

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

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

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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.

- - -

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

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

- - -

APPEARANCES:

BRIAN D. LONG, ESQ.
Rigrodsky & Long, P.A.

-and-

PATRICIA C. WEISER, ESQ.
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of the Pennsylvania Bar
The Weiser Law Firm, P.C.
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DAVID A. JENKINS, ESQ.
ROBERT J. KATZENSTEIN, ESQ.
ROBERT K. BESTE III, ESQ.
STEPHANIE S. HABELOW, ESQ.
Smith, Katzenstein & Furlow, LLP

-and-

EDUARD KORSINSKY, ESQ.
MICHAEL H. ROSNER, ESQ.
of the New York Bar
Levi & Korsinsky, LLP
for Plaintiff Peter P. Weigard

1 APPEARANCES: (Continued)

2 WILLIAM M. LAFFERTY, ESQ.
3 ERIC S. WILENSKY, ESQ.
4 D. McKINLEY MEASLEY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP

5 -and-

6 STEPHEN D. HIBBARD, ESQ.
7 of the California Bar
8 Shearman & Sterling LLP
9 for Defendants Health Grades, Inc., Kerry R.
10 Hicks, Mats Wahlstrom, Mary Boland, Leslie S.
11 Matthews, John Quattrone, David G. Hicks, Wes
12 Crews, and Allen Dodge

13 GREGORY P. WILLIAMS, ESQ.
14 JOHN D. HENDERSHOT, ESQ.
15 GEOFFREY G. GRIVNER, ESQ.
16 Richards, Layton & Finger, P.A.

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18 YOSEF J. RIEMER, ESQ.
19 GALIA MESSIKA, ESQ.
20 MICHAEL D. REISMAN, ESQ.
21 of the New York Bar
22 Kirkland & Ellis LLP
23 for Defendants Mountain Acquisition Corp.,
24 Mountain Merger Sub Corp., Mountain Acquisition
Holdings, LLC, and Vestar Capital Partners V,
L.P.

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

6 I want to applaud the lawyers today
7 for being so well prepared. And I particularly want
8 to applaud the plaintiffs for being not only well
9 prepared but exceedingly measured and logical in their
10 argument. I really -- in a world where we all read
11 briefs and letters and probably read e-mails to each
12 other where l-y words are there and everybody is
13 saying outrageous, the plaintiffs have really focused
14 their claims -- you know, the claims they pressed in
15 the injunction in a reasonable way. They haven't
16 thrown hand grenades; but they've made some, frankly,
17 very potent arguments about the reasonableness of the
18 board's process without, frankly, making wildly
19 speculative -- often we see sinister motives thrown
20 around without basis. Mr. Jenkins and his team
21 admirably really focused on the core of the matter and
22 in a very skillful way. I think too often lawyers
23 forget that, frankly, targeted, measured advocacy is
24 often more persuasive than extreme gesticulation.

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

13 Here, on the merits, I'm going to say,
14 I -- although I -- I'm not free from doubt about it,
15 if I had to and for reasons I explained I don't have
16 to, if I had to say right this moment whether the
17 plaintiffs have demonstrated a reasonable probability
18 of success on the merits as to their Revlon claim, I
19 would find that they have. I -- I have listened hard
20 to the defendants' explanation of this. And I'm not
21 saying that they are -- I don't want to be judgmental
22 in some narrow-minded amoral sense; but the Revlon
23 standard is not a business judgment standard, and it
24 does require the Court to look into the reasonableness

1 of the board's decision making. Part of what you have
2 to do in that is to figure out why is the board acting
3 as it is.

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

12 I'm sorry, but people like Mr. Hicks
13 on average -- I haven't had a chance to meet him. I
14 met him through his deposition. People like that, who
15 built a business -- let's face it. He was one of the
16 founders of this business. (Continuing) -- they care
17 about who their business goes to. They particularly
18 care about who it goes to and at what price. If they
19 aren't done, if they have an interest in continuing,
20 it does matter to them who the buyer is. That's a
21 profoundly different interest than other stockholders
22 have. It's not to say they don't care about the price
23 at which their equity's cashed out; but when there's a
24 substantial likelihood that you will remain as an

1 executive and retain the ability to share in the
2 upside of the company, you actually have to be careful
3 about pushing things too long. Think about the
4 Lyondell. You know, one of the amusements about
5 Lyondell, right, I mean, if you're the seller and
6 you're staying with the seller, getting too good a
7 price and sharing in the benefits of too good a price
8 when you're on the team still is not real good for
9 you. If you can get a respectable price, build up
10 your retirement nut, be able to roll into some equity
11 and have a future upside, that could be a really good
12 thing.

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

19 So what happened here? Well, the
20 board decided that Vestar was the only bidder, while
21 saying it wasn't for sale. Let's give the board
22 credit. No rights plan in place. It's basically
23 saying to the marketplace "You can come forward." The
24 board had taken meetings. Citigroup had taken

1 meetings. Company's doing well, though. Market's
2 recognizing it. Vestar comes forward. I think
3 Mr. Riemer just admitted, Vestar early in the process
4 really would have been a little freaky weird, kind of
5 an act of hutzpah. People would have laughed and
6 giggled. If you said, you know, "You can't have lunch
7 with anybody else," it would have looked a little
8 adolescent jealous; right? I mean, kind of crazy.
9 "You can't have lunch with anybody else because I've"
10 -- "we've said that we want to talk to you and we've
11 signed an NDA. We haven't made an expression of
12 interest in price."

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

24 What does the board and its advisors

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

10 I heard some very skillful advocacy
11 from Mr. Lafferty about the plush level of funds that
12 are available to private equity firms because they
13 were entrusted by investors and deals didn't exist.
14 How about getting a skilled investment bank like
15 Citigroup to look at who's pushed up and what their
16 interests are? How about the strategics? I would
17 have a lot more confidence had I seen any reasoned
18 examination.

19 Here's the thing about advisors. I'm
20 aware of -- like, I come out of one of the advisorial
21 professions. You get the right to play. You get to
22 go through the slides. You get to show "Here's why
23 this one wouldn't do this. Here's the pitch that they
24 made." There's slides in here that people actually

1 indicated that they wanted to partner up and make a
2 bid.

3 Now, body language and receptivity of
4 management are very important in the private equity
5 context. Timing's important. But there is an
6 obligation to try to get the best price, and there are
7 powerful self-interests that apply to people like
8 Mr. Dodge, Mr. -- and the Hicks brothers that don't
9 apply to other stockholders. They're not -- their
10 interests are not perfectly aligned. It appears like
11 Mr. Hicks is saying nobody else is really serious.
12 Citigroup says no one else is really serious.

13 Now, I mean, I suppose Citigroup would
14 want a blow-out price; but, remember, there are
15 incentives. They do have a percentage kicker. But
16 the reality is if they can get a deal, they get a
17 deal. And even if they were exercising judgment, it
18 would be nice to see an appropriately-serious
19 articulation of the reason why other buyers were not
20 likely to come forward. One would think that would
21 mean taking them apart a bit on a case-by-case basis.
22 "How different, really, are they positioned than
23 Vestar? How much money do they have? What are they
24 interested in? Are there funds expiring such that

1 they actually need a deal? Are there strategics out
2 there? Hey, Mr. Hicks, what was your body language
3 with these people? Do you have some relationship
4 where you hate this dude because he got some industry
5 award and you didn't or he's a cooler guy?" I mean,
6 that never affects things; right? Because CEOs are
7 not -- they're not rivalrous people. They never have
8 other considerations.

9 In the middle of the process somebody
10 else gets interested. What does the board do?
11 Mr. Hicks and his team meet with them privately. No
12 lawyers, no independent directors, no financial
13 advisors. Just top management.

14 This is a top management where the CEO
15 asked the principal of the private equity firm to join
16 his board in years prior, where there are, frankly --
17 it is a level of cordiality and chumminess in the
18 e-mails that suggest they're very comfortable with
19 each other. I'm not overstating it. I'm not
20 suggesting they vacation together. I'm not suggesting
21 that they are the platonic equivalent of people who
22 have been partnered up on eHarmony.com. I'm
23 suggesting that this is a organization, this is a
24 person, Mr. Holstein, that Mr. Hicks was very

1 comfortable with and could see himself partnering with
2 in the future. That is a benefit to Mr. Hicks and
3 Mr. Dodge and his brother -- the other Mr. Hicks that
4 other stockholders don't care about.

5 The fact that Mr. Hicks will be happy
6 in the future, I assume that stockholders, as good and
7 moral people, that's what they think about, that they
8 want Mr. Hicks to do well. They probably don't want
9 him to do well at the expense of a dollar more per
10 share from someone else. If there's another deal
11 available that doesn't involve Hicks or that involves
12 Hicks working for someone that he's not as ducky with,
13 they would want that.

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

22 Now, admittedly, the defendants can
23 say "Well, but the record doesn't show what it was
24 in." Well, if you take QVC seriously, and I do --

1 it's my job and it's a pretty good decision -- it's
2 defendants' obligation to prove reasonableness. The
3 absence of any indication of what those folks were
4 actually interested in, in some ways the absence of
5 the -- of the -- of the record is because of the
6 defendants. Did anybody ever at the board meeting say
7 "Hey, Hicks, did those people ask you, tell you that
8 they would be willing to do an MBO?" and said "Yeah."
9 "What'd you tell them?" "We're not for sale." "Well,
10 you're asking us to talk to Vestar now. Perhaps
11 without wearing a For Sale sign we have skillful
12 enough bankers who can make a discrete phone call and
13 see whether we can get them in the game."

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

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

1 Again, I'm not asking anybody to go on
2 eBay. That's not what Revlon says. But what the
3 board's relying upon in terms of -- it didn't do any
4 -- I mean, it didn't position itself. It didn't take
5 market soundings. As I said, it didn't even sift
6 through -- without contacting anyone, sift through
7 possible strategic and private equity buyers and make
8 a judgment about whether there might be someone who
9 would be interested. It was simply -- I mean, I don't
10 even really get, frankly, the synapse on this record
11 between a list of people who had expressed an
12 interest, the consistent notion the company wasn't for
13 sale, and then the ruling-out that anyone would come
14 forward.

15 I understand that no one actually came
16 forward. And I understand and give credit to the
17 board for not -- by not having a pill, by taking the
18 meeting, to say "We would listen." But you're now at
19 a different situation where you're actually -- to say
20 the board wasn't for sale, come on. When you're --
21 I'm not saying that you have to have an auction
22 formally or any of that stuff. The board was actively
23 in listening mode, actively willing to consider a sale
24 of the whole enchilada and never kind of bored down on

1 the market with a lot of precision, I mean. And,
2 frankly, I'm going to put it on the defendants today.
3 It is a burden under Revlon. You can say "Strine, we
4 did all that."

5 Well, I spent a lot of the last four
6 days reading a lot of appendices, reading every word
7 of every deposition. Now, don't give me that much
8 credit. There were four depositions. It's not like
9 it was the hugest thing I ever did, but I've read the
10 appendices. That's why I asked the question about the
11 slides. There's no there there. The board can't go
12 through and say -- no member of the board could be
13 quizzed on three or four of them and say "These were
14 the most serious expressions of interest and, frankly,
15 one of them popped up a price a couple years ago and
16 was at a ludicrous level" or "This one can't do it
17 because they're totally strapped on their covenants"
18 or something like that. Nobody could give testimony
19 like that because nobody remembers any of it, because
20 it appears to have been, frankly, just a list. And
21 rather than being used as a -- as a -- in a serious
22 way as a possible way of considering what other people
23 have done, it was more like window-dressing.

24 Then you get to the whole point of the

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

11 But the board decided, as I understand
12 it, "We wanted to get the 8.20 in the hands of the
13 stockholders a couple weeks before" -- "three or four
14 weeks" or "six weeks before. That's why we" -- "We
15 knew that it would actually limit the effectiveness of
16 the passive market check, but we assented to the
17 demand to do the tender offer."

18 Well, you know, if you're not going to
19 do as much on the front end, you got to make sure the
20 back end works. It may be the case -- I agree with
21 Mr. Riemer -- I'm not going to exaggerate -- there are
22 people who particularly love to ruin lawyers' summers.
23 I mean, they love to ruin your weekend. You know, I
24 think there's a Friday -- there's a club that sends

1 Friday e-mails to lawyers, questions that you don't
2 really need an answer to but you're going to send on
3 Friday afternoon just for fun.

4 But it is -- it is an odd time of the
5 year. The financing markets are really still a little
6 bit difficult. I'm not going to exaggerate the
7 barriers of entry, but I do still think -- and I'm not
8 going to say that I'm a master of the evolving
9 etiquette of the private equity world. I will say I
10 don't believe private equity buyers have as much of an
11 incentive as a strategic rival to top another bid;
12 that there is a perception that when management is
13 happy about a deal, that it's difficult to disrupt
14 that; that when management with this much stock signs
15 up voting support agreements, that they may be pretty
16 happy; that yes, it is true that if a higher bid is
17 accepted, that the voting agreement goes away. It
18 doesn't mean that Mr. Hicks or anybody else has to
19 vote for the other deal. It just means the voting
20 agreement goes away.

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

24 And, again, what I'm asked -- it could

1 be right that if someone wanted to come forward,
2 there's plenty of cash out there, that this financing
3 contingency and other sorts of things aren't an issue,
4 that the management thing isn't an issue and that
5 there really isn't a necessary contradiction between
6 the front-end conclusion there wasn't a likely buyer
7 and that reality. It could be that there are -- there
8 are buyers, people who have cash but because of the
9 nature of this company and the -- the -- the cash and
10 where it's located within the private equity industry,
11 that it's not located in the sector that's likely to
12 come forward for Health Guard [sic]; that the risk of
13 losing a unique buyer like Vestar that really is
14 incentivized on the front end made it not worth the
15 candle to take the risk of exploring that, but we left
16 the door open to those other people.

17 There's a very simple way in which a
18 judge would have more confidence in accepting that
19 argument. And I think it's -- relates to what I just
20 talked about, which is had Citi and the management
21 team really rigorously gone through with the board the
22 possible other buyers, broken down by private equity,
23 strategic within private equity by those who
24 concentrated in the health space, within the health

1 space looked at people's financing capacities, and
2 actually done something where I could say -- feel that
3 they had confidence in making that determination, I
4 would have a much better basis to conclude that they
5 acted reasonably. But I don't see any of that
6 sifting. I don't see any of the things that a
7 sales -- right, you are in -- a bit in a sales mode.
8 Even when you're not out there, you're assessing how
9 likely is it we could sell this to someone else, who
10 else might want our asset. I don't get any flavor of
11 that.

12 And so when I'm asked later on in the
13 passive market check to assume that everyone knew that
14 there's plenty of money out there, how do I know?
15 There's no evidence in the record other than, you
16 know, "We're \$300 million," Citigroup says. "There
17 are people who can buy things for \$300 million and
18 they've done it before." You know, that is not --
19 defendants in this context rightly asked this Court to
20 examine the decisions that a board makes in light of
21 the particular circumstances that that board faces.
22 That is absolutely a fair expectation. What comes
23 with that, then, is the duty of the board to actually
24 do that itself and not come in to court without having

1 done so and then tell the judge that there's plenty of
2 money in the world; that in the past there are
3 people -- in circumstances that are totally different
4 that I can't possibly explore, nor can the plaintiffs
5 explore, people have come forward in this time frame.

6 Well, you can't have it both ways. If
7 boards want to have the benefits, as they should, of
8 credit for the contextual risks that they face, they
9 also need to create a record that they've thought
10 about them in a reasonable way. And when a board,
11 honestly speaking, doesn't create any record that it
12 really segmented the market or considered whether
13 there was a likely buyer and then tells the Court on
14 the back end, "Ah, the market is plush. Come on in,"
15 that does not instill confidence.

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

1 going to negotiate your deal."

2 But, honestly speaking, I don't buy
3 for a minute the notion that the script isn't a fully
4 accurate view of what was truly communicated to the
5 managers of Health Guard [sic]. I'm talking about
6 Exhibit 53. Does that mean that if Mr. Hicks says
7 that he wants \$25 million a year, 25 percent of the
8 equity and he doesn't have to roll any cash into it
9 that Vestar is going to keep him on? No. Does it
10 mean that "We're" -- "We are private equity. We
11 understand the game. We partner with management. The
12 only way we make money is if it's good for management,
13 and we want you to get the transitional benefits that
14 management gets in a situation like this. And we're
15 making every verbal and nonverbal promise short of a
16 binding contract to you"? Yes. Could they be fired?
17 Sure. Right. Like Joe Paterno could have been fired
18 five years ago. It's not likely JoePa is going
19 anywhere.

20 And this script, it's perfectly in
21 keeping with the relationship that the two principals
22 had. And, again, I'm not going to say there's
23 anything intrinsically wrong with it, but it is -- it
24 does mean that Mr. Hicks and his top managers have a

1 totally different incentive system than everybody
2 else. And this board didn't supervise it. The
3 advisors didn't supervise it in a way that instills
4 confidence. They didn't explore alternatives in a way
5 that instills confidence. And, therefore, if I had to
6 bet today, I'd say the plaintiffs have a reasonable
7 probability of success on the merits.

8 Does the plaintiff get what they want?
9 No. I'm not going to enjoin this. And I agree with
10 Mr. Jenkins that, does that leave our law in an
11 awkward place? I suppose. It actually, though, isn't
12 any different than any other part of the
13 Anglo-American legal tradition. Injunctions are
14 really an exception.

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

24 I don't -- there's an equity pool. I

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

6 And people are going to, in an
7 uncoerced way, get to decide for themselves to decide
8 whether to take the \$8.20 or not. Because there's no
9 coercion, you know, this Court should be hesitant --
10 and because this could possibly be a valuable price.
11 It appears like it is a fairly high market multiple.
12 Whether the company has, frankly, told its story
13 accurately enough so that it's getting full
14 recognition, I don't know; but it appears -- it may
15 be -- and this is not a bad thing, but it may be
16 taking advantage of selling at the top of the market.
17 I mean, good. Again, I would have more confidence, if
18 it wasn't clear, that the Hicks brothers and Mr. Dodge
19 were probably going to continue along.

20 But the risk I take out of the hands
21 of the people whose money's at stake the ability to
22 make an uncoerced decision for themselves to accept
23 this price. I don't have -- I mean, I'm pretty -- I
24 like to think -- you know, probably y'all think -- and

1 I'm sure the defendants right now, even though they
2 know right now they're probably not going to get an
3 injunction, probably think I'm a bit edgier than I
4 should be. The confidence I have of taking it
5 actually out of the hands of the stockholders and
6 making the investment choice for them I don't have.

7 You know, people can get things wrong
8 in terms of process and they turn out right and vice
9 versa. I mean, it's just -- and I don't even know
10 that it's wrong. I'm looking at this
11 probablistically. It could be when I have a trial
12 that I have a much more authentic and, you know,
13 understandable case from the defendants. The
14 plaintiffs' case, on the other hand, might get
15 stronger, too. I don't know. But I'm here where I've
16 got to weigh, really, the risk of what I'm going to
17 do.

18 And Mr. Jenkins said, you know, is it
19 empty. Well, I don't think -- I actually don't think
20 there's any difference in this tradition. I mean, I
21 really think the number of times that this Court has
22 ever enjoined stockholders from considering a
23 premium-generating transaction in the absence of fear
24 of a disclosure violation or coercion and the absence

1 of a higher competing offer that it's impeding, it's
2 just -- it's basically a null set. We do the
3 disclosure stuff to try to get it cleaned up so the
4 people can make the decision for themselves.

5 When -- the irreparable injury
6 potentially of the stockholders, frankly, is if you
7 deter the other higher competing bid, there's the
8 irreparable injury to the bidder who lost the asset;
9 but the stockholders actually are prevented from
10 considering something very tangible and valuable at
11 that time. And the risk -- the risk calculus for the
12 judge during the injunction is totally different. I
13 don't really care about that. I mean, it's not my --
14 my interest about Vestar. I'm talking about it from
15 the perspective of the class that the plaintiffs
16 represent in the situation where somebody is being
17 impeded from presenting something that was a genuinely
18 higher bid.

19 For example, on this record, imagine
20 somebody coming forth with an inquiry, really couldn't
21 clear financing, had a very good shot at clearing
22 financing but the board had not reserved, frankly,
23 contractual flexibility to stop the closing of the
24 tender offer and stockholders are wondering what's

1 going on. Perhaps in that circumstance an injunction
2 or something like that could -- the balance of the
3 harms would tip in a different thing. Here, I don't
4 think the balance of the harms -- the risk of an
5 injunction and the fact that I could be depriving a
6 stockholder base that might actually genuinely believe
7 this is a really good price and genuinely actually
8 believe that the board was right, that the board
9 actually got into a market multiple irrespective of
10 the DCF value of the sensitivity case, that you know,
11 "The DCF value of that sensitivity case was a bit" --
12 "is still a bit aggressive; and if we can get this
13 kind of multiple now as stockholders, we want to take
14 it." I don't want to take it out of their hands.

15 And with respect to irreparable
16 injury, I don't want to say there's no hint of
17 irreparable injury in this context. There is
18 something substantial to what the plaintiffs say about
19 not knowing, right. One will never know exactly what
20 would have happened if. That's sort of life. The
21 doctrine tends to be, you know, if you can be
22 compensated in money damages, you don't have -- get an
23 injunction. Not that "Oh, well, we might only get
24 money damages if we win the trial, whereas we get

1 leverage now, we get the injunction." You don't do
2 that in a tort context. You don't do it anywhere
3 else.

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

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

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

1 interests are different potentially.

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

9 You could have a situation where,
10 frankly -- and I admit that there are voting
11 agreements in place, which means you could have a
12 situation where less than a majority of the
13 disinterested stockholders, I suppose, tender and the
14 deal gets done; but the others who dissent could --
15 could press on with the case, which does suggest
16 that -- and there is -- there are remedies at law for
17 that.

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

1 think that's the thing.

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

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

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

1 I do worry about that.

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

10 But I certainly think absent some sort
11 of argument that the business judgment rule standard
12 applies because of a fully-informed vote, I would not
13 dismiss these claims, because I do have serious
14 concerns about the process used.

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

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

21 THE COURT: Uh-huh.

22 MR. JENKINS: Does Your Honor think --
23 let me try this again. Would Your Honor think it
24 appropriate for the company to send to the

1 stockholders either a copy of this transcript or a
2 summary of Your Honor's decision?

3 THE COURT: I'm -- I'll leave that up
4 to them. If they've got an 8-K -- we haven't
5 generated a sufficient interest that Courtroom Connect
6 wanted to broadcast today. So I don't know, you
7 know -- we weren't on TV or anything. But, you know,
8 I'm not going to -- you know, I'm not in the business
9 of -- of giving that sort of guidance. That's really
10 up to the -- the company has its own disclosure
11 obligations that they're going to have to think about.
12 Given the stockholder base, my sense is there are
13 people who probably do -- are reading about this and
14 wondering what's going to go down.

15 And, you know, one of the things
16 that's obviously open to your clients -- and I
17 wasn't -- you know, I didn't mention the number of
18 shares that they have in my ruling, and you were
19 candid about what it is; but that's something that's
20 on the Court's mind when people with a relatively
21 modest economic stake are asking to take a -- you
22 know, I didn't ask about the bond because it would be
23 ludicrous to ask them. And I realize that. But your
24 clients are obviously free to do whatever they want.

1 It's the -- they have First Amendment rights. And to
2 the extent that they think this is a stinky deal, you
3 know, they're free within the context -- within the
4 parameters of the securities laws to engage in
5 communications about their views of the deal.

6 MR. JENKINS: Thank you, Your Honor.

7 THE COURT: Okay.

8 (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 32 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 3rd day of September 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent