

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COLFAX CORPORATION : Civil Action No. 10447-VCL

- - -
Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, April 2, 2015
10 a.m.

- - -
BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON DEFENDANTS' MOTION FOR JUDGMENT ON
THE PLEADINGS, PLAINTIFFS' MOTION FOR AWARD OF
ATTORNEYS' FEES AND EXPENSES, and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
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1 APPEARANCES:

2 NED WEINBERGER, ESQ.
Labaton Sucharow LLP
3 -and-
JEREMY FRIEDMAN, ESQ.
4 of the New York Bar
Friedman Oster PLLC
5 -and-
ERIC L. ZAGAR, ESQ.
6 of the Pennsylvania Bar
Kessler, Topaz, Meltzer & Check, LLP
7 for Plaintiffs

8 ANTHONY W. CLARK, ESQ.
MATTHEW P. MAJARIAN, ESQ.
9 Skadden, Arps, Slate, Meagher & Flom LLP
for Independent Director Defendants

10 STEPHEN E. JENKINS, ESQ.
11 Ashby & Geddes, P.A.
12 for Defendant Colfax Corporation

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1 THE COURT: Welcome, everyone.

2 Mr. Clark, how are you?

3 MR. CLARK: Good morning, Your Honor.

4 I'm just fine on this fine spring day.

5 THE COURT: It seems we have finally
6 gotten to spring.

7 MR. CLARK: Too long in coming --

8 THE COURT: Exactly right.

9 MR. CLARK: -- I must say.

10 Tony Clark and Matt Majarian of
11 Skadden Arps for the independent directors of Colfax.
12 Also here this morning, Your Honor, with us is Lynne
13 Puckett, general counsel with Colfax.

14 THE COURT: Welcome.

15 MR. CLARK: Your Honor, we're here
16 this morning on Colfax and the independent directors'
17 motion for judgment on the pleadings. The plaintiffs
18 have also put in -- the derivative plaintiffs have put
19 in a request for fees, and we're going to talk about
20 that. But with respect to the substantive relief
21 sought in the Section 205 action, there's really no
22 opposition to the entry of that judgment.

23 The derivative plaintiffs never
24 answered or responded to the Section 205 application.

1 So the facts with respect to what's before the Court
2 this morning are those facts as stated in the
3 application, which has been admitted -- which have
4 been admitted to by the directors, who have also
5 joined in the request for relief.

6 Now, Your Honor, I don't want to
7 simply repeat what's in our papers, so I'll try and
8 keep my remarks brief and try to respond to any
9 questions that the Court may have.

10 Per the 205 application, Your Honor,
11 the basic facts -- and Your Honor's as familiar as
12 anybody with them -- are as follows: Colfax and BDT
13 were the only parties to the certificate of
14 designations at issue here; and BDT had the exclusive
15 right as a stockholder, preferred stockholder, to
16 vote to amend that certificate of designations. So
17 the alleged provision in the certificate of
18 designations that the plaintiffs rely on, the one they
19 say was -- barred the inducement payment here, could
20 easily have been fixed by an agreement simply between
21 the company and BDT without any stockholder vote.

22 So in connection with the Victor
23 acquisition about a year ago in the spring of 2014,
24 Colfax and BDT determined in good faith to improve the

1 capital structure and its debt capacity by getting BDT
2 to convert its preferred shares to common shares in
3 exchange for the \$23.4 million inducement payment.
4 Those efforts were immediately perceived by the market
5 as wildly successful, and, in fact, the market cap
6 increased by some \$575 million upon the announcement
7 of these transactions.

8 Now, Your Honor, at the time of our
9 November 3rd, I believe, conference call, Your Honor
10 wasn't quite prepared then to call the plaintiffs'
11 claim a foot fault -- the court reporter called it
12 footfall; I think you meant foot fault -- or a gotcha.
13 But, respectfully, now, Your Honor, the factual record
14 is closed, as set by the pleadings. And I think --
15 again, respectfully -- now is the time to call a spade
16 a shovel and to find, I believe, that the plaintiffs'
17 claim is, indeed, a foot fault, a gotcha and of no
18 real value to Colfax or its stockholders.

19 Now, I give plaintiffs' counsel full
20 marks for being clever. They came up with an issue on
21 a law school exam here that no one else saw. So I
22 give them a couple of extra points on their grade.
23 But the derivative plaintiffs want \$375,000 as an
24 appropriately modest fee for that.

1 Now, Your Honor, as I was thinking
2 about this last night, I tried to think of a -- a B
3 word other than Joe Pesci's apt phrase from My Cousin
4 Vinny to describe this request under these
5 circumstances, and I came up with one. The word is
6 "balderdash." It's an old word for senseless
7 nonsense.

8 The question before the Court is, in
9 fairness, what's the alleged benefit that was
10 conferred by the plaintiffs here and what's that worth
11 for a fee. Now, the plaintiffs can't point to any
12 financial benefit whatsoever from their claims. And,
13 in fact, when you look at it from a financial or an
14 economic standpoint, Colfax and the stockholders --
15 there not only hasn't been a financial benefit, but
16 the entire situation has been a financial detriment to
17 Colfax and its stockholders because they've had to
18 shoulder the costs of the defense of -- of the
19 litigation.

20 First, they had to defend against a
21 way overbroad breach of fiduciary complaint, alleging
22 loyalty breaches and self-interest. And when those
23 allegations were vigorously challenged by the
24 derivative defendants, they were abandoned by the

1 plaintiffs.

2 And then, secondly, the company and
3 its shareholders had to shoulder the expense of
4 defending the follow-on litigation, the amended
5 complaint, where the plaintiffs raised this
6 hypertechnical reading of what is, at best, an
7 ambiguous certificate provision and as to which the
8 parties to that contract, Colfax and BDT, would affirm
9 that it was never their intention to limit conversion
10 inducement payments in the manner the plaintiffs have
11 argued and which Colfax and BDT could have fixed the
12 issue by a simple amendment to the certificate of
13 designations.

14 And how would that have happened, Your
15 Honor? It would have happened if these plaintiffs,
16 these derivative plaintiffs, had done what, under --
17 respectfully, under Delaware law they should have
18 done. There were no interested directors on the board
19 with respect to this issue. They should have made a
20 demand. They should have pointed out the problem in
21 their demand. And then the directors, if they
22 believed that there was any merit to it whatsoever,
23 could have done what we're doing now. They could have
24 fixed it, could have come here on a 205 application

1 and asked Your Honor to -- to bless it, and that would
2 have been the end of it. There would have been no
3 need to incur all the expense that was incurred in
4 connection with defending this derivative litigation.
5 And, frankly, at the end of the day, the plaintiffs
6 still would have had the same standing, if you will,
7 if the company refused to pay them a fee to come
8 before Your Honor and say "I created a benefit. I'm
9 entitled to a fee." So we could have saved a lot of
10 money if we had gone down that route, but the
11 plaintiffs chose not to.

12 Now, their original complaint, Your
13 Honor, as I say, accused the independent directors
14 of -- of, in effect, self-dealing and breach of the
15 duty of loyalty. Now, that, in the -- as the
16 Catholics would say, being a good member of the parish
17 of St. Joseph's on the Brandywine --

18 THE COURT: It's Maundy Thursday. I
19 always -- what is Maundy? I don't know.

20 MR. CLARK: I know Holy.

21 THE COURT CLERK: Holy Thursday.

22 THE COURT: Holy?

23 MR. CLARK: Holy Thursday. Tomorrow's
24 Good Friday.

1 THE COURT: It's just an old word for
2 Holy? I meant to look it up this morning because, you
3 know, in this country we always called it Maundy
4 Thursday. I always wondered what Maundy meant.

5 MR. CLARK: That's a -- that's a new
6 one for me, Your Honor.

7 THE COURT: You have the more -- you
8 must be -- that's probably like a Vatican II
9 substitution where they decided --

10 MR. CLARK: Modernized.

11 THE COURT: Exactly. But, anyway, I
12 interrupted you. I'm sorry.

13 MR. CLARK: Well, I -- using Catholic
14 phraseology, Your Honor, those allegations,
15 self-dealing, breach of the duty of loyalty, that
16 amounts to a corporate cardinal sin. You go straight
17 to eternal damnation and hell when you do one of
18 those. But once the defendants attack that claim with
19 full force, the plaintiffs abandon it and, instead,
20 rested on their technical argument for breach of the
21 certificate. Again, using the Catholic parlance, that
22 amounts to, at most, venial -- that's v-e-n-i-a-l, not
23 venal -- sin, which is a slight and permissible
24 offense. And for that, Your Honor, we respectfully

1 submit that if any award is to be made here -- and the
2 Court, in its discretion, could determine that no
3 award is warranted; but if a fee is to be awarded
4 here, an appropriately modest fee, we submit, would be
5 in the range of a hundred thousand dollars or less.

6 THE COURT: You could really continue
7 this analogy further and think about 205 as a
8 confessionary statute.

9 MR. CLARK: You are cleansing us of
10 our venial sin.

11 THE COURT: There might be something
12 here. I can imagine -- you know, I'm good friends
13 with one of the professors at the Boston College, and
14 he might be very interested in the parallels between
15 Catholic doctrine and 205.

16 MR. CLARK: Well, my nine-year-old
17 keeps debating with me whether his various offenses
18 fall into the cardinal mortal or the venial category.

19 THE COURT: Wow.

20 MR. CLARK: About every two weeks I
21 get him into the mortal somewhere and drag him over to
22 St. Joseph's. The monsignor blesses him, thank God.

23 So let me just -- to -- to close this
24 out, Your Honor, let me talk just a little bit about

1 the ev3 case that Your Honor directed the parties to
2 and which does appear to be the most closely analogous
3 case to what we have here.

4 In that case, Your Honor awarded a
5 hundred thousand dollars in fees for a, quote, minimal
6 benefit conferred by the settlement of an appraisal
7 dilution claim since that claim was weak. There was
8 no likely harm to shareholders from the alleged
9 dilution for appraisal purposes from the exercise of a
10 top-up option used to facilitate the short-form
11 second-step merger in that case. And, moreover, Your
12 Honor observed that the parties to the merger
13 agreement, quote, could have addressed the alleged
14 dilution issue themselves by agreement in their
15 disclosure documents.

16 It seems to me that that precisely
17 describes the situation here with the plaintiffs'
18 certificate of designations interpretation claim.

19 By contrast in the same case, same
20 settlement, the Court ordered a million-dollar fee for
21 the settlement which, in Your Honor's words, "diffused
22 a corporate land mine" arising from the fact that the
23 top-up option at issue there, the consideration for
24 the option wasn't set forth in the documents and was

1 to be determined at some future point when, as, and if
2 they actually had to exercise the option to get to the
3 short-form merger on the back end.

4 And Your Honor found that -- because
5 of that absence of the consideration in the documents,
6 Your Honor found that that appeared to violate three
7 provisions of the General Corporation Law: 157, which
8 requires option consideration to be set forth either
9 in the certificate of incorporation or in the board
10 resolution creating the option; Section 153, which
11 requires the par value stock be issued for
12 consideration of not less than par; and 152, which
13 require the board to determine the sufficiency of
14 consideration to be received for stock.

15 The settlement in ev3 fixed that
16 problem. But if it hadn't and the merger,
17 nevertheless, had been effectuated, Your Honor
18 observed that the merger might have been subject to
19 being invalidated as ultra vires, which would have
20 thrown a multibillion-dollar public company
21 transaction straight into a -- into a cocked hat.

22 So the benefit achieved there by that
23 settlement, while Your Honor said it was
24 unquantifiable, Your Honor also found that it was

1 significant. And I would agree with that. That's not
2 the situation here.

3 Compared with the corporate land mine
4 that was diffused by the settlement in ev3, the issue
5 diffused by the derivative plaintiffs' efforts here I
6 think is best described as a -- a little corporate
7 party popper. The plaintiffs' reading of the contract
8 provision to bar an inducement payment to BDT was
9 strained. And the only parties to that contract, the
10 certificate that plaintiffs allege was breached, were
11 Colfax, BDT. They could have easily amended the
12 contract to state that inducement to state explicitly
13 that inducement payments were permitted, if necessary,
14 and they could have done without a shareholder vote.
15 So we would argue that the plaintiffs created no
16 benefit for Colfax and the stockholders here.

17 To the contrary, the only financial
18 effect of their efforts was to cause the company to
19 incur substantial and unnecessary litigation expenses,
20 and, for that, we think it would be fair if they got
21 nothing; but even if the Court disagrees and thinks
22 that there has been some modest benefit here, in its
23 discretion, we think the Court should determine to
24 award the plaintiffs no more than a hundred thousand

1 dollars as a fee, which we think is -- is, if
2 anything, generous.

3 And I'd be happy to address any
4 questions Your Honor might have.

5 THE COURT: That's fine. Thank you
6 very much. I appreciate it, Mr. Clark.

7 MR. CLARK: Thank you, Your Honor.

8 THE COURT: I hope no one will think
9 that we were being disrespectful of anyone's religion.
10 Sometimes when people aren't here, they sometimes kind
11 of read the transcript and they think, "Oh, my
12 goodness, you know, these are snide." But I think
13 everyone here would understand that those were
14 respectful comments in good humor from both of us, I
15 hope.

16 MR. CLARK: I tried to reach the Pope
17 in advance to get it cleared, Your Honor, and I left a
18 message.

19 (Laughter)

20 MR. CLARK: I left a message.

21 Thank you, Your Honor.

22 THE COURT: Sure. Thank you.

23 MR. WEINBERGER: Good morning. Ned
24 Weinberger from Labaton Sucharow on behalf of the

1 plaintiffs. Also here at counsel's table, Jeremy
2 Friedman --

3 MR. FRIEDMAN: Good morning, Your
4 Honor.

5 MR. WEINBERGER: -- from Friedman
6 Oster; Eric Zagar from Kessler, Topaz --

7 MR. ZAGAR: Good morning, Your Honor.

8 MR. WEINBERGER: -- Meltzer & Check.

9 THE COURT: You're in front of the bar
10 today; sometimes sneak in and sit in the back. It's
11 good to have you at counsel table.

12 MR. ZAGAR: Thank you, Your Honor.

13 MR. WEINBERGER: Your Honor, my
14 colleagues and I are here today seeking a fee award of
15 \$375,000 inclusive of expenses for the benefits
16 conferred in the underlying derivative action,
17 specifically the remediation of a transaction that
18 violated Colfax's charter. And we believe that the
19 amount we're seeking is fair, it's reasonable, it's
20 appropriate. It is significantly less than this court
21 has awarded in similar instances where, like here, a
22 plaintiff's litigation efforts caused a transaction to
23 comply with Delaware law.

24 And Your Honor had pointed the parties

1 to ev3 where the settlement corrected a flaw in the
2 top-up provision to cause that top-up provision to
3 comply with Delaware law. And there, Your Honor
4 awarded a million dollars. And we're not seeking a
5 million dollars, obviously. We're not even seeking
6 half that. We're seeking a very small -- or a small
7 fraction of that amount.

8 THE COURT: Look, I give you a lot of
9 credit for moderating your ask. And so, you know,
10 part of -- I think you both have good arguments in
11 this case. And I do appreciate that, you know, you
12 took the guidance on that and that you didn't, you
13 know, come in at a million and that -- particularly
14 that you didn't come above a million.

15 I mean, it would not -- some of your
16 brethren would have interpreted my suggestion that you
17 look at ev3 to say that ev3 was the floor and they
18 ought to come in somewhere above ev3 but not too far
19 above ev3. So, as I say, you get a lot of points for
20 all that, and I commend you for all that.

21 But I do want to hear you walk through
22 the two parts of ev3 that Mr. Clark and the defendants
23 have focused on and, you know, why your fix is the
24 million -- you know, is closer to the million-ish fix.

1 You ultimately did come down closer to the hundred
2 thousand fix. As I say, you get points for that --
3 but why you ought to be higher up than what defendants
4 are suggesting.

5 MR. WEINBERGER: Right, Your Honor.
6 We absolutely concede that the DGCL violation section
7 in ev3, the benefit conferred here is not as
8 significant as in ev3. There, the -- the issues with
9 this top-up provision threatened an entire merger.
10 Here, you know, we weren't challenging the actual
11 conversion itself. We didn't -- our claims would not
12 have cast any doubt on those actual shares that were
13 issued and -- as part of the transaction. So it was
14 really just the payment.

15 But the appraisal dilution claim, I
16 just don't think -- we don't believe that has anything
17 to do with this claim here. That was a claim that
18 Your Honor had commented was barely colorable. I'm
19 here based on Your Honor's comments that it appears
20 that our claims --

21 THE COURT: You were -- you were at
22 least at the colorable level.

23 MR. WEINBERGER: We were at the
24 colorable level.

1 THE COURT: At least.

2 MR. WEINBERGER: Right. And, Your
3 Honor, at the November 3rd teleconference, Your Honor
4 indicated that you would likely deny defendants'
5 motions to dismiss. So our claim here was a much
6 stronger claim than that -- than the appraisal
7 dilution claim that Your Honor had indicated, even in
8 that case, while clever, didn't really stand up to the
9 plain language of the DGCL, that appraisal shares
10 would be -- or, rather, top-up shares would be
11 excluded from appraisal -- from an appraisal.

12 But as far as a hundred thousand
13 dollars goes, you know, defendants -- defendants have
14 cited many of these disclosure cases. And, you know,
15 we -- we -- we would dispute that disclosures have any
16 analogy to the -- to our claims here to the benefits
17 that were conferred here. But, you know, as Your
18 Honor even noted in Sauer-Danfoss, which is cited by
19 defendants, this court often awards 400 to \$500,000
20 for one or two meaningful disclosures. And we are
21 seeking less than that here, Your Honor.

22 THE COURT: No; you are. And I
23 will -- I've said this before and I'll say it again
24 because people don't necessarily get it. I mean,

1 Sauer-Danfoss was in many ways a market corrective
2 because this was an era, for a lot of historical
3 reasons, you know, we were getting fee awards for
4 disclosure cases that were ratcheting up. And so it
5 was, like, 750, 800, 850. And, you know -- so when --
6 and not only that, but you had other courts in other
7 jurisdictions that were even going higher.

8 I had one, it was a case in -- where
9 it was multidistrict in front of me and in Florida.
10 The parties decided to settle it in Florida because
11 they could get a million down there. I would only
12 have given them, like, 4 and 500,000. And so part of
13 the idea of Sauer-Danfoss was a market corrective. It
14 wasn't, you know, to create, like, a pricing for
15 all-time. It was, "Look, prices have gotten out of
16 control. We need to reestablish a new baseline and
17 then think about this again rather than just
18 ratcheting, ratcheting."

19 You guys -- again, I'm going to lump
20 you with your plaintiffs' brethren. You guys are
21 really good at citing the fee awards that support why
22 yours ought to be a little bit better than average,
23 sort of like a compensation consultant. I always
24 figured that, like, as long as I could get the

1 client -- that would be my problem, getting the
2 client, you know. I'm not -- but -- but once you --
3 like, I get how you do that job. Like, I get the idea
4 of picking the right peer companies and then coming in
5 and saying to the guy who used to hire you and now has
6 a role in hiring you, "He is great. He is better than
7 all these peer companies and, therefore, he ought to
8 get a little bit more than the peer companies."
9 That's something I could do. I could get paid for
10 that. But that's what plaintiffs' lawyers were doing
11 on the disclosure settlements.

12 So Sauer-Danfoss was not supposed to
13 say, like, "This is the new floor." It was supposed
14 to be "Things have gotten out of whack. Let's bring
15 these things down materially to a number that used to
16 be acceptable, and then let's really start thinking
17 about whether this stuff is worth this."

18 But that's my own digression. I don't
19 know whether it will be edifying for you in a future
20 case; but if you ever come before me in a true
21 disclosure settlement and say, you know, "Hey, 4,
22 500,000," that is what you would hear. And so you can
23 put it in your back pocket.

24 MR. WEINBERGER: No. I very much

1 appreciate that.

2 And even continuing, I guess just
3 briefly, with these disclosure cases that, you know,
4 defendants cite where the Court has awarded the
5 hundred thousand dollars, I mean, those are in the
6 weakest of the weakest cases. We respectfully submit,
7 Your Honor, that our case, our claims, the benefit
8 achieved -- here again, a remediation of a charter
9 violation -- is far more significant than Gen-Probe
10 where Your Honor awarded a hundred thousand dollars.
11 To quote Your Honor from that case, "The case was very
12 weak. I think the benefits were very weak, and I
13 think that is a fee which hopefully you'll all hear me
14 saying was very weak."

15 Our claims here were not weak, Your
16 Honor. And, in fact -- and I know Mr. Clark and
17 defendants have spent a lot of time denigrating our
18 claims here, denigrating the benefits that we've --
19 that we believe we achieved here. But they forget
20 that at the motion to dismiss stage, the positions
21 that they advanced unwittingly conceded that this
22 transaction violated the certificate of designations.
23 It made a lot of noise about how we had this strained
24 interpretation, nobody could possibly read the statute

1 to be a prohibition. And at first BDT, and ultimately
2 Mr. Clark and all defendants, ended up advancing what
3 Your Honor had termed the "no-stub period"
4 interpretation, that only dividends from that stub
5 period were barred by that prohibition. Because the
6 conversion happened right smack dab in the middle of
7 the stub period, they inadvertently had conceded that
8 part -- at a minimum, part of that \$23.4 million
9 payment violated the certificate of designation in
10 Colfax's charter.

11 So -- just a couple more points to
12 address. These loyalty allegations that Mr. Clark
13 talks about, the centerpiece of this case, our focus,
14 the crux was never disloyalty. When we filed the
15 initial complaint, you know, we look at these
16 documents. We look at the COD. We see what appears
17 to us to be a pretty clear prohibition that the board
18 of directors here simply blew through, and we asked
19 ourselves why.

20 And you look at the relationship
21 between BDT and Colfax. They had financed this very
22 transformative charter acquisition several years ago.
23 Colfax, associated with the Rales brother -- Rales
24 brothers, it is a family-run company. BDT is Byron

1 Trott. He is the go-to person for wealthy families
2 and family-run businesses. And it seemed like a fair
3 inference. It was based on a reasonable inquiry, and
4 ultimately it was an allegation that -- again, not the
5 focus and didn't really matter to our claims here --
6 potentially strengthened some demand futility
7 arguments.

8 THE COURT: I think it's great the
9 Rales brothers are still around, you know? You read
10 about those guys and -- in so many cases. Rales v
11 Blasband. They were -- they were the guys in Blasius,
12 weren't they, on offense -- I might be wrong about
13 that. But it's nice to have them.

14 MR. WEINBERGER: It was a familiar
15 name, for sure --

16 THE COURT: Yes.

17 MR. WEINBERGER: -- to put in our
18 complaint.

19 THE COURT: Exactly.

20 MR. WEINBERGER: And, then, finally,
21 this notion that we should have made a demand on the
22 board. Based on -- based on the defenses here, based
23 on the positions defendants were taking, I doubt, I
24 highly doubt that making a demand on this board would

1 have at all been a productive exercise. And, in fact,
2 you know, Mr. Clark had said "If you would have just
3 made a demand on the board, we would have gone to a
4 205 proceeding." 205 wasn't even in effect when we
5 filed this complaint in early March. 204 is what Your
6 Honor termed the Bob the Builder amendment. 204 and
7 205, those did not even exist yet, Your Honor.

8 So unless Your Honor has any
9 questions, I don't want to belabor any other points in
10 our papers.

11 THE COURT: No, I don't. Thank you
12 very much.

13 MR. WEINBERGER: Thank you, Your
14 Honor.

15 THE COURT: Mr. Clark.

16 MR. CLARK: Briefly, Your Honor.

17 204 and 205 came into effect very
18 shortly thereafter and could have been relied on. I'm
19 not saying that would have happened. I can't predict
20 what would have happened if things would have been
21 done the way they should have been done. But the fact
22 is plaintiffs didn't make a demand. And with respect
23 to this claim is, no one on this board of directors
24 other than, arguably, perhaps, the BDT designee, who

1 was at all self-interested in the issue. So demand
2 should have been made.

3 Mr. Weinberger says he's got a strong
4 claim because Your Honor had indicated it would likely
5 survive a motion to dismiss. But considering the
6 facts established on the 205 record, plaintiffs' claim
7 could not have prevailed on the merits because the
8 parties to the contract, BDT and Colfax, you go back
9 to sort of first principles on contract law and
10 contract litigation. And Your Honor says, "Well, this
11 provision is ambiguous because there was at least one
12 reasonable reading at the motion to dismiss stage that
13 might support what the plaintiffs had to say."

14 What does that mean when you get past
15 the pleading stage and you get into plenary
16 litigation? Well, all that means is that parol
17 evidence of what the intent of the parties was comes
18 in where otherwise it wouldn't if it wasn't ambiguous.
19 And the parol evidence, as we put -- as the company
20 put in its application and as the directors admitted,
21 would have been that BDT and the company would say "We
22 never intended for anything in this contract to bar us
23 from entering into an inducement payment transaction
24 like we did here."

1 So on the merits, that claim could not
2 prevail, and that's the record before the Court here
3 on the 205 action.

4 So sort of put it all in a hopper, mix
5 it up. Your Honor has -- Your Honor's breadth of
6 discretion here is as wide as it could possibly be in
7 the Court of Chancery. You come up with a number.
8 You can do it as a baseball arbitration or you could
9 split a baby.

10 THE COURT: But I'm not allowed to say
11 up-front I'm doing this as a baseball arbitration.

12 MR. CLARK: But if you split the baby,
13 Your Honor, we should get the larger part.

14 Any questions for me, Your Honor?

15 THE COURT: No. .

16 Thank you, both. I appreciate it.

17 MR. CLARK: Thank you, Your Honor.

18 THE COURT: I'm going to give you my
19 answer now. I do appreciate your presentations this
20 morning, as well as your written presentations, which
21 were to the point and succinct. And I'm grateful for
22 that.

23 The first issue today is to address
24 Colfax's Section 205 petition. In the fall of 2011,

1 Colfax sold 13,877,522 shares of Series A perpetual
2 convertible preferred stock to BDT at a purchase price
3 of \$24.50 per share, for an aggregate purchase price
4 of \$680 million.

5 The certificate of designations
6 governing the preferred stock included a provision for
7 an optional conversion allowing BDT to convert the
8 preferred to common. The certificate of designations
9 provided that in an optional conversion -- and I'm
10 quoting now -- "Except as described above, upon any
11 Optional Conversion, the Corporation shall make no
12 payment or allowance for unpaid dividends on the
13 shares of Series A Preferred Stock that are converted
14 in connection with such Optional Conversion." That's
15 the end of the quote.

16 In the fall of 2014, Colfax and BDT
17 agreed that BDT would convert its preferred stock to
18 common in exchange for an inducement payment, and they
19 entered into a conversion agreement to govern that
20 transaction. The inducement payment was set at the
21 amount of dividends that would have been payable in
22 the company's agreement.

23 The plaintiffs then sued. The
24 plaintiffs brought a derivative claim on March 20th,

1 2014, alleging that the inducement payment violated
2 the prohibition on a payment or allowance for unpaid
3 dividends in the certificate of designations. The
4 defendants moved to dismiss.

5 After the motion was fully briefed and
6 argued, I observed that this might be an opportunity
7 to use Section 205, and encouraged the parties to
8 consider that route.

9 On December 10th, 2014, the defendants
10 filed a petition seeking validation of the transaction
11 under Section 205. They noted that the certificate of
12 designations provided that the holders of the
13 preferred stock voting as a class had the exclusive
14 right to vote on amendments to the certificate of
15 designation. Consequently, Colfax and BDT, as the
16 holders of all the preferred stock, could have
17 unilaterally modified the certificate of designations
18 to remove the prohibition on a payment or allowance
19 for unpaid dividends without stockholder approval.

20 Whether that would have been
21 challengeable on other grounds, I don't know, but in
22 terms of the statutory issue, that, in theory, could
23 have been addressed. The problem, of course, was that
24 by the time this issue came up, the Series A

1 convertible preferred had been converted. So the
2 people who had the right to modify that provision,
3 namely, the holders of the preferred stock, were no
4 longer holders of preferred stock. So the
5 counterparty technically for that modification was no
6 longer in existence.

7 Section 205 authorizes this court to
8 determine the validity of any corporate act or
9 transaction and any stock, rights, or options to
10 acquire stock. In connection with considering whether
11 to validate action under Section 225, the Court of
12 Chancery may consider five enumerated factors. The
13 last enumerated factor is a catchall that includes any
14 other factors or considerations that the Court deems
15 just and equitable.

16 In my view, all of the factors favor
17 validation here. The first factor is whether the
18 defective corporate act was originally approved or
19 effectuated with the belief that the approval or
20 effectuation was in compliance with the provisions of
21 this title, the certificate of corporation or bylaws
22 of the corporation. Other than the fact that they did
23 something that was arguably contrary, there is no
24 evidence that Colfax or BDT subjectively believed that

1 they were violating the certificate of designations.
2 Had they had that belief at the time and analyzed the
3 question while the preferred stock was still
4 outstanding, presumably they would have amended the
5 provision, which could have been done without
6 third-party approval.

7 The second factor is whether the
8 corporation and the board have treated the defective
9 corporate act as valid and whether any persons acted
10 in reliance on the public record that the act was
11 valid. It is certainly true here that Colfax and its
12 board treated the inducement payment as valid. BDT
13 exercised the optional conversion in reliance on the
14 inducement payment, and that was represented to the
15 world to be an effective transaction.

16 The third factor is whether any person
17 will be or was harmed by the ratification or
18 validation of the defective corporate act, excluding
19 any harm that would have resulted if the defective
20 corporate act had been validly approved or
21 effectuated.

22 Focusing solely on the statutory
23 question, the stockholders were not entitled to vote
24 on the amendment had it been done at the time the

1 preferred stock was outstanding and, therefore, were
2 not harmed by a transaction that could have been done
3 in compliance with the law. Again, whether there was
4 some theoretical harm on some other basis is not
5 something that I'm addressing in this 205 application.
6 That's the familiar distinction between a statutory
7 analysis as a matter of law - the first test under
8 the twice-tested doctrine, and the equitable fairness
9 components under the second test. Section 205 deals
10 with the first test, legal validity, not with the
11 second test of equity.

12 The fourth factor is whether any
13 person will be harmed by the failure to validate the
14 defective corporate act. Here, there are strong
15 arguments that the transaction was commercially
16 reasonable based on market standards and would benefit
17 both Colfax and BDT. Colfax obtained a more flexible
18 capital structure that allowed it to finance a
19 transaction that the board viewed as advantageous.
20 BDT gave up preferences associated with ownership of
21 the preferred stock in exchange for an accelerated
22 payment of dividends that would have been otherwise
23 due absent an early conversion. If the parties were
24 deprived of the benefit of that bargain because there

1 was an invalidation of some or all of the transaction
2 and some form of remedy from this court, that could
3 certainly harm BDT but also potentially harm Colfax.

4 I'm not going to reach any other
5 factors or considerations. I think those four are
6 enough. Because I believe all these factors favor
7 validating the transaction in question, the
8 Section 205 petition is granted.

9 This, then, leads to the question of
10 an appropriate fee for the plaintiffs, who brought
11 this matter to the company's attention and who played
12 certainly a causal role in the fixing of this
13 transaction through the use of Section 205.

14 Delaware's policy on attorneys' fees
15 is to ensure that even without a favorable
16 adjudication, counsel will be compensated for the
17 beneficial results they produce, provided the action
18 was meritorious when filed and has a causal connection
19 to the conferred benefits. That is a paraphrase of
20 the Delaware Supreme Court in the Allied Artists
21 decision.

22 In setting fee awards, the Court of
23 Chancery must make an independent determination of
24 reasonableness. In this case I think it's clear that

1 the plaintiffs' claim was meritorious when filed.
2 That standard really looks at whether it can survive a
3 motion to dismiss. I think it could survive a motion
4 to dismiss. I was inclined to deny the motion to
5 dismiss. I also think there's a clear causal
6 connection to the conferred benefit, because but for
7 the plaintiffs' lawsuit, the correction would not have
8 happened.

9 This brings me to the question of a
10 reasonable fee. Delaware applies the Sugarland
11 factors which take into account the amount of time and
12 effort applied to the case by plaintiffs' counsel; the
13 relative complexities of the litigation; the standing
14 and ability of counsel; the contingent nature of the
15 litigation; the stage at which the litigation settled,
16 or ended in this case; and whether the plaintiff can
17 rightly receive sole credit for all the benefits
18 conferred or only a portion thereof and, hence,
19 ultimately the size of the benefit conferred by the
20 litigation. In my view -- and supported by other
21 decisions -- the size of the benefit is most
22 important.

23 The defendants have opposed the fee
24 application. Most of the Sugarland factors don't

1 really warrant a major upward or downward adjustment
2 based on what might otherwise be awarded based on the
3 benefits conferred. I don't think the case was either
4 more complex materially or materially simpler than the
5 average case. If anything, it was a little bit more
6 complex because a lot of these cases in this bronze
7 age -- certainly not a golden or silver age -- of
8 merger litigation are cookie-cutter complaints based
9 on disclosures. Here, the plaintiffs identified a
10 potential charter-based problem. So I think, if
11 anything, this was a marginally more difficult case,
12 but still within the range of what we expect to see.

13 Plaintiffs' counsel spent some time
14 and resources prosecuting the case. They investigated
15 the transaction, prepared their complaint. They
16 engaged in some discovery. They briefed and argued
17 the motions to dismiss.

18 The defendants have suggested a fee of
19 \$100,000. The plaintiffs have requested a fee of
20 \$375,000. I think both of those are arguably within
21 the range. They are at the opposite poles of the
22 range, but I credit both sides for coming up with not
23 crazy numbers. I particularly credit the plaintiffs
24 for making what I think is a reasonable ask.

1 In terms of evaluating the benefits, I
2 do think that there is a material benefit here. It's
3 a not insignificant benefit. I recognize and
4 empathize with Mr. Clark's argument that this thing is
5 something that could have been fixed beforehand.
6 That's an argument that people can usually make in
7 these settings, because particularly with statutory
8 violations, if people understood the issue beforehand
9 or perceived the issue beforehand, they generally
10 won't violate the statute. They'd generally find some
11 way to do it in compliance.

12 Once it's done, however, there's a
13 problem. And here, because the preferred stock was no
14 longer outstanding, once it had happened, there wasn't
15 an easy fix. In my view, statutory violations are not
16 things that we want people to take cavalierly. I
17 understand the argument that people shouldn't be
18 penalized for gotchas or foot faults or other easy
19 mistakes, but, in my view, that argument cuts both
20 ways. If it's a gotcha or an easy mistake, it's
21 actually something that company counsel should catch.

22 As I said, I don't think we want
23 people to be cavalier in terms of compliance with the
24 Delaware statute. I think that there is some risk

1 that statutory violations won't be detected or
2 identified and, hence, when one is identified, we
3 should err on the higher side -- I'm not saying for a
4 windfall -- but to err on the higher side to make sure
5 people are careful. If all that happens if you commit
6 a statutory violation is you come in and you make a
7 nominal payment that's roughly the cost of what it
8 would have taken to have some very high-priced
9 corporate lawyers -- and they deserve to be high
10 priced. I'm not saying that they don't -- but very
11 high-priced lawyers run this issue down and analyze it
12 and write memos and things like that, I think that
13 there's a risk that people will be more casual about
14 their statutory compliance.

15 Consequently, when deciding between
16 these two awards, I am going to go with the
17 plaintiffs' number of \$375,000. I don't think that it
18 is beneficial to split the baby because I think that
19 encourages bracketing. I actually think that
20 plaintiffs should be encouraged and somewhat rewarded
21 for coming in with a reasonable number. And so as
22 between those figures, I am going to award \$375,000.

23 I think this is appropriate for the
24 benefit of assisting the company and the defendants in

1 bringing their transaction into compliance with
2 Delaware law and with the corporation's governing
3 documents. While I think the benefit and the
4 corrective measure is nonquantifiable, I think it can
5 be quite substantial. There is a relatively close
6 precedent for this number in the form of Chancellor
7 Strine's award of 333,000 in the Exclusive Forum
8 Provision Mootness Fee Petitions.

9 And so I've also considered, lastly,
10 the plaintiffs' lodestar of \$432,602.25. This is
11 another place where I appreciated not getting a
12 ridiculous number from the plaintiffs. I sometimes
13 get lodestars that look like they are, you know,
14 efforts at creative writing from the Iowa Writers'
15 Workshop rather than actual indications of what people
16 worked on a transaction. This was a number that I
17 thought was not crazy. This was a number that I
18 thought was plausible.

19 So for all these reasons, I am going
20 to award \$375,000 for the benefits conferred.

21 I do not remember. Is there a form of
22 order somewhere?

23 MR. CLARK: Your Honor, I don't
24 believe on the 205 that we submitted a form of order,

1 but we can have one over here within the hour.

2 THE COURT: There's no rush, but,
3 Mr. Clark, if you and your colleagues could do that,
4 that would be great.

5 MR. WEINBERGER: We do have an order
6 for the -- for the -- for the fee application that was
7 submitted with our motion, which I can hand up to Your
8 Honor.

9 THE COURT: If you could hand that up,
10 that would be fantastic.

11 MR. WEINBERGER: And I apologize.
12 You'll have to cross out "March." It is still the
13 original order.

14 MR. CLARK: We did confer last night
15 or late yesterday with Mr. Weinberger on a form of
16 order for the derivative action that we've agreed on.
17 Now that we've gotten your ruling on the number, we
18 can plug that in and get that over with the 205 action
19 order as well.

20 THE COURT: Why don't I just let
21 you-all send me some revised documents that will --

22 MR. CLARK: Very good.

23 THE COURT: -- put a nice period in
24 the record and close this up.

1 Again, let me thank counsel. I think
2 this was a very professionally handled matter on both
3 sides. I appreciate the effort and involvement that
4 went into it. Thank you all.

5 We stand in recess.

6 MR. CLARK: Thank you, Your Honor.

7 MR. WEINBERGER: Thank you, Your
8 Honor.

9 (Court adjourned at 10:44 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 39 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 26 through 39, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 8th day of April 2015.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public