tires now, you have to make a formal --

MR. LAFFERTY: That's correct.

THE COURT: -- expression of interest at a superior price; right?

MR. LAFFERTY: That's correct. And the advice -- and, again, there's a lot of different ways you can do this process, right. I mean, the board had all of the information it had; and it had a to weigh and balance it, the risk of the price going down. The board thought this price was a great price. And --

THE COURT: Yeah. Tell me about that.

Why the striking disparity between comparative methods of valuation in the DCF? And put aside that it's misleading, the base forecast, which seems to have been not the base. The sensitivity case seems to have been the base forecast, right, the more realistic forecast. There seems to be some -- there -- there's just an unusual discrepancy between the two. And I'm trying to figure out --

MR. LAFFERTY: Well, I believe, Your Honor, it's in the growth rates in the DCF.

THE COURT: Is it because of the later year being --

MR. LAFFERTY: Yeah. I think it's because of the size of the growth rates that are -- that are -- that are built into these projections. And then --

THE COURT: And that the comparable method, just so -- I mean, is basically taking either the current -- the current-year EBITDA --

MR. LAFFERTY: Correct.

THE COURT: -- and the next-year EBITDA and then using a market --

MR. LAFFERTY: Absolutely, because you have -- obviously the -- the -- the multiple for the

2009 actual -- it was an actual number that you know. And you're comparing that to what the comparable transactions are. And it's a terrific comparable multiple. There's no -- been really no rebuttal or dispute about that.

And -- and then when you're looking one year out at 2010, again, you got better visibility into this year. We're already -- we're already, you know, halfway done or more than halfway done, almost three-quarters done. You sort of know where you're headed. You have much more confidence level in those types of numbers.

When you're getting into the issue of five years out and then doing terminal value multiples that are layered in on top, which are -- which are high -- I mean, you look at the numbers, you know --

THE COURT: How much of the growth rate; do you know, is in the terminal value?

MR. LAFFERTY: Your Honor, I have to look at the number. I think there's a chart in the banker's book that -- that -- that has a range -- does a range sort of across the top of the chart. And I -- I think there were, like, 11 -- 11 to 12 percent, in that -- in that range for a terminal value multiple.

And, you know, I -- look, that's -- that's my understanding of why the number's -- there is sort of this discrepancy.

The board did consider all that. I mean -- and they obviously wanted -- they actually sent management back when they got the first set of -- of projections, because, again, this was not something the company did routinely. They didn't have a set of five-year projections. They specifically asked the management team to put these together for purposes of analyzing the expression of interest and, frankly, for purposes of giving them to the buyer. The buyer, I think, had requested a set. The board authorized that to happen.

They looked at them and said "Look, these look really aggressive." And so they asked, "Give us a reasonable case and go back." And they did. And they did a second set. And I agree. Look, the midpoint of that range is still higher than the 8.20, but that wasn't the be-all and end-all number that this board really looked at. And they -- and Mr. Wahlstrom zeroed in on it. And his -- his copy of the board book where he -- he literally circled -- circled the key multiples that -- that he thought were

the ones that he needed to focus on.

And what we have here -- it's very interesting, because I heard Mr. Jenkins talk about the price. And I hadn't -- had sort of been prepared to -- to really address this, but he said it again today and he argued it in his reply brief, is, this is an issue about the premium not being high enough, in his view. We don't have an expert like the plaintiffs usually do, Mr. Keith or whoever it is from Texas, that usually comes in and gives us an affidavit saying "This is an unfair price. This is ridiculously low" for this reason and that reason. We don't have that.

What else don't we have? We don't even have an affidavit from their own clients, the hundred shares that they may own or the thousand shares that they may own, the $20,000 nut that they have in this, saying that "This deal is bad" or that "We don't like this price." What we have are arguments by lawyers that the premium ought to be measured against the day prior to the day in May when -- when we kind of agreed on the 8.20.

THE COURT: Well -- but isn't it your burden under -- technically under Revlon to prove -- I mean, they have to earn the injunction; but QVC says

the burden's on the directors to prove they took reasonable steps to ensure that they got the highest -- you know, the price that's -- best price reasonably available.

MR. LAFFERTY: That is --

THE COURT: And -- and --

MR. LAFFERTY: Yeah, that's true.

THE COURT: -- we really don't know, do we?

MR. LAFFERTY: Your Honor, I would say we know as well as you can know anything in this world; that we -- we had a situation where the board -- and you're measuring the reasonableness of the directors' action at the time they took this decision, okay, and you had a body of the evidence that they had. They had advice from their advisors, Citigroup and -- and the lawyers. They had their own knowledge. They had what management imparted to them. They knew Vestar's position. They knew the price had come -- through discussions with them, had come up significantly to a point where they, the board, made a judgment that they thought it was a preemptive price. We can debate that until the cows come home. That's not what Revlon is about. That's not what the inquiry

of the Court is, is was the process that they came to reasonable. And the board negotiated for a provision that allowed them a post-signing window shop period.

And since -- in that time period -- and I -- granted, it's --

THE COURT: Mr. Jenkins, I think, conceded that most of the other likely buyers were private equity firms. And you cite a few private equity tops. Is ... I'm supposed to rely on the market basically that the private equity, really, nobody cares about management's happiness anymore. They're really willing to always aggressively compete with each other and even in a very short window where management's happy, management signed up a voting agreement, people are going to flood in for passive market checks if there's really a buying opportunity.

MR. LAFFERTY: Your Honor, I think the answer is yes. In terms of what we have in the record -- look, I -- I don't know -- I don't think any of us know what the etiquettes are or the arrangements are and the private -- as they may be among private equity firms. I actually don't believe that that ought to be the be-all and end-all of the analysis, because whatever deals they have with each other about

not topping, why is that -- why should that become the be-all and end-all of the board's problem here?

THE COURT: Well, because the board's problem is, if that -- if you have a group of buyers who go around, part of their way of doing business is to make management teams happy.

MR. LAFFERTY: Correct.

THE COURT: They can be useful to stockholders because they will make bids, but the boards then have to take into account the dangers that the CEO and, frankly, Mr. Hicks, his brother, and Mr. Dodge have fundamentally different interests than other folks; and that if -- part of why private equity doesn't do it is, "You don't mess with" -- part of it is "I don't mess with your deals, you don't mess with mine." Part of it also is, they're sending a generalized message to the management community that "We do deals when we are welcome by management. We don't do deals when we're not."

MR. LAFFERTY: Your Honor, may I -- may I address?

THE COURT: I understand, we may have -- private equity may have proliferated, but among the big boys, that's a fairly unbroken

tradition. I was interested to see the names of the entities that you -- you mentioned made topping bids.

MR. LAFFERTY: I actually think --

THE COURT: Because I learned about them for the first time by reading about them.

MR. LAFFERTY: Your Honor, there are actually -- look, on the record you have -- Your Honor had raised this issue --

THE COURT: No, no.

MR. LAFFERTY: -- at the scheduling conference and we had a week to go out and do this research, we have more. We -- we found a lot more. Every deal, though, is different. There's a unique set of factors that go into each one. We gave you four examples. That are a lot more out there. I will say that on the record.

THE COURT: Of no --

MR. LAFFERTY: We could give you more.

THE COURT: Of no-shop interloping.

MR. LAFFERTY: And that's -- and that -- yeah, absolutely, there are. And there are lots -- and in more recent history, there are lots more -- I think they -- they become more prevalent in recent years; but there is history over the last five to

seven years when these deals are being done where there have been examples where PE firms, they're not reticent in coming in in these circumstances and topping.

And I -- and I would say this: I understand that there's always a perception management -- that there's a maybe a perception out there publicly somehow that management's happy. But anybody could look at the support agreements. They understand that this terminates on a higher deal. And I think -- I think that sends a message. There's no -- there's been no management piece cut. They would know all that if they wanted to come in and make -- make a bid.

And -- you know, so I think that -- I think that changes the equation. And I don't think there's any -- and there's no barrier -- and we have no private equity firm in here today jumping up and down saying "We were treated unfairly, that the door was slammed in our face." We didn't even get anybody that picked up the phone and called and say, you know, "We might be interested. Can you talk to us?" Nothing. No sign -- no sign of --

THE COURT: That's part of why I asked about the etiquette. Because if the etiquette was the

old school etiquette, you wouldn't have that because, you know, they wouldn't do that because they wouldn't perceive it as unfair. They would just perceive it as just management made their deal and they move on. If what you're saying is that the etiquette's changed, then I take your point.

MR. LAFFERTY: Well, I'm also not sure that whatever the etiquette was where you had the -- the era of the big private equity club deals, those deals, at least right now, are gone. Whether they're going to come back or not is another thing. And maybe in that context private equity firms might be concerned "If I compete with you on this, then I won't get a piece of the next one," that type of thing where they're grouped up. This is a different kind of a deal, I mean, in the sense of, one, its size and the fact that there's a lot of, you know, capital that these firms have. And these aren't all the big private equity firms. This isn't KKR and it's not Apollo on the list --

THE COURT: And it's not, like, the original -- I wouldn't even call them club because they're competitors. It's the original stable of private equity innovators.

MR. LAFFERTY: And I don't know whether there, indeed, is this sort of club aspect. All I'm saying --

THE COURT: I heard very reputable people in the private equity say, for example, that yes, the difference between a go-shop and a no-shop was very significant to them because in a go-shop there weren't not these etiquette concerns. There was not, you know, any kind of concern that when you took a flier on your competitor's deal, that you were going to be either upsetting them or management, because by expressly indicating the deal was subject to shopping, that you could proceed. But when it said no shopping, no shopping was no-shop. Your industry partner had signed up the deal. Management had agreed to the no-shop and that was not something we looked at.

And it may have been self-interest on their part, right, because if they each agree -- if it's a small group and if they even agree that's the way it's going to go and if their reputation really is "We want management to want to work with us," that can be valuable even if it cost them a couple deals, because they -- remember, the benefit is when you have your own deal, nobody messes with it.

But you're asking me to buy that that isn't a factor here. And -- and what was used to justify the go-shop period was, "We did do" -- you know, "We did a single-bidder negotiation like a strategic deal. We did it with a private equity buyer, but the assurance was distinct from a strategic deal. We got a" -- "an affirmative period to test the market."

MR. LAFFERTY: That's correct.

THE COURT: And now the evolution is someone like Vestar can come and claim they're strategic because they got a couple different health care portfolio companies, say they're going to walk away if they hear a flutter. And the board says "Okay." And management says "Well, we're really scared of that. We're going to lose them. So we'll basically do a strategic model" in circumstances where the likelihood of a passive market check bringing out a higher bid is far less likely than in the strategic situation where you often have a consolidating industry and genuine competitors need potentially to enter the marketplace, you know, in order to seize a unique opportunity or they're going to have a competitor get it; right?

I mean, what's unique about Health Grades to any of these other private equity firms?

MR. LAFFERTY: I think some of them -- some of the other players that are listed on the slide have -- have entities that they own that are in related spaces. I -- I can't say that anyone matches up with Health Grades --

THE COURT: Uh-huh.

MR. LAFFERTY: -- and is a competitor by any stretch; but I do think some of them have interest in this space and have other companies that are related to this space, for sure.

THE COURT: I mean, isn't it pretty easy to tell the story your clients are telling anytime as long as you got good scriveners in the boardroom?

MR. LAFFERTY: Your Honor, look, I -- I don't think we're just telling a story. I mean, the story -- the record that you have is the record as it happened. I mean, this record, I think, is -- is a good one. And I don't think it's just a scrivener issue about what happened in the directors -- in the board meetings.

And I think the connotation of using a

punch list that the plaintiff uses is not supported by this. And -- and it wasn't just sort of the directors touching the bases. These directors were engaged. They met repeatedly. They had independent advisors, independent lawyers, and they received that advice and --

THE COURT: For the list, right --

MR. LAFFERTY: Yeah.

THE COURT: -- there was a list put together, a combination of Citigroup and management, the list of potentially interested parties. There are not slides on each party. There's not indication that the board actually went through the 15, went through the contact, asked Mr. Hicks, "Did they say at that meeting, did they express an interest in an MBO?" and Hicks say "Yes. And I" -- "I said well, we're not for sale, but we don't" -- "we're always" -- "we always listen" or something like that, you know. And they never came forward, as opposed to saying "I told them firmly we were not for sale" and the independent directors saying "Well, we're listening to Vestar now."

Is there some reason to believe these folks won't be as interested as Vestar?

MR. LAFFERTY: Your Honor, I believe that the record is that the board did talk about the contacts that Mr. Hicks had had.

THE COURT: About each of the players.

MR. LAFFERTY: Yeah, to the extent that there were specific things to relate. You're talking about a period of time -- it's not that every one of the seven or eight --

THE COURT: Well --

MR. LAFFERTY: -- firms --

THE COURT: -- what I'm saying is --

MR. LAFFERTY: -- that contacted them --

THE COURT: -- what was done to really sift through the 15 as opposed to just put them on a slide so the slide looked good? I'm talking about a serious look at who might be a possible buyer, what the expressions of interest were, and a buyer -- a possible buyer-by-buyer determination of whether they might have a real interest. Where would -- where do I find that in this record?

MR. LAFFERTY: Your Honor, I don't believe -- other than in the board minutes and in the --

THE COURT: And if we're going to seem --

MR. LAFFERTY: -- board books --

THE COURT: -- to think we just put everybody that we'd ever heard from on the list, then Citigroup and Mr. Hicks said "We're not likely to get a bid for them and then we moved on"; right?

MR. LAFFERTY: I don't -- I don't -- look, I don't believe that that's the way the board minutes read. I do believe that the board discussed the particulars. And -- and they may not have gone through every one, as Your Honor says, and there certainly is not a slide in the book; but to the extent there was anything of any note in -- in the approaches that had been made, those were noted in terms of "Look, these" -- "these people have contacted us before. We've talked to them."

But -- but, you know, was there a --

THE COURT: For example, was there somewhere --

MR. LAFFERTY: -- entity-by-entity discussion? I don't believe that there was.

THE COURT: I mean, if we take a break and I come back, are you going to be able to point to

a slide where Citigroup said "Of the 15, these four expressed an interest in possibly acquiring the entire company"?

MR. LAFFERTY: I don't believe that there is -- there's certainly not such a slide, to my knowledge.

THE COURT: But you're saying that somehow orally each of them was gone over and there was actually a distinction made between folks who would -- you know, I get the idea that you can have a chat with somebody where they might want to do a joint venture, they might want to do something else, some sort of equity infusion that's a lot less than a sale of the whole enchilada. But I take it some of these were folks who had actually expressed some -- may have been a slide, admittedly not followed up on, but had said "Look," you know, "if you're ever thinking of an LBO, think of us."

MR. LAFFERTY: Yeah, I believe that's true. And Your Honor pointed to one of the presentations from, I think back in 2009 that had been made.

THE COURT: But did anybody -- you know, Citigroup supposedly knows the market. And I

get that they said some of them are likely to. You mentioned that everybody has all this capital. Did Citigroup then go by them and say "Look, this one's sitting on" -- "this one's been sitting on a billion bucks in a fund for 18 months, and the fund's expiration is 18 months from now, and they don't have a deal yet"?

MR. LAFFERTY: I don't believe that that happened.

THE COURT: Because for some of the factor you're talking about about the passive market check, it might have made it more likely that people would actually deploy that capital, right, because they needed a deal.

MR. LAFFERTY: I think that is -- that's possible, Your Honor, but I think what -- again, the board -- and I think -- I think Mr. Wahlstrom may have also testified about it, but I don't believe there was a party-by-party discussion. I believe -- I believe that is what Mr. Wahlstrom testified to.

But -- but in terms of what was -- you know, what had happened, I think Mr. Hicks did relate to them if we had received an inbound expression at

some point and whether it had gone anywhere to the board. And that's -- that's what it was. I mean, that was the level. I'm not trying to elevate that to the point of saying that's -- that's a presigning auction. That's a piece of information that the board had in -- in terms of what it factored into the overall picture of what it had.

And -- and these parties -- again, if they had wanted to make an offer or wanted to go somewhere, they would have done it. I mean --

THE COURT: When -- when Mr. Hicks signed up the NDA -- I mean, he did that. He entered into that with Vestar before the board meeting; right?

MR. LAFFERTY: Yes, that's right, because I think, again, the general -- the general approach and the authority -- and the board had said, "Look, if you're going to talk to these players, if they" -- you know, "whether it's a strategic or a financial, you need to get an NDA in place." And that -- that was done as a matter of course.

THE COURT: After he did that, what you're saying, when he shared the information with Vestar, they, unlike everybody else, came back and seriously said they wanted to buy. That's the

distinction.

MR. LAFFERTY: That's correct.

THE COURT: And when is the first time they mentioned a price?

MR. LAFFERTY: Your Honor, I think it -- I think it may have been in December; is that right, or was it?

MR. HIBBARD: February.

MR. LAFFERTY: It was in February, I believe.

THE COURT: So he's just chatting away up until that point basically but the -- with the clear idea that Vestar wants to be a buyer.

MR. LAFFERTY: That's correct. And -- and I do think that that -- you know, look, the private equity firms know -- and any buyer knows that if you want to buy something, at some point you got to come forward and express an interest in buying it. And I think this is -- this is what happened with Vestar. We weren't out marketing the company. I'm not saying we were, but we took inbound calls from all of these players over a period of years, and they -- they knew our phone number. They knew how to get in touch with the company. They --

THE COURT: But that also means between September -- I know it's the listening mode, but that's also where the board and Mr. Hicks could have been putting themselves in listening mode with some others in a fairly low-cost way; right? Because -- in what position is Vestar -- I mean, I'd love to see, you know, the -- the video of the, you know, "We're going to walk away when we haven't made an expression of interest at any price." I mean, Alec Baldwin, you know, who may be the best actor going, maybe he could pull it off plausibly. I doubt it. I think he'd be more giggling at it than thinking he's in Glengarry Glen Ross mode. I think he'd think he's more in 30 Rock mode. "You're going to walk away from what? You're nonexpression of an offer?" You don't have to tell anybody that you're talking to somebody when you're -- when they never even made an offer.

And so there was a whole period, right, before Vestar even got to this where the board could have had Citigroup get in a bit more of a listening mode; right? And they just chose not to do it?

MR. LAFFERTY: Yeah, I don't think that that's -- I mean, look, the board could have done

this differently. They could have done a presigning market check. They could have gone out and either quietly or publicly ran an auction. That didn't happen. It didn't mean that Citigroup wasn't sort of still listening and -- and talking to people that -- that were routine contacts. Again, they didn't do it at the direction of the board to go out and specifically kick the tires. That didn't happen. That did not happen.

THE COURT: Then what would -- again -- and I'm trying to -- okay. So, then, when we accelerate the 8.20 because of the time loss of money as opposed to doing -- you know, by doing the tender offer route as opposed to saying "No; you're going to do a long-form merger." You know, "We didn't give you the go-shop" -- "We didn't get the go-shop. We honored your skittishness because you were so scary and credible; but," you know, "we want three and four months for the market to know this. And we're not doing it the height of vacation season and during a difficult financing thing. We're not going to have a situation where people don't have some time to come forward."

MR. LAFFERTY: Your Honor, look, I --

could the board have done something different? Again, you could always do something different. The board negotiated for the best terms that it could get, and -- and its focus was on the price; thinks the price is a preemptive bid and wanted the opportunity to give this to the stockholders. And that comes with a cost. And it came with a negotiated set of deal protections and terms. And the contract is, frankly -- you know, has a lot of seller-favorable aspects to it. Your Honor focused in on -- on the specific performance and the fact that the funds are fully committed and we have a right to go against the buyer to get that. And Your Honor has been through the busted-deal cases. This isn't going to be one of those cases. This -- this deal is firm.

You know, the issue of the -- the break-up fee and whether there's some coercive aspect to it, I would submit that there's not. There was real arm's-length negotiation --

THE COURT: Well, yeah. What are the features of it?

MR. LAFFERTY: Your Honor had hit the nail on the head. It's a -- it's a -- it's a -- the termination fee has a 12-month tail on it. So if the

stockholders, in essence, don't tender and the deal doesn't get done, they don't -- they don't automatically walk away with a break-up fee. There's a 12-month tail, that if -- it kicks in if somebody prior to the time of the vote --

THE COURT: Okay.

MR. LAFFERTY: -- expresses an interest, they would -- and a deal gets consummated later, they would get paid.

THE COURT: But -- but --

MR. LAFFERTY: It's not payable, in essence, on the two-step equivalent of a naked note.

THE COURT: Right. There's a free -- there's a free chance to either accept 8.20 or not.

MR. LAFFERTY: Correct. Correct. They're absolutely free -- there's no -- there's no coercion here.

And I think important from the record, the other thing that's not here -- and Mr. Jenkins didn't -- didn't come up with any and we didn't hear any in the briefing and Your Honor rejected the other claims they had come forward with at the scheduling conferences -- there's no disclosure claim here. The stockholders in a week from now are going to get to

decide --

THE COURT: And the stockholders basically know this was not preshopped --

MR. LAFFERTY: Absolutely.

THE COURT: -- that the only market check is this passive market check and, you know, they know that going in.

MR. LAFFERTY: They --

THE COURT: And if they --

MR. LAFFERTY: They absolutely know that going in. The disclosure here is full. They have a chance to make a decision.

THE COURT: And they know that there's a -- a very good possibility that Mr. Hicks and Mr. -- Messrs. Hicks and Messrs. Dodge will continue to work for the company.

MR. LAFFERTY: Yes. I mean, look, Your Honor, you can read -- you can read the documents and make a decision yourself whether you think Vestar will or will not keep them on. They haven't committed to keeping them on.

THE COURT: Right. But I think the disclosures indicate that traditionally they do; right?

MR. LAFFERTY: Yeah. Yeah. There is public evidence out there in the marketplace. They used Vestar's website in -- in -- in Mr. --

THE COURT: No. I'm talking --

MR. LAFFERTY: -- Alpert's deposition.

THE COURT: -- about the rendition of the deal.

MR. LAFFERTY: Yeah, there -- there -- there is, yes, Your Honor. And the fact they expressed a general interest in keeping management on is in the D9. So the stockholders are going to have a chance on full information to vote this deal up or vote this deal down a week from today. And they ought to get that chance. They -- these -- these shareholders ought not take that decision out of the hands of the stockholders who now have a chance to decide whether they agree with the board's judgment that this price is preemptive enough to -- to -- to merit their consideration or whether they -- they think the prospects of stand-alone are better.

And I must say, this is a sophisticated stockholder base, putting aside the plaintiffs in this case. There's a slide --

THE COURT: You're not slighting them

as unsophisticated. You're just saying --

MR. LAFFERTY: Not -- not the lawyers in -- in any way, no.

But the point is -- and there's a slide in the Citi presentations -- it appears a couple of them -- about the shareholder makeup here. It's roughly 48 or 49 percent of the stockholders here are institutions. Fidelity I think is right up at the top that has a huge stake here. You're talking about 50 percent of the stockholders being very sophisticated institutions who can make a judgment for themselves whether they think 8.20 is a good price. And that same slide indicates that their basis in the stock on average is roughly 4 bucks a share. And that's consistent with the trading history of this company.

THE COURT: Uh-huh.

MR. LAFFERTY: Why it is that the stock ran up in the -- whether it was just a market run-up, whether it was the company all of a sudden was perceived, you know, as being on the go, why the stock ran up to 7 bucks in May just prior to the deal being signed, I don't know. I'm not an expert on that. I'm not proffering myself as an expert in that; but the

stock has historically traded in the 4 buck range in the year prior and, frankly, even lower. It had traded down in the $2 range, you know, a year -- year-plus ago.

So, you know, there's reason to believe that the -- the stockholders, you know -- I think the record is clear that stockholders have everything that they need to make a decision here.

THE COURT: Do you know what percentage has been tendered to date?

MR. LAFFERTY: I don't know that. And I -- I think we could find that out on a break potentially. I'm not sure that it's particularly large at this point just given the timing aspects of the way these things work. I suspect the number is -- is relatively low at this point. But we -- we could probably check that on a -- on a break.

THE COURT: Well, unless you have something more at this point, Mr. Lafferty, what I propose we do is we take a 10-minute break now.

MR. LAFFERTY: That's fine, Your Honor. I think there are a number of other things I -- I wanted to say. And I think --

THE COURT: Well, I don't want to cut

you off if there is something --

MR. LAFFERTY: Well, I -- I think there are a lot of other -- a lot of other things to talk about. I think irreparable harm, balance of the hardships are obviously important equations here. This -- this isn't just a one-shot equation that the Court has to look at. And Your Honor zeroed in. There's no other bidder here.

Your Honor explained the rationale, I think, behind the case law in this area in Netsmart. Your Honor talked about the notion of, you know -- and you did it again this morning when you talked about the cases where the Court's thrown the injunction flag, it's cases where there's another bid, where the stockholders may have another alternative immediately available to the existing bid that is the subject of the injunction application. That's not present here. And the risk -- there is risk, and there's always market risk that is associated with doing that and the cost. And, frankly, we don't think -- Your Honor, we don't think the Court ought to take the decision out of the stockholders' hands here. And I think that -- that is the critical -- the critical thing here. Nobody else has even --

THE COURT: Even if they bond it?

MR. LAFFERTY: And -- and, Your Honor, you know, there -- obviously Your Honor has also hit on the issue of appraisal rights. There are appraisal rights here for the stockholders. And if they -- they think the price is a bad one and they don't want to tender, they can pursue that avenue. But there -- there -- there's simply no reason to throw the injunction flag here, I don't believe, on this record.

And I think -- and I think, lastly -- this is maybe backtracking. There are a lot of other things about the process we -- we really haven't talked about. But there is case law that still says that doing a post-signing market check is an appropriate way to sell the company and to test the market and to fully inform yourself about the potential value of the company and whether or not the price you're putting out there is, indeed, the best price.

THE COURT: Well, there is that case law, but isn't most of that case law in a situation where --

MR. LAFFERTY: It --

THE COURT: -- you have an industry

and the likely other buyers or other industry players who will have strong competitive incentives to come forward in a passive market check?

MR. LAFFERTY: I don't think that's necessarily true. I think if you go back to cases even like Fort Howard, which was a management buyout -- and that's one of the early cases involving the post-signing market check period, the corporate software cases also were financial buyers; and I believe Yanow -- I think the Scientific Leasing case may have also involved a PE buyer on the back end.

So you -- you do have a history of this. And this isn't -- this isn't actually new. It's not -- it's not really that novel. And I know Pennaco is a -- is a strategic buyer, but there was no presigning market check there. The break fee's very similar. The amount of time period in the tender period is similar. And we pointed out --

THE COURT: Fort Howard --

MR. LAFFERTY: We pointed out all those --

THE COURT: Fort Howard was a very different kind of market check, though; right?

MR. LAFFERTY: It -- it was --

THE COURT: There were affirmative press releases, I believe, about --

MR. LAFFERTY: There were --

THE COURT: -- their being able to entertain offers and --

MR. LAFFERTY: There absolutely was a press release that went out on the announcement of the deal that said they had a no-shop. But, you know --

THE COURT: But we're open to --

MR. LAFFERTY: But -- but that was 1988.

THE COURT: But we read our mail.

MR. LAFFERTY: Well, yeah. That was 1988. This is 2010.

THE COURT: That could be the new -- I mean, I'm willing to, you know, share that with the world, is to have the we-read-our-mail clause. No-shop, but we read our mail.

MR. LAFFERTY: Well, I think my point is the fact that the press release that announced this deal didn't include that. In this day and age, where information is at your fingertips, you know whether or not they can consider a superior proposal or not. And -- and I just think it's -- I don't know that that

distinction is -- is that material in the context of the transaction.

But, again, my point is simply that there are a number of other situations where the Court -- where the Court -- and, again, I don't want to -- it was facts and circumstances, because that's what you have to come back to. Every case is different. But where this Court has approved similar situations involving a tender offer, similar postsigning time periods for bidders to emerge, it's not new. We're not -- we're not creating some new situation. And I think Your Honor doesn't have to go that far. You don't have to create some new rule of law. We're not asking you to do that. I think the law is pretty well settled --

THE COURT: The Health Guard [sic] doctrine?

MR. LAFFERTY: Well, I won't -- I won't go there. But no. I think -- you know, I think some of the other things that we talked about in terms of the deal protections, the match rights point, for example, that came up with Mr. Jenkins, I agree with Your Honor. I don't see anything in -- in the use of the match rights here that are impeding somebody from

coming forward. And, indeed, you know, again, different circumstances. Every one of these is different. You look at what's going on --

THE COURT: Isn't the biggest issue for somebody coming in is, you know, arguably the perception that the top management's happy and has a considerable amount of voting power -- admittedly their vote can go away but it may not want to -- and financing? What you're telling me is financing is not really an obstacle.

MR. LAFFERTY: Look, Your Honor, I -- it -- again, what the board was advised was look, if a buyer had to get debt financing in a choppy debt market, it might be more problematic for them. That is in the -- that is in the record. And I think that's common sense. But the point is, is that -- that the size of this deal is such that a buyer could -- could -- you know, many of the PE firms have that type of money to do a deal.

THE COURT: Yeah. But just realize you're asking me, then, right, the same consideration that you've just said makes a postsigning market check viable also increases the potential attractiveness to those private equity firms of making a bid for Health

Guard [sic] earlier in the year and the potential for creating -- getting some competitive juices going among a couple of private equity firms.

I'm not saying there's perfect symmetry; but the idea is if they're well-loaded with capital such that they can make a deal -- such that they have an incentive and can make deals irrespective of the choppy finance market and the company's doing well, heck, why didn't you get them in the game earlier; right?

MR. LAFFERTY: I -- look, Your Honor, that didn't happen; but --

THE COURT: No; I know. But you see what I'm saying. At every point, then, it becomes easy to script this as -- for boards to simply say "Always go with the bird in hand." It's most comfortable for management because CEOs are control freaks. I don't -- that's not a negative term. I mean, people who manage things. You know, General Marshall was a control freak. That's a good thing, right, you know, when you're running a large organization; but they do have a tendency to not want to get things out of control. That's just natural.

And then what you say is that we can

always justify "Well, wait a minute. They can come forward later. But" -- "We concluded none of them would. We concluded it wasn't worth talking to them because none of them really had an interest." But then it said later, "Well, the market check isn't that good." "Well, wait a minute. They all have an incentive. They all have the money. They'll rush forward in a gush."

MR. LAFFERTY: Your Honor, I think the advice that the board got was -- was twofold. There -- you know, there was enough time if somebody was interested and motivated to do this deal to come in and do it. That was one.

The other thing was, is that I think Citi specifically looked at it from the perspective of given the type of multiple you're looking at here that is -- is being paid by the buyer, the price that's being paid, that the likelihood of somebody else -- a financial buyer in particular coming in and being able to do it and wanting to do it was very slim.

THE COURT: Right.

MR. LAFFERTY: But the key was --

THE COURT: What you're saying, because they have similar financing models.

MR. LAFFERTY: Correct.

THE COURT: And I take it Vestar -- the argument was that Vestar, unlike other private equity firms, because it had relatively more portfolio companies in the health care space, was able to capture some synergies on top of that that others -- other private equity buyers might not have been able to and then justify a plusher price.

MR. LAFFERTY: I can't speak to their motivations; but I think that in part, yes, that's -- that is part of the equation here. And -- and, you know, I think -- you know, did the board rely on the fact that -- that -- they weren't counting on the fact that -- that Vestar was a -- a strategic here. I mean, the contract and the way they negotiated was much more like a strategic contract.

Your Honor, we've talked about a lot of the provisions in the merger agreement. They certainly view themselves as more of a strategic -- and I think as Mr. Alpert testified, they -- they think they can run this company without management, and management decides to go in and take their boat and go to the islands after they get the same price that every other stockholder is going to get for all

of their equity, everything, then they could run this company and -- and move forward without the management team. And that's Mr. Alpert's testimony. They think they -- they believe they can do that and they might do that. They might find themselves in that position.

But the bottom line is, we don't know that. We won't know that until this deal gets done.

THE COURT: Okay. Well, why don't we take 10 minutes. I don't want to slight Vestar, but, you know, we've got basically the defendants' team and the plaintiffs' team. And so I expect Vestar to be kind of to the point, and then we'll finish with Mr. Jenkins.

MR. LAFFERTY: Thank you, Your Honor.

(A short recess was taken from 11:40 a.m. until 11:50 a.m.)

MR. LAFFERTY: Your Honor, I'm going to cede the podium to Mr. Riemer in a second. I just wanted to answer one other question.

THE COURT: Sure.

MR. LAFFERTY: Your Honor had asked about the banker's fee here. Citi's fee is graduation, such that their fee is higher. It's based on a percentage of transaction value --

THE COURT: Okay.

MR. LAFFERTY: -- as defined in the agreement.

THE COURT: Thank you.

MR. LAFFERTY: Thank you.

THE COURT: Good morning, Mr. Riemer.

MR. RIEMER: Good morning, Your Honor. I -- I take to heart the Court's comments and will be as brief as Your Honor wants.

I'd like, if I could, to make two or three quick points -- three quick points. And then I want to answer whatever questions Your Honor has or that remain from those you posed earlier. But if I could just make two or three quick points.

One, to echo the comments Mr. Lafferty made, I personally was involved as a very young lawyer in litigating the Yanow against Scientific Leasing. It's the first case I did in this Court in 1988. And I know for a fact, if the opinion doesn't say so, it was a private equity firm. I've been representing -- as was the case in the corporate software case and the others he mentioned.

Your Honor, if one looks at the implicit market check cases, I think they all involved

tender offers. I don't think any of them involve the three-month long-form mergers that Your Honor spoke of. None of them. We started checking to see how many of them were done over the summer. I think one was. But the reality is, we live in a world with BlackBerries and e-mails where, I must tell you, my phone doesn't stop ringing in August when bankers, unlike me, go to the beach.

The -- people, it's true, historically haven't liked to do road shows to raise money in the summer. But one does deals all the time with committed financing and syndicates them after they've gotten the deal. I don't think road shows are an issue.

Let me just add -- I think it's critical here -- we are paying 22 times last year's earnings. The buyer here, the board could rationally have decided, is going to be paying cash or very little debt with a deal that is priced at 22 times earnings. That's --

THE COURT: What you're saying is, nobody's paying that in the market now.

MR. RIEMER: Well, Your Honor, I don't see a lot of deals. You see more than I do. But 22

times last year's earnings?

THE COURT: Well, you just told me everything -- all these deals you see because you can't go to the beach.

MR. RIEMER: Fair enough --

THE COURT: So you must --

MR. RIEMER: -- Your Honor. And I've never seen one --

THE COURT: I'm not sure which to believe now.

MR. RIEMER: Fair enough, Your Honor. I -- I can't say that I remember seeing anything at 22 times. I was shocked when I saw it.

But what -- what I also want to say is that --

THE COURT: But the marketplace must be valuing the company pretty highly, then, too; right?

MR. RIEMER: I think the marketplace is. I think -- frankly, I've --

THE COURT: I mean, because what is its trading market -- multiple?

MR. RIEMER: I don't recall that. If somebody wants to hand me the number, I can speak to

it.

THE COURT: What, 20 times earnings?

MR. RIEMER: Well, presumably -- well, it's trading now at the deal price; right?

THE COURT: Right.

MR. RIEMER: Before that it was --

THE COURT: It's still --

MR. RIEMER: -- probably trading --

THE COURT: -- trading at the --

MR. RIEMER: -- at 18 or so, that's right. I mean, we're dealing with a company -- and I think this --

THE COURT: And what's the overall market trading at; do we know? In terms of a multiple --

MR. RIEMER: I don't know.

THE COURT: -- where it is?

MR. RIEMER: I don't know, Your Honor. We didn't have a banker in the transaction. I don't know the answer to that.

But what -- what I will say, though, Your Honor, is that I think --

THE COURT: How are your clients able to do the deal, then?

MR. RIEMER: Because private equity has changed so much --

THE COURT: I know. I mean, how they can do something without a banker. I mean, I don't do anything without a banker.

MR. RIEMER: Well, in --

THE COURT: I mean, isn't it part of Van Gorkum that everybody has to have a banker?

MR. RIEMER: Everybody selling --

THE COURT: If the buyer doesn't have a banker, don't I have to -- isn't it a per se rule there has to be an injunction?

MR. RIEMER: Well, the bankers might want you to do that. And after comments you made about your collars and your -- your -- the rest of your shirt matching, they'd be particularly welcoming, I suppose, of that rule. But -- but I hadn't understood that it was required that buyers had bankers.

We -- we brought to the table both a great deal of financial sophistication -- frankly, that's what Mr. Alpert does; but, unusually, we brought to the table the ex-CEO of the company that, my sense is, everybody wants to be. Everybody in this

business wants to be the next WebMD. And we have been buying companies and we have been putting together things in this space. And, you know, we're very confident we could put a price out there that others wouldn't match.

Now, Your Honor said fundamentally he doesn't think it's credible. And I think my client would be complimented to know that you think perhaps the physical resemblance, although I don't know if that's what you would suggest, that Mr. Baldwin might be an appropriate actor to play him. But -- but -- but the point is, it was credible to this board. And with all respect, Your Honor, I don't see why it wouldn't be.

THE COURT: Well, because -- I'm talking about a time frame; right? Your clients come on the scene. When did your clients first make an expression of interest at a particular price?

MR. RIEMER: Your Honor, I -- I think there were -- discussions had started in '08, and -- and at no point did we put a price on the table until early February '09.

THE COURT: Right. But between the signing of the NDA --

MR. RIEMER: I'm sorry. I've got the wrong year. I meant to say February 2010.

THE COURT: No; I understand. And, I mean -- we're talking the signing of the NDA in November of '09.

MR. RIEMER: Correct.

THE COURT: And February of '10. That's when I'm talking about the Alec Baldwin, you know, the idea that your client then is going to give some speech, "By the way, while we have lunch like this, pal, if I find you're having lunch with somebody else, I'm going to walk away. I'm going to take my nonexpression" -- "my nonquantitated -- "quantified expression of interest away."

MR. RIEMER: No. But I think -- I think the record, Your Honor, is that those comments were made again, and they were made in the context of a different point in the transaction entirely.

THE COURT: No; I understand that. But what I was getting at with Mr. Lafferty was, just like your client was being very tentative and hadn't reached a point where it put a price on the table and there's a certain etiquette in how people go about this, that was exactly the time when this board could

have gotten some more recent soundings from your client's industry's competitors.

MR. RIEMER: Could have, Your Honor, but, again, remember, we hadn't come close to a price they were interested in.

THE COURT: Oh, I --

MR. RIEMER: The evidence is they weren't interested in selling unless somebody did that. And, again, I don't think this case is going to require any broad rules of the kind you're talking about.

And I do want to address this etiquette point, because I think it's important.

You know, there is -- whatever the evolution of the jurisprudence on go-shop clauses, we've got a record here -- we don't have issues about whether there was more clubbing than there should have been and all the colorful things that The Wall Street Journal article had about investigations of clubbing or lawsuits about clubbing or anything like this. This is a different segment of the private equity --

THE COURT: What sort of clubbing are you talking about now?

MR. RIEMER: I'm talking about the

clubbing of private equity firms forming a consortium. And I think you knew that, but I just wanted to respond to the question.

Your Honor, what we have here is a different model. We have people who go out and get the ex-CEO of the company that is the -- the most -- there's lots of stuff in the press about how profitable it is, and so on. There is nothing that prevents whatever company you want to imagine wants to be in this space, companies you and I have never heard of, companies you and I have heard of, be it AOL or Google or anyone else, from coming in.

I do want to underscore a point that I don't know was made clearly. When one looks at the merger agreement, the key to the opening up, if you will, of the no-shop is the defined term "Acquisition Proposal." And acquisition proposal only requires an inquiry. And that's what allows them to sign an NDA of a form that's comparable to ours. One is attached to the agreement. That's what allows them to begin negotiation --

THE COURT: So you get nonpublic information by making an inquiry that "We're willing to pay a higher price, but" --

MR. RIEMER: Your Honor, I used to say an inquiry took a stamp. It doesn't. People can make a pdf of the letter and send it in. I mean, that's all it takes. And no one has done that. And I just don't think there's a basis on this record to say because of August we're going to have some different set of rules or to say when there's no evidence of it, that no private equity person would do it because of the structure.

Fundamentally, Your Honor, I -- I would ask the Court this: On what basis in this record can somebody conclude that private equity bidders, sine -- what Your Honor has said is normally the sine qua non of a management buyout, an agreement on the price at which management will take equity, an agreement on the price at which people will continue to work? Those issues are important when you're talking about people who are taking $40 million out of a deal and have every incentive as the other stockholders to get that per-share price as high as possible.

THE COURT: Well, no, they don't -- I mean, I understand the way that this was done puts Mr. Hicks and -- the Messrs. Hicks and Hodge [sic] in

a somewhat different -- Dodge -- it's Dodge, isn't it?

MR. RIEMER: It is, Your Honor.

THE COURT: (Continuing) -- in a somewhat different position than if they had fully baked it up. It still doesn't -- your client hopes to retain them; right?

MR. RIEMER: You know, I -- I -- what my clients -- what my client said in deposition --

THE COURT: I didn't write the script.

MR. RIEMER: Your Honor, there's no evidence the script was used. None. None. And I've been --

THE COURT: Was it written by the plaintiffs or was it written by somebody at your client?

MR. RIEMER: You know, I don't, frankly, know sitting here. And I tried to find out whether it was written -- I know it wasn't by the plaintiffs. I don't know whether it was written by some PR person who doesn't know what's going on. There's nothing -- I mean --

THE COURT: So your guy -- your clients have PR people write scripts for your CEO about the time the CEO -- your main principal and the

CEO of the target are going to talk to the top management staff?

MR. RIEMER: Your Honor --

THE COURT: That's what Vestar has PR people to do that?

MR. RIEMER: Your Honor, I don't know if it was written by an intern --

THE COURT: Come on. It was a script written by somebody close enough to your dude that, you know -- where do you think they got the -- I mean, frankly, it looks like something your own guy could have written or someone who is pretty close to him knows how this stuff is done. Are you saying these sentiments are not the sentiments that were basically expressed?

MR. RIEMER: Your Honor, there wasn't a question asked of my client in deposition about this document. And I honestly don't know, sitting here, whether this was used and who --

THE COURT: "While I have known Kerry now for almost 7 years, we have had the chance over the last few months to get to know the rest of the senior management team as well" --

MR. RIEMER: Okay. So --

THE COURT: -- "and let me say we are delighted to have the opportunity to partner with each and everyone of you."

MR. RIEMER: There's only --

THE COURT: It has typos suggestive of a bit -- a rushed executive writing his own thing. "As partners with management, we look forward to supporting you ...."

This is a --

MR. RIEMER: Your Honor --

THE COURT: -- PR person?

MR. RIEMER: Your honor, the person who's known people seven years is Mr. Holstein. Mr. Holstein's never done a transaction at Vestar like this. And whether this was reviewed -- written by him and reviewed by somebody else and what was said was changed, there's nothing in the record to show this was used. The only person at the meeting who was deposed --

THE COURT: I'm not saying it was used. Remember, one of the things that people do, people like yourself, right, like, especially with judges like me, you get -- you've written out kinds of stuff that you will never use. You'll never use it

literally in the sense that you won't read from it. You have used it. The act of preparing the document is a use of the document. It is a way for someone like Mr. Holstein to stand up and confidently make the points he wishes to make in the seemingly impromptu and relaxed manner precisely because he's actually written it out beforehand and gone over it and internalized it, unlike the Governor of Arizona who didn't do it with her closing in the debate --

MR. RIEMER: Agree, Your Honor, but -- but --

THE COURT: -- I mean, apparently did not do this --

MR. RIEMER: But, Your Honor --

THE COURT: -- did not have the PR person.

MR. RIEMER: But, Your Honor, there are plenty of cases we've all seen where somebody did the draft and something changed and it, because -- and it changed because people who are more experienced with particular kinds of transactions --

THE COURT: What I'm supposed to do is, basically this is all nonsense, that your message to management is basically, you know, "Good to see

you. We brought in the really good baked goods this morning for breakfast because this is the last time you'll be having breakfast out here."

MR. RIEMER: No.

THE COURT: Isn't this the kind of message that your client gave to the Health Guard [sic] top executives?

MR. RIEMER: Your Honor, the evidence from Mr. Alpert is that we said "We may keep you; we may fire you." More importantly, the evidence from Mr. Hicks is that's what he said. Mr. Hicks was deposed, and he said "We agreed. We can't negotiate this stuff until afterwards. We may never come to an agreement. They" -- he said, "They may fire me." He said, "They may keep me. They're taking that risk."

And in the end I don't know that that -- that those notes are reflective of anything. I do know what Mr. Hicks testified to being told and what Mr. Alpert --

THE COURT: I thought the deposition was that basically something to this effect was in fact said, but he probably didn't read from it.

MR. RIEMER: I think he said -- I -- I -- I wonder if I could ask Ms. Messika to hand me

the deposition. I didn't think it was that clearly said. If it was --

THE COURT: Was there in fact a meeting with Mr. Holstein and the top --

MR. RIEMER: There was a meeting after the deal was signed where people went out and where the whole company was there --

THE COURT: And he went. And contrary to this, rather than be reassuring and saying he wanted to be in partner with you and -- you know, Vestar's website, right, it basically says "We may keep you; we may fire you" --

MR. RIEMER: Well --

THE COURT: -- the webstar -- the Vestar approach. "We may keep you; we may fire you. We like to keep you on your toes." That's what sets us apart in private equity."

MR. RIEMER: Well, Your Honor, I agree the website doesn't say that.

THE COURT: Right. It does -- it does --

MR. RIEMER: And I agree, the website needs -- and Mr. Alpert told me afterwards --

THE COURT: It doesn't say anything

like that --

MR. RIEMER: It doesn't.

THE COURT: -- right?

Are we down ludicrous alley here? I mean -- and I don't mean that to insult the -- the actual pop star. I mean to use it in the -- in the way -- I mean, is this really what you want me to take from it, is that basically your guys created some sort of, you know, gut-wrenching anxiety on the part of the top managers --

MR. RIEMER: I -- I --

THE COURT: -- who are worried about their future?

MR. RIEMER: Your Honor, I don't think gut-wrenching anxiety is required.

THE COURT: There's a equity pool set aside; right?

MR. RIEMER: Sure. And -- and -- and what Mr. Alpert said, unlike where they cut the quote off, is -- and -- and who goes in it, and so on, including, he said, "the new people we will be bringing in," the part they didn't quote --

THE COURT: Uh-huh.

MR. RIEMER: -- "has not been

determined," and he also said, "has never been discussed with them."

Okay. You want to talk about ludicrous? This is like a thought crime now. They made a decision, sure, in figuring out --

THE COURT: Well, as someone who's raised Catholic, I'm familiar with that.

MR. RIEMER: Fair enough.

THE COURT: If you think it, you done it.

MR. RIEMER: I -- I --

THE COURT: And so it's a very hard doctrine for me to -- it's a very difficult faith, I mean, because you think it, you done it.

MR. RIEMER: Well --

THE COURT: So you don't even get credit for stopping short of -- of the act.

MR. RIEMER: Then I'm -- then I'm going to move on, but I just didn't think in the Court's jurisprudence that -- that we enjoin directors from selling something because the buyer might have begun to think about which of the management people would get something.

THE COURT: The issue is not that.

The issue is that -- the idea of accepting the notion that a very scary walk-away person like your client is going to -- that everybody in the industry is now going to say "By the way" -- you know, you're at the Four Seasons. You're having your lunch. (Continuing) -- "if you" -- "if you have another lunch like this, if I find out you went to BLT Steak with Pete, we're gone."

MR. RIEMER: Your Honor --

THE COURT: "And you just got to understand from the beginning. Before we even get to the entree, if you" -- "if I see you with that" -- "I mean, if I even see you at the same fundraiser, I'm just" -- "I'm walking."

MR. RIEMER: But, Your Honor --

THE COURT: And so everybody now has their favorite private equity dude, and they go to lunch with them; and then all of a sudden after four months they have a deal and then they do passive market checks because everybody is so scared that that -- that the original person's going to walk away.

MR. RIEMER: But, Your Honor, isn't there a difference between -- that happened at the beginning, but it also happened as they got us to go

from 6.25, as I recall, up to 8.20. And when it was set at 8.10 and 8.20, it seems to me it has a lot more credibility.

The point was --

THE COURT: Oh, I know.

MR. RIEMER: -- they couldn't have --

THE COURT: The issue --

MR. RIEMER: -- a process.

THE COURT: The issue is not what your client did. The issue, to some extent, is before it gets to that point. Like, what your client might have done, it's nice for your client to talk tough. Everybody talks tough.

I mean, as a person who mediates cases one of the things, I always have to talk to parties about is "It's not my job to instill in you intestinal fortitude"; that if you're going to be the kind of negotiator who keeps kicking your own lines away in the sand" -- I've had people in mediation who honestly could have gotten -- I know they could have gotten materially more, but they failed their own gut check and, frankly, like, undercut me as a mediator and took less. It's amusing, but I see it all the time.

What your client would have done if

they had said "Well, that's nice. We like you. We'll give you a fair opportunity to compete, but here are these two other people and they're in the process. If you want to walk away, walk away; but if you walk away, you won't get us," we don't know what your client would have done.

MR. RIEMER: No, Your Honor, we don't. And that's why ultimately this is like the dialogue Your Honor wrote in the Toys 'R' Us case, because it could have turned out fine. And that's what they're here standing saying. "Don't worry. It'll turn out fine." But it also could have ended with the phone going click.

THE COURT: Uh-huh.

MR. RIEMER: And maybe you don't think it was a credential threat at the beginning. I, frankly, don't think the board thought it was a credible threat, but they didn't view themselves as having a price interesting enough to warrant having their banker make some affirmative calls, because they didn't regard themselves as being for sale. But I sure think it's credible once they had pushed us and pushed us and pushed us and gotten us to a price that was way above where we started. And I think you have

to examine both those periods from the board's perspective. But I also think, Your Honor, that they involve a very different calculus. And somehow those have been coconnected together as if they are the same when they're not.

You know, again, I want to answer whatever questions the Court has, but I feel like I have addressed it and I'm going --

THE COURT: Okay. Well, I mean, at some point we would like to get the mystery of who wrote the script involved and see if the PR person -- I'm kidding.

MR. RIEMER: But -- but in all seriousness, the notion of a draft, Your Honor, is -- you know, whether somebody started writing something -- I learned a long time ago in litigation the fact that somebody has something in the files prepared for somebody may mean it has nothing to do with what ended up getting said, including the 19 drafts I have of the argument I didn't make this morning.

THE COURT: Well, that's true. I said what -- what is being communicated here is exactly the sort of message and body language that appears to be the consistent -- consistently-used by your client in

its business when it approaches target management. And you're the one resisting the idea. Is there something in here shocking that would be a shocking departure from the Vestar approach --

MR. RIEMER: Well --

THE COURT: -- towards target management?

MR. RIEMER: -- you know, I think what's more striking --

THE COURT: "Without each and everyone of you, we would not be" --

MR. RIEMER: -- is the talking points that were given when the -- I think -- let me get the citation to the exhibit -- where it says "We'll do this as a strategic," you know, "We'll assume the contracts, but we're not going to negotiate anything with you." I mean, that, to me, is completely different than documents one typically sees in management buyouts because this isn't a management buyout.

And that's the fundamental thing, that if you need it to distinguish other cases would, but Your Honor doesn't need to distinguish other cases because this is classic down-the-middle implicit

market check, because all those cases involved tender offers of roughly this period or almost all of them and many of them involve private equity buyers. There is truly nothing novel here. In no way does this require some new rule.

And with that, I'll sit down. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Jenkins.

MR. JENKINS: Thank you, Your Honor.

I have a relatively small number of points I'd like to make in connection with statements Mr. Lafferty said. We've been searching the record on some of these.

Your Honor -- I'm sorry. Your Honor had questions. Let me answer them first. Two of the three questions have been answered by Mr. Lafferty. We agree with both of them. That's in connection with the Citigroup transaction fee and the question of whether or not -- would the parent have to pay a transaction fee if they didn't get the majority of the stock. We agree with both of those responses.

The third question Your Honor asked was the amount at issue for the plaintiffs in this

action. It is approximately $18,000 worth of stock, assuming the --

THE COURT: The deal price.

MR. JENKINS: Yes.

Let me go to several of the things that Mr. Lafferty mentioned where at least our look into the record indicates something different.

Your Honor had questions of him concerning whether the -- whether nondisclosure agreements were entered into with other bidders. Mr. Hicks at page 97 of his deposition said he could not recall.

THE COURT: So -- did he testify inconsistently on that?

MR. JENKINS: That is possible.

THE COURT: Yeah. I just recall him saying that he had done -- he had entered -- they had entered into NDAs before relatively early in his deposition when he was talking about the period when --

MR. JENKINS: Right. Because of this second question, it was not clear to us that his initial question was talking about nondisclosure agreements in this sort of context --

THE COURT: Okay.

MR. JENKINS: -- or nondisclosure agreements generally in any sort of context.

THE COURT: Uh-huh.

MR. JENKINS: Your Honor was speaking about Exhibit 53, which is the March 10th e-mail. Mr. Lafferty said that the deal was almost done at that point. I was a little surprised to hear that, because I thought they would have tried to push the deal back until July when they actually signed the merger agreement. Since the final deal price wasn't struck until May, I don't think March 10th the deal was almost done. But Your Honor can decide upon that.

THE COURT: Yeah. I'm trying to remember if Mr. Lafferty said that in connection with that or -- I thought he had said that -- that when that e-mail was sent, the board and Citigroup and the -- Mr. Hicks were trying to gin up some way of getting Vestar into a range that was more attractive and they were trying to push a synergy case at that -- at that point.

MR. JENKINS: I think he did say that, but the phrase I wrote down is "the deal is almost done." The record will reflect that.

One point I wish to make is that, as Mr. Lafferty pointed out, the sensitivity analysis which was requested by the board for the first time on February 12th, that is, I don't think coincidentally, the day they received the price --

THE COURT: Uh-huh.

MR. JENKINS: -- the initial price. You can question as to what happened, but you could argue that the price comes in. It's at $7 a share, which is a long way below the bottom of the range of the base case. Now, the board could have looked at this and said legitimately "Boy, this base case is really out of whack." It can also be a way to justify having a sensitivity analysis of less aggressive price points could be a way to justify a lower price. That is the chronology.

As to the question of what Citi and the board did with respect to these 15 names on the list, Mr. Wahlstrom testified to that at pages 92 to 98. He said specifically that Citi did not say which of these 15, if any, they talked to and the board didn't ask; and that Mr. Hicks did not give the board specific names as to who he was talking with on this list of 15.

I think the point is obvious. A board interested in getting the highest price might have thought to ask those questions.

Finally, the question of -- which I think Your Honor actually asked me, was the question of whether any of the 15 names had approached the board this year during the investigation -- excuse me; during the negotiation process with Vestar. On page 8 to 9 of our reply brief we set forth the 2010 contacts. There's one with TCV that occurred in February or March of this year. That is --

THE COURT: And that's -- is that the one Mr. Lafferty was referring to where -- where management met with him?

MR. JENKINS: I believe so.

And let me finish with something Mr. Lafferty said a couple times, because I don't think he and I disagree very much. We don't disagree on the law, seemingly, and we don't disagree on most of the facts here. He said several times that there's no be-all and end-all of the analysis; that is, the board doesn't have to do any specific thing. I had tried to make it clear in my opening that I agree with that, that I think the Delaware jurisprudence, if it

says anything, there isn't a check list you have to go through and if you do this, you're okay and if you do that, you're not okay.

And everything is context specific. My point here isn't that any one thing wasn't done; it was that almost nothing was done. And the cases that Mr. Lafferty pointed out, which are in his brief, there's no case we could find in which --

THE COURT: Well, isn't that why it's called a passive market check?

MR. JENKINS: Right.

THE COURT: Because almost nothing is done.

MR. JENKINS: Almost nothing is done, exactly, Your Honor. In situations such as this where the only market check is a -- is in a no-shop provision, none of the cases in Delaware jurisprudence which we could find and which defendants could cite, had either -- they either have longer periods, they had less restrictive matching rights, they had less restrictive termination fees, they had less restrictive information requirements. There's nothing --

THE COURT: But your friends say all

you had to do was make an inquiry and you can get nonpublic information and I assume sign up a confidentiality for something like that, but you can basically -- any of these 15 who were interested can kick the tires at relatively low cost with no public visibility.

MR. JENKINS: I had not thought that was correct. I thought they had to make a superior proposal in order to get that.

THE COURT: But your friends just read the inquiry.

MR. JENKINS: I heard that, and we have been looking for that and just haven't found it.

THE COURT: What section is that?

MR. RIEMER: Your Honor, it's -- it's -- what counsel wants to look at is the definition section, which defines the term -- I think it's 1.1 -- which defines the term "Acquisition Proposal." And "Acquisition Proposal" is in turn the term that's used in the section that addresses the restrictions to which the board is subject. And "'Acquisition Proposal' shall mean" -- "'Acquisition Proposal' shall mean any inquiry, proposal or offer from any person." So one needs to read the definition

with the prohibition.

THE COURT: Okay.

MR. JENKINS: If that's what the document says, it's what it says, Your Honor.

I have nothing further. If the Court has additional questions, I will attempt to answer them.

THE COURT: I do not.

MR. JENKINS: Thank you, Your Honor.

THE COURT: Anything further, Mr. Lafferty?

MR. LAFFERTY: Your Honor, I'm prepared to answer any other questions Your Honor has.

THE COURT: I have no further questions. You may sit down.

I'm in a position, I think, to rule with confidence about one -- the key aspect of what I -- I'm being asked to do today.

I want to applaud the lawyers today for being so well prepared. And I particularly want to applaud the plaintiffs for being not only well prepared but exceedingly measured and logical in their argument. I really -- in a world where we all read briefs and letters and probably read e-mails to each

other where l-y words are there and everybody is saying outrageous, the plaintiffs have really focused their claims -- you know, the claims they pressed in the injunction in a reasonable way. They haven't thrown hand grenades; but they've made some, frankly, very potent arguments about the reasonableness of the board's process without, frankly, making wildly speculative -- often we see sinister motives thrown around without basis. Mr. Jenkins and his team admirably really focused on the core of the matter and in a very skillful way. I think too often lawyers forget that, frankly, targeted, measured advocacy is often more persuasive than extreme gesticulation.

So I've got to basically -- today what I'm being asked to do is to grant a preliminary injunction against the procession of a tender offer. And that makes me have to consider whether there's a reasonable probability of success on the merits for the plaintiffs, which is essentially what will -- what does the record show about what I would likely find as to the merits after trial. Then I have to see whether there would be any irreparable injury from the -- if -- if the plaintiffs are not granted an injunction; and then I have to weigh the relative balancing of the

harms.

Here, on the merits, I'm going to say, I -- although I -- I'm not free from doubt about it, if I had to and for reasons I explained I don't have to, if I had to say right this moment whether the plaintiffs have demonstrated a reasonable probability of success on the merits as to their Revlon claim, I would find that they have. I -- I have listened hard to the defendants' explanation of this. And I'm not saying that they are -- I don't want to be judgmental in some narrow-minded amoral sense; but the Revlon standard is not a business judgment standard, and it does require the Court to look into the reasonableness of the board's decision making. Part of what you have to do in that is to figure out why is the board acting as it is.

Now, admittedly, Revlon arose in a kind of quintessentially '80s sort of situation where the CEO of a company was resisting it being sold to anyone. But there are also concerns when CEOs have an interest that's different than everyone else -- even though they're willing to sell, they have an interest in who the buyer is -- and when they are not purely a seller.

I'm sorry, but people like Mr. Hicks on average -- I haven't had a chance to meet him. I met him through his deposition. People like that, who built a business -- let's face it. He was one of the founders of this business. (Continuing) -- they care about who their business goes to. They particularly care about who it goes to and at what price. If they aren't done, if they have an interest in continuing, it does matter to them who the buyer is. That's a profoundly different interest than other stockholders have. It's not to say they don't care about the price at which their equity's cashed out; but when there's a substantial likelihood that you will remain as an executive and retain the ability to share in the upside of the company, you actually have to be careful about pushing things too long. Think about the Lyondell. You know, one of the amusements about Lyondell, right, I mean, if you're the seller and you're staying with the seller, getting too good a price and sharing in the benefits of too good a price when you're on the team still is not real good for you. If you can get a respectable price, build up your retirement nut, be able to roll into some equity and have a future upside, that could be a really good

thing.

Now, is that to say this is evil, that this should never be allowed? We had that debate in the '80s. We didn't do the per se rule. But to ignore the dangers in that, the human incentives would be naive. It would be totally contrary to the whole reason for heightened scrutiny.

So what happened here? Well, the board decided that Vestar was the only bidder while saying it wasn't for sale. Let's give the board credit. No rights plan in place. It's basically saying to the marketplace "You can come forward." The board had taken meetings. Citigroup had taken meetings. Company's doing well, though. Market's recognizing it. Vestar comes forward. I think Mr. Riemer just admitted, Vestar early in the process really would have been a little freaky weird, kind of an act of hutzpah. People would have laughed and giggled. If you said, you know, "You can't have lunch with anybody else," it would have looked a little adolescent jealous; right? I mean, kind of crazy. "You can't have lunch with anybody else because I've" -- "we've said that we want to talk to you and we've signed an NDA. We haven't made an expression of

interest in price."

Does Citigroup and the board get in the game and really look at things? The most I can find, honestly, is that they compiled a list of people they had had conversations with over the previous two years. I give Citigroup credit that they were the financial advisor to the company and they weren't just a flier. It wasn't like Netsmart, where somebody who wasn't even representing somebody just kind of put somebody's name on everything they did. I give them credit that they talked to some people. I give Mr. Hicks some credit for that.

What does the board and its advisors do at this time? Do they go through each of the contacts? Do they -- gosh forbid, did they even think of maybe there were people other than the 15 in the world who might bid, such that "We" -- "Let's have a look, a private confidential look, at other possible strategic acquirers. Let's consider, for example, the fact that we aren't huge, that we might be annexed to somebody larger. What are their barriers? Let's look at the private equity funds"?

I heard some very skillful advocacy from Mr. Lafferty about the plush level of funds that

are available to private equity firms because they were entrusted by investors and deals didn't exist. How about getting a skilled investment bank like Citigroup to look at who's plushed up and what their interests are? How about the strategics? I would have a lot more confidence had I seen any reasoned examination.

Here's the thing about advisors. I'm aware of -- like, I come out of one of the advisorial professions. You get the right to play. You get to go through the slides. You get to show "Here's why this one wouldn't do this. Here's the pitch that they made." There's slides in here that people actually indicated that they wanted to partner up and make a bid.

Now, body language and receptivity of management are very important in the private equity context. Timing's important. But there is an obligation to try to get the best price, and there are powerful self-interests that apply to people like Mr. Dodge, Mr. -- and the Hicks brothers that don't apply to other stockholders. They're not -- their interests are not perfectly aligned. It appears like Mr. Hicks is saying nobody else is really serious.

Citigroup says no one else is really serious.

Now, I mean, I suppose Citigroup would want a blow-out price; but, remember, there are incentives. They do have a percentage kicker. But the reality is if they can get a deal, they get a deal. And even if they were exercising judgment, it would be nice to see an appropriately-serious articulation of the reason why other buyers were not likely to come forward. One would think that would mean taking them apart a bit on a case-by-case basis. "How different, really, are they positioned than Vestar? How much money do they have? What are they interested in? Are there funds expiring such that they actually need a deal? Are there strategics out there? Hey, Mr. Hicks, what was your body language with these people? Do you have some relationship where you hate this dude because he got some industry award and you didn't or he's a cooler guy?" I mean, that never affects things; right? Because CEOs are not -- they're not rivalrous people. They never have other considerations.

In the middle of the process somebody else gets interested. What does the board do? Mr. Hicks and his team meet with them privately. No

lawyers, no independent directors, no financial advisors. Just top management.

This is a top management where the CEO asked the principal of the private equity firm to join his board in years prior, where there are, frankly -- it is a level of cordiality and chumminess in the e-mails that suggest they're very comfortable with each other. I'm not overstating it. I'm not suggesting they vacation together. I'm not suggesting that they are the platonic equivalent of people who have been partnered up on eHarmony.com. I'm suggesting that this is a organization, this is a person, Mr. Holstein, that Mr. Hicks was very comfortable with and could see himself partnering with in the future. That is a benefit to Mr. Hicks and Mr. Dodge and his brother -- the other Mr. Hicks that other stockholders don't care about.

The fact that Mr. Hicks will be happy in the future, I assume that stockholders, as good and moral people, that's what they think about, that they want Mr. Hicks to do well. They probably don't want him to do well at the expense of a dollar more per share from someone else. If there's another deal available that doesn't involve Hicks or that involves

Hicks working for someone that he's not as ducky with, they would want that.

The gateway to those deals, when it's through the CEO, body language matters to this. It does. And what this board knew about the market? I'm sorry. I'm not impressed on this record. Telling me that they took meetings where people -- and it's actually -- had expressed an interest. This was a list of people who had affirmatively expressed an interest.

Now, admittedly, the defendants can say "Well, but the record doesn't show what it was in." Well, if you take QVC seriously, and I do -- it's my job and it's a pretty good decision -- it's defendants' obligation to prove reasonableness. The absence of any indication of what those folks were actually interested in, in some ways the absence of the -- of the -- of the record is because of the defendants. Did anybody ever at the board meeting say "Hey, Hicks, did those people ask you, tell you that they would be willing to do an MBO?" and said "Yeah." "What'd you tell them?" "We're not for sale." "Well, you're asking us to talk to Vestar now. Perhaps without wearing a For Sale sign we have skillful

enough bankers who can make a discreet phone call and see whether we can get them in the game."

I don't see any of that. There's no differentiation among the 15. And then what I'm asked to do is passive market check. And let's get to that.

Again, I don't find Vestar that scary. The notion private equity buyers now are just all going to walk away, I give credit to Vestar. You know, frankly, once you get down the road, yeah, you're talking in the $7.80 range, they're not going to want to have somebody come in and do an auction at that point. But Vestar's not the board. The board's been at this since December.

Again, I'm not asking anybody to go on eBay. That's not what Revlon says. But what the board's relying upon in terms of -- it didn't do any -- I mean, it didn't position itself. It didn't take market soundings. As I said, it didn't even sift through -- without contacting anyone, sift through possible strategic and private equity buyers and make a judgment about whether there might be someone who would be interested. It was simply -- I mean, I don't even really get, frankly, the synapse on this record between a list of people who had expressed an

interest, the consistent notion the company wasn't for sale, and then the ruling-out that anyone would come forward.

I understand that no one actually came forward. And I understand and give credit to the board for not -- by not having a pill, by taking the meeting, to say "We would listen." But you're now at a different situation where you're actually -- to say the board wasn't for sale, come on. When you're -- I'm not saying that you have to have an auction formally or any of that stuff. The board was actively in listening mode, actively willing to consider a sale of the whole enchilada and never kind of bored down on the market with a lot of precision, I mean. And, frankly, I'm going to put it on the defendants today. It is a burden under Revlon. You can say "Strine, we did all that."

Well, I spent a lot of the last four days reading a lot of appendices, reading every word of every deposition. Now, don't give me that much credit. There were four depositions. It's not like it was the hugest thing I ever did, but I've read the appendices. That's why I asked the question about the slides. There's no there there. The board can't go

through and say -- no member of the board could be quizzed on three or four of them and say "These were the most serious expressions of interest and, frankly, one of them popped up a price a couple years ago and was at a ludicrous level" or "This one can't do it because they're totally strapped on their covenants" or something like that. Nobody could give testimony like that because nobody remembers any of it, because it appears to have been, frankly, just a list. And rather than being used as a -- as a -- in a serious way as a possible way of considering what other people have done, it was more like window-dressing.

Then you get to the whole point of the passive market check. Now, there has got to be some trade-off in life on what you don't do on the front end and your reliance on the back end. And, of course, the board, because of the credible threat of Vestar walking away, because it's a major publicly-listed strategic whose involvement in a transaction like this could threaten all kinds of harm to its CEO and others and public employees and tumult -- and you could even have a bid for Vestar; right? I think not.

But the board decided, as I understand

it, "We wanted to get the 8.20 in the hands of the stockholders a couple weeks before" -- "three or four weeks" or "six weeks before. That's why we" -- "We knew that it would actually limit the effectiveness of the passive market check, but we assented to the demand to do the tender offer."

Well, you know, if you're not going to do as much on the front end, you got to make sure the back end works. It may be the case -- I agree with Mr. Riemer -- I'm not going to exaggerate -- there are people who particularly love to ruin lawyers' summers. I mean, they love to ruin your weekend. You know, I think there's a Friday -- there's a club that sends Friday e-mails to lawyers, questions that you don't really need an answer to but you're going to send on Friday afternoon just for fun.

But it is -- it is an odd time of the year. The financing markets are really still a little bit difficult. I'm not going to exaggerate the barriers of entry, but I do still think -- and I'm not going to say that I'm a master of the evolving etiquette of the private equity world. I will say I don't believe private equity buyers have as much of an incentive as a strategic rival to top another bid;

that there is a perception that when management is happy about a deal, that it's difficult to disrupt that; that when management with this much stock signs up voting support agreements, that they may be pretty happy; that yes, it is true that if a higher bid is accepted, that the voting agreement goes away. It doesn't mean that Mr. Hicks or anybody else has to vote for the other deal. It just means the voting agreement goes away.

But the board, even between transactional alternatives, didn't really press for the one that lengthened the period of time.

And, again, what I'm asked -- it could be right that if someone wanted to come forward, there's plenty of cash out there, that this financing contingency and other sorts of things aren't an issue, that the management thing isn't an issue and that there really isn't a necessary contradiction between the front-end conclusion there wasn't a likely buyer and that reality. It could be that there are -- there are buyers, people who have cash but because of the nature of this company and the -- the -- the cash and where it's located within the private equity industry, that it's not located in the sector that's likely to

come forward for Health Guard [sic]; that the risk of losing a unique buyer like Vestar that really is incentivized on the front end made it not worth the candle to take the risk of exploring that, but we left the door open to those other people.

There's a very simple way in which a judge would have more confidence in accepting that argument. And I think it's -- relates to what I just talked about, which is had Citi and the management team really rigorously gone through with the board the possible other buyers, broken down by private equity, strategic within private equity by those who concentrated in the health space, within the health space looked at people's financing capacities, and actually done something where I could say -- feel that they had confidence in making that determination, I would have a much better basis to conclude that they acted reasonably. But I don't see any of that sifting. I don't see any of the things that a sales -- right, you are in -- a bit in a sales mode. Even when you're not out there, you're assessing how likely is it we could sell this to someone else, who else might want our asset. I don't get any flavor of that.

And so when I'm asked later on in the passive market check to assume that everyone knew that there's plenty of money out there, how do I know? There's no evidence in the record other than, you know, "We're $300 million," Citigroup says. "There are people who can buy things for $300 million and they've done it before." You know, that is not -- defendants in this context rightly asked this Court to examine the decisions that a board makes in light of the particular circumstances that that board faces. That is absolutely a fair expectation. What comes with that, then, is the duty of the board to actually do that itself and not come in to court without having done so and then tell the judge that there's plenty of money in the world; that in the past there are people -- in circumstances that are totally different that I can't possibly explore, nor can the plaintiffs explore, people have come forward in this time frame.

Well, you can't have it both ways. If boards want to have the benefits, as they should, of credit for the contextual risks that they face, they also need to create a record that they've thought about them in a reasonable way. And when a board, honestly speaking, doesn't create any record that it

really segmented the market or considered whether there was a likely buyer and then tells the Court on the back end, "Ah, the market is plush. Come on in," that does not instill confidence.

And it's -- as I said, this is not a situation where Mr. Hicks is out. If Mr. Hicks made it clear from the beginning that this was his last harvest and he wasn't possibly working for anyone else and neither was Mr. Dodge and even his brother, even if they were, but "I'm not working for anybody else. I'm taking my load and I'm going," I'd have a lot more confidence that he had the right incentives. I give credit to the board for saying, you know, "You're not going to negotiate your deal."

But, honestly speaking, I don't buy for a minute the notion that the script isn't a fully accurate view of what was truly communicated to the managers of Health Guard [sic]. I'm talking about Exhibit 53. Does that mean that if Mr. Hicks says that he wants $25 million a year, 25 percent of the equity and he doesn't have to roll any cash into it that Vestar is going to keep him on? No. Does it mean that "We're" -- "We are private equity. We understand the game. We partner with management. The

only way we make money is if it's good for management, and we want you to get the transitional benefits that management gets in a situation like this. And we're making every verbal and nonverbal promise short of a binding contract to you"? Yes. Could they be fired? Sure. Right. Like Joe Paterno could have been fired five years ago. It's not likely JoePa is going anywhere.

And this script, it's perfectly in keeping with the relationship that the two principals had. And, again, I'm not going to say there's anything intrinsically wrong with it, but it is -- it does mean that Mr. Hicks and his top managers have a totally different incentive system than everybody else. And this board didn't supervise it. The advisors didn't supervise it in a way that instills confidence. They didn't explore alternatives in a way that instills confidence. And, therefore, if I had to bet today, I'd say the plaintiffs have a reasonable probability of success on the merits.

Does the plaintiff get what they want? No. I'm not going to enjoin this. And I agree with Mr. Jenkins that, does that leave our law in an awkward place? I suppose. It actually, though, isn't

any different than any other part of the Anglo-American legal tradition. Injunctions are really an exception.

And the difficult issue that I face, you know, I am in no position to make a decision about whether this is the right price for Health Guard [sic]. I'm assuming people who invest in the company have made some calculus about its utility. I believe that the disclosures are such where, frankly, the Health Guard [sic] -- this was not shopped. They're pretty sophisticated. They're going to know Mr. Hicks and the boys, they're likely to stay.

I don't -- there's an equity pool. I don't know whether that was disclosed or not. I assume people realize when they're likely to stay, they're going to get equity. That's what private equity does with them. They make them owners and they let them share in the upside.

And people are going to, in an uncoerced way, get to decide for themselves to decide whether to take the $8.20 or not. Because there's no coercion, you know, this Court should be hesitant -- and because this could possibly be a valuable price. It appears like it is a fairly high market multiple.

Whether the company has, frankly, told its story accurately enough so that it's getting full recognition, I don't know; but it appears -- it may be -- and this is not a bad thing, but it may be taking advantage of selling at the top of the market. I mean, good. Again, I would have more confidence, if it wasn't clear, that the Hicks brothers and Mr. Dodge were probably going to continue along.

But the risk I take out of the hands of the people whose money's at stake the ability to make an uncoerced decision for themselves to accept this price. I don't have -- I mean, I'm pretty -- I like to think -- you know, probably y'all think -- and I'm sure the defendants right now, even though they know right now they're probably not going to get an injunction, probably think I'm a bit edgier than I should be. The confidence I have of taking it actually out of the hands of the stockholders and making the investment choice for them I don't have.

You know, people can get things wrong in terms of process and they turn out right and vice versa. I mean, it's just -- and I don't even know that it's wrong. I'm looking at this probablistically. It could be when I have a trial

that I have a much more authentic and, you know, understandable case from the defendants. The plaintiffs' case, on the other hand, might get stronger, too. I don't know. But I'm here where I've got to weigh, really, the risk of what I'm going to do.

And Mr. Jenkins said, you know, is it empty. Well, I don't think -- I actually don't think there's any difference in this tradition. I mean, I really think the number of times that this Court has ever enjoined stockholders from considering a premium-generating transaction in the absence of fear of a disclosure violation or coercion and the absence of a higher competing offer that it's impeding, it's just -- it's basically a null set. We do the disclosure stuff to try to get it cleaned up so the people can make the decision for themselves.

When -- the irreparable injury potentially of the stockholders, frankly, is if you deter the other higher competing bid, there's the irreparable injury to the bidder who lost the asset; but the stockholders actually are prevented from considering something very tangible and valuable at that time. And the risk -- the risk calculus for the

judge during the injunction is totally different. I don't really care about that. I mean, it's not my -- my interest about Vestar. I'm talking about it from the perspective of the class that the plaintiffs represent in the situation where somebody is being impeded from presenting something that was a genuinely higher bid.

For example, on this record, imagine somebody coming forth with an inquiry, really couldn't clear financing, had a very good shot at clearing financing but the board had not reserved, frankly, contractual flexibility to stop the closing of the tender offer and stockholders are wondering what's going on. Perhaps in that circumstance an injunction or something like that could -- the balance of the harms would tip in a different thing. Here, I don't think the balance of the harms -- the risk of an injunction and the fact that I could be depriving a stockholder base that might actually genuinely believe this is a really good price and genuinely actually believe that the board was right, that the board actually got into a market multiple irrespective of the DCF value of the sensitivity case, that, you know, "The DCF value of that sensitivity case was a bit" --

"is still a bit aggressive; and if we can get this kind of multiple now as stockholders, we want to take it." I don't want to take it out of their hands.

And with respect to irreparable injury, I don't want to say there's no hint of irreparable injury in this context. There is something substantial to what the plaintiffs say about not knowing, right. One will never know exactly what would have happened if. That's sort of life. The doctrine tends to be, you know, if you can be compensated in money damages, you don't have -- get an injunction. Not that "Oh, well, we might only get money damages if we win the trial, whereas we get leverage now, we get the injunction." You don't do that in a tort context. You don't do it anywhere else.

As I said, Revlon originated, and the irreparable harm in Revlon was that the bidder was going to lose the target, not that the target stockholders were not going to get the price. Because, remember, the delta also -- it's really the delta or, you know -- because I like Animal House I say "delta." But the difference between the 8.20 and whatever was available, that's the harm.

It is appraisal -- I don't want to overstate the use ability of appraisal. It comes with its risks. If you don't get the deal consideration, then you might get less. On the other hand, especially in recent years, with the rise of institutional investors, if you have the courage of your convictions, sometimes you get a lot more. And there is the possibility here of also bringing an equitable claim.

I asked about the 102(b)(7) clause. That may limit the ability of folks to get at the other directors. Frankly, it leaves Mr. Hicks still in a little bit of an awkward situation because his interests are different potentially.

But to some extent, whether, you know, monetary damages are available, it's really not a question about whether they're available. They are. It's a result of what the stockholder base determines about the deal. And if the stockholders really don't like the 8.20 price, it's not going to happen, in which case they'll protect themselves.

You could have a situation where, frankly -- and I admit that there are voting agreements in place, which means you could have a

situation where less than a majority of the disinterested stockholders, I suppose, tender and the deal gets done; but the others who dissent could -- could press on with the case, which does suggest that -- and there is -- there are remedies at law for that.

But -- so at bottom, my primary basis, I cannot under the balance of the harms in good conscience drop the injunction flag, because, in my view, that would be an act of arrogance in which I take out of the hands of people who really have money at stake the ability to make this determination for themselves. And because there are other remedies, I think that's the thing.

So I deliver unto the plaintiffs somewhat of a Pyrrhic victory. I've tried to be candid with you all. Again, I don't believe that this is a model.

And I am aware and I will say I think the plaintiffs make some good points about the extent to which people can just simply take a single-bidder approach in every single context and just say "Oh, no one will buy" or "This person," who hasn't even put out a price, "will walk if we even take any market

soundings."

And as long as you simply marry it up to some future -- some past case in the time frame, which could be a totally different marketplace, a totally different financing condition, a totally different array of buyers, as long as you can do that, it's okay, even when, frankly, the process is largely being led by a chief executive officer who's not simply on the sell side of the transaction but also potentially and most likely will find himself still working for the company, still having an equity interest and whose motives and self-interest, frankly, therefore, are different than the other stockholders. I do worry about that.

But sufficient unto the day is the evil thereof. And so the world has another transcript ruling. We'll see what happens with the deal. If I were the defendants, I wouldn't be particularly optimistic about your chances of getting a 12(b)(6) motion granted, although I admit that, you know, obviously it depends on how the vote is and how you put together the doctrine.

But I certainly think absent some sort of argument that the business judgment rule standard

applies because of a fully-informed vote, I would not dismiss these claims, because I do have serious concerns about the process used.

So thank you again for your patience with my questions and your skillful advocacy and to our reporter for taking it all down. And have a good day.

MR. JENKINS: Could I ask the Court one question?

THE COURT: Uh-huh.

MR. JENKINS: Does Your Honor think -- let me try this again. Would Your Honor think it appropriate for the company to send to the stockholders either a copy of this transcript or a summary of Your Honor's decision?

THE COURT: I'm -- I'll leave that up to them. If they've got an 8-K -- we haven't generated a sufficient interest that Courtroom Connect wanted to broadcast today. So I don't know, you know -- we weren't on TV or anything. But, you know, I'm not going to -- you know, I'm not in the business of -- of giving that sort of guidance. That's really up to the -- the company has its own disclosure obligations that they're going to have to think about.

Given the stockholder base, my sense is there are people who probably do -- are reading about this and wondering what's going to go down.

And, you know, one of the things that's obviously open to your clients -- and I wasn't -- you know, I didn't mention the number of shares that they have in my ruling, and you were candid about what it is; but that's something that's on the Court's mind when people with a relatively modest economic stake are asking to take a -- you know, I didn't ask about the bond because it would be ludicrous to ask them. And I realize that. But your clients are obviously free to do whatever they want. It's the -- they have First Amendment rights. And to the extent that they think this is a stinky deal, you know, they're free within the context -- within the parameters of the securities laws to engage in communications about their views of the deal.

MR. JENKINS: Thank you, Your Honor.

THE COURT: Okay.

(Court adjourned at 12:55 p.m.)

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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 4 through 177 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 Wilmington, this 10th day of September 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
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