

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RON PARCELL, On Behalf of :
Himself and All Others :
Similarly Situated, :
 :
Plaintiff, :
 :
vs. : Civil Action
 : No. 7003-VCL
SOUTHWALL TECHNOLOGIES, INC., :
GEORGE I. BOYADJIEFF, ANDRE R. :
HORN, DR. R. EUGENE GOODSON, :
JAMI K. DOVER NACHTSHEIM, :
WILLIAM A. BERRY, PETER E. :
SALAS, DENNIS E. BUNDAY, :
DENNIS CAPOVILLA, SOLUTIA INC., :
and BACKBONE ACQUISITION :
SUB, INC., :
 :
Defendants. :

- - -

Chancery Court Chambers
New Castle County Courthouse
Wilmington, Delaware
Monday, November 7, 2011
12:30 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, VICE CHANCELLOR

- - -

TELECONFERENCE

- - -

CHANCERY COURT REPORTERS
410 Federal Street
Dover, Delaware 19901
(302) 739-3934

1 APPEARANCES:
(By telephone):

2 JAMES P. McEVILLY, III, ESQ.
3 Faruqi & Faruqi, LLP
-and-

4 JUAN E. MONTEVERDE, ESQ.
5 BRIAN MOON, ESQ.
of the New York bar
6 Faruqi & Faruqi, LLP
for Plaintiff

7 STEPHEN C. NORMAN, ESQ.
8 BRIAN C. RALSTON, ESQ.
9 MATTHEW DAVIS, ESQ.
Potter, Anderson & Corroon LLP
-and-

10 JAMES F. BASILE, ESQ.
11 ELIOT A. ADELSON, ESQ.
of the California bar
12 Kirkland & Ellis, LLP
for Defendants Solutia Inc. and Backbone
13 Acquisition Sub, Inc.

14 LISA A. SCHMIDT, ESQ.
15 MARGOT F. ALICKS, ESQ.
Richards, Layton & Finger P.A.
-and-

16 JONATHAN S. KITCHEN, ESQ.
of the California bar
17 Cox, Castle & Nicholson LLP
for Defendants Eugene Goodson, William
18 Berry and Dennis Bunday

19 KURT M. HEYMAN, ESQ.
20 SAMUEL T. HIRZEL, ESQ.
Proctor & Heyman, LLP
21 for Defendants Southwall Technologies,
Inc., Dennis Capovilla, George Boyadjieff,
22 Jami Nachtsheim and Andre Horn

23 MICHAEL A. WEIDINGER, ESQ.
24 Pinckney, Harris & Weidinger, LLC
for Defendant Peter Salas

1 THE COURT: Welcome, everyone. This
2 is Travis Laster speaking.

3 MR. McEVILLY: You have Jim McEvilly
4 from Faruqi & Faruqi for the plaintiffs, and with me
5 on the line are Juan Monteverde and Brian Moon from my
6 firm.

7 THE COURT: Excellent.

8 MS. SCHMIDT: This is Lisa Schmidt
9 from Richards, Layton & Finger here with Margot Alicks
10 appearing on behalf of Messrs. Goodson, Berry and
11 Bunday.

12 MR. NORMAN: Steve Norman on behalf of
13 defendants Solutia and Backbone Acquisition. With me
14 is Brian Ralston and Matt Davis. Also on the line
15 with me from Kirkland & Ellis is Jim Basile and Eliot
16 Adelson.

17 MR. HEYMAN: This is Kurt Heyman along
18 with Sam Hirzel on behalf of the company Southwall
19 Technologies along with certain of its directors,
20 Dennis Capovilla, George Boyadjieff, Jami Nachtsheim
21 and Andre Horn.

22 THE COURT: Great. Welcome, everyone.

23 MR. KITCHEN: This is Jonathan
24 Kitchen. We are California counsel for Southwall and

1 certain of its directors.

2 THE COURT: Great. I'm glad you're on
3 too.

4 MR. WEIDINGER: This is Michael
5 Weidinger on behalf of Peter Salas.

6 THE COURT: Is that everybody? I
7 don't want to cut anybody off.

8 Well, listen. Thanks, everybody, for
9 getting on the phone. Mr. Monteverde, are you going
10 to be doing talking?

11 MR. MONTEVERDE: Yes, Your Honor.

12 THE COURT: Why don't you kick it off.

13 MR. MONTEVERDE: Excellent, Your
14 Honor.

15 Well, this morning we have before Your
16 Honor a motion to expedite on a single defendant's
17 motion to request that one forum be the only forum to
18 proceed. The transaction is a tender offer set to
19 expire November 22nd between Southwall and Solutia.

20 I am happy to let the Court know I
21 think the motion for expedition is one that can be
22 resolved between the parties. We have had
23 discussions, and I am optimistic about that being
24 resolved. The only problem or the hurdle here is two

1 other cases before the Court in California.

2 Southwall is a Delaware corporation
3 that conducts business in Palo Alto, California.
4 There are two cases there. We, and when I say "we," I
5 mean the plaintiff, me, personally, I have tried to
6 coordinate with the California counsel. I am not able
7 to reach agreement.

8 In my view, they are being
9 unreasonable in their expectation on how the case
10 should proceed and where it should proceed. I think
11 defense counsel can attest to that. My understanding
12 is that there's some issues there as well.

13 THE COURT: Well, they generally think
14 you all are unreasonable, so I'm sure they join new
15 that sentiment.

16 MR. MONTEVERDE: Well, I think I was
17 reasonable, but Your Honor may be correct on that.

18 THE COURT: You're always reasonable,
19 Mr. Monteverde.

20 MR. MONTEVERDE: This is not a
21 traditional tender offer, Your Honor. I think there
22 are a couple of things that make it different.

23 I want to discuss the merits a little
24 bit because I think it's important. It's something

1 that the Delaware court is best positioned to deal
2 with, and specifically Your Honor, in fact, because I
3 think there's some Del Monte resemblances here in the
4 sense that there may be a banker conflict.

5 You have a majority shareholder,
6 Needham Capital and its affiliates, hold 63 percent of
7 the stock, and the process that was conducted during
8 2010 through the present was also by Needham & Company
9 who has a relationship with Needham Capital.

10 They did have a banker, at the end of
11 the day, come and give a fairness opinion, but I don't
12 think -- from the plaintiff's perspective, we don't
13 think that's sufficient. We think there may be some
14 conflicts here, and it might have not resulted in the
15 best process or the best price at the end of the day
16 for shareholders. We think that alone merits
17 expedition.

18 We also think that the 14D-9 isn't
19 complete, and we have said that in our papers. There
20 are some of the issues that we have presented to this
21 Court in the past, such as lack of free cash flow.
22 There are some projections that the line items needed
23 to come from free cash flow that are not there.

24 There's also some issue with the

1 summary of the financial analysis performed by the
2 banker that don't appear to be complete from the
3 plaintiff's perspective, and no fair summary.

4 Like I said, I think coordination
5 really is the issue here, Your Honor. I don't think
6 expedition is the issue, and I don't want to speak for
7 defendants.

8 THE COURT: Well, let me ask you about
9 expedition. Given that you've got two stockholders
10 that together make up a 63 percent holder, and given
11 that they're supporting the tender, why isn't this a
12 case where it shouldn't be expedited, and if you have
13 any disclosure claims, you'll get a quasi appraisal
14 case as contemplated by Berger versus Pubco.

15 MR. MONTEVERDE: Your Honor, I think
16 because we have an opportunity now to maybe force a
17 go-shop period that I think would be beneficial to
18 conduct now, because once the transaction closes, yes,
19 we have the quasi appraisal remedy as an option, and
20 certainly it is an alternative, but I think that's not
21 the best alternative.

22 The best alternative is to deal with
23 it today, see if we can do something between now and
24 the tender closing. Just because there's a tender

1 closing on November 22nd does not mean the transaction
2 will be consummated on that same day, right? We may
3 have still some time, maybe a week or so.

4 So I think we could possibly have a
5 go-shop process now, or between the tender offer
6 closing and 20 days thereafter, to insure the price
7 and any process deficiencies that we might have
8 alleged are resolved. I don't think quasi appraisal
9 would be adequate.

10 But, going back, I don't think
11 expedition is something that the parties are in
12 disagreement on. I think the issue is does this Court
13 want the case, and can this case proceed in Delaware.
14 I think the answer should be yes.

15 I will say the California case has not
16 moved for expedition. I think they filed papers the
17 day after they spoke to me where I expressed my
18 preference to be in Delaware, and they filed a request
19 for a hearing date. My understanding is California
20 has a hearing date on November 21st to determine
21 whether expedited discovery and a TRO are warranted.

22 THE COURT: I saw in your papers your
23 reference to that date being an ex parte TRO
24 application hearing.

1 MR. MONTEVERDE: What was that, Your
2 Honor?

3 THE COURT: Let me hear from the
4 defendants.

5 MR. KITCHEN: This is Jonathan
6 Kitchen, Your Honor, from San Francisco. There is
7 currently pending in one of the two cases filed in
8 California, which are essentially going to be, at some
9 point consolidated, I imagine, an application for a
10 temporary restraining order and a preliminary
11 injunction which is now set for a hearing on
12 November 21st.

13 We filed this morning a virtually
14 identical motion to the one you have in front of you
15 for one forum in the same action, and there is a
16 hearing on that matter now set for tomorrow morning at
17 8:30 in front of Judge Kleinberg.

18 We are in the process, as I am
19 speaking to you, of giving notice to the plaintiffs
20 counsel that they are required in court tomorrow
21 morning in California at 8:30 to hear essentially an
22 identical request to the one being made to you here,
23 which is not that the defendants preferred Delaware
24 over California, but that we want to be in one forum,

1 whichever is appropriate, and inviting the courts to
2 coordinate.

3 THE COURT: I just lost you.

4 MR. KITCHEN: At what point?

5 THE COURT: I heard you say "inviting
6 the Court," and then there was silence.

7 MR. KITCHEN: The motion in California
8 is identical to the one filed in front of you or this
9 Court, which basically says we are not expressing a
10 huge preference for one forum over the other. We just
11 don't want to proceed except in one forum.

12 THE COURT: I get that. What do you
13 think about whether I should expedite this thing at
14 all?

15 MS. SCHMIDT: Your Honor, Lisa Schmidt
16 on behalf of the defendants as well. Your Honor, it
17 looks like we're going to be proceeding on an
18 expedited basis in California if not here, and so we
19 would prefer to have some guidance as to which
20 location, I think for purposes of having some
21 certainty as to the deal, which, as Your Honor pointed
22 out, could close in a very so short amount of time.

23 We have agreed that we will consent to
24 expedition. We have documents ready to produce and

1 can talk about depositions as soon as we know where we
2 will be litigating.

3 THE COURT: All right.

4 MR. MONTEVERDE: Your Honor, what
5 counsel was just referring to, my understanding is --
6 I sent a letter last week with some categories of
7 documents, and my understanding is that they have been
8 collecting documents based on that.

9 And I do think this case needs to be
10 in Delaware. It's not just the go-shop issue. We
11 also have the disclosure issue, Your Honor, and I
12 think the Court of Delaware is better suited for this
13 case.

14 THE COURT: Okay. Well, look, in
15 terms of the one-forum issue, there is nothing that I
16 am going to say on this that is in any way novel and
17 isn't something that everyone on this phone call has
18 heard numerous times before, not only from me, but
19 more eloquently from the good Chancellor Strine.

20 In a situation like this where you
21 have simultaneous filings among plaintiffs' lawyers in
22 multiple jurisdictions, in our view, it makes sense
23 that the case should proceed in the jurisdiction whose
24 law governs the dispute.

1 Why? Because the people in the court
2 whose law governs the dispute necessarily have a
3 moderate comparative advantage in adjudicating that
4 state's law.

5 I have no problem admitting that if
6 this case involves California law, a California judge
7 would be far better suited than I. They deal with
8 California law all the time. They have California law
9 books on their shelves. They know what California law
10 is all about.

11 Certainly a California judge is
12 perfectly capable of figuring out what Delaware law is
13 all about. They're smart people. But it takes time,
14 incremental time, to learn a new area, or an area of
15 the law that you don't deal with frequently, and when
16 you're dealing with an expedited case, it is helpful
17 to have regular contact with this body of law.

18 Perhaps more importantly, and, again,
19 this is something that is not novel for anyone on the
20 phone, it's something that we say probably several
21 times a month, because these types of situations now
22 come up several times a month; Delaware is the only
23 state that can give you a definitive ruling on what
24 the law is.

1 That's not going to come from me.
2 That's going to come from the Delaware Supreme Court.
3 Under our federal system, the Delaware Supreme Court
4 is the only body that can give a definitive ruling as
5 to what Delaware law is. It's a state law question,
6 and the highest court in the state is the one that can
7 definitively rule on it.

8 So if people don't like what I do, and
9 they often don't, they can appeal immediately and get
10 a definitive answer from the people who are
11 constitutionally empowered to give it. Any other
12 court in any jurisdiction anywhere, be it state,
13 federal, even the United States Supreme Court itself,
14 can only predict as to what Delaware law is. Only our
15 Supreme Court can give a definitive answer.

16 It, therefore, makes complete sense to
17 have this type of case proceed in the jurisdiction
18 that can give you the definitive answer because you
19 have a direct appeal from this Court's decisions to
20 the Delaware Supreme Court.

21 This is a case where we have people
22 who frequently sue all around the country.
23 Mr. Monteverde of the Faruqi firm often sues here. He
24 often sues elsewhere. Mr. Brualdi often sues all

1 around the country. Now, he doesn't sue in Delaware
2 as much lately because my predecessor, Vice Chancellor
3 Lamb, sanctioned him in a case, and he understandably
4 hasn't been as eager to come back to Delaware since
5 that happened.

6 But, nevertheless, he has no
7 particular view on where cases ought to be developed.
8 What he cares about is getting a seat at the table.

9 Likewise, the Glancy Binkow firm,
10 although they are California based, they frequently
11 litigate in this court.

12 This is not about one court versus
13 another court. In my view, this is about which court
14 can best handle the matter. It's also not about
15 favoring one firm over another firm, because these are
16 all folks who are filing to insure that they get a
17 seat at the table and taking whatever the open slot is
18 to try to best maneuver for that seat at the table.

19 So in terms of where this case should
20 go forward, it is my view, and it's something that we
21 have expressed repeatedly, that these cases where it
22 is this type of simultaneous filing situation, should
23 go forward in Delaware.

24 If this was a case involving

1 California employment law, I would have a radically
2 different view, and I would be deferring to my
3 California counterpart in a hot minute.

4 Likewise, if this is a case that had
5 been on file for some lengthy period of time such that
6 my friends in California had already expended judicial
7 resources on it, had already gotten up to speed, were
8 already issuing rulings and had convened hearings, et
9 cetera, I would not, at that point, believe that it
10 was appropriate for Delaware to assert primacy in the
11 matter because there was already someone who was
12 addressing the case.

13 But when you have a situation like
14 this, whether this matter is expedited or not, then
15 it's the type of situation where, again, in our view,
16 the state whose law controls should take the lead.

17 Here, there can be no dispute, because
18 of the United States Supreme Court precedent applying
19 the internal affairs doctrine, that Delaware law will
20 control what happens as a result of these claims.

21 So, in terms of the one forum motion,
22 it's my view that the one forum on these types of
23 recurrent facts should be Delaware.

24 And the desire of plaintiffs' lawyers

1 to try to generate litigation mayhem by filing
2 elsewhere simultaneously so as to get a piece of the
3 pie and a seat at the table for potential settlement
4 negotiations should not affect judges coming up with a
5 rational scheme for how to handle these things.

6 I'm not in competition with
7 California. I was just out speaking to some judges
8 out in San Diego. They're great people. They're very
9 smart people. But we all have too much to do, and
10 this is the type of thing where, if people were able
11 to address this rationally, they would agree ex ante
12 on forums that would hear this so that you wouldn't
13 have this type of fight every time.

14 So my view on the one forum motion is
15 that it should go forward here. And I don't intend to
16 stay the case.

17 As far as the motion to expedite, if
18 people want to agree to an expedited schedule, so be
19 it. I will not require an expedited schedule because
20 I think when you have facts that set up like this;
21 namely, with a 63 percent holder, with no allegation
22 of any misalignment of interests except a very vague
23 and conclusory assertion that there's some desire for
24 liquidity based on size of holding, where there's no

1 other reason to think that there is any type of
2 material conflict in a third-party sale situation, and
3 when the only election that stockholders make is the
4 appraisal election, I think that under those
5 circumstances, our Supreme Court in Berger V. Pubco
6 has held that there is a path to an adequate remedy at
7 law.

8 That adequate remedy at law is a
9 class-wide appraisal action -- I'm sorry, class-wide
10 quasi appraisal action in which stockholders can get
11 money. I understand Mr. Monteverde doesn't like those
12 actions, and -- I don't mean to pick on
13 Mr. Monteverde. I should say that differently.

14 I understand plaintiffs' lawyers who
15 represent small holders and bring actions on a class-
16 wide basis don't like that remedy. It gives them less
17 leverage. It gives them less ability to extract
18 disclosure-only settlements that result in them being
19 awarded a fee. That doesn't mean that it's not an
20 adequate remedy.

21 So, in this situation, if the parties
22 want to agree to expedition, you can manage the case
23 and agree to it. I will not order it, however,
24 because I think Berger V. Pubco provides for a remedy.

1 If, indeed, there are inadequate disclosures that are
2 made, then there will be ample opportunity for the
3 plaintiffs to obtain relief in a monetary form on a
4 class-wide basis.

5 What Berger V. Pubco does is it avoids
6 the need for breakneck litigation over disclosure
7 issues on an evolving set of facts. It rather allows
8 the defendants to make the disclosures that they
9 believe should be made.

10 Then we can actually proceed with
11 litigation on the ordinary course, have a motion to
12 dismiss, have whatever proceedings are necessary, and
13 ultimately result in the type of remedy that the
14 Supreme Court has said should happen when there are
15 disclosures that prevent a stockholder from accurately
16 making the appraisal election.

17 Again, having said that, if people
18 want to agree to expedited proceedings, the parties
19 have the freedom to do that, and I won't stand in
20 their way. We just need to, at some point, think
21 about hearing dates, because I will need to be
22 sufficiently convinced that I need to devote whatever
23 weekends and evenings I'll need to devote to reading
24 all the wonderful briefs that you're going to need me,

1 et cetera, if I really don't think that there is a
2 need for expedition on these facts.

3 So hopefully that has given you
4 guidance both on the one forum motion, which I'm
5 saying Delaware, not out of any disrespect for
6 California, but simply out of an effort to craft a
7 rational way for these cases to go forward.

8 As to the motion to expedite, I shan't
9 order it.

10 Any questions as far as how this
11 should move forward?

12 MR. KITCHEN: Your Honor, if I could
13 get a transcript of that very eloquent explanation, I
14 would put it in front of Judge Kleinberg tomorrow
15 morning at 8:30.

16 THE COURT: I assume you have Delaware
17 counsel.

18 MS. SCHMIDT: Yes, Your Honor. We
19 will take care of that for Mr. Kitchen.

20 THE COURT: Miss Schmidt knows how to
21 take care of those things.

22 MR. MONTEVERDE: The only question I
23 would ask, Your Honor, if the parties are going to
24 agree on it being expedited, which we think is

1 warranted, and we would want an opportunity on a
2 preliminary injunction, is there a date that Your
3 Honor may have in mind, or does Your Honor want us to
4 write a further letter explaining the reasons why we
5 think we are entitled to a hearing.

6 I just want some guidance on that if I
7 may ask that from the Court.

8 THE COURT: The latter. You need to
9 explain to me why I should be at all concerned about
10 misalignment of interests by a 63 percent stockholder
11 who, except for your allegation about needing
12 liquidity, and I guess some side fees as to its banker
13 role, but not financing types fees, side fees as to a
14 transactional engagement, creates some type of
15 disproportionate material divergence of interest such
16 that it is necessary to invoke the mechanics of
17 expedited litigation and put everybody to the trouble
18 of that additional burden.

19 This looks to me like an arm's length
20 deal. It looks to me like an arm's length deal where
21 you had a major stockholder whose interests are
22 aligned with those of the stockholders as a whole.

23 It is not clear to me why the holder
24 of an undisclosed number of shares gets to roll in and

1 call expedition on these facts. So, yes, you will
2 need to convince me, and if the parties have agreed to
3 expedited proceedings, you all can send in a joint
4 letter. I'd be happy to consider a joint letter.

5 MR. MONTEVERDE: Just for the record,
6 if Your Honor wants a number, my client has 1500
7 shares.

8 THE COURT: Great.
9 Any other questions or comments?

10 MR. MONTEVERDE: Nothing further for
11 plaintiff.

12 THE COURT: All right. Thank you,
13 everyone, for getting on the phone. I appreciate it.
14 It's good to hear from everybody. You can proceed on
15 that basis. Have a good day.

16
17 (The teleconference concluded at 1:00
18 p.m.)

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CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 21 contain a true and correct transcription of the proceedings as stenographically reported by me at the teleconference in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 7th day of November, 2011.

/s/Maureen M. McCaffery

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