IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THEODORE B. MILLER, JR. and BOOTS CAPITAL MANAGEMENT, LLC,	:	
Plaintiffs,	:	
v	:	C. A. No. 2024-0176-JTL
P. ROBERT BARTOLO, et al.	:	
Defendants.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, March 8, 2024
9:15 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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HEARING ON MOTION TO EXPEDITE AND FOR A TRO
HELD VIA ZOOM

APPEARANCES:

KURT M. HEYMAN, ESQ.
SAMUEL T. HIRZEL II, ESQ.
JAMIE L. BROWN, ESQ.
BRENDAN PATRICK MCDONNELL, ESQ.
Heyman Enerio Gattuso & Hirzel LLP
-and-
JAMES C. WOOLERY, ESQ.
BENJAMIN HOWARD, ESQ.
of the New York Bar
Woolery & Co PLLC
for Plaintiffs Theodore B. Miller, Jr. and Boots Capital Management, LLC

MATTHEW D. STACHEL, ESQ.
-and-
ANDREW G. GORDON, ESQ.
GEOFFREY R. CHEPIGA, ESQ.
of the New York Bar
Paul, Weiss, Rifkind, Wharton & Garrison LLP
for Defendants P. Robert Bartolo, Cindy Christy, Ari Q. Fitzgerald, Andrea J. Goldsmith, Kevin T. Kabat, Anthony J. Melone, Tammy K. Jones, Kevin A. Stephens, Matthew Thornton III, Bradley E. Singer, Crown Castle Inc., and Sunit Patel

MICHAEL A. BARLOW, ESQ.
HAYDEN J. DRISCOLL, ESQ.
Quinn Emanuel Urquhart & Sullivan, LLP
-and-
ANDREW J. ROSSMAN, ESQ.
CHARLES H. SANGREE, ESQ.
of the New York Bar
Quinn Emanuel Urquhart & Sullivan, LLP
for Defendants Elliott Investment Managagement L.P., Elliott Associates, L.P., Elliott International, L.P., and Jason Genrich

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THE COURT: Good morning, everyone. Sorry about that. I was so engrossed in finding something in your cooperation agreement that I didn't realize we had started.

All right. So who is here from the plaintiffs?

ATTORNEY HEYMAN: Good morning from New Orleans, Your Honor. Kurt Heyman for plaintiffs, Theodore Miller and Boots Capital Management. With me on the line today are Sam Hirzel, I believe Jamie Brown and Brendan McDonnell are on, as well, and also our co-counsel, James Woolery and Ben Howard from Woolery & Company. And also on the line is our client, Mr. Miller.

THE COURT: Great. It's good to have you all here, and particularly to have Mr. Woolery in his latest incarnation as a lawyer. It's good to have him back in the game.

All right. How about for the defendants? And I'm not clear on who is exactly representing who. I admit that I haven't really tracked that down, but why don't you tell me what the alignment is here.

ATTORNEY STACHEL: Good morning, Your

Honor. Matt Stachel of Paul Weiss on behalf of Crown Castle Inc. and the 11 directors unaffiliated with Elliott.

Also on the line with me is Andrew Gordon and Geoff Chepiga of Paul Weiss. Both are admitted *pro hac vice*. Mr. Gordon will address the *status quo* motion and Mr. Chepiga will address the motion to vacate expedition, if that's okay with Your Honor. And also on the line is Teddy Adams of Crown Castle.

THE COURT: Great. Thank you all for being here as well.

ATTORNEY BARLOW: Good morning, Your Honor. Mike Barlow of Quinn Emanuel on behalf of the Elliott defendants. Your Honor, the Elliott defendants are the three Elliott-named entities in the caption and Mr. Genrich.

Your Honor, I'm joined today by Hayden Driscoll of Quinn Emanuel and my colleague Andy Rossman, who has been admitted *pro hac vice* and will be, with the Court's permission, addressing the motions today. I'm also joined by Charlie Sangree of the Quinn Emanuel firm and several client reps.

THE COURT: Great. Thank you all for

being here. I appreciate that. I'd like to start with the motion to vacate expedition and then turn to the motion for *status quo* order. I think that probably means that Mr. Chepiga is up first, unless Mr. Rossman is going to take the first crack at it. But I'll let you figure that out.

ATTORNEY CHEPIGA: Thank you, Your Honor, and good morning. Sorry, I just had a technical difficulty and lost you for a moment, but I'm back and ready to proceed.

THE COURT: Please do.

ATTORNEY CHEPIGA: Good morning, Your Honor. Geoffrey Chepiga from Paul Weiss on behalf of the Crown Castle defendants.

Plaintiffs sought expedition on the grounds that the upcoming annual meeting was potentially being "corrupted" by the company's cooperation agreement with Elliott Management.

Plaintiffs' motion pointed to three provisions of the cooperation agreement that supposedly created an unlawful playing field and that needed to be addressed prior to the vote: first, the provision that Elliott vote it shares in favor of the board's nominees. That provision is now gone.

Following the amendment to the cooperation agreement, Elliott will vote proportionally, *pro rata*, with all other stockholders. By definition, Elliott's votes cannot impact the outcome of the upcoming meeting.

Second, plaintiffs complained about the nomination provision in which the company agreed to nominate two new directors. This provision is facially valid under Your Honor's decision in *Moelis*. It does not violate Section 141(a) on its face.

As Your Honor wrote in *Moelis*, quote, "Because stockholders have the right to nominate candidates, they can legitimately bargain with the corporation over the exercise of that right." That's the second provision.

The third provision they complained about was that the board agreed to recommend the new directors to stockholders. But the cooperation agreement has now been amended to clarify that the board can change its recommendation to stockholders. If the board determines, consistent with its fiduciary duties, that it should recommend against a new director, the board can recommend against a new director when the proxy comes out.

With these amendments having been

made, there are no impediments to a free and fair election at the annual meeting. Nothing stands in the way of plaintiffs running their own slate of candidates for election. There is no need for expedition, in these circumstances, before the annual meeting.

Your Honor, the Crown Castle defendants submit that plaintiffs are pursuing this case and pursuing expedition and the *status quo* order not because there is any longer any impediment to a stockholder free and fair election, but rather, in an effort to gain leverage from litigation to try to force the company to make a deal with Mr. Miller to put him on the board.

Plaintiffs' real complaint is that an independent board decided to enter into an agreement with Elliott Management but not enter into an agreement with Mr. Miller. Plaintiffs are essentially asking this Court to overturn the board's business judgment in that regard.

I want to focus just on the two elements for expedition. The first addresses irreparable harm, because we submit there is no imminent harm before the election. Plaintiffs can run

their slate, and I'm sure they will run their slate. And the situation here is just like in *Politan*, which we cited in our reply brief we filed last night, Your Honor. There, after certain changes were made to the bylaws, Vice Chancellor Cook ruled that it was no longer necessary to have an expedited trial in advance of the stockholder meeting. He explained that the dissidents' remaining arguments amounted to speculation about potential harm, not actual imminent harm to an election.

And as Vice Chancellor Cook noted in that case, the request for extreme expedition may have reflected a "desire to use the forum of a public trial to achieve nonlitigation ends in a proxy contest."

We have the same concern here.

Plaintiffs have also argued that there is threatened irreparable harm through the functioning of the two new committees that have been created: the CEO search committee and the fiber review committee. But their arguments wholly mischaracterize the nature of those two committees as ultimate decision-makers and mischaracterize that Elliott Management now somehow controls this independent board.

To be clear, the committees can only

make nonbinding recommendations to the full board. The CEO search committee charter is Exhibit 12 to our motion. The fiber review committee charter is at Exhibit 13 to our motion, and they can only make recommendations. The full board retains authority.

And Elliott does not in any way control either committee. Mr. Genrich, the only Elliott-affiliated director on a 12-person board, is one of five members of the fiber review committee, he's one of four members of the CEO search committee, and, as I mentioned, only one of 12 members on the full board, which retains authority over all the decisions.

The work of the committees is ongoing, and it's critically important to the company; and plaintiffs have not identified any remaining legal issues regarding the functioning of those committees that create a need for expedited treatment.

That brings us to colorability. In light of the amendments, Your Honor, we suggest that there is no need for expedition because the claims also are no longer colorable. The provisions that potentially run afoul of *Moelis* -- and we studied Your Honor's decision carefully -- have been amended. We

have addressed them.

Plaintiffs also assert a *Unocal* claim, or what they call self-dealing, a *quid pro quo*. But we submit that what has happened here is the exact opposite of entrenchment. A fully independent board rescinded an advance notice by law in December. Two directors departed; two new directors were added. And as Vice Chancellor Noble explained in *Ebix*, applying *Unocal* to a board's agreement to give up board seats is counterintuitive. This is not entrenchment.

In all events, under the second prong of *Unocal*, the claims are no longer colorable because the amended agreement has no coercive and no preclusive impact. The measures are imminently reasonable. There are no voting requirements in favor of incumbents. Every director on the 12-person board will be up for election, and there is just no preclusion or coercion to state a *Unocal* claim here.

So in sum, Your Honor, the Crown Castle defendants respectfully submit that there is no longer a need for the burdens and costs of expedition on the schedules that have been laid out before the annual meeting. Happy to address any questions that Your Honor has.

THE COURT: Sure. I do, and I appreciate your thoughts. Thank you.

First of all, on the nomination provision, that's what I was looking for when we started up. The question I have about that is the tie-in to the board's decision not to support the Miller nominees when they were proposed to the board in February. And I wanted to look back at the text of that provision.

You-all point out, and I think it's correct under my decision in *Moelis*, it's at least what I intended, that one of those nomination provisions is just designed to put people in front of the stockholders.

What's not clear to me, and what I wanted to look back and reread the text on, is whether one might have thought, based on the provision, that the board was only exclusively permitted to nominate the incumbent directors and the new directors.

Can you point me to the original nomination provision in the letter agreement; which I know is Exhibit 7, but, as I said, I was looking through it to try to find that exact language again because I unfortunately didn't put a flag on it.

ATTORNEY CHEPIGA: Sure. It's Exhibit 7, Your Honor, page 3, provision 6(a). And it says, "The Company shall include the New Directors as director nominees on its slate for election at the 2024 Annual Meeting." It does not say anything about not including others.

THE COURT: Yes, great. That's helpful. And, again, just for my edification, I think this concept of slate, right, like, we all used to think that the management slate was the management proxy card which basically had one nominee for each seat and that was it. We're now in a world of universal proxy. I haven't delved into this issue. I'm curious about it.

Is it true that a company could say, for example, here are ten directors, ten nominees, we've got five seats open. You guys take your pick among them, and we're recommending Directors A through E. It seems to me like you could do that as a matter of Delaware law, which is what I'm concerned with.

Is there something under the federal securities laws that limits your ability to do that, such that "management slate" basically just means the five directors that you put up? Or my hypothetical

where the board could say, here are the ten people, we like these five, but you take your pick, in a world of universal proxy, is that legitimate?

ATTORNEY CHEPIGA: I'm not aware of any provision under the proxy rules, the federal proxy rules that would prevent that. I don't purport to be the world's leading authority on that, but I am not aware of anything that would prevent that, Your Honor.

THE COURT: That's the assumption that I have been operating on. But I frankly got a little bit worried as I focused more in on the concept of what the understanding or meaning of "slate" might be, so I appreciate your help on that.

All right. I guess the question in my mind would be that at the time you-all decided not to recommend the insurgent nominees, was there some understanding in the board that they had an exclusive obligation just to recommend the incumbents and the new directors. You-all have obviously said in your papers that you didn't recommend them because you thought they had a lack of experience.

Is that something that the plaintiff should, at a minimum, be allowed to explore through discovery and make their pitch on as to whether there

was some belief at the time that there was some binding requirement that they just couldn't consider the other people?

ATTORNEY CHEPIGA: I don't believe so, Your Honor. I think if the board -- the board has business judgment to decide who to put on, who to recommend. And there is nothing that would have -- if the board determined in its business judgment that these candidates were the most qualified, it would have put them on its slate. I don't think that's a claim that's entitled to discovery.

THE COURT: All right. Let me ask you something else about the operation of the fiduciary out. And this is another sort of quasi-hypothetical one. I'm interested about this idea that the fiduciary duties require -- and, look, I know that you guys are porting this over from the merger agreement context. This is language that often appears in that context, in terms of framing a change of recommendation provision. I get where you guys are coming from, and I appreciate the thoughtful effort that went into this.

One of the things that I have been wondering, in terms of the 141 implications -- I'm

going to give you a hypothetical here. Let's assume that you've got a range of acceptability of director candidates, and one is someone who is just clearly not suitable and fiduciary duties would require you to recommend against that person. And let's assume at the other end of the spectrum is somebody who we would all love to see. Let's imagine our hypothetical perfect director.

What about somebody who is at a 3, all right? Let's call him Mr. Disagreeable. He is just somebody that nobody really wants on the board, but you can't say that this person is so utterly horrible that your fiduciary duties require you to say that this person can't be on the board.

I could imagine where, but for this provision, we would be in business judgment world and you would say, as you did in response to my earlier question, well, look, the board can make a decision, and if they don't like Mr. Disagreeable, they don't have to have Mr. Disagreeable on the board.

Subject to this requirement, though, you can only get rid of Mr. Disagreeable if you think your fiduciary duties require you to get rid of him. And so it creates this separation -- and, again, I'm

stylizing this in my hypothetical, I'm admittedly stylizing this in my hypothetical. But it creates this separation between the level-one basement human that we would all agree your fiduciary duties require, and this Mr. Disagreeable, who the board otherwise could freely reject but now, under your agreement, they can't back out of, all right.

And I have no reason to think anything negative about the Elliott folks or the independent director that came on with the Elliott person. But imagine hypothetically that one of them is this Mr. Disagreeable. I mean, would you view that as this provision altering what the board can do from its unconstrained fiduciary abilities, its unconstrained powers? How should I be thinking about that type of scenario?

And feel free to take issue. I know you'll say it's not our case, but feel free to -- I imagine one response could be, no, Laster, this idea of the range of directors with this sort of extreme yes, extreme no, and then some fuzziness in the middle, that's really not the way it works. It's just a binary switch and it's either on or off; you either have a fiduciary duty to put somebody on or -- that's

one way to get out of it. It doesn't strike me as, intuitively, a terribly convincing way to get out of it, but I'm willing to be convinced by your explanations. So tell me what your reactions are.

ATTORNEY CHEPIGA: I appreciate the question, Your Honor.

Let me start by agreeing with you that I will start by saying that's not our case, because the board met with these candidates before putting them on the board, interviewed them, and added them to the board in full consultation with them, having met them and spoken with them about the company. So nobody thought they were a 3 to begin with.

And then I understand why you think it's not convincing to say it's a binary on and off, as opposed to a 1 through 10.

What I was thinking, Your Honor, is that it's also a majority board decision, and nobody -- not everybody is going to think it's a 3. You're going to have a situation where a majority of the board thinks it's one way or the other, and however a majority of the board, and it's an independent board, they can figure that out.

I think that's how it would be

decided. I don't think there's a universal -- not everybody is going to think somebody is a 3. So I think if a majority of the board feels that way, the majority of the board would, you know, exercise the fiduciary out.

THE COURT: Yeah. Look, that's a very good response. I appreciate it. It's arguing with a hypothetical, though. Because basically what you're presenting is more of a real-life circumstance, which is there is going to be variation in people's assessments about whether this person is a 3 or not.

If I really put you on the spot and say, well, let's just assume there is unanimity about whether this person is a 3. It does seem to back into a situation where this contractual constraint alters the level of decisional freedom that the board has from full-bore 141(a) authority to contractually constrained authority.

And it just makes me wonder about it. I don't have an answer, sitting here today, about what the right outcome is, because this is language that is comparable to what is used frequently in merger agreements. But it is something that I'm curious about.

So you can feel free to say more about that, or if you feel like you've said what you want to say, you can tell me that's it.

ATTORNEY CHEPIGA: I would just underscore your last point, that this is what boards do all the time in the merger context. And that's where this language is from, and that's how we took it here.

THE COURT: Let me ask you another thing about the origins of the Elliott approach. And this may be a better question for Mr. Rossman, but since your folks were on the other side of it, hopefully you can tell me about it too.

It seems to me that what matters is not the change from *status quo*, but the change from threat. So in *Ebix*, the decision focuses on the change from *status quo* — namely, like, oh, we added two directors. But what was actually happening in *Ebix* was the activist rolled in and threatened to replace four out of six of the board. And so the trade was not expand to two from baseline. The trade was either two-thirds of us are going to get knocked out or get threatened to be knocked out, or all of us get to keep our seats and two get added; right? And

that's a very different comparison than what the decision presents. I don't think the decision actually presents the actual dynamic that is going on there.

And so I'm curious here because here, you-all frame it in the positive sense, but my impression from the papers was that the ask, the original Elliott ask was five. And I tried to go back through the history of the board. And there's been a lot of changes over the past couple of years, but it seemed to me that, at the time, that would be five of ten, right, which seemed like a relatively significant ask. And therefore, you could view this as five people were threatened with losing their job and, instead, this compromise came out where people got to keep their jobs but we added these two more people.

So can you clarify for me what the origins and what the Elliott original ask was. Were they only going to run a short slate? Were they planning to replace the whole board? Am I right that they initially came in and asked for five out of ten? What is the background on that.

ATTORNEY CHEPIGA: Sure. So the Elliott approach at the end of November, Your Honor,

was not -- I mean, that was before the time for nominee -- it happens in February. So this was very early, so nothing was set. It was an opening of a discussion.

The first thing we did was received a 220 demand regarding an advance-notice bylaw provision, which the company rescinded. And so discussion -- that followed discussions with Elliott. I believe at some point they did ask for five, but it would have been 11, not 10, is my understanding. And so, you know -- and through discussions said we're not putting five, and put two.

But I don't think -- you know, it was very early days, and long before the deadline for nominations, so there was nothing that was set.

THE COURT: Right. All right. That's very helpful. Thank you very much.

So, Mr. Rossman, is there anything that you want to add?

ATTORNEY ROSSMAN: Yes, just briefly, Your Honor.

I think Your Honor appreciates that, at the time, there was no Elliott representative at all on the board. Elliott had no control. It was a

fully arm's length negotiation.

And it's important, because plaintiffs have put before you something that's not accurate, I'll say it neutrally, the idea that Elliott approached the company in 2020 and that, you know, Elliott somehow should be responsible for all that happened from 2020 through 2023 and that this is all part of, you know, some Elliott control scheme, is quite contrary to the facts.

Elliott didn't get anything in 2020, was rebuffed, didn't have any control, didn't have any, you know, voice on the board or any role in nominating the directors back in 2020. Didn't have anything until 2023, when it negotiated this cooperation agreement at arm's length and asked for 5 of 11. He got 1 of 12.

And, you know, Your Honor, I want to -- I think Mr. Chepiga covered it very well, but a few points I wanted to hit.

Let me emphasize, Your Honor, we did not come into this court lightly, seeking to revisit your expedition order. And you may be wondering, you know, from Elliott's perspective, why we were willing to modify our rights with respect to the cooperation

agreement. And I want to assure Your Honor it's not because we thought we did anything wrong in the first place. It was what I think Your Honor would recognize pre-*Moelis* was fairly customary activist settlement. And, you know, before the ink was barely dry on your opinion, we sat down and we conformed it, with -- negotiating it at arm's length with the company, and conformed it to *Moelis*.

And why would we do that? We could stand on principles and, you know, people might take a different view of the *Moelis* decision. And we could certainly tell Your Honor why our situation is quite dramatically different than *Moelis*. We never had control. We don't have negative consent rights. It's qualitatively different in a number of respects. We have one director. We have representation on board committees that don't have power even of their own right. They have recommendation rights. They are essentially advisory committees.

But we did that because we wanted to dispense with a litigation that comes at a critical time for the company. The company is actively engaged in two mission-critical processes here. We did not want them derailed. And, you know, we think, quite

transparently, the plaintiff group here, a distance shareholder group who's, you know, obviously disappointed that they were not welcomed by the board, at a time when Your Honor already knows the board could have recommended them -- the board could have taken them on. The cooperation agreement didn't prevent that -- you know, they want to use the litigation as a lever to advance their own, we think, ill-considered and very self-serving, self-enriching proxy contest here.

And, you know, the very first thing that we would urge Your Honor to do is, you know, follow the Hippocratic oath here and not allow the litigation to do harm to the company when it's in the midst of this.

And I just wanted to relay that that's why we cleared the way for that. And I think we did it not as a fig leaf. I think we did it fully, in full conformity. And the board is not constrained -- two critical things are the board is not constrained in its ability to fulfill its fiduciary obligations. And I think most folks would say that Mr. Genrich is Mr. Agreeable, not Mr. Disagreeable, but certainly, if that were interfering with the board's ability to

manage the affairs of the company, you know, then they have a fiduciary out that protects that. And that's all that the law requires. The law does not require that the company be unrestrained whatsoever.

And likewise, the shareholders have, you know, a free and fair election ahead of them. There is nothing in the cooperation agreement at all that interferes with their ability to exercise their franchise. And, you know, if the Miller group has a good case to make, they can make their good case to the shareholders. And there is nothing coercive or constraining about the cooperation agreement or anything else in this circumstance.

And I will stop there, Your Honor.

THE COURT: All right. Thank you very much. I appreciate it.

Okay. Response?

ATTORNEY HEYMAN: Thank you, Your Honor.

With Your Honor's permission, I will address the arguments related to our claims under Section 141 in *Moelis*, as well as our fiduciary duty claims relating to the cooperation agreement. And Mr. Woolery, who, as Your Honor knows, has a

background in hedge funds and has been admitted *pro hac vice*, will address our claims under the company's bylaws. I may also tag Mr. Woolery if I have trouble answering any of Your Honor's factual questions or questions about proxy rules, which are way outside of my bailiwick.

So I know I don't need to repeat everything we have in the papers. At bottom, the questions are whether we have articulated a colorable claim and a possibility of irreparable harm.

And so just hitting the highlights here. In this action, as Your Honor knows, we're challenging a cooperation agreement entered into between Crown Castle and activist investor Elliott Investment Management on December 19, 2023, and amendments to that agreement adopted on March 3, 2024, directly in response to the filing of this action.

We argue that the cooperation agreement and amendments violated Section 141, as explained in Your Honor's *Moelis* decision, breached the directors' fiduciary duties, and also violated the company's bylaws.

Beginning with Section 141, we contend that the cooperation agreement unfairly stacked the

deck in favor of the company's incumbent directors for the 2024 annual meeting and tied the board's hands as to the composition of key board committees by, among other things, giving Elliott two board seats, representation on fixed board committees charged with reviewing Crown Castle's fiber strategy and selecting the new CEO, and including the Elliott director nominees on the company's 2024 slate.

Defendants have made our job a little bit easier, in some ways, by effectively conceding that the original agreement violated Section 141 by amending the agreement to remove the contractual cap on board committee -- board and committee size.

Defendants argue that the amendments render our Section 141 claim moot. But the problem is that the cooperation agreement, including the board slate and the committees that it created, were void *ab initio* under Your Honor's *Moelis* decision. Yet the amendments keep in place all of the key elements of the original bargains struck between the board and Elliott.

For example, although the amendments allow for a theoretical increase in board and committee size, they leave intact the precise CEO

search and fiber review committees, including the Elliott directors, constituted under the original agreement.

Further, the amendments leave untouched the requirement to include the Elliott directors on the board slate and the board's recommendation of that slate pursuant to Section 8 of the agreement.

The new provision allowing the board to change its recommendation in the amendments after consultation with counsel does not reverse the board's already-issued recommendation, nor its rejection of the Boots candidates.

So while the amendments attempt to address specific problems that Your Honor raised in *Moelis*, they leave in place all of the key features of the now admittedly unlawful bargain between the board and Elliott. Those key features continue to loom large over the upcoming annual meeting because the very same directors who are required to be nominated under the void cooperation agreement remain as the nominees.

Because the cooperation agreement was void, and not merely voidable, defendants cannot fix

it by amending it at the edges while adhering to its material terms and asking the Court to declare no harm, no foul. If this were a case involving a noncompete agreement that was void as against public policy, the Court would not blue-pencil it to make it enforceable. And defendants here should not be permitted to blue-pencil their own *ab initio* void cooperation agreement to make it enforceable.

Moreover, because the cooperation agreement was void, defendants' laches arguments -- which we didn't even hear about today -- have no application here, as Your Honor held in *Moelis*. And because we're talking about a violation of a statute here, in particular Section 141, case law holds that that violation may be enjoined even without some separate showing of irreparable harm.

Now, even if Your Honor were to find that defendants' amendments to the cooperation agreement validly corrected the statutory defects, under our twice-tested regime, we still have colorable claims that they breached their fiduciary duties in entering into the cooperation agreement as a *quid pro quo* for Elliott calling off its proxy contest. Keeping their positions was a nonratable benefit to

the directors not shared with the stockholders.

Entrenchment is subject to heightened scrutiny, and self-dealing is subject to entire fairness review. These claims were not mooted by the amendments precisely because the amendments maintain the entrenching effect of the original cooperation agreement.

It's also noteworthy that the board was dealing with a new and, to our knowledge, unprecedented tactic by an activist. Unlike other activists, who take substantial equity stakes in the company and can truthfully tell a board that their interests are aligned with other shareholders, Elliott took a tiny equity interest, holding only about one-quarter of 1 percent of the company as of December 31, 2023, and retained freedom to dispose of its investment; which we understand it did.

It permitted -- this arrangement permitted it to promptly take advantage of the stock price pop when the cooperation agreement was announced, and Elliott has not disclosed what its direct or indirect equity ownership in the company is at this time.

So the board seats and governance

rights were granted to an almost entirely nonaligned hedge fund, and whatever threat the board believed it faced from Elliott, its response was excessive and would be an unfortunate precedent, if upheld. Indeed, because of Elliott's miniscule stock ownership in the company, the amendment requiring it to vote its shares *pro rata* with all the other stockholders is illusory.

Moreover, the amendments themselves were plainly adopted in response to this action brought by plaintiffs. If the cooperation agreement was only voidable and the amendments cured the defects, then the amendments themselves, which effectively ratify all of the key terms of the agreement -- including sticking with the same nominees to the board mandated by the original agreement -- must be viewed in the context of the challenge presented by plaintiffs here and subjected to heightened scrutiny.

Plaintiffs and all stockholders are subjected to irreparable harm when denied the right to fairly vote their shares or obtain fair representation on the board. And even if we're in the equitable world of fiduciary duties, rather than the world of statutory voidness, laches would still not bar

plaintiffs' claims — although, again, we didn't hear about that today.

As set forth in our papers, plaintiffs undertook extensive efforts to engage with the board about its concerns prior to bringing this action and asked the board to submit the cooperation agreement to a stockholder vote as a cleansing measure on February 14th. It was only after the company announced it would not do that and set its annual meeting date on February 20 that claimants filed the instant action on February 27.

So I think at this stage, since we're splitting the motions, I will hand it over to Mr. Woolery, if it's all right with Your Honor.

ATTORNEY WOOLERY: Thank you, Kurt.

And it's a great privilege, Your Honor, to be in front of you today as a lunch-pail lawyer again. I appreciate it.

The first thing I want to address is Mr. Chipega said to you that our complaint -- he characterized it as we're upset because the board entered into an agreement with Elliott and not with us. The board couldn't have entered into an agreement with us, Your Honor. It entered into an agreement on

December 19th with Elliott. They didn't even know about us. That's number one.

But let me just tell you that there is another thing in this contract that I really want you to -- I want us all to take a hard look at. And that is that this contract is with a derivative holder, Your Honor. Directors do not owe fiduciary duties to derivative holders. And I'm going to explain, as I go through this argument, the great harm that that causes and how it actually elevates the derivative holder above the stockholder.

So, Your Honor, under the company's own advance-notice bylaw, stockholders are contractually entitled to submit proposals for consideration by the board during a window of time between January and February 17th. And the board then considers, or is supposed to consider, what proposals, all or none or a combination thereof, are in the best long-term interests of all stockholders to whom they owe a fiduciary duty. They look at all the proposals, they weigh them.

Here, it fails under *Moelis* and a host of Delaware precedent regarding elections -- in particular, we're not in a merger; we're in elections,

Your Honor -- to give over fiduciary responsibility to a third party, in Elliott, and bind the board to one certain shareholder proposal prior to a known intervening event to come up in January and February of other proposals from other stockholders under their own bylaw.

And to do so when no threat of a proxy contest can even exist in December, Your Honor, prior to Elliott even submitting nominations for directors at Crown can only have one purpose: that of insulating the remaining incumbent directors from any future contests that would come from Elliott or from anyone else later on from the shareholder proposals.

Defendants talk of mootness. This structure moots the advance-notice bylaw because the slate is preset and preagreed before any other proposals can even be known. And this is the activist calendar for contest, Your Honor, not the Delaware calendar that is at issue here; because this contract goes further and beyond the problem of binding in advance, inappropriately, the board against other proposals and mooting the bylaw Miller relied on in preparing his business proposal for six months and aiming for the proposal to go to the board on

January 1st, consistent with the bylaw.

The agreement grants special rights to a holder of derivative instruments, as opposed to stock. And that is a big problem under Delaware law. Directors do not owe duties to holders of swaps. And Elliott's admitted business model is to not hold stock, but to hold derivatives that look to stock and play off of the stock price but are not, in fact, stock.

This means an activist can announce a $2 billion position in November here that is not in stock, but derivatives, and take the profit from the pop on announcement right up front. And here, Elliott targets companies under the 13D limit, and they are allowed to do that, so their position of how it works, how it hedges out risks, how it operates differently to stock -- because it clearly does -- is not known or reported.

But for Elliott it's fine, and this is their business. But the board here elevates the interest of the derivative holder above the stockholder in exchange for board seat preservation, because it is economic for the activist to hold these interests -- it's cheaper, Your Honor -- and the

contract endorses it.

This contract talks about total economic exposure, all right. And it says you can -- it says to Elliott, you can stay in these derivatives; you don't have to own stock, you can stay in them. And we don't know what they are. We have no way of knowing.

So if they've hedged out interest rate risks -- stockholders have interest rate risks, Your Honor. If they have made this a relative value hedge, where they have isolated only Crown and not the competitors, and taken out industry risks -- stockholders have industry risks, Your Honor.

And so these trading positions of Elliott can change daily, Your Honor, and they are not reported to the board. And the contract also requires -- which is really unbelievable -- it requires the company to protect Elliott's trading rights. Look at the provisions. The board here had to protect Elliott's right to trade these derivatives through the life of the contract. Derivatives aren't stock, Your Honor. And they can be changed, Your Honor.

And what this does is it creates a

subsidized-by-the-board total economic exposure concept that is not stock by definition -- it is not. But the directors keep their seats and make it self-dealing under the agreement because they grant special governance rights -- we haven't asked for governance rights -- to Elliott ahead of the window for proposals. And they only know now, because of this contest and our complaints, that over 90 percent of Elliott's position is still in derivatives. And those derivatives move differently value-wise, by definition, than a share of stock. But the directors don't know how Elliott's nonstock position moves differently.

And the contract doesn't require any reporting to the board of the position, even though Mr. Genrich is on the board and gets paid out of the Elliott position and is subject to duty of loyalty and should be required to disclose it daily to the board if it's changing. And, again, that is not in this contract. It is the reverse. It is a black box to the board.

And so future Miller proposals, Your Honor, will not be brought for stockholders to see and choose from, because a very efficient nonstock trading

holder can front-run the process and be rewarded by the board and protected with special rights that stockholders do not enjoy, in exchange for board seats. And more and more elections, Your Honor, will be settled up-front, before windows open for stockholders to propose anything, because it is efficient for the market, it costs less.

And if Paul Weiss' latest statement is correct, it will become market standard. It's not market standard. These agreements do not routinely refer to total economic exposure. Even Elliott's own agreements in other situations, Your Honor, don't have this concept.

So for Miller, every day that this contract stays in place is a day of enormous harm because it dominates the proceedings. See where we are today, Your Honor, and what he has gone through to get this proposal forward. And it represents an unprecedented advantage, this contract, for one holder over all others.

And by the time we get to this meeting, Your Honor, to have stockholders vote -- which is not passé -- they will have picked a CEO and a fiber plant. And all that will have been done with

predominantly a publicly stated-to-be derivative holder on the phone here influencing all of those decisions, with no protections for stockholders who want to have a say, who relied on the bylaw, Your Honor, and a clean vote and played by the rules and waited for the proposals.

Thank you, Your Honor.

THE COURT: That was very helpful. I appreciate it.

Can you point me to the language that you were alluding to in terms of preserving Elliott's ability to trade through the derivative securities. You said, I think, it was in the original cooperation agreement somewhere.

ATTORNEY WOOLERY: It's in the original cooperation agreement and the new one.

And, Ben, I don't know if you are on the phone, you can help me -- have it in front of me.

But there are provisions in the contract that relate to Elliott's ability to trade, and the company can't taint or infect them or -- and have to allow them to trade. I apologize, I don't have the contract right in front of me.

Ben, I don't know if you could raise

it.

I know the provisions are there, Your Honor, because I read them. And I was in shock the first time I read them and they are there still.

But what they are really about is -- what those provisions are about, Honor, is, you see, Elliott is in synthetic equity, right?

THE COURT: Okay.

ATTORNEY WOOLERY: So it's not stock.

THE COURT: I get it. I just want to know the language so I can read it.

Mr. Ben, whoever you may be, can you point us to the right provision?

ATTORNEY WOOLERY: Ben, can you point the Chancellor to --

MR. HOWARD: Hi Jim, and hi, Your Honor. Give me one moment as I run that down, if you don't mind. Thank you.

THE COURT: No worries. And you can tell me after I hear -- in reply. That's fine as well.

All right. Mr. Chipega and Mr. Rossman. Why don't we go back to Mr. Chipega first.

ATTORNEY CHEPIGA: Thank you, Your Honor.

Just briefly, in plaintiffs' presentation, you heard nothing about what the actual interference with the vote is. They talked about things that are looming, overhangs, but there's no actual coercive, preclusive -- any kind of imminent threat to a free and fair election in May.

Mr. Heyman said that all of the actions of the board were void *ab initio*. I haven't heard a case or a principle as to why that is. He hasn't come forward with a legal argument that suggests that that's true.

The derivative argument that Mr. Woolery was making, it's just not true. I mean, Elliott is a beneficial owner of stock. When they filed their 220 demand, they presented it to the board. We saw that they were beneficial owners of stock, not just derivatives. And my understanding is that they own more beneficial shares of stock than the Boots team does.

The fact that they also have derivatives is not anything of concern to us or the Court at this point or on this motion. And I do not

know the language that Mr. Woolery is referring to about giving them any sort of trading rights. That's just -- that's not true.

And finally, Your Honor, you heard complaints about the timing of the deal in December. There is nothing that would prevent a company from signing a cooperation agreement at any point. The timing was what it was because Elliott came with a 220 demand about the advance-notice bylaw, and that's what kickstarted the conversation.

There is no provision stopping anybody from signing a cooperation agreement at any point in the calendar year or calendar cycle, so the harm that they are complaining of in that respect, they are just seeing ghosts, respectfully.

And if Your Honor has any other questions, I'm happy to address them.

THE COURT: Mr. Rossman, how about you?

ATTORNEY ROSSMAN: Thank you, Your Honor.

I want to start by saying none of the arguments that Mr. Woolery made are in the papers or properly before the Court, and I don't know what

provision he is referring to in the agreement. I will look forward to reading it when he points it out to me.

But the idea that there is anything wrong with, you know, investors investing, in addition to the common stock, in options or in swaps or in other synthetic equity would be a novel idea. And it would be a novel idea to Mr. Woolery's client, because my understanding is that the vast majority of their position is in options and in swaps, and not in common stock; that they have a relatively modest amount of common stock that they hold.

And to be clear, Your Honor, Elliott has, my understanding is, over a million shares of common stock, that it is an actual holder of. There is plenty of an interest for it to be motivated to participate here. And the full measure of its position makes it one of the, I believe, five largest investors in the company, period.

And that's important, Your Honor, not just because of fiduciary obligations that are owed to shareholders. It's important because Elliott's interest entirely is in a positive outcome for the company. Elliott's interest is seeing the company

succeed. That is the only -- that is the only financial interest that it has in Crown Castle.

And, Your Honor, the idea that there was some entrenchment here -- and oh, before I get to entrenchment, I just want to emphasize one point that stuck with me.

Mr. Woolery said they were in shock when they saw these provisions — provisions which I have yet to have pointed out to me. That was December 19, 2023, okay? They didn't come forward at that time to file a claim or to seek immediate injunctive relief from those provisions. They didn't do anything, and they waited.

And only after Your Honor's *Moelis* decision did they kickstart this litigation. And I would submit, very respectfully, Your Honor, in a very cynical way, to try to weaponize your *Moelis* decision. Because they are very transparently not standing up here arguing for, you know, a board-centric view of corporate governance. What they're arguing for is that they want their voice, over the company's voice and over one of the largest investor's voice, to be the one that dominates the discussion.

So, Your Honor, if they had any -- and

this is important as it relates to the expedition, also to the *status quo* order. If they had a beef with those provisions that Mr. Woolery just identified for the first time in arguments --

ATTORNEY WOOLERY: I have the provisions, Your Honor.

THE COURT: Hold on. We will get back to you. Don't worry, don't worry.

ATTORNEY ROSSMAN: -- then the time to make it was back in December, not now. And I think laches very much operates with respect to their request that the Court now immediately drop all other matters and try to take this up to conclusion in the course of a month; you know, disputes that might otherwise take two or three years.

So, you know, that's -- I will pause there, Your Honor, and I will wait for further word on the provisions.

THE COURT: All right. That's helpful.

So, Mr. Woolery, do you want to share with us the provisions.

ATTORNEY WOOLERY: It's in Section 10, and I'm going to it now, Your Honor. And I apologize

for not being more spry. In the middle of the paragraph: "The Company acknowledges and agrees that [] no Company Policy shall in any way inhibit any Board members (including the New Directors) from engaging in dialogue with the Investors so long as they" blah, blah, blah, blah, blah, blah. "[N]o Company [bylaw] shall be ...."

These provisions talk to the company's policies, and they run to the ability of the investors to trade in the company's securities by their terms here, Your Honor.

So now we're talking about company policies, Your Honor, that the board has, and we're talking about -- and it's not a novel argument at all, it is in our papers.

And I'm shocked that Mr. Rossman doesn't see our papers. How many times do our papers say they don't own stock, Andrew? It says it over and over again.

So in that -- so what I'm saying, Your Honor, is that the derivative position -- and it's a huge issue. It's 90 percent derivative. They admit it. In their public statement, they came out and said we only have 100-and-some million dollars on the 13F,

but we are right under the index holders. That was the public statement of Elliott. Which means that over 90 percent of it is in derivatives.

Mr. Chipega wants to tell you it doesn't matter to the board how those derivatives move, when they have a representative on the board. So in other words, a stock -- the stock could go up $1, and it could go up a dollar because of a lot of different reasons.

The derivative position that Elliott has got could move in all different directions off of that stock move. Totally different than the stockholders. And so you're going to talk to them about fiber and who is going to be the CEO, and you don't know whether their position is short-dated.

They could have taken all of their profit and hedged out all of the risk here, Your Honor. They could have no remaining outstanding risk. Mr. Rossman doesn't know. Mr. Chipega can't tell you their position, can't tell you how it works. And Mr. Gordon wants to tell you, oh, the board doesn't need to know about that; this is all market standard, they don't need to know.

THE COURT: So I remember -- and again

this may be my own hallucinating from having to read this relatively quickly. I felt like there was something in the agreement about being net long to some extent.

ATTORNEY WOOLERY: Yes.

THE COURT: So, again, I'm in --

ATTORNEY WOOLERY: Could I talk to that?

THE COURT: Yes, please do.

ATTORNEY WOOLERY: So what it says -- and it only governs certain parts of the contract. It says they have to be net long 1 percent. Now, this company is a $50 billion, roughly, market cap. 1 percent of the company is 500 million.

To buy a one-week option, Your Honor, to be net long 1 percent costs roughly a million dollars, all right? So to be net long 1 percent is no big deal, all right? They make it like this is -- and, again, I guarantee none of this was explained to the board.

But they say, oh, it's no big deal. It is a big deal. They could come in and out of the position. They can trade openly; there's no restriction on it. They could be trading debt

securities. They can play the fiber sale. They can play all which way to Sunday.

The board has no idea. They are not required to report it. We don't know how their position moves. Mr. Chipega and Mr. Rossman today can't tell you how this position moves. They can't tell you if -- if Crown stock goes up a dollar, Andrew Rossman, what happens to Elliott's position? Tell me.

THE COURT: Just keep focused on me instead of moving to Mr. Rossman.

ATTORNEY WOOLERY: Okay. Okay. I'm just trying to understand, Your Honor, because I don't -- this part, I just don't understand. I'll leave it there.

THE COURT: I hear you.

Let me ask you to refocus, in terms of how this fits in with the challenge to the agreement. What I understood you to be saying is that at the time the board entered into this agreement, you don't think that they understood all these things and, therefore, that figures into the *Unocal* analysis, et cetera. And I hear that.

I think what your friends are saying in response, though, is okay, we disagree with that,

but let's assume that is true and let's accept Mr. Woolery's argument that this is a form of front-running the window.

It doesn't matter because Mr. Woolery's clients weren't prevented by this from proposing their directors, and they could have proposed other business to be conducted at the meeting, had they wanted to. And now they can run their slate, and, in fact, from the concept of running the slate, the fact that Elliott has such a minimal position is good for your folks because it means that they don't have much voting power to bring to bear -- now they're voting aligned anyway, but they wouldn't have had much voting power to bear.

So tell me how you see it, in terms of this front-running actually impairing your clients' rights. Because I will tell you that that resonates with me to some degree. I mean, I do think that there is good reason to think that people ought to be generally following the rules, and if the board creates a window where they know people are going to be making nominations, the idea that you would lock in a slate before you get to that nomination window, all right, it's not crazy to me that that could be a

claim.

But why, here, are you actually being harmed as things exist now?

ATTORNEY WOOLERY: Because we -- we spent six months, and aiming for the window. And the way the front-running works is, you see, derivatives are cheaper to hold. You can announce a $2 billion position. It's not $2 billion. We all know that, right?

And that's the activist calendar. They announced before the window. And so if Your Honor -- if we create a situation in Delaware where a subsidized sort of hedge fund nonstockholder can announce on a board, and the board can basically prenegotiate -- I mean, boards are not -- you know, don't love proxy contests. That's no secret, right? So they can prenegotiate with Wall Street through a hedge fund, settle the proxy contest, and do it before the window opens.

It's right that we can run a proxy contest. Of course we can. We are doing it over chairs. We are doing it over glass. Mr. Rossman says I have to climb Mount Everest over here, but he gets to skate downhill.

So the question for Your Honor is, why is it hard for the board to wait for the proposals? What would have been so hard to wait to sign this or to have a fiduciary out for those proposals in the agreement?

And Mr. Rossman also wants to sound very equitable in this amendment. Your Honor, they didn't even talk to us about this amendment. They could have called us and said, look, we think *Moelis* says this. What do you guys think? It wouldn't have harmed them at all. They did it in two days. It was a tactic.

"Require" versus "want" is a very big difference, Your Honor. M&A, when you are required and you're locked into an agreement, and it says I can only get out of it if required, that's different. That requires lawyers and analysis, and we might be sued. So by definition it's different than -- than if it's not there.

So our client has been before -- what -- what this board said to us was there is no room at the inn. I wish you guys had called us earlier. If they had known about everything evenly at the same time, would they have made the same

decisions? We don't know that, Your Honor. They should have.

THE COURT: So is that your understanding of what happened? Because what I am told --

ATTORNEY WOOLERY: Yes.

THE COURT: -- by the other side is, no, we thought these guys weren't qualified, and so --

ATTORNEY WOOLERY: They didn't even know about us. The board didn't -- when they signed the agreement, they didn't know about us.

THE COURT: I agree with that. But when you-all came to them in February, what the defendants are saying is, yeah, if we thought they were qualified, we would have added them to the slate. There wasn't any limit on us doing that. We would have put out a slate of 16 people and the stockholders could have picked; but we just didn't think they were qualified.

And that, to me, is a different situation than them telling you, look, we've only got 11 slots. We've recommended our 11 slots. Sorry, guys, we just don't have slots for you. We've already picked the team, you know, try out next year.

ATTORNEY WOOLERY: Yeah, I mean, it was basically, Your Honor -- those were their public statements. What they really did with us was they said, look, this is -- we've already done our deal with Elliott, like, we have our protector here. We have settled the proxy fight, like, we don't want to get back into it.

And when we went through it with them, it was a very efficient process. They were totally robotic, okay, through the whole thing. And the guy, Bartolo, would never call us back. We could never engage with them.

We made a 48-page presentation to this board. There were practically no questions. The only questions came from the investment banker. I was on the board meeting, so I saw the impact of it.

The overhang of this agreement and the psychology of directors, we're done with this. We settled -- it's over. Like, we did this deal. And so now we don't want to get back into a contest, we don't want to get back into these issues, we've settled our team. And I also believe there is something else at work, Your Honor.

There is a fiber sale here, okay?

It's a big -- it's a $12 billion, roughly, carve-out. Elliott can play in the financing of that. It's very juicy financing. They have that -- they are in the private equity and financing business. Nothing restricts them from doing it here. Why do they want Miller under the tent messing around?

You know, Miller came forward with all these bidders, Your Honor. We did bidders and financing shorts because that was our play to show how credible we were, all for the company. I don't think Elliott likes all that. I think Elliott kind of, you know, wants to be sort of -- doesn't want us under their tent. And the incumbent directors did their deal, and they feel like they already gave it -- you know, kind of gave at the office kind of thing. So why should they give up more seats to us or, you know, do something different. Because, again, I did my deal with Elliott; like, it's over.

That's the whole problem with this whole process. And, again, I fundamentally believe that if they had waited and not entered into this agreement in December 19th, then we would have had competing proposals. We would have blended the proposals.

THE COURT: I appreciate your position. I understand where you are coming from.

So, Mr. Chipega and Mr. Rossman, you-all are the movants, so you get the last word.

Mr. Chipega, why don't you go first if there's anything else you want to add.

ATTORNEY CHEPIGA: Just very briefly, Your Honor.

The idea that the mindset was closed is not true, and demonstrably not true. The board added another member at the end of January, after the Elliott deal was announced, Mr. Singer. That came at the end of January. This was not a set, baked thing.

Just to the points on the position. The company saw Elliott's position when they filed their 220 demand in December. That was clear. It showed common stock ownership. And there is a minimum voting threshold, as Your Honor rightly pointed out. That's in provision 6(b) of the cooperation agreement that requires a long position.

And finally, Your Honor, the claims, just to say it, the claims that Mr. Woolery is articulating now were not pled in the complaint or in the amended complaint. They are new things we're

hearing for the first time today, and none of it warrants expedition on the schedule that plaintiffs are demanding.

THE COURT: Mr. Rossman.

ATTORNEY ROSSMAN: Your Honor, briefly, just to be crystal clear about this. Elliott has a position that dwarfs the size of Boots' position in the company. I believe it's over $1.5 billion in cash-held common stock and equity swaps that have the exact same economic consequences as holding the stock. That's why it's described as a long position. So all of the, you know, speculation that I think Mr. Woolery was laying out there is nonsense with respect to Elliott's position.

Paragraph 10 specifically, that was just identified for the first time in this argument, is not referenced in their briefs, is not referenced in their complaint. It's brand new, it's outside of the case, and it doesn't make any sense, Your Honor.

And, frankly, there is at bottom, there's nothing, there's nothing that prevents the board from deciding to put the Boots nominees, you know, on their slate today, if they thought that was in the best interests of the company; and nothing that

prevents shareholders from voting for them, which fully sinks their claims.

Perhaps it's because the board doesn't like the idea of someone who hasn't been involved in the company in 20 years coming back in, trying to appoint himself executive chairman, trying to get his son-in-law on the board, and trying to get $5 million of reimbursement for some uncommissioned consulting work that they did, which apparently didn't resonate with the company that's actually running this business.

And the last thing I'll say is one of the reasons why they can run this proxy contest free and fair at the annual meeting is because when Elliott came in, they asked for the advance-notice bylaws that included the acting-in-concert provision to be withdrawn. And the company withdrew them. So it cleared the path for them to be able to run a slate if that's what they want to do, and there is no need for expedition or injunctive relief.

Thank you, Your Honor.

THE COURT: All right. I appreciate all of you-all's presentations. And I know we have a second motion to get to, but I do believe that this is

really the gating item, and I also think that I need to give you an answer.

What I'd like to do is it's 10:23 right now. Let's take a 15-minute break. If I need longer, I will have one of my clerks get on and tell you. But by my clock, that will mean we'll all get back on the phone at 20 of, and then hopefully I will be able to give you an answer on the motion to expedite at that point and then we'll move on in light of that ruling.

Mr. Gordon, you had something to say?

ATTORNEY GORDON: Yeah, Your Honor, I have a problem, and I'm happy to take it any way you want, but I'm supposed to speak at Tulane in a little bit, Your Honor, on controller liability, which I promise to just --

THE COURT: You know my thoughts on that.

ATTORNEY GORDON: I know your thoughts, Your Honor, so I plan to, you know --

THE COURT: To object to them vehemently?

ATTORNEY GORDON: Not true, Your Honor, not true. Greg Varallo is on my panel. There

will be no way I can object.

THE COURT: You'll have a good debate. That will be great.

ATTORNEY GORDON: So, Your Honor, I'm happy to tell them I can't do it if that's --

THE COURT: What time are you supposed to be on there? At 11?

ATTORNEY GORDON: 11:30 Eastern.

THE COURT: Well, we'll make it unless your TRO argument is incredibly verbose. But thank you for raising it. I appreciate it.

ATTORNEY GORDON: Okay. Thank you, Your Honor.

(Recess taken, 10:25 to 10:41 a.m.)

THE COURT: All right. Welcome back everyone, and thank you for being here and ready to go. I have often commented on people not having their screens on, so it's great to have all of you have your screens on. I appreciate it.

I'm going to go ahead and give you a ruling now. I'm going to leave the motion to expedite in place but as to a more limited aspect of the case, because I do think that, to some degree, the actions that Elliott and the company have taken have mooted

significant aspects of the plaintiffs' claims.

We're here because of a proxy contest. The incumbent directors include at least one representative of Elliott Management, which is a quite successful activist hedge fund.

In 2020, Elliott made some proposals to the company. Subsequently, the board added three independent directors. I note that fact as a background point. The plaintiff has attempted to paint those three independent directors as tools or representatives of Elliott. I don't think that, at this point, I have any basis to draw that conclusion. That's simply historically when Elliott first got involved in the situation.

In the fall of 2023, Elliott launched a new campaign. In December, they entered into discussions with the company. They initially asked for five of ten directors. The company and Elliott settled and entered into a cooperation agreement. That cooperation agreement added two directors to the board — one Elliott-affiliated director and one independent director.

The cooperation agreement contained agreements that reflected other aspects of the board's

judgment at the time, such as a decision to create two new committees. But in addition to those provisions reflecting the board's judgments at the time, the cooperation agreement contained provisions that bound the board going forward. The board was obligated to include the new directors on its 2024 slate, and the agreement capped the size of the board and the size of the two new committees, and it also did things like lock in the charters of those committees.

This all happened before the company's designated window for nominations for directors and proposals for business to be conducted at the annual meeting, which opened in January.

During the January nominating window, the plaintiffs proposed a slate of their own. The plaintiffs engaged in discussions with the company, and on February 14th the board declined to recommend any members of the plaintiffs' slate.

On February 23, I issued a decision in *Moelis* that called into question the validity of the provisions in the cooperation agreement that bound the board on an ongoing basis. The plaintiff has challenged the cooperation agreement on that basis as well as a breach of the directors' fiduciary

duties, arguing that enhanced scrutiny applies under *Unocal*.

There is a meeting coming up to vote on directors on May 22nd.

As I noted, the plaintiff has two theories. The first is a *Berle I* theory of statutory invalidity that challenges provisions in the original cooperation agreement, including a mandatory voting obligation, a nomination provision, and a recommendation provision. There's also a *Berle II* fiduciary argument contending that the cooperation agreement constituted a breach of duty.

We're here right now because of the motion to expedite. I previously granted the motion to expedite *ex parte*. I did so because, in these settings, I have to credit the plaintiffs' allegations. And in a case like this one, where there is an upcoming vote and an agreement that colorably was interfering with aspects of that vote, the real issue didn't seem to be whether expedition would be granted, but to what degree.

I therefore asked counsel to agree to a schedule but gave the defendants leave to revisit it. I got a letter from the defendants saying that

they would revisit it, but they didn't tell me why. They didn't mention that it was going to be due to some mooting action, so I inferred that it was just going to reargue the situation, which didn't seem helpful.

That resulted in an exchange of orders about scheduling. I appreciate you-all putting in those orders and engaging in that effort. I now know that the change in the state of play is because of the mooting action.

What the defendants have done is amended the cooperation agreement to eliminate some of the provisions and limit the effect of others. The plaintiffs' counsel argues that all of these provisions were void *ab initio*, and so none of these fixes have any affect.

I view the matter differently. I don't think that the entire agreement is void *ab initio*, and I do think aspects of this are severable. I distinguish between the actions that the board decided to take at the time that got memorialized in the agreement and ongoing obligations that bind the board as to future decisions that the directors might make on an ongoing basis.

The first dimension is, for example, "We think it is wise to appoint two new directors to the board." Or the first dimension would be, "We think it's wise to create the fiber review committee."

The second dimension is "We will recommend these two directors, no matter what, for the next two years." Or "We will appoint a replacement director suggested by Elliott, and our consent will not be unreasonably withheld." Or "We will always keep in place the charter of the fiber review committee over the next two years, no matter what happens." Or "We will not increase the size of the board or the size of the fiber review committee over the next two years, no matter what happens."

It's the latter aspect that I think implicates Section 141(a). The former, I think, is a fiduciary decision that then gets documented in the agreement, but it doesn't have this ongoing constraining effect.

What that means in my mind is that the latter type of provisions, these ongoing commitments, are what is subject to the Section 141(a) challenge, but that doesn't necessarily render void the decisions that the directors made and implemented in real time.

I think that the amendments mooted virtually all of the issues that the plaintiff challenged. I don't think they mooted all of the provisions that have ongoing effects, but they mooted virtually all the provisions that the plaintiffs challenged. The only one that I think is still live is this question of the obligation to recommend the incumbents, including the new directors.

And here, after the modification by the fiduciary out, I'm not saying that it's invalid. I'm saying that I'm not sure. What Elliott and the company did to modify this provision was to allow the directors to withdraw their recommendation of a specific individual if the directors determined, after consultation with counsel, that their fiduciary duties required it.

That is a common formulation that's used in M&A agreements, so that starts out with a lot going for it. As you-all know from *Moelis*, but also from my earlier *Primedia* decision, following the work of distinguished practitioners like Frank Balotti and some of the folks over at Morris Nichols, I distinguish between a termination right and a recommendation right. The termination right is what,

to me, more obviously implicates third-party contractual interests. The recommendation right is something that, to me, is strongly internal and connected to the board's duties to its stockholders.

It's not clear to me that the same limitations can apply to a recommendation right that we all would readily concede, or at least acknowledge, can apply to a termination right. I basically want to think about this one more, and I want your help thinking about it more.

I think that there continues to be a colorable challenge to the recommendation obligation as made subject to the fiduciary out. Again, no one should interpret this as meaning that it's going to be held invalid. There is a question in my mind about the use of that format in this context involving an election scenario where the board's recommendation is so important.

Now I move to the *Unocal* issues. And here I also think the plaintiffs have cleared the colorability threshold, if barely so. The defendants rely on *Ebix* to say that this cooperation agreement can't give rise to a *Unocal* issue because the board added directors and thereby diluted the incumbents'

voting power, rather than doing anything to entrench themselves. I think that misses the point and looks at the wrong comparison.

The issue in *Ebix* was the directors' entry into a director nomination agreement. A firm called Barrington threatened to launch a proxy contest for majority control of Ebix' board, so they were looking for four out of six directors. The individual defendants decided to bargain over it. And as the decision notes, the agreement reflected negotiated terms, presumingly in line with each contracting party's intent.

The decision then says that applying *Unocal* to the board's agreement to give up board seats, though conceivable as entrenching, as far as that concession was a part of a *quid pro quo*, or, in Ebix, the extinction of Barrington's not-yet-launched proxy contest, is counterintuitive.

I don't think it's counterintuitive. I think that this is sound-bite reasoning. It sounds good when you say it fast -- "Oh, they added seats, so how could that possibly be *a Unocal* claim?"

But the issue is not with them adding seats. The issue is that the original threat was that

four of the six would lose their jobs and be out. And they came up with a solution in which all six kept their jobs and two more were added. That is the comparison. Not with *status quo*, it's the comparison against the threat.

Here, I think we have a similar dynamic. It's at least alleged Elliott came in threatening five out of ten -- I guess five out of eleven -- which is a substantial portion of the board. I agree with the defendants that there isn't a suggestion that this is coercive or preclusive. The question is whether it falls within a range of reasonableness.

I think there is some reason to think that this is reasonable on its face, but I do think that the plaintiffs have raised enough of a colorable issue about the timing of the agreement in advance of the January nomination window, and the potential differences that stem from Elliott's use of derivatives, rather than common stock, to at least allow the *Unocal* claim to go forward. I think, in other words, that there are colorable claims here as to those issues.

The last question is whether there is

any colorable threat of irreparable harm. And here again, I think that the plaintiffs have cleared the hurdle for purposes of a motion to expedite, if only barely.

The plaintiffs' argument is that this combination of provisions has constrained the board so that the board has not recommended or otherwise supported the Miller slate and their ideas. Instead, the board felt bound. They had already agreed with Elliott and they weren't going to cut another deal.

That is colorable. The defendants have a different view. They say that the board made a decision and viewed Miller and his crew as not having good ideas, as being out of touch, and as being self-interested because Miller wanted to appoint himself as executive chairman and pursue a strategy that wasn't advisable.

That's also a colorable view. I can't decide between those views at this stage of the case, and therefore I am going to allow this matter to go forward. I am not going to allow it to go forward as to the mooted aspects of the cooperation agreement.

That brings us to the question of how to implement a schedule. We have the meeting date

scheduled for May 22nd.

It seems to me that we can have a preliminary injunction hearing instead of a trial. I think what I would be doing here is not giving any type of mandatory relief. What I would be doing here is issuing an injunction that would block the recommendation provision as modified by the fiduciary out. I would be enjoining that provision from having any effect, which strikes me as classic prohibitive relief and, therefore, addressable in an injunction posture.

I also think that we can do this type of hearing in the second half of April. That would give me enough time to give you-all a ruling in advance of the May 22nd meeting, which I would commit to do promptly.

That's my views on the motion to expedite. Let's turn now to the motion for a temporary restraining order.

And so Mr. Heyman, I think that's your initial water to bear.

ATTORNEY HEYMAN: Yes, Your Honor, and I will be brief. I think Your Honor's rulings on colorable claim and irreparable harm largely govern

the outcome on this. But, you know, I want to note that we recognize that the *status quo* motion may be a bit of a misnomer, that we're really seeking a TRO. And I want to emphasize that for clarity because the defendants keep trying to foist different standards on us.

You know, this motion is based on the concept of the fruit of the poison tree. We're seeking on this motion to enjoin the fiber review and CEO search committees created by the cooperation agreement, and left in place by the amendments, from continuing to carry out their charters and possibly lead to decisions regarding these what they call "mission-critical matters" -- they could be difficult to undo -- all while we're in the midst of this proxy contest regarding the future of the company.

Conclusion of the committee processes would fundamentally alter the playing field by making it nearly impossible for Boots to carry out the plan that it's proposing to shareholders as part of its slate.

Defendants admit that since the formation of the CEO search and fiber review committees, they have been searching for a CEO and

conducting a review of strategic alternatives and operational changes for its fiber business. Specifically, defendants explain that the fiber review committee is currently in the process of evaluating potential strategic alternatives as well as conducting an operational review of the company's fiber business, including having discussions with potential counterparties.

The committee meets weekly, has been updating the full board on its progress, and its work will likely lead, in the committee chair's view, to an opportunity for a valuable strategic transaction.

Likewise, the CEO search committee has continued to work during the pendency of this litigation and is in the process of interviewing candidates for the CEO position. This progress report confirms plaintiffs' concern that an opportunity will arise in the near future and the compromised and entrenched board will hire one of its preferred candidates.

Defendants downplay the role of the committees, we heard earlier today, as merely advisory. But in reality, the board has delegated substantial responsibility to these committees to

shape the company's immediate strategy.

For example, the fiber review committee is empowered to oversee and direct the board and management's review of fiber alternatives and to provide recommendations and to retain its own accountants, consultants, financial advisors, lawyers, and other advisors.

Similarly, the CEO search committee is empowered to conduct substantially all of the hiring process for new company leadership, from hiring outside advisors, including advisors on qualifications for acceptable candidates, and actively interviewing potential CEOs. The full board will consider only the hand-picked winners of the committee-run process.

Defendants' insistence on maintaining the committees and not agreeing to our TRO defies their suggestion that the committees are unimportant. These decisions may radically alter the company's strategic options and could foreclose better opportunities to realize stockholder value, all of which is at issue in the current proxy contest.

Specifically, here, the CEO search committee could alienate desirable candidates, and a fiber sale or other disposition of assets could have

significant adverse effects, such that the company and its stockholders would permanently miss out on the opportunity to reap the benefits of Boots' carefully researched proposal, including up to $1 billion in tax savings if a spinoff is completed by the end of this year.

And I don't know if Mr. Woolery has anything to add to what I have just stated.

ATTORNEY WOOLERY: Not at all, other than these are the critical items in the contest, Your Honor. That's it.

THE COURT: All right.

Mr. Gordon.

ATTORNEY GORDON: Thank you, Your Honor. For the record Andrew Gordon, Paul Weiss, for the Crown Castle defendants.

Your Honor, let me, before we launch into the factors, make two maybe overarching points. The first, and it's important, is, having read the case law and *status quo* orders -- and I'm quoting from *Dyer*, a *status quo* order should not alter the *status quo* "to return the state of affairs to a prior status quo." And, Your Honor, as we put forward in our papers, that is precisely what the plaintiffs'

proposed *status* order seeks to do.

As noted, since December, the CEO and the fiber review committees have been searching for a CEO and undergoing an in-depth operational review of the fiber business, as well as exploring strategic alternatives for that business — and that's laid out in the Bartolo affidavit. And that's the *status quo*.

And plaintiffs' proposed order would substantially disrupt that *status quo*. And if you look at the overbreadth of that order, it's they can't take any action in furtherance or in reliance of the cooperation agreement; can't initiate a sale process; including, but not limited to, initiating a sale process, retaining advisors, soliciting potential bidders, retaining a new CEO, holding any meetings or taking any actions based on recommendations. That's paragraph 2 of their proposed order.

And as we pointed out, that request is far from a *status quo* order that we have seen. And we should keep in mind, this is not a 225 case where there -- there is a board here. There is no debate about -- we're not fighting over whether that board is a legitimate board.

And in the non-225 context, it's our

view that the relief being requested radically up-ends the *status quo* insofar as it prevents the board from managing the company in just about all important aspects of its operational review and its ability to retain a new -- new CEO.

We think that's really extraordinary relief. It goes way beyond what they would be entitled to even if they were successful on their claims. And we haven't found, and they don't cite, a single case that would justify it. So that point one is sufficient to deny the motion.

Second, Your Honor, my other overarching point is because plaintiffs seek a return to the *status quo* before the cooperation agreement was entered into, what plaintiffs are truly seeking, whether they call it a TRO or something else, is truly relief in the form of a mandatory injunction. Again, relying on *Dyer* -- and I should say that's D-y-e-r, for the court reporter -- the Court noted that to grant such an injunction, the Court "'... must either hold a trial and make findings of fact, or base an injunction solely on undisputed facts.'" And as the Court noted in *Dyer* -- and I think it's true here, as evidenced by the argument and the papers -- the facts

underlying the motion for a *status quo* order reveals the facts are "anything but '[]disputed,'" and that's another reason to deny the motion.

Your Honor, turning to the factors. As I read the case law, we really focus on whether the order will avoid imminent irreparable harm and whether that harm to plaintiff outweighs harm to defendants.

I won't say much on reasonable likelihood of success. I think we've had a whole debate about the merits of the claims, and I also appreciate, you know, the preliminary nature of where we are right now.

On irreparable harm, Your Honor -- and I think we have to look at what the plaintiffs here are saying. They are saying the cooperation agreement -- and I'm looking at paragraph 30 through 32 of their moving papers -- delegates control over key strategic decisions to Elliott. And they say things like unless enjoined, Elliott will be able to initiate a sales process, retain advisors, conduct analyses, solicit potential bidders. They worry -- I'm quoting from paragraph 32 about how Elliott will conduct the process. And even in the reply papers, they argue that permitting Elliott to pervade the

committee decision-making will inflict harm. And that's at paragraph 16 and 17.

But, Your Honor, the problem that plaintiffs face here is that Elliott does not control either the CEO search or fiber review committees. It is one of four on the CEO search committee, one of five on the other committee. Independent directors are the other members of those committees, and independent directors chair both committees. And the Elliott directors, there is no dispute, if you look at paragraphs 2 and 3 of the cooperation agreement, can be removed from the committees at any time by the full board. That's point one.

Point two, the committees are advisory. They truly are advisory. If you look at their charter, they can only make nonbinding recommendations to the full board.

So I'm not sure why plaintiffs think it's something other than that. If you look at that full board, 11 of the 12 are independent of Elliott. So these committees have zero decision-making authority.

Finally, point three, under Section 2 and 3 of the cooperation agreement, the full board can

change in light of the amendments the size of those committees. So if anybody thought Elliott was exercising undue influence there, the board has a means to deal with that problem short of a *status quo* order barring the committees from doing anything.

So, Your Honor, there is no conceivable universe where Elliott is unilaterally launching a sales process or hiring a CEO at Crown Castle, and for that reason, there is really no irreparable harm, insofar as what they are seeking in their *status quo* order.

The next point I will turn to is the balance of equities. Here, Your Honor, I think the plaintiffs say that there is -- and repeat -- that there is nothing in their proposed *status quo* order that would prejudice defendants, paragraph 34.

That is wrong. Here, the equity would clearly favor defendants, based on the affidavit that Mr. Bartolo put in, where he explains that disrupting the work of the CEO search and fiber review committees, which has been underway since December, will severely harm the company and its stockholders.

As he explained with regard to the CEO search process, we're actively interviewing CEO

candidates. Any delay in the process presents significant risk that otherwise-qualified candidates will walk. And without a permanent CEO, Your Honor, I don't think you need any special knowledge here; a company like our client, or anybody else, would face enormous challenges without a permanent CEO to advance operational and strategic objectives.

Second, with regard to the fiber business review committee, Your Honor, they are currently conducting a review of the business. That's an operational review. They are also considering strategic alternatives for that business. And as Mr. Bartolo explains, delays mean risk. Buyers can lose interest, market industry conditions can change, interest rates can change, economic conditions can change. All can impact a potential transaction or price, or even just the operational review.

So there is enormous potential to harm the company, as shareholders, by delaying a potential value-enhancing strategic transaction, or whatever the results of that operational review are, if it can't act under a *status quo* order.

On the other hand, if we look at the plaintiffs, they are not harmed. They can wage their

contest -- they obviously are unhappy with the direction of the company. They can wage their contest. They can try to get elected to the board, and if the company decides to do something, it will be time for them to deal with that.

Your Honor, I probably would like to think a little bit about reasonable likelihood of success, in light of your comments a little bit. But my reaction here is, given what you said about the two buckets, which is, you know -- and in that first bucket, appointing two new directors or forming committees, I think there is no reasonable likelihood of success here, given that we have mooted out the other claims. I think the claims that you have set for expedition moving forward don't really relate to the relief that they are seeking, at least insofar as the *status quo* order is concerned.

So my view is, even though Your Honor said the claims were colorable to move forward, I'm not sure the claims that are moving forward entitle them to the relief they're seeking. But there is a difference between colorability and reasonable likelihood of success. And for the reasons we have put forward in our papers, we would argue that while

they may have gotten through that low bar, they cannot get past, in light of the amendments, a reasonable likelihood of success; again, insofar as the relief they are seeking in the *status quo* order.

Your Honor, we did also discuss how the request for relief bears no logical relation to the plaintiffs' claims. I will rely on my arguments in our papers there, Your Honor. So unless you have any other questions, I can turn it over to Mr. Rossman to see if he has anything to add.

THE COURT: Okay.

Mr. Rossman.

ATTORNEY ROSSMAN: Thank you, Your Honor. I will try to be as brief as I can.

Just picking up where Mr. Gordon left off, Your Honor has already determined that their claims regarding the formation of the committees, Mr. Genrich's presence on the committees, those are moot. And if the claims are moot, then obviously they can't be colorable, so they cannot form the foundation for injunctive relief.

So what the focus should be at this point, you know, taking into account Your Honor's ruling already on expedition, is what's left in their

case that maps to any injunctive relief that they are seeking in advance of the preliminary injunction hearing that they are having. Is there a need for a TRO in advance of that hearing? And, Your Honor, the only thing that I understand that's in play is the recommendation right and the related *Unocal* claims.

And the relief that they are seeking is relief that Your Honor can entertain in time for the annual meeting at the time that you hear us on preliminary injunction. So there is no need for any relief on that whatsoever here.

And I want to emphasize, Your Honor, the relief that was originally requested on their motion for *status quo* order -- which should properly have been called a motion for a temporary restraining order -- that relief that relates to the fiber sale process and the CEO search process not only disturbs the *status quo* but really threatens a real and imminent, and potentially staggering, in terms of value to the company, harm to the company and all of its shareholders.

If they lose out on a world-class CEO candidate, if they lose out on a multi-billion-dollar transaction, if they even delay operational changes

that could provide enormous savings to the company, all of that is tangible harm to all shareholders.

And there is no -- and I want to be very clear about this, Your Honor. Elliott has no interest other than the success of the company. If the Boots group has an idea that is value-maximizing for all shareholders, they can bring it forth. If they had a CEO candidate; if they had, you know, a potential transaction in mind, they could have brought those forth. They had an audience for it, okay? There is no reason why they can't come forward with something that's value-maximizing for everyone.

What they want is not to have the best ideas win out and the best value propositions win out. What they want is to bootstrap some element of control for themselves ahead of the proxy contest. And the only thing that they seem to be complaining about is that the board is following the board's own business judgment and not abdicating that business judgment to Boots.

And Your Honor well knows that there is, you know, one Elliott director, of 12 here, on the board. And no action can be taken without full board approval. So, you know, we think quite clearly that

the company and all of its unaffiliated shareholders are fully protected with respect to the company discharging the fiduciary obligations.

I'm aware of and I have been cited to no doctrine, no case law, that says that a proxy contestant can bootstrap control over the company and its board in advance of winning the proxy fight to, in effect, no pun intended, to put the crown on the head of Mr. Miller here in advance of his winning the election.

And there is no such thing as an overhang doctrine. There is a mootness doctrine, for good reason. And when claims have been rendered moot, there should be no injunctive relief associated with that.

Thank you, Your Honor.

THE COURT: Mr. Heyman.

ATTORNEY HEYMAN: Thank you, Your Honor. I'll also be brief. I may want the opportunity to heckle Mr. Gordon at his upcoming panel.

Defendants continue to focus on nomenclature here, saying it's a *status quo* order and this would be changing the *status quo*. But it really

is a TRO, and a TRO can enjoin ongoing activities. And that's not mandatory relief, to prohibit someone from continuing to do something.

And colorability is still the standard, not a preliminary injunction standard of likelihood of success on the merits. And Your Honor has said that there are colorable claims regarding the recommendation right. And like defendants' counsel, I want to sift through the ruling and divine Your Honor's intent, as well, as we go forward.

But where there are issues regarding the recommendation issue, the composition of the committees is an extension of that; and having a voice on a committee is a valuable and important right. And they continue to try to dismiss these committees as being advisory on the one hand, and yet mission-critical on the other hand. I always tell Your Honor that every motion should have an irony, and I think this is one of the central ironies here.

So why are they in such a rush to be able to complete these mission-critical processes before the annual meeting? They don't say.

Now, we do think that they don't believe that any of these issues would require

shareholder approval. So the shareholders will not be given any voice on these issues, when we are presenting plans on these very issues and they want to be able to pull the rug out from under us in this proxy contest and make decisions that will essentially moot our plans, because we will not be able to effectuate our plans if these are carried through.

So I think that is all I have to say, and I don't know if Mr. Woolery would like 60 seconds or so.

ATTORNEY WOOLERY: Maybe just 30, Kurt, just to say once the egg is scrambled here, as a factual matter, Your Honor, if the fiber business is sold for a low price, it's over. You can't redo that.

And Mr. Rossman and the team of excellent lawyers, I should say, Mr. Gordon, they talk of hypotheticals; we're in a review. They are not coming to Your Honor saying we have a candidate right now we want to hire. We have a buyer for fiber today, right. They don't.

And these are the core issues on the contest. We brought 22 buyers to this board, signed up to NDAs. We said to this board we want to do this lickety-split; there are tax benefits this year. So

we are very interested in moving this forward, Your Honor, but we think this agreement is an illegal device overhanging this process, and it infects the committees and it infects those two processes. And we need an opportunity to show that to Your Honor before the eggs are irretrievably scrambled. And once you've sold a business, you can't unsell it.

Thank you.

THE COURT: All right. Well, I appreciate everyone's arguments and your time.

We're here on the second motion of the day, which is the application for a temporary restraining order. To give you the answer up front, I am not granting the temporary restraining order. The elements of a temporary restraining order application are parallel to the elements for a motion to expedite in that they initially require a showing of a colorable claim, and they also require a showing of irreparable harm, particularly for purposes of scheduling a preliminary injunction.

That said, because the results of the motion are different, the balancing of those elements can be different and generate different outcomes. Here, as I already described to you, I do think there

are colorable claims. That's a low standard, and the plaintiffs have cleared that low bar.

I also think there is a threat of irreparable harm tied to the lack of an endorsement of the Miller slate. That is a different issue than the ongoing operation of the business in the form of the fiber committee and the CEO search committee.

I do give some credence to Mr. Heyman's argument that this is all fruit of the poisoned tree. He views the original cooperation agreement as constituting a breach of fiduciary duty, and therefore, he thinks that all of these other things flow from that and should be stopped.

I think for purposes of the proxy contest and the nature of the irreparable harm at issue, the area that I'm focused on is the board recommendation and decisions regarding candidates.

I don't think that there is the ability to freeze your target corporation in place. I think of that principle as stemming from a Chancellor Allen decision. He did that in a case that I think of as the *Ethan Allen* case, where there was a question of whether the defendants were going to spin off the Ethan Allen business, and he said you couldn't stop

the company from considering that spinoff pending the outcome of the corporate takeover fight.

I think the same is true here. That said, I don't want the company doing anything that I potentially couldn't remedy after the fact. And I think there should be some reasonable amount of notice to the plaintiff if the company is going to do something that would effectively be a *fait accompli*.

Now, I'm not going to say more than that, because how you-all structure your agreements is up to you. And so if you can, for example, enter into an agreement that's conditioned on the absence of some court injunction before closing, that's clever and fine and all well and good.

But what I don't want to have happen is to have something unfixable or unalterable suddenly be announced as an after-the-fact thing, without the plaintiff having at least some notice -- and my instinct would be five business days -- so that if they believe that there is some reason why this would dramatically upset the *status quo* and alter the proxy contest and could be viewed as some form of interference with voting rights in its own right, that they would have the opportunity to come and challenge

it.

I think that should happen. But otherwise, I'm not going to specifically require, for example, five days' notice before you enter into some type of agreement. I want you-all to figure out some way such that there is an opportunity for the Court to potentially act if, indeed, you were going to do something that otherwise would be irreparable and could be construed as affecting the outcome of the proxy contest.

I don't want to learn after the fact that there has been a simultaneous signing and closing of a sale of the fiber business and it's all over and done. That would be frustrating. But beyond that, I'm not going to impose any TRO restriction that would stop the work of these committees, for the reasons I have stated and for the reasons set forth in the defendants' papers.

Some final guidance on the scope of this litigation. I think that these things can tend to spin out of control once the lawyers really dig in.

Again, I am most focused, for purposes of the claims that I have allowed to go forward, on what happened in December that led to the cooperation

agreement. I am also interested in what happens in terms of the February decision to not recommend and support the Miller slate. It seems to me like that's where the key facts come into play.

Now, could there have been something in the intervening days or afterwards that sheds light on those issues? Sure. I'm not saying only conduct discovery into those two isolated points in time. But what I'm not going to want this litigation to devolve into is a lawsuit about the merits of the proxy contest or a lawsuit about what these committees are doing, or discovery into what those committees are doing.

Whoever wins this proxy contest is going to be determined by the stockholders; it's not going to be determined by me. That's the *In re Gulla* case. We often cite it; it's an oldie but goodie. All I'm going to do is make sure that people have had a fair opportunity to participate in the proxy contest, and that's why the case is going to be, from my perspective, narrowly focused on the issues that I have flagged.

I know you-all have relatively limited time to do this, but I am interested in this

distinction between the voting and the recommendation and the termination right. If people come in and argue a lot about merger agreement termination right fiduciary outs or superior-proposal outs, it's not going to be very persuasive to me. So focus your thinking.

I know people have places to be, so those are my rulings. I will trust that with this guidance, you-all can put your heads together and get together on a schedule.

And thank you again for all your time today. We stand in recess.

(Proceedings adjourned at 11:27 a.m.)

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CERTIFICATE

I, LORENA J. HARTNETT, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Professional Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 95 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, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 10th day of March, 2024.

/s/ Lorena J. Hartnett

Lorena J. Hartnett
Official Court Reporter
Registered Professional Reporter
Certified Realtime Reporter
Delaware Notary Public