IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GEN-PROBE INC. SHAREHOLDERS LITIGATION : Consolidated
: Civil Action No. 7495-VCL

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Chancery Courtroom 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, April 10, 2013
2 p.m.

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

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SETTLEMENT HEARING and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
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APPEARANCES:

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-and-
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THE COURT: Welcome, everyone.

MR. ENRIGHT: Good afternoon, Your Honor.

MS. FOSTER: Good afternoon, Your Honor.

THE COURT: Ms. Serra, how are you?

MS. SERRA: I'm good. How are you, Your Honor?

Good afternoon. May it please the Court. Gina Serra from Rigrodsky & Long on behalf of plaintiffs. With me today are Jessica Zeldin from Rosenthal Monhait --

THE COURT: Come on, Ms. Zeldin. You know to stand up.

MS. ZELDIN: Sorry, Your Honor. Not likely introduced.

MS. SERRA: -- Kira German from Gardy & Notis --

THE COURT: Welcome.

MS. SERRA: -- as well as Donald Enright from Levi & Korsinsky.

THE COURT: Mr. Enright, how are you?

MR. ENRIGHT: I'm okay, Your Honor. How are you?

MS. SERRA: Mr. Enright has been admitted pro hac vice and will be presenting today's argument.

THE COURT: Great.

MS. SERRA: Thank you.

MR. ENRIGHT: Good afternoon, Your Honor.

THE COURT: So, Mr. Enright, let me start by asking you, why are you here?

MR. ENRIGHT: Your Honor, that was going to be the first thing that I was going to start off telling you.

THE COURT: I got to tell you, you didn't take any depositions and you have zero time recorded on any of the attorneys' affidavits.

MR. ENRIGHT: That's right.

THE COURT: And yet -- I mean, I'm not saying -- you're obviously welcome in this courtroom, and you're a good lawyer. But why are you here on this case?

MR. ENRIGHT: Because my partner, Shannon Hopkins, who spearheaded this case, ruptured her ACL the other day --

THE COURT: That I'm very sympathetic

to.

MR. ENRIGHT: -- in karate class, and had to have surgery to repair it.

THE COURT: So you are pinch-hitting.

MR. ENRIGHT: That is exactly the word I was going to use, Your Honor, pinch-hitting.

THE COURT: Well, as someone who ruptured his own ACL and his meniscus as well, I have deep sympathy, and I hope your partner is -- mends well.

MR. ENRIGHT: I do, too. She -- she had surgery late last week and is apparently on the mend. Apparently they have you up and about, walking, and stuff like the next day now to -- to try to rehab it. But apparently she's okay, but she's not capable of working quite yet.

THE COURT: That's perfectly understandable. And, please, as I say, convey my sympathies, because last July I did the exact same thing but not in karate.

MR. ENRIGHT: How did you do it, Your Honor?

THE COURT: I was playing Ultimate Frisbee. Not nearly -- not nearly as impressive as

karate class. Karate class is much tougher.

MR. ENRIGHT: Maybe more fun.

THE COURT: Yeah.

MR. ENRIGHT: So yes, Your Honor. I come before the Court today in the odd position of asking the Court to approve a settlement that I had no role in negotiating in a case that I had no role in litigating.

THE COURT: But other than that --

MR. ENRIGHT: I'm afraid that because I didn't actively litigate the case, my familiarity with all the ins and outs may not be up to what I would normally expect of myself. And for that, if I have any gaps in my knowledge, I apologize in advance.

That said, I have reviewed the -- the docket and the -- the key documents, to the extent that I've been able to, and have prepared as best as I can.

And just by way of background, Gen-Probe is a Delaware corporation headquartered -- or was a Delaware corporation headquartered in San Diego. It developed, manufactured, and marketed molecular diagnostic products and services related to diagnosing diseases and screening blood donations and

organ transplants. So it's a biotech company.

Its stock was traded on the NASDAQ and had approximately 46 million shares issued and outstanding on the record date for the shareholder vote.

THE COURT: How many did Mr. Coyne have?

MR. ENRIGHT: Mr. Klein -- I don't know about Mr. Coyne. That would have been the Gardy & Notis firm's client. My client, Mr. Klein, had 500 shares. I can tell you Mr. Klein is a facilities engineer with the Cobra Puma Golf Company in Carlsbad, California. He's a -- he lives in Escondido, California. This is the first matter in which my firm has represented him.

I don't know if you want Ms. German to address the Court with regard to --

THE COURT: Ms. German, what do you know about Mr. Coyne?

MS. GERMAN: Your Honor, Mr. Coyne --

THE COURT CLERK: I'm sorry.

THE COURT: Why don't you come up to the podium.

You actually took some depositions in

this case, two of them; right?

MS. GERMAN: Yes.

THE COURT: That's what it looks like.

MS. GERMAN: Mr. Coyne had two shares.

THE COURT: Two?

MS. GERMAN: Yes.

THE COURT: How did you find Mr. Coyne?

MS. GERMAN: How -- oh, he approached our firm regarding this -- the transaction.

THE COURT: And what was his rationale for wanting to litigate the transaction while holding two shares?

MS. GERMAN: He felt that the price was too low.

THE COURT: Did you suggest you might toss him a fiver, since, basically, the value of his stake was $160 at the deal price and that if he was that frustrated about it, you could probably, you know, throw in some lunch money for him and take care of his concerns?

MS. GERMAN: No.

THE COURT: All right. Thank you.

MR. ENRIGHT: Okay. So between 2007

and 2010 the company had been in persistent on-again/off-again merger discussions with a company that is referred to in the proxy as Party A. Between November 10 -- November of 2010 and March of 2011, Party A made a couple indications of interest in the range of $68 to $74 per share, to be paid 60 percent in cash and 40 percent in stock.

While this wasn't exactly compelling stuff, it did prompt the board to hire Morgan Stanley as its financial advisor in March of 2011.

Morgan Stanley then commenced a market check process, contacted seven potential strategic acquirers on a confidential basis.

Then late April of 2011 Bloomberg published an article stating that the company had engaged Morgan Stanley and was seeking buyers. So the cat was, sort of, out of the bag after that.

This prompted six other potential bidders to -- to initiate or try to initiate discussions with the company in addition to Party A and the seven that Morgan Stanley had contacted. So at that point the company was in contact with -- with 14 potential purchasers.

Seven of those 14 signed

confidentiality agreements. Three of them submitted indications of interest which ranged from 75 to $85 per share. However, after due diligence, all three of them backed out, terminated discussions; and the sale process itself ended and was terminated in July of 2011.

The company resumed its -- its business and pursuing its strategic plan for -- for its own growth. But then in September 2011 Gen-Probe's CEO, Mr. Hull, contacted Hologic, who ended up being the buyer here, to discuss a potential technology-sharing relationship, some sort of technology licensing. This overture was rebuffed for competitive reasons by Mr. Cascella, the CEO of Hologic; but this, sort of, started the wheels grinding and some analytical work being done at Hologic concerning a potential combination with Gen-Probe.

There were some contacts between September of 2011 and March of 2012 between Mr. Cascella and Mr. Hull concerning, you know, when they could meet and talk again. And then on March 7th of 2012, they actually met again. And at that point Mr. Cascella made an indication of interest

verbally in the range of 80 to $85 per share.

There were further meetings over the next couple weeks thereafter. And Mr. Hull, in consultation with the special committee, which had been appointed during the 2011 process, requested that they make their indications of interest in writing. The first one was made at $80 per share. There were further discussions, and then an indication of interest in the range of 80 to $85 per share was made.

The first time that this was reported to the full special committee formally was at the April 3rd meeting of the special committee. First time it was reported to the full board was on April 5th.

Mr. Hull led negotiations for Gen-Probe and eventually negotiated a deal at 82.75 per share, which is close to the top of the end of the range of indications of interest that the company had received during that 2011 process.

The deal was approved by the board on April 29th, 2012.

Following the announcement of the deal, Mr. Coyne and Mr. Klein filed complaints. Again, my firm represents Mr. Klein. Mr. Klein

verified each complaint that was filed and executed a settlement affidavit. He felt that the price was too low, primarily in relation to the public share price before the deal was announced, to which the deal was only a 20 percent premium which he felt to be low. However, it's important to realize that this was not an unaffected share price and this was not necessarily something that Mr. Klein had fully thought through or, frankly, that -- that we had fully appreciated before we went through the litigation process ourselves.

There had not only been that Bloomberg article, Your Honor, but there had been a couple of Wall Street Journal articles that had come out every month or two following that April Bloomberg article up until that -- around the time that the process ended. And it had a significant inflating effect on the share price.

THE COURT: Why is that not something you had perceived before you filed suit?

MR. ENRIGHT: Because, Your Honor, it had been a year beforehand. So we must not have picked it up for whatever reason.

Again, Your Honor, I didn't participate in -- in the actual litigation of the

case. So I -- I can't really speak directly to that.

THE COURT: No. Look, I understand there are gaps in your knowledge, Mr. Enright, and I think it's wonderful of you to step into the breach for your partner. I mean, the -- the problem is that you have built up some credibility in terms of pushing these cases and bringing decent cases, and you're now here arguing for a pretty weak settlement.

MR. ENRIGHT: Well, there's a couple things to consider here, Your Honor. First, that 2011 process had been nearly a year -- had been something like nine months before this deal was announced. So it's hard to really figure -- or was hard to figure how much credit to give that, how stale the information was until we got a look under the hood.

The company's results seemed to be broadly consistent with what it had projected. It was coming in slightly higher than projected but not -- not -- I don't think materially so. And so that information, while stale, I think was still a very relevant data point.

Moreover, the fact that it had turned out the way it did, with the information becoming public and -- and creating a bit of havoc with the

company's share price and with speculation, that clearly affected the board's approach to things in 2012, and I think reasonably so, frankly.

And Hologic also, based on Mr. Cascella's deposition and Mr. Hull's deposition, they made it very clear that they were not interested in participating in any broader process after the circus had taken place the year before.

So there's this ... this disconnect between what appeared to be the case at that time where they signed a deal for a pretty small premium after a essentially minimal process in 2012; but when you look further back into that 2011 process, it starts to make sense, okay? And that's apparently what -- what the litigation process revealed to my -- to my colleagues at the Gardy & Notis firm and my New York office.

So there's all of that.

The -- the litigation was -- was initially filed in, I guess -- I'm not sure exactly when -- it was shortly after the -- the deal was announced on, I think, April 29th. So it would have been in early May.

THE COURT: May 4th is when Mr. Coyne

filed. April 30th is when the deal was announced. So --

MR. ENRIGHT: Okay.

THE COURT: -- four-day clock.

MR. ENRIGHT: Okay. And then I think my firm filed a week or so after that.

THE COURT: And then -- right, exactly.

MR. ENRIGHT: Okay. And then on May 18 the Court appointed the two firms as colead counsel and --

THE COURT: Who are the Californians?

MR. ENRIGHT: You know, Your Honor, I don't know. I know that there was something out there, but I -- I'll be honest with you, I haven't really concerned myself with that in the limited time I had to prepare myself for this.

THE COURT: Mr. Micheletti, off the top of your head, do you know who the Californians were?

MR. MICHELETTI: I do not know the names of the individuals, but I do know the result of the action. It was briefed as a motion to stay or dismiss in deference to this Delaware proceeding. And

rather than take that motion on, the plaintiffs there dismissed their case without prejudice.

THE COURT: Thank you.

MR. MICHELETTI: You're welcome, Your Honor.

MR. ENRIGHT: So on May 18th the Court also certified a class, which I assume was -- was -- which I believe was by stipulation or by agreed motion.

THE COURT: It was.

MR. ENRIGHT: The preliminary proxy was filed that same day, and then plaintiffs filed an amended complaint on May 24th. Thereafter the parties negotiated expedited proceedings, and agreed upon -- obviously removing the need for any motion practice on that -- and agreed on the terms of a confidentiality stipulation.

On May 30th document production commenced. It ultimately included over 154,000 pages of nonpublic documents. And, Your Honor, I would be remiss if I didn't tell you I have not looked through even a fraction of those, given my --

THE COURT: Understood.

MR. ENRIGHT: -- limited time in

preparing for today. But my understanding is that they contained nonpublic documents, including minutes, presentations, forecasts, budgets, e-mails, and work papers prepared by Morgan Stanley, which had previously not even been shown to Gen-Probe.

Plaintiffs took three contested depositions, Mr. Hull; Jeffrey Hogan, who was the person most knowledgeable designated by Morgan Stanley; and Mr. --

THE COURT: I read them. I mean, that's how I know that they were defended in a California-esque fashion rather than in a Delaware fashion, and that I knew that Ms. German took two of them.

MR. ENRIGHT: Okay. Thank you, Your Honor.

(Continuing) -- Mr. Sofaer, who's an outside director of Gen-Probe.

THE COURT: I mean, half the transcripts were the defense attorney talking. It was not a -- it was not a Delaware defense of a deposition. It was an obstructive defense.

MR. ENRIGHT: Actually, Your Honor, speaking objections are not permitted in California,

either, actually.

THE COURT: I guess it wasn't in California. But I don't know what the custom is out there. It certainly wasn't a -- a -- I can -- I can say it wasn't a Delaware defense. I can't say whether or not it was in accordance with the California custom. Perhaps the rules are one thing and custom is the other.

MR. ENRIGHT: My experience is, in California, which are not all that recent -- I used to do a lot of 10b-5 litigation out in the Ninth Circuit, Your Honor. And my experience with that was that -- that they were usually pretty observant of that rule out there as well. I don't know what to say about this particular instance, Your Honor. Regardless --

THE COURT: I was just letting you know I was familiar with the depositions.

MR. ENRIGHT: And I appreciate it, Your Honor. Thank you.

During discovery and -- and prior to the due date for plaintiffs' opening brief for preliminary injunction, the parties engaged in discussions, arm's-length negotiations, and discussed potential resolution of the case.

While that was going on, plaintiffs obviously were assessing the claims. And based on what I've been able to -- to educate myself on and familiarizing myself for today's -- for today's hearing, the plaintiffs concluded that -- that that 2011 process, while somewhat stale, was -- was not so out of touch that it was going to be held to be an insufficient process, particularly given the fact that the deal protections were not so out of whack as to be preclusive; and also concluded that if you looked at the price, both compared to the theoretical analyses of that -- that Morgan Stanley and our own financial experts performed, and also in relation to -- to the unaffected share price prior to that Bloomberg article in April of 2011, if you took all that together, it didn't look like this was going to be a price that we were going to be able to argue was outside the range of fairness. And our own experts informed us of that.

So this didn't look like something we were going to be able to win a process PI on, and it didn't look like something that we were going to be able to establish damages on. And even if we could establish damages, Your Honor, this didn't appear to be a situation where the defendants were so remiss as

to be able to satisfy Lyondell or otherwise establish a breach of duty of loyalty.

THE COURT: I can tell you on all those things, I agree.

MR. ENRIGHT: Well, I thank you, Your Honor. If I'm going down the wrong road, you let me know, because, I'll be honest with you, I'm kind of feeling my way through.

THE COURT: No. You're doing fine. Your partner should appreciate you stepping into the breach.

MR. ENRIGHT: I hope so. I'm doing my best.

So at $82.75, the deal price was at the top end of the range of the indications of interest that had been received during that 2011 process. And it was also a little bit above the midpoint of the range of indications of interest that Hologic had originally made. So they -- it appeared that Mr. Hull and the committee did negotiate this in a fairly robust fashion.

So we -- we -- or my firm, and the Gardy & Notis firm, concluded that it did not appear that we were really going to have any realistic

possibility of success on those elements or of those claims.

So as is not uncommonly the case, plaintiffs' counsel turned to -- to the disclosure issues to see what good could be done there and apparently did find some -- some things that I think, at least -- at least one thing that appeared to really have a material problem with it and a couple other things that -- that, if not rising to the level of PI level materiality, at least they are, I think, helpful for the shareholders to understand the -- the dynamics that were involved here.

The most important supplemental disclosures that were obtained here related to the -- the cash flow projections and the DCF analysis. In discovery, plaintiffs' counsel found that the total free cash flows that were -- that were set forth in the projections in the proxy statement were different from and actually much higher than the unlevered free cash flow projections that were actually used in Morgan Stanley's DCF analysis. And apparently what happened was management gave Morgan Stanley its financial projections. Morgan Stanley took those, deconstructed them, and then calculated their own

unlevered free cash flow projections.

But when the -- the proxy didn't disclose any of that. And it also -- by disclosing total free cash flows in this context, I think it -- it was highly likely to mislead the reader into thinking that those were the cash flows that were used in Morgan Stanley's DCF analysis. And they very much were not. The unlevered free cash flows that were used were actually significantly lower. And the -- the numbers are laid out in the supplement. So you can see the difference. And it's significant.

Additionally, discovery showed that when calculating those unlevered free cash flows, the EBITDA that they used as, sort of, the starting point for calculating those unlevered free cash flows, the EBITDA numbers they used were the non-GAAP EBITDA numbers that had been provided by management rather than the higher adjusted EBITDA numbers, which were much higher and which, if they had used those instead, again, that would have produced significantly higher unlevered free cash flows than those that were actually calculated and used in the DCF. And that would have, in turn, resulted in a higher implied range of value in the DCF analysis.

Discovery also revealed that the DCF analysis that Morgan Stanley performed only took into account or -- or used or -- or included $16 million of the 2012 projected unlevered free cash flows for 2012 rather than the -- the full 93 million that was projected for that year, in part, because they were projecting an October consummation date for the -- for the transaction, which, No. 1, turns out to have been off by a couple months, and, No. 2, is unusual, at least in my experience in terms of how that -- that is generally performed.

So as part of -- of the negotiated resolution with defendants here, plaintiffs obtained corrective disclosures on all these points. And I actually do think, Your Honor, that that's the -- the proper term, "corrective disclosures" at this point, not "supplemental," because I think what was there before -- I'm sure it was not by design, but -- but I think it was actively misleading, because you would never guess any of this stuff from -- from reading it before. And you would just look at those total free cash flows listed there and think those are the cash flows listed there. And if you applied those total free cash flows to a reasonable DCF analysis, you

would get a range very, very different, a range of implied values very different from those that Morgan Stanley actually produced.

So it -- there was a fairly significant disconnect there. And I think fixing that was significant. And what we -- the way we fixed that was by obtaining the corrective disclosures from, No. 1, the total free cash flow -- revealing that there was -- total free cash flows that had been set forth in the proxy were not the cash flows that Morgan Stanley used; got the -- the actual unlevered free cash flows that Morgan Stanley used disclosed; disclosed that the free cash flow projections that Morgan Stanley calculated and used were derived from non-GAAP EBITDA rather than the higher-adjusted EBITDA; and disclosed that only the -- that 16 million portion of the 2012 cash flows were applied to the analysis.

And when you take all that into account, Your Honor, I think it provides shareholders with an overall picture that Morgan Stanley was using its judgment here in a way that tended to minimize the value of the DCF analysis. You know, I don't want to go so far as to say they put the thumb on the scale,

because that would -- that would apply -- imply this, sort of, nefarious intent, which I don't have any evidence for; but it does appear to create an inference that Morgan Stanley exercised its judgment, in several respects intended, to minimize the value range for that DCF analysis.

And I think, taken in context with that $24 million contingent fee structure that Morgan Stanley had in connection with this transaction, you know, I think it had good reason to give shareholders some actual pause in considering this and in considering whether or not to exercise appraisal rights.

So I think that those disclosures, Your Honor, regardless of anything else in the -- in the supplement, I think those are actually significantly importantly material and justify approval of the settlement. I think everything else that comes after that is, essentially, gravy.

With regard to the employment discussions that took place, Mr. Hull, in that initial March 7th discussion with Mr. Cascella, apparently was provided with the -- the knowledge that his continued services would be desired and that he would be a

valued part of the package going forward for the company, for the combined company.

Now, they disclosed that -- that had taken place in that March time frame in the original proxy, and they disclosed that he told the board that; but they didn't disclose a couple things. I don't think they disclosed that the -- the way that the board considered that in the context of determining whether or not he should continue to be the point person for the negotiations and how they -- they determined that, and also didn't disclose the fact that there was a second approach from Hologic in which they raised this issue with him again after he had committed to the board not to discuss this with them.

And I think that that second approach, the materiality of that, is certainly attenuated or -- or reduced by the fact that that first contact was -- was made; but I think the fact that -- that even after he, sort of, stepped back from the table on that issue, they continued -- they continued to press the issue, tends, to me, anyway, to -- to indicate that they were using this as a point of leverage in -- in the negotiations and something that -- that the shareholders had a right to draw inferences from in

terms of the dynamics that took place here, and the fact that it was Mr. Hull who was the point person in these negotiations.

Is this earth-shattering, game-changing news? I don't think so, Your Honor, given the fact that the first disclosure had been made; but does it add some useful color from which additional inferences can be drawn? Yeah, I think it does.

So as I said, it's gravy, and I think it's -- it's actually useful gravy, but it's not -- it's not game-changing stuff.

And lastly, the -- the issues relating to the timing of the disclosure. The supplement included a long recitation concerning why they timed their first-quarter results disclosure in relation to the -- the signing and disclosure of the transaction. Whether or not I or even the Court find those explanations to be particularly availing or credible, I'm not sure is the point. The point is that the record here actually reflected that that was what they discussed and that -- that they are telling the shareholders that they had a -- a concern in their business judgment that -- that disclosing those prior

to disclosing a merger transaction that they were on the cusp of agreeing to would potentially expose them and the company to liability.

And I don't think that that is a facially, you know, implausible explanation. Again, is this game-changing stuff? I -- I don't think so, Your Honor; but I do think that it does go to how the shareholders weigh the credibility and candor of the board in conducting this process, which, again, you know, as is not uncommonly the case, after you really get a look at some things that are really hard to figure out or look fishy or suspicious before you -- you get in there and -- and get a look at the documents and, you know, talk to the people involved, often have honest explanations, but the shareholders should -- should have a chance to weigh for themselves the credibility and candor of the people involved. And because of this disclosure, they had that opportunity.

Now, this disclosure -- and there were a few other minor things in the supplemental disclosures. These disclosures were filed with the SEC on July 19th of 2012, and the shareholder vote was held 12 days later, on July 31st. So I think that

this was given ample time to percolate and be digested by the market. And the vote approved the transaction, which closed on August 1st of 2012.

And so it's also important to weigh the give and the get here and determine whether or not the settlement is fair, reasonable, and adequate. Plaintiffs' counsel and plaintiffs themselves have weighed in and said they think it is. To me, Your Honor, it looks like the give here was fairly negligible in value. I don't think the release that was given up here had much value, honestly.

The -- the prospect of obtaining damages here seems sufficiently remote to me to -- to justify approving the settlement; whereas I do believe that those DCF and cash flow-related disclosures actually provided meaningful, important information for the shareholders with regard to not only the voting decision, but I also think specifically with regard to a potential appraisal decision. To the extent that this Court, in -- in conducting appraisal actions, tends to give strong credit to the discounted cash flow analysis, which is frequently referred to as the gold standard, I think that -- that -- that if you take -- take these -- this additional information that

was obtained here and given to the shareholders, it could very well prompt somebody to -- to seek appraisal who otherwise might not have. I don't actually know the answer as to whether or not anybody --

THE COURT: I'm going to ask. Mr. Micheletti, do you know if anybody sought appraisal?

MR. MICHELETTI: To my knowledge, no one sought appraisal, Your Honor.

MR. ENRIGHT: Oh, well. I didn't know the answer to that.

THE COURT: Could have.

MR. ENRIGHT: Could have. You know, Your Honor, you know, our job is not to make those decisions for the shareholders, obviously. Our job is to give them the information and let them make their decisions. And they voted to approve the transaction, despite, Your Honor, I think some things here that did raise some reasonable questions. They voted for the transaction. In the absence of -- of glaring problems, they often do. And people like to get a premium. It's -- it's the reality of the world.

So weighing the give and get, Your

Honor, I think this does fall squarely in the zone of fair, reasonable, and adequate. And this assessment on plaintiffs' counsel's part was, again, supported by extensive discovery; that review and analysis of over 150,000 pages of documents; four depositions, including three of which that were contested, apparently contested very nastily --

THE COURT: I don't know how nasty it was, but it was vociferous.

MR. ENRIGHT: Vociferous, okay. Thank you. Verbosely.

THE COURT: Verbosely.

MR. ENRIGHT: -- and our consultations -- or plaintiffs' counsel's consultations with financial experts. So I believe this settlement should be approved.

With regard to the class certification issue, first, that -- you know, I won't bore the Court with a lengthy Rule 23 recitation. The notice issue obviously was one that -- that the Court noted an error in the original notice that was sent to the shareholders. A corrected notice was prepared and was sent to the shareholders. Over 18,000 of them were mailed. The -- the affidavit of Jose Fraga attests to

that and to the fact that at this time it did not contain any omissions of important information.

So I believe that we cured that problem, and I apologize for -- for plaintiffs' counsel for that error having taken place in the first place.

After two notices, we received no objections whatever. The -- the class period is -- is narrowly drawn. It's April 29 to August 1, 2012. It's the date of the -- the merger agreement to the -- and announcement to the date of the consummation. I think that that is a -- an appropriate class to be certified and should be.

And then we turn, Your Honor, to -- to the issue of attorneys' fees and expenses. Plaintiffs' counsel are requesting $450,000 in fees and expenses. Plaintiffs' counsel had $28,000 in expenses, and the time and expenses affidavits submitted to the Court reflect that roughly a thousand hours of time were devoted to this litigation. So when you net out that $28,000 in expenses, you're talking about $422,000 in requested fees. Apply that to the -- to the time reflected in those time and expenses affidavits, and you're talking about

something in the $422 per-hour range, which is a blended rate that would be below what this Court often approves in this type of case.

So under Sugarland, the real question is does the benefit obtained justify the requested fees and expenses? Even ignoring the disclosure timing and employment discussions disclosures, which I think have some value, but even ignoring them altogether, Your Honor, I think just the -- the DCF and cash flow-related projections here would merit the -- the requested fees.

This Court has often held that -- that where one or two truly material supplemental or corrective disclosures are obtained, that will merit a fee in the range of 400 to 500, which can be dialed up or dialed down based on a variety of factors. Since Your Honor developed them, I don't need to tell the Court.

In Hawk, the Hawk case, Your Honor, you held that -- or -- I don't know if "held" is the right word. You discussed the fact on the record that fee awards in cases where free cash flow projections are obtained as part of the settlement, that those fees cluster in the range of 400 to $500,000. And in

the Hawk case, where that was the only material disclosure that was obtained, the Court awarded a fee of $450,000.

And I didn't participate in negotiations of any element to this case, let alone the fee; but it would be surprising to me if that was not considered as a relevant data point by -- by everybody involved in arriving at the same number here.

So I think that that's an appropriate number to -- to reach out to. The -- there was -- based on the affidavits, there appears to have been an extraordinary amount of time spent on this case. So that does not seem to me to be a reason to -- to reduce the fee.

So -- and I also think, Your Honor, that it's very -- this was not low-hanging fruit that was intentionally omitted from the proxy for the purposes of providing consideration for a quickie settlement. I think that this was stuff that they genuinely were reluctant to tell the shareholders and perhaps more on the part of Morgan Stanley than on the part of Gen-Probe. And getting them -- getting this information to shareholders in that regard,

particularly -- again, particularly with regard to the DCF analysis and those cash flow projections -- that seems to me to be something of a significant result here and seems to me that it would merit that -- a fee in that range.

Thank you for your time and for permitting me to pinch-hit for Ms. Hopkins. Unless you have any questions, Your Honor, I have nothing further.

THE COURT: I don't. Thank you.

MR. ENRIGHT: Thank you, Your Honor.

THE COURT: Do the defendants have anything to add?

MR. MICHELETTI: Your Honor, Ed Micheletti on behalf of the Gen-Probe defendants. We submitted a brief on --

THE COURT CLERK: I'm sorry. Could you come to the podium, please?

MR. MICHELETTI: Oh, sure. Sorry.

I was just going to briefly rise to state that we submitted a brief on January 7, 2013, in support of the settlement that outlines our views, I would say definitively, in support of the settlement and why we think it makes sense.

Unless Your Honor has any questions of me, we're happy to stand on that brief.

THE COURT: No. I don't. I appreciate it, and I appreciate your answering the questions I had during the presentation of Mr. Enright.

MR. MICHELETTI: Thank you, Your Honor.

THE COURT: The issue today for me is to consider the proposed settlement in the Gen-Probe Shareholders Litigation. I will think of it as Stockholders Litigation, C.A. 7495. This litigation concerns the acquisition of Gen-Probe by Hologic in which Hologic purchased all shares of Gen-Probe through a wholly owned subsidiary for $82.75 per share.

I think this is a difficult settlement to approve because it's, frankly, terribly thin. I think if there's one thing that comes through from the record -- and I appreciate Mr. Enright's candor in this regard -- is that there really wasn't anything here on any process claims. There is one somewhat oblique disclosure claim scraped together based on the disclosure of the unlevered free cash flows. Given

that the 10-Q was disclosed relatively simultaneously -- and, indeed, that's a major subject of the supplement -- it's not clear to me that that actually provided any incremental information to the stockholders at all. The rest of the disclosures that were provided are very soft, of the tell-me-more variety, and don't even tell me that much more.

So, really, I come in -- I came into this on the fence as to whether the more appropriate course was to reject the settlement, recognizing that I'd already certified a class, recognizing that we were postclosing, and recognizing the defendants then would have what looks, to me, like a lay-down motion to dismiss under Malpiede. That would be Option 1. Or Option 2 would be to approve the settlement and take into account the underwhelming nature of it in terms of the fee.

The outcome for the class, because the class has already been certified, unless I were to decertify it, is effectively the same. A dismissal under Malpiede would have the same kind of res judicata effect as would the approval of this settlement. The scope of the res judicata effect would include any claims that were raised or could

have been raised in this litigation, which is, effectively, the scope of the release, except for some, perhaps, unknown claims that might add in something, but they would still have to be related to this litigation. And under the Malpiede alternative, the plaintiffs still could, I guess, in theory, come back and make a fee petition based on the disclosures that the defendants actually made and argue that they should get a benefit for conferring those under the mootness doctrine.

At that point, as I've suggested -- and I know the Chancellor suggested -- it becomes a little awkward for the defendants to walk away from the fact that they agreed to value these disclosures at $450,000. If they come back at that point and say "No, no. These disclosures actually were worth materially less," well, then, the natural inference is the defendants are not paying for the benefits conferred; they were, in fact, paying for the release. So that adds in a complication.

Since I don't think this settlement is worth $450,000 to the plaintiffs, I actually think, all in all, it's better for me to rule on the settlement today, to approve it, and then award a

suitable fee as opposed to rejecting the settlement, receiving a Malpiede motion -- by all indications, as I say, I think the Malpiede motion is a laydown -- and then having to deal with the fee motion in a mootness posture.

So with that background, I am going to approve the settlement, and then I will turn to the fee. But I can tell you that this was a very close call that I went back and forth on. It's really hard for me to see these disclosures as terribly distinct from what the Chancellor decided were insufficient to support the settlement in Transatlantic. Essentially it comes down to whether the unlevered free cash flows -- as I say, because of the 10-Q, it's not really clear to me whether they were incremental adds -- are worth more than the additional financial information concerning loss ratios and expense ratios.

But perhaps you're catching me on a good day. Perhaps I reasoned through this improperly in terms of a Malpiede issue; but since I do think that what effectively would happen here is we'd be at a postclosing motion to dismiss on 102(b)(7), that it is confirmatory that the give here was essentially minimal. And so a vapor-density get for a

vapor-density give is not, all in all, an unfair trade.

So with those comments and with that preview of the bottom line, first, I will confirm class certification as had been previously done by stipulation, and I reviewed and approved that stipulation. To confirm, the class is appropriately defined as stockholders broadly defined between April 29, 2012, and August 1, 2012, which represents the time period at the start date when the board approved the merger agreement and the end date when the merger was completed. That is a coherent class and an appropriate definition.

In terms of the 23(a) requirement, numerosity is met. Gen-Probe had over 45 million shares outstanding. It was publicly traded on NASDAQ. Numerosity is satisfied.

Commonality is satisfied for a case like this because it is an injury to the stockholders' interest in his shares. All stockholders are affected equally by that alleged breach of fiduciary duty and, therefore, the claims are held in common across the class.

The class members' claims here are

typical in that they are stockholders and do not have any separate, individual, or different harms other than in their capacity as stockholders.

The stockholders satisfy the minimal requirement of adequacy. At least Mr. Klein does. I, frankly, think Mr. Coyne is not a rational suer with only two shares, which is also a fact that is similar to the Transatlantic case. Nevertheless, since Mr. Klein is adequate and holds a -- I don't know if it's a token stake or not, but it's at least a noninfinitesimal stake, at 500 shares, I think that there's adequate representation at least for Mr. Klein. Both have filed Rule 23(aa) affidavits. Both have filed Rule 23 affidavits.

And counsel, which are known to the Court, was hired and retained, who are experienced in these matters.

Certification under Rule 23(b)(1) is appropriate. The prosecution of separate actions by individual class members who, because of their stockholder status, are identically situated, would risk inconsistent or varying results. Adjudication with respect to one class member would, therefore, be dispositive to the class' interest.

This is a classic, historic (b)(1) true class action. It also could be certified under (b)(2), as the Supreme Court noted in Celera. For all these reasons and having specifically found that adequacy is satisfied, I will certify the nonopt-out class as defined under Rule 23(a) and Rules 23(b)(1) and (b)(2).

Adequacy of notice was initially inadequately given. The time of the settlement hearing wasn't included. Time is required under the Delaware Supreme Court's decision in Philadelphia Stock Exchange. A revised notice was mailed out that adequately described the lawsuit. It adequately provided the location, date, and time of the settlement. Notably, it did so in three places, pages 1, 3, and 6, not just in the usual one. And it informed the class members whom to contact for further information.

Notice was adequately delivered. The affidavit of Mr. Jose C. Fraga, Sr., director of The Garden City Group, attests both to the mailing of the original notice and the revised notice to record and beneficial holders. In all, 19,130 copies of the original notice went out; 17,196 copies of the revised

notice went out. It is an interesting discrepancy in the numbers, but I suspect it's because there was already information about the ultimate beneficial holders that was gained and could be narrowed for the second -- gained from the first mailing and could be narrowed for the second mailing.

In terms of the merits of the settlement, as I say, I think this is a really close one. I thought long and hard about whether I would even approve this one. But, frankly, I think it puts the defendants unnecessarily in a worse position should I not approve it, and the plaintiffs, ironically, in a better position should I not approve it, when the equities here really are on the side of defendants for having done a transaction that really didn't merit challenging, or at least once it was shown to have been a transaction where perhaps the few wisps of fiduciary wrongdoing were not borne out. It was a transaction where perhaps the challenges merited abandoning. So, as I say, I actually think that it's better, on balance, to approve the settlement and address fees.

The so-called Revlon claims for breach of fiduciary duty might have had some initial

attraction, however weak; but certainly once it became clear how quickly Mr. Hull reported his initial inquiries to the lead director and two other directors on the board, how the process proceeded from that point on and the various negotiating positions that were taken, it did, I think, rapidly become clear, as Mr. Enright acknowledged, that there was no meaningful Revlon claim here.

In terms of the disclosures, as I've already said in my preliminary comments and won't repeat, I think that they are very slight consideration. Were the claims marginally stronger, I would not have approved this settlement. Were this a stock deal rather than a cash deal, and had someone like Mr. Enright not carefully carved out federal securities law claims, as he's done in other cases, I would not have approved this settlement. But on these facts, I am going to approve the settlement.

So then the question becomes how much of an attorneys' fee award. I recognize that the policy is to encourage stockholder champions to bring meritorious litigation but not to confer unwholesome windfalls that result in excessive and unwarranted lawsuits. The pertinent factors are set forth in

Sugarland and, in turn, include the time and effort spent by counsel, relative complexity of the litigation, standing and ability of counsel, the contingent nature of the litigation, the stage at which it ended, the degree of credit for the benefit that goes to the plaintiff, and the size of the benefit conferred.

The amount of time and effort was not atypical. Nobody claimed a ridiculous amount of hours, which I appreciate. And so there's no reason, in terms of the crosscheck, to give unique or special weight to that factor.

The litigation was not materially more complex than other deal litigation. This is a standard deal litigation case.

In terms of the standing and ability of counsel, there's no reason for a departure there.

I don't view this litigation as terribly contingent. Now that we're at a stage in life where 95 percent of deals get sued on and virtually all of them settle, I really think that we can start radically discounting under the contingent-nature-of-the-litigation factor.

In terms of the stage at which the

litigation ended, it ended after three depositions, but, still, it ended before the PI hearing. So maybe that's slightly better than a quick harvest. And then the size of the benefit conferred, as I've suggested, was slight.

Now, as I know -- or I know that I have been a fan of trying to standardize or at least -- not standardize -- at least be consistent in how I've approached these, how I perceive myself to approach these in terms of fee amounts. I do think that, generally speaking, the -- I try to stick to the ranges, and I have said repeatedly about the 450 to $500,000 range as being something that I start on.

I am starting to think that range is too high, and I'm starting to think of that range as too high because over the past couple of years -- I haven't been on the bench that long. So it really is -- when I say a couple years, I mean two years. I've been on the bench three years. But over the past two years I've actually seen people get some money. And what's striking to me is how you compare the amount of fees that are given out in these disclosure cases to the amount of fees that actually go out when people get money.

So, for example, I have had within the past couple months situations where people fought hard, outside the injunction context, and got basically 10 to 12 million bucks' worth of hard cash. Well, that equates to a fee of, you know, $2 million. And relative to that, the idea that, left and right, we would be giving out 400, $500,000 for a -- a settlement based on five numbers really just strikes me -- as I say, I'm starting to think that it's excessive, I really am, particularly when 95 percent of deals get sued on.

Here, in particular, I think it's excessive because, as I say, all that really happened was we went from free cash flow numbers to unlevered free cash flow numbers. I do credit the point that Mr. Enright made about it suggesting a degree of analytical discretion by Morgan Stanley, but that really suggests that the burden of the fee ought to be on them. Unfortunately, it's on the company.

What I am going to do ultimately in this case is award a fee of a hundred thousand dollars. And I'm going to do that because I do think the case was very weak. I think the benefits were very weak, and I think that is a fee which --

hopefully, you-all will hear me saying this was very weak.

I will continue to ponder whether, in light of the fact that we now have people who are actually willing to litigate and get money, we now have a sample, which, frankly, didn't exist, really, five years ago to compare these disclosure cases against. And I think the idea that we're giving out, left and right, 500 grand for five numbers, when you now see what people get when they actually get real money, there may need to be a recalibrating of the market. But all that's for another day.

So do you have a copy of the order, Mr. Enright?

MR. ENRIGHT: I do, Your Honor.

THE COURT: Thank you.

MR. ENRIGHT: And I took the liberty of inserting the dates for the settlement --

THE COURT: Thank you. That's very helpful.

MR. ENRIGHT: -- for the hearing and for the scheduling order, et cetera.

THE COURT CLERK: Just one.

MR. ENRIGHT: Just one?

THE COURT: All right. I've written in the fee award of $100,000 inclusive of expenses. I have signed the order. I'll hand it to my clerk. Thank you very much.

I appreciate everyone coming in today. Mr. Enright, thank you for pinch-hitting. As I say, I was a little bit confused but -- as to why you would be here, but that's a good explanation. I appreciate it. As I say, your partner should appreciate it as well.

So thank you, everyone. Have a good afternoon.

MR. ENRIGHT: Thank you, Your Honor.

(Court adjourned at 3 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 3 through 49 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 36 through 49, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 16th day of April 2013.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent