IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BARNES & NOBLE STOCKHOLDERS DERIVATIVE LITIGATION	:	Civil Action No. 4813-VCS

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Chancery Courtroom No. 12A
New Castle County Courthouse
Wilmington, Delaware
Thursday, October 21, 2010
10:50 a.m.

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

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ORAL ARGUMENT

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THE COURT: Good morning, everyone. Sorry to keep you waiting. I thought it was at ten, and I was early at ten, and then I was late at 10:30. I think you all can understand the phones ring and other things and how that would make sense. I apologize for the delay.

I was ready to go like 9:50. I'm, like, why aren't we in court? Oh, it's 10:30. And then we're here. So let's -- we may proceed. Miss Tikellis.

MS. TIKELLIS: Yes, Your Honor. I'm going to rise very briefly to say good morning to Your Honor. I think Your Honor knows everyone with me. They're all Delaware attorneys. Tiffany Cramer from my office; Michael Berry and Ned Weinberger from the Grant & Eisenhofer firm.

THE COURT: Thank you.

MR. ROHRBACHER: Your Honor, I would like to introduce Eric Rieder from Bryan Cave and John Kircher from Bryan Cave. Mr. Rieder will be making the presentation on behalf of the nonvoting directors.

In reviewing the docket this morning, we realized -- although Mr. Rieder had appeared in

front of Your Honor in the preconsolidation motion to expedite -- a formal motion pro hac vice had not been filed. I'll hand one up.

THE COURT: So long as you're willing to pay interest. It's been lean years for state governments.

MR. WALSH: Good morning, Your Honor. Peter Walsh on behalf of the nominal defendant, Barnes & Noble, Inc. I rise to reintroduce to the Court Kevin Orsini of the Cravath Swaine & Moore firm. To the extent the Court has any questions of counsel for the company, Mr. Orsini will respond.

THE COURT: Thank you, Mr. Walsh.

Good morning, Mr. Nachbar.

MR. NACHBAR: Your Honor, it's my privilege to introduce Charles Duggan of Davis Polk.

As Your Honor knows, we're here today on the defendants' motion to dismiss the complaint. With the permission of the Court, I'll present argument on behalf of the outside directors, sometimes called the voting directors. Mr. Rieder will argue on behalf of the inside, or nonvoting directors.

My client's motion is brought pursuant to Rule 23.1, for failure to make a presuit demand,

and Rule 12(b)(6), failing to state a claim.

Factually, as Your Honor knows, this case challenges the acquisition by Barnes & Noble of Barnes & Noble College, sometimes referred to as College Booksellers from Len Riggio, the chairman and 31 percent stockholder of Barnes & Noble. The transaction was recommended by a special committee of four independent directors advised by independent counsel, David Polk & Wardwell, and independent financial advisor Greenhill.

Plaintiff challenges the independence of the committee members, which I'll get to, and it challenges Greenhill's compensation, but it doesn't otherwise challenge the special committee.

And I should point out that we've got a record here. There was a Section 220 demand that was made and there are certain documents incorporated into the complaint. Those are included in the affidavit of Susan Waesco that we filed that has 15 or 16 of what we think are the more important documents.

So despite the record, the complaint does not in any way challenge the functioning of the committee, the independence or competence of its advisors. It does not allege, unlike some other

cases, that Mr. Riggio interfered in any way with the functioning of the committee, or that the committee failed to act appropriately. Nor could it. The record shows that the negotiations here occurred, albeit with some interruptions, over 18 months. The committee met 15 times before ultimately approving the transaction. The record also reflects arm's-length negotiations as to both price and structure.

The Waesco affidavit, Exhibit 5, indicates that there was originally a 650 million-dollar price that got reduced significantly, and there were several iterations that came down in stages. Also, that initially Mr. Riggio was asking for $470 million in cash. That also got reduced significantly.

The true gravamen of the complaint is that plaintiffs disagree with the committee about the wisdom of the transaction. And we submit, perhaps reasonable people can disagree, but that's not the stuff of demand excusal.

THE COURT: I think one of the issues here is, if this was so logical, why was it never thunk of by anyone for 15 years?

MR. NACHBAR: Well, I don't know that

it wasn't thunk of. It certainly wasn't implemented. We can agree with that.

THE COURT: There's -- I mean, we're here on a pleading stage. And we're going to deal with some of the things that I know. I think I'm rather surprised, frankly, that plaintiffs did not amend their complaint in light of the other case in some ways, just because there are things that are known out there that are, frankly, pleadable, as a matter of public record. You have some things about Mr. Del Giudice. It's hard for me to unknow. And I can't understand why they would never amend their complaint, leave weak stuff in when there's something real that people can debate about but much more tangible. But they didn't.

But even with respect to this transaction, I think part of what they're saying is, why would anybody do this, other than that it's a situation where people feel that there's a control environment, and so, in this kind of self-constrained world, it begins to make sense to think about this. When it's all been maintained separately for 15 years, and more favorable environments arguably for Barnes & Noble to bring this in, and yet at a time

when it probably, for Mr. Riggio, makes entirely good estate planning and other sense to begin to reduce the concentration of his wealth and particular assets, and at a time where he's, frankly, publicly expressed -- or expressed to people skepticism about the future retail. He has the public company double down on retail. He's able to liquidate a large part of his net wealth and put it in safer cash assets, retain all his voting control, because the company didn't take any steps to use it to say, "Well, maybe this is a chance to actually reduce the influence of Len Riggio. But no. We'll let him keep the stock. We won't buy in our own stock." That's what's nagging at me.

You're telling me that this is just like a normal garden variety business decision. And sort of help me alleviate these concerns.

MR. NACHBAR: Sure. And I think that there was a special committee. It was independent. It was well advised. And it took all of that, I believe --

THE COURT: Let's talk about the special committee. It's a very odd-looking special committee because, when I mention that nobody for 15 years ever thought of this, three of the four members

of the special committee had a professional obligation to think about this for 15 years because they had been continuously a director of Barnes & Noble, and they never thought this was a good enough idea, from the record, to put it on the table themselves. Not only on the board 15 years, they're alleged to be personal friends with Leonard Riggio. And in the case of the chair, she was his management protege, served under him for management for six or seven years, was retained on the board after that, and has had essentially a continuous 20-year relationship with Leonard Riggio. And she's appointed to be the chair.

Then there's another person who has been a friend and been on there for 15 years, who is removed from the comp committee after investigation, because the comp committee didn't do such a great job, but is immediately put on audit and on a transaction committee.

Then you have Mr. Dillard who is alleged to be a close friend, been on the board for 15 years, and who happens to be in what might colloquially be called the controllers club, which is, no doubt, he's not economically dependent on Leonard Riggio because he runs an eponymously named

company called Dillard's. But there is this notion -- it may be in the notion of the controller club, but I don't know. You lay a friendship, 15 years. You know, controllers just don't mess with each other. It's kind of etiquette. It's just an odd-looking committee.

And then I'll hit you with something else. I'm not sure why they let Bryan Cave go to the other side. Then you got Stephen Riggio -- right? --the CEO. Now, he's in a no-win situation because his bro is the largest stockholder, the chairman, and proposing a conflict transaction. But he's the CEO. He the man. And he plays the role of the bullfighter's cape. Probably not that active. The bullfighter's cape has a role because it attracts the bull. He just steps aside. Well, that stepping aside -- he's not in the way, but he's also -- there's the chief executive officer of the company, who is not operating on a transaction of fundamental importance?

I'm just -- and I'll finish. But I want you to address, in all its texture, because that's the stuff that's on my mind, Mr. Nachbar. It's not that I have any preconceived view, one way or the other, this is an inconceivable deal. But it's not a

kind of ordinary situation either.

MR. NACHBAR: Well, let me address those. I appreciate Your Honor's expressing those concerns because it helps me know which points to hit.

And to start, I guess, at the beginning, the landscape has changed tremendously for Booksellers, obviously. The rise of Amazon, and the advent of eBooks has just changed that world dramatically. So the last 15 years, or, you know, certainly the last dozen years prior to 2007, 2008, I think are very different than the subsequent three or four years.

THE COURT: But in a way that makes it more or less sensible for Barnes & Noble to acquire again.

MR. NACHBAR: I think more sensible at the right price. Look, any acquisition, you know, at the right price is favorable; at the wrong price is unfavorable. I'm sure, if College Booksellers had been bought for a dollar, nobody would have a problem with it. I'm sure, if it had been bought for $2 billion, you know, it would be a ridiculous transaction.

It was purchased at a favorable price.

There's no question about that. There is a question -- reasonable minds, as I say, can differ -- did it make strategic sense? And the idea behind it is that the College Booksellers is very different than the bricks and mortar, freestanding bookstore down in Christiana. You've got a captive audience. You've got a monopoly. A lot of these stores are leased operations. And the idea is that it's somewhat countercyclical. Yes, in the broadest sense of the word, you're doubling down on books because bookstores sell books. Although a minority of their revenue is from books, a lot of it is tee shirts, apparel, all the other things.

THE COURT: And how many of the stores do they own the bricks and mortar of?

MR. NACHBAR: I don't know the answer to that.

THE COURT: Are there a large number of them leased?

MR. NACHBAR: I believe a large number are leased.

THE COURT: You're saying, if they do, like the Penn bookstore, which I believe they do, all the Penn athletic tee shirts that they get the sales

out of, they're on campus, they have a coffee cafe, the students go there. They have an e-technology center, and students with computers and stuff use them.

MR. NACHBAR: Exactly.

So the idea is that it's not cyclical, and that it's a sort of counter to the traditional bookstores. You know, the limited record that we have, the committee minutes show that that was all discussed. That was all -- you know, it's not like somebody -- Len Riggio -- came in and said, "Do this." You know, and the special committee said, "How high do I jump?" That's not what the record shows. So the last 15 years, you know, I think two things. One, the world has changed; two, you know, Len Riggio has to be willing to sell.

Now it's fair to say, well, did anybody ask him to sell? You know, as far as I know, the record doesn't indicate that anybody did. But the record also doesn't indicate that he was willing to sell.

THE COURT: I understand that. But that's -- you know, there's a razor's edge here on a few points, which is one of the points to make. This

was an opportunity for the public company to get its trademark.

MR. NACHBAR: Right.

THE COURT: The flip side of that is, this is a dude who was smart enough, when he took these companies public, to do the rather self-interested act of retaining the trademark in the company, whose retail face in some ways -- retail face to the public -- is often less about Barnes & Noble. I believe there's some of those College Bookstores where, from the outside, you would not even know that it was Barnes & Noble. It's when you get inside and you realize the texture of the relationship between the university and the book stores that Barnes & Noble comes across. But you'd be thinking you're going into the Penn, or the Auburn, or the Delaware book store; right?

MR. NACHBAR: Right.

THE COURT: But Len Riggio, who everybody, you know, on your side, kind of dances around, whether he's in control or not, he got the trademark; right?

MR. NACHBAR: He set it up that way a long time ago.

THE COURT: Right. What you're saying is, until he wanted to relinquish this, nobody, you know -- you couldn't make him. But that's the flip side of when he wants to relinquish it. You have to wonder: he kept it all these years and he kept it for himself. And he may be a good man, but we're in the area of commerce. So there's an assumption that maybe he did it for his own benefit to keep it to himself when it's his own benefit. And when he wants to unload it, perhaps there ought to be a healthy measure of skepticism about whether it's in the interest of Barnes & Noble to let him unload it; right?

MR. NACHBAR: I think there was a healthy level of skepticism. That's why this took 18 months. That's why there were arm's-length negotiations. That's why the price dropped significantly, that's why the amount of cash in the deal changed significantly.

THE COURT: I guess what I'm getting at is, I'm saying those are really good arguments. We haven't moved up to the number in the rules that begins with five. We're down in the --

MR. NACHBAR: The ones and twos.

THE COURT: In the teens and in the

twenties; right? You may be right. But isn't it premature?

MR. NACHBAR: Well, I think not. And I guess that sort of segues into who the directors were and if they're independent. Because I certainly agree. If the directors are not independent, if the majority of them aren't independent, then, first prong of Aronson, Your Honor is going to deny a motion to dismiss. We all understand that. So let's talk about that a little bit.

You know, we had a trial in the Yucaipa case. And Your Honor found, after an evidentiary record, that five of the six independent directors were indeed independent, and the sixth, Mr. Del Giudice, Your Honor had doubts about, which Your Honor expressed.

Five is a majority of nine, for sure. What's alleged about the four special committee members, in particular, extremely thin. Mr. Campbell, for example, he's president of Cooper Union.

THE COURT: In the interest -- they haven't laid a level camp. I mean, even the one who is the newer edition to the board, who is on the special committee --

MR. NACHBAR: Patricia Higgins.

THE COURT: Right. Who is basically a professional director, it appears, at this point. They own the game.

MR. NACHBAR: So that leaves us with Dillard, Monaco and Miller.

THE COURT: Yeah.

MR. NACHBAR: Right. Mr. Dillard is an independently wealthy man. He's been a friend of Len Riggio's for a long time. But Beam v. Stewart says that friendship alone isn't sufficient. And I think that's all they have got here.

THE COURT: Wait a minute. He's been on this board -- you know, it's like the guy, when they talked about Enron. One of the weirdest things about Enron, when professionals write things like Enron had model corporate governance, the man had been on the audit committee chair for 17 years. That's a long period of time to be resolutely independent. 17 years. You bring in that fresh mindset of -- it's -- he's alleged to be a close friend who regularly socializes with Mr. Riggio. He's been on his board since the 1990s. All this time College Bookstores has been maintained separately. Never proposed the

transaction, from what I can tell. When Len Riggio wanted to do it, it did it. There's no question here. He's financially beholden.

But there's also an issue, again, of, you don't have to be financially beholden. And he's in the controllers club. And then you got the other one who has been on the board and is a friend -- the friends club of 15 years -- chaired by the protege, one of whom was the protege is your special committee. Why would anybody do this?

MR. NACHBAR: Well, again, you know, the allegations about friendship are extremely vague, extremely nonspecific, and were disproved in the Yucaipa case. I mean, these are not -- they played golf once a year. These are not people who are best buddies. They don't live -- you know, Mr. Dillard doesn't live in New York. He doesn't see Mr. Riggio often. Yes, he's been on the board, you know, since 1993. That's a fact.

THE COURT: What you're telling me is, there's stuff about Dillard in the other record?

MR. NACHBAR: Yes.

THE COURT: Okay.

MR. NACHBAR: And Your Honor made

factual findings based upon that record. And they really -- you know, if they had contrary allegations in this case, we would need to, I suppose, accept them as true and move on to that higher number rule some day. But they don't have those types of specific allegations. They have conclusory allegations of friendship that, you know, we know they won't be able to prove because we had a trial that addressed those issues.

The only other thing they say about Mr. Dillard is that he is on the national advisory board -- two national advisory boards for JPMorgan.

THE COURT: I don't care about that. That overstates it. I'm trying to be helpful to everybody. If they were actively -- and I get the one about the former. She used to be at Merrill Lynch. She's not at Merrill Lynch now. If they are each at JPMorgan now, or Merrill Lynch, that might matter.

MR. NACHBAR: That's the point. It's Margaret Monaco, who is the former affiliation with Merrill Lynch. You know, again, as to Miss Monaco, what do they say? Well, she was on the compensation committee. But, again, there was testimony about that. There was a report that was done -- an

independent report. There was no wrongdoing. What happened was there was some inadvertent and pretty trivial options backdating that were not options that went to Mr. Riggio, or any other senior management people. They went to, you know, relatively low-level employees.

There was some sloppiness within the managerial ranks, like happened to a lot of companies. It was corrected. You know, there was -- there's no implication of Margaret Monaco in that in any way. The only other thing they say about her is that ten years ago she and Mr. Riggio supported Bill Bradley for president.

THE COURT: Yeah.

MR. NACHBAR: But that's the type of allegations we have. That's the level of the allegations that they're making here. You know, you roll your eyes at some of those. I do, too. But that's what they're alleging.

THE COURT: It was a very small group that ultimately supported senator Bradley.

MR. NACHBAR: In the end, that was true, I suppose.

THE COURT: He was one of the least

exciting great basketball players and one of the least exciting presidential candidates. Even his basketball game had a relentless efficiency. Almost so relentless, you couldn't watch it after a while.

MR. NACHBAR: They were talking about choosing leadership positions in the new senate one year and he suggested jumpshots from the top of the key.

THE COURT: That would be his thing.

MR. NACHBAR: Irene Miller, finally. Obviously was a former employee of Barnes & Noble, but her employment ended in 1997. The New York Stock Exchange rules, as Your Honor knows, provide for a three-year cooling off period. Miss Miller had a 13-year cooling off period.

THE COURT: But she never -- here's the thing I was thinking about. Again, our law is contextual. When you think of -- when you set up these rules, you tend to think that somebody, who was somebody's superior, will continue on the board. What you have here is a situation where a person was a subordinate and protege, continued on the board. Am I supposed to ignore that?

MR. NACHBAR: Well, I don't think that

the fact that somebody was a subordinate or a protege affects their judgment. I mean, Your Honor hears cases, you know, where some of your former superiors or proteges are representing a party. And I don't think Your Honor's --

THE COURT: You said a very, very important thing -- "representing a party" -- because we do. I mean, you know, you can't help -- any judge who ignores their own experience or ignores -- it does affect things.

One of the things that all of us do, who are judges, is there are a lot -- I'm pleased to have -- you know, I'm proud of the fact, and I know members who in our profession that just say something about -- you know, I could probably say that close to a majority of the people I care about most in this world, who aren't family members, are lawyers. Through all kinds of firms in Delaware, and stuff like that. I mean -- and if the idea was that people on our court could not hear cases because friends of ours were doing their job, our system of justice would shut down. That's very different. Like somebody representing a client.

This is not a situation where

Miss Miller has to rule on whether Len Riggio's client gets something. This is a situation -- this would be more analogous to me as a judge, or one of my colleagues as a judge, having someone who we had worked with, and who we had a continuous relationship, be a party in the case. Now, we wouldn't do that.

Now, I'm not saying that the rules of litigation apply in the business world. Obviously it's not as strict. There's a reason why you set up a transactional committee, and it's designed to create something like arm's length.

Here you have a situation where it's really pled -- it may be unfair, I agree. They haven't had discovery. That Miss Miller -- really, this is a very important personal and professional relationship with her that has been going on for more than a generation. And that if she got an award from some national association and she stood up and thanked the people who have been most important to her career as an executive, Len Riggio would play a prominent role in that speech. And that's -- why would someone like that be put in the place to being a chair of the special committee? You know, that's what I'm struggling with on a pleading stage. I'll give you a

chance to answer. That's what's on my mind. It's not a case like Len Riggio is appearing before her, she's a judge, he's a lawyer. It's Len Riggio is the party. And this is her mentor.

MR. NACHBAR: Well, again, I think the record here speaks for itself. I mean, you know, Your Honor could read the minutes. There was -- the ones that are in the record -- there was 18 months. There was arm's-length bargaining. These things were considered. The transaction -- you know, Len Riggio, at a certain point, made demands. The special committee said no.

So it's hard to understand how, if the members of the committee -- and Miss Miller in particular -- weren't independent, if they were somehow beholden to Mr. Riggio -- not in the position to say no -- how did they say no?

THE COURT: Well, they didn't ultimately say no. The fact that they said no to some things are bargained doesn't mean they got to a level that was consistent with what would have been done if it was a disinterested transaction; right?

MR. NACHBAR: Well, we --

THE COURT: I remember going -- I went

to a directors session. It was really interesting. A bunch of directors, a professor/moderator. The professor said, "Do any of you knowingly overpay a CEO?" They said no. Come on. Didn't you ever have a situation where you knew it was too much, and it started to come out? And no one had ever knowingly overpaid a CEO by more than a million, but virtually everyone had knowingly given more than they were really comfortable with, and most was in the half million to a million dollar range. And part of it was, "Well, the CEO needs to feel loved. You know, we were afraid it's going to affect his moral." Did they have another opportunity? No, not really.

That's what I'm struggling with here. I understand they can say no. But part of the dynamic is, did they get themselves in a situation where, honestly, they wouldn't be behaving this way if it weren't for Len Riggio? They wouldn't even be thinking about this. Then they -- but they go down this road and they do kind of the best they can. But it's still not what they would have done with someone else.

MR. NACHBAR: Well, that's a tautology, I think, in the sense that, if you posit

that people who have a relationship that these people had, are not independent, are not fully independent, and that it would be different with arm's-length people who had no relationship. Then there's no way at a pleading stage, or any other stage, that you could ever prove that they got the best deal and the same deal --

THE COURT: See, that's the difference. At another stage you have more information. You hear people and you make a fully contextual determination. Admittedly because it's made by humans: imperfect. But you're asking me to foreclose that and to conclude that it's indisputable that this was an independent committee, because the fact that three of the four members had these deep, long-standing relationships with Len Riggio could not have possibly influenced their approach to this transaction. Right? That's what I have to conclude.

MR. NACHBAR: That the types of relationships were ones that did not preclude the committee members from exercising independent --

THE COURT: You just did not preclude.

MR. NACHBAR: Right.

THE COURT: I have no doubt that

someone like Miss Miller could act independently. Could. I don't know Miss Miller. Could. But I also -- we all have mentors in our lives; right? I could probably think of some of yours. You could probably think of some of mine, you know, where you'd have to say, "If it was on your mind every day that it was blank, when you're doing your job, one of the things you have to ask yourself is, should I be doing this." Because if it's on my mind that it's blank, I'm trying to put it aside and I'm trying not to let it -- it's, frankly, on my mind. And I don't know how it's making me act. There's that possibility.

There's the possibility -- there's the possibility on the other side you actually make them -- it could be that the deal is way, way more favorable to Barnes & Noble precisely because Miss Miller, Miss Monaco, and Mr. Dillard were a little uncomfortable, and tightness rules. That's a possibility. But I'm on a complaint.

MR. NACHBAR: Well, again, I can only go back to the law and the legal standards in cases like Beam v. Stewart.

THE COURT: But somebody went to Martha Stewart's wedding.

MR. NACHBAR: That's possible.

THE COURT: Her daughter's wedding. Had they been on the board for 15 years with Martha Stewart?

MR. NACHBAR: What was alleged was long-term friendships, exactly of the type we have here. You know, the exact same type of allegations. And if those are now going to be disabling, I think we have turned a page in the law and we basically -- I think that, in special litigation committees, there's been a very high standard because you're terminating litigation that was properly brought. And that was controversial, certainly in the Oracle case, in particular.

THE COURT: Yeah. Oracle had nothing -- had very little to do with personal friendship. It had to do with, you know, being on --

MR. NACHBAR: There were independent direct connections through Stanford University.

THE COURT: Not indirect. I know the case. The Lucas Conference Center at the Stanford Research Institute. Lucas was a target of the special committee. The two special committee members were board members at the Lucas Conference Center -- at

that facility. Lucas was the principal economic contributor to that. Larry Ellison had expressed publicly he was leaving his house to Stanford. His house was worth hundreds of millions of dollars.

The other target of the committee was a fellow board member at the Economic Research Institute, who was a fellow professor at Stanford. The fellow target of the committee, the guy Lucas had given money, a specific thank-you gift to Stanford, half of which went into one member of the special committee's research fund. This had very little to do with golf. It had everything to do with cardinals. It had everything to do with dollars. It had everything to do with, you know, universities. I react to that because people -- oh, the fact that one of them made like one walk through Stanford? No. It was -- this was real money, real stuff.

In Beam, people were in the same social circle, ran in the same thing. Not that they had been friends for 15 years. Not that they were the managerial protege of the controller -- such a protege that they got to stay on the board for 15 years; right? That wasn't the case in Beam, was it?

MR. NACHBAR: No. That specific fact

was not.

THE COURT: Wasn't it Beam was basically these are the types of people who like to appear in that Sunday part of the New York Times where they show the charitable balls, and that there was a picture five years ago and it showed Martha Stewart at the Met's Annual Ball next to these people?

MR. NACHBAR: I think there was more than that. I think there was close, personal friendship, and there were other cases with golfing buddies and things that, frankly, rise on a personal level to much higher levels than is the case here. These are business associates, to be sure, but they are not people who are house guests at each others' houses or vacationing together frequently. That's just not the level that we have here.

So if the law is going to say that those types of relationships are going to be disabling, I think what it eventually gets to, before too long, is term limits for directors. Because, if the fact that you've been a director for five years or ten years, or even 15 years, makes you nonindependent, then I think it leads logically to term limits for directors. Maybe that's a good idea. But that's

certainly not where our law is or has been.

THE COURT: I get that there are difficulties. I mean, it's also one of the difficulties with using boxes about one of the things I don't like really particularly about the NYAC rules, you're either nonindependent or independent for all purposes, and you put a label on somebody.

We also have the strength of our law. The weakness of it is it's contextual sometimes. The fact that you've been 15 years -- right? --if there had been five CEOs -- not five. That would probably suggest you're on a terrible board. But assume that there had been three CEOs and that there was a management development program, a regular program of managerial succession that this was Johnson & Johnson and you'd been independent for 15 years, and during that course -- frankly, this is the third year. She's on her second year as CEO. It would be expected in probably six years she'll go. It may be a different situation than when you're a friend and been on the same board for 15 years, with the same dude in charge and, when he doesn't want to be a CEO himself, he says, "Make my bro a CEO."

MR. NACHBAR: Well, Barnes & Noble has

a nonRiggio CEO currently.

THE COURT: Currently. Under an atmosphere of externally increased barometric pressure; right?

MR. NACHBAR: I think the barometric pressure rose somewhat before the new CEO was chosen, but it rose a lot more after he was chosen.

THE COURT: I think it was already rising; right?

MR. NACHBAR: It was rising a little bit.

THE COURT: This lawsuit had been filed?

MR. NACHBAR: Yes, this lawsuit had been filed.

THE COURT: The Yucaipa insurgency had begun to emerge?

MR. NACHBAR: I don't think it was viewed as quite the same insurgency when they had 8 percent as when they had 18 percent.

THE COURT: I understand. But some letters had been written of a disquieting nature?

MR. NACHBAR: Yes.

THE COURT: Are you the one to ask

about Steve Riggio, or is someone else representing him?

MR. NACHBAR: Someone else is representing him.

Unless Your Honor has more questions about the independence prong, I'll move on to the second prong of Aronson.

THE COURT: Sure. I understand they actually kind of relate to each other in some ways. I know I've asked you some questions that are probably in that realm.

MR. NACHBAR: Right. The second prong of Aronson, as I understand it, is implicated when directors are not in a position to pass upon the merits of a demand because there's a threat of personal liability that would interfere with their ability to function with respect to such a demand.

Aronson expressly holds that the mere threat of personal liability for approving a questioned transaction standing alone is insufficient, but it holds that there are rare cases in which a transaction may be so egregious on its face that, quoting from page 815 of the opinion, ". . .board approval cannot meet the test of business judgment and

a substantial likelihood of director liability therefore exists."

I think the threat of director liability is the key to the second prong of Aronson. I think numerous cases recognize that and they say, to survive a Rule 23.1 motion, plaintiff must plead a nonexculpated claim of breach of duty.

THE COURT: That's true. You don't have to plead that as to every member of the board; right?

MR. NACHBAR: A majority.

THE COURT: You have to plead that a majority face a nonexculpated claim?

MR. NACHBAR: Yes. I believe that's correct.

THE COURT: What case stands for that?

MR. NACHBAR: I think that's the whole underpinning of Aronson.

THE COURT: So that, if two of them face nonexculpated claims, you get rid of the claim against all of them?

MR. NACHBAR: You have a demand requirement. Let's take the prototypical case. Let's say you have a nine person board and you've got eight

independent outside directors who are just added yesterday and are just wonderful people, and the ninth person is accused of having, you know, stolen money from the company. Do you get to sue on that or do you have to make a demand? I think you have to make a demand.

THE COURT: That's an unusual situation, obviously, because in that -- because the stealing -- the one person steals, then there's no question it's really alleged that he stole. Then why isn't anybody doing anything about it? I thought Disney said -- and I thought a legion of other cases say -- if you state that's a breach of fiduciary duty and you have a nonexculpated claim against someone, it goes forward. Yes, it is the liability. I agree with you -- part of it. Part of it is Aronson is also dealing with this structural bias issue by saying you don't need to be so binary about the determination about indepedence because we've got this safety valve. The safety valve would seem to me in Aronson, if you plead facts that suggest that the deal with the interested person was a breach of fiduciary duty, such as in Aronson, when a person had 46 percent, if you plead that under a particular pleading standard, then

you get by, regardless of the fact that a majority of the board is not interested in the transaction or lacks independence.

Remember, under the first prong, it's both. So how would they face liability under the second prong? Except what it is -- you're trying to show a particularized team. Why it is you think it's suspect? And we'd be turning 102(b)(7) -- I doubt -- I'm one of the members of the court, fairly assiduous about respecting the 102(b)(7) provision. We had Emerald Partners dust up for a while. But here you're talking about a safe harbor for people like Mr. Riggio, where it may be, for example, that directors are exculpated because they only screwed up in terms of their duty of care.

But I thought, when you screwed up in terms of your duty of care in approving an interested transaction, that left one person still on the hook.

MR. NACHBAR: I think it does.

THE COURT: Well, but what you're saying is that it doesn't.

MR. NACHBAR: Well, no. You have to make a demand. Just because you make a demand doesn't mean that Mr. Riggio is off the hook. I mean, the

board has to then function with respect to the demand and may well take remedial action. And, you know, the board may also have changed in the interim. You know, board's do change.

THE COURT: There's also a psychological -- you're putting down -- I do think it is one of the things -- and I've written it. You're probably citing in part things that I've written -- that there's a sufficiently real threat of liability when someone meets a particularized pleading standard that people have to weigh the personal consequences.

There's also, for all the reasons you talk about, reputational things at stake. And when somebody survives a particularized pleading standard, the board -- whether you have a 102(b)(7) clause or not, you don't want litigation against you proving that you were not a very good monitor.

MR. NACHBAR: Right.

THE COURT: If they passed the gateway, so basically they're going to accuse themselves of having let a big one slip by?

MR. NACHBAR: Well, again, our law looks at personal liability. That's the underpinning of Aronson. To go back to the question of whether one

person's --

THE COURT: What you're saying -- I know of no place in Aronson where it suggested, by the way, we have this really major stockholder -- 46 percent -- the transaction is with him.

MR. NACHBAR: That's the facts of Aronson.

THE COURT: Yes. But that if -- that the second prong only has teeth if you have a claim against a majority of the board that is pled with particularity and that is nonexculpated. It doesn't seem like much of a safety valve, because how does it act as a safety valve? It's basically a reduplication of the same analysis with this overlay that, frankly, if they can't be held liable -- a majority can't be held liable -- the fact that someone else could, in particular the interested party, that doesn't matter. They just sue him.

MR. NACHBAR: Yes. That is --

THE COURT: Has it ever been applied that way?

MR. NACHBAR: Well, let's look at the logic of it.

THE COURT: I'm asking, though, more,

has it ever been applied that way, even by some of the more persnickety of us on courts in terms of reading complaints?

MR. NACHBAR: I don't know that there's a particular case that comes out either way on that issue.

I do know this. If a nonexculpated claim against one director is sufficient to excuse demand, then all breach of duty of loyalty cases are demand excused cases because, by definition, there's a non-- you can't exculpate a breach of the duty of loyalty claim. So all transactions attacking self-interested transactions, no matter who is on the board, are demand excused.

THE COURT: Only if you meet a particularized pleading standard.

MR. NACHBAR: Right. But still --

THE COURT: But there are plenty of cases where loyalty claims have been brought and dismissed under 12(b)(6).

MR. NACHBAR: Right. But they're also dismissed.

THE COURT: Your friends on the plaintiffs bar will say, "Mr. Nachbar, you slight your

own record of obtaining dismissals of our complaints. You've done it many times."

MR. NACHBAR: They're also dismissed under 23.1.

THE COURT: That's the point. If they're dismissed under 23.1, they have been dismissed on both prongs.

MR. NACHBAR: Right.

THE COURT: So what I'm saying is, it's not so toothless, as you suggest, because the plaintiffs still have to lay -- they have to plead a nonexculpated claim. Because there's so many cases where they never -- that's why I'm asking. You're in a situation where, if there was no exculpatory charter provision, the judge would conclude that there was a due care claim against the independent directors. It's an interested transaction, thus the interested party is, frankly, always reliant upon how good is that cleansing mechanism. If it's not good, and it's unfair: loyalty claim. Then you overlay 102(b)(7). You have the same factual paradigm. Six of the members: you have concerns about whether they acted with gross negligence. But they're exculpated. There's two interested members. So there's a

nonexculpated claim against two. You're saying the second prong of Aronson: tough. The board gets to decide.

What I'm asking: is there a case to tell that? I thought Disney, for example, held -- wasn't there an exculpatory charter provision in Disney?

MR. NACHBAR: Yes, there was.

THE COURT: Didn't the Supreme Court hold in Brehm, if you pass muster on the second prong, the case goes forward?

MR. NACHBAR: Yes. But the reason, I believe, was because if -- there was a nonexculpated claim against every member of that board is what the Court found. There was enough pled to allege that the entire board had breached its duty of good faith.

THE COURT: If there was enough pled in a case where you were hiring an outside executive, who was giving up his control of the hottest talent agency in Hollywood to go into a messed up company that needed a dealmaker, and give up controlling his own company and riding in limos with Gwyneth, how can you win here?

MR. NACHBAR: Well, because the

specific allegations were that they had received particular advice, or I guess had not asked for advice from their -- they had a compensation expert.

THE COURT: I understand. They seized the day; right?

MR. NACHBAR: They also didn't win that case in the end.

THE COURT: I know. Again, you're asking me to foreclose the great legal drama --

MR. NACHBAR: There were specific facts pled in that case that said that all of these board members -- each of them has breached his or her duty of good faith because, for example, they never -- they had the compensation person there and they never asked A, B, C, D.

THE COURT: To me that makes no inference -- that's entirely a care issue. They had no relationship with Ovitz.

I never -- admittedly, it's a case I always had -- it's a situation I always had issues with because it never seemed to me that the outside directors had any reason, and if anybody -- if there was anybody to be concerned about, it would have been Eisner, and, frankly, undermining Ovitz or whatever.

But, you know, what I'm saying is, if it's a situation like that, where in a nonconflict transaction it goes forward, how would in this case I say, "Oh, well, yeah, there's nonexculpated claims as to Riggio and Zilavy, but, you know, because everybody else is potentially protected by 102(b)(7), it's okay, and they'll be happy to sue Riggio over this"?

MR. NACHBAR: I believe that's where the law is because otherwise --

THE COURT: Where is there a case for that?

MR. NACHBAR: Every case that has dismissed on 23.1 grounds, a claim alleging a breach -- a self-interested transaction --

THE COURT: No. I'm asking, very precisely, where you were past the second prong of Aronson on its own terms, but where, because the suspected breach of fiduciary duty by a majority is at most a duty of care violation that you then dismiss all the claims, including the loyalty claim against the interested party. That's what I'm asking for -- a case that specifically holds that.

MR. NACHBAR: I would have to go back and look. I think Lear may so hold or be read to so

hold. I would have to go back and look at it again.

The whole purpose --

THE COURT: I thought Lear said -- maybe it didn't. I mean, I wrote them, but it doesn't mean I remember them or what they say. I thought Lear also said there wasn't any pleading of a breach of fiduciary duty. Maybe it did say nonexculpated.

MR. NACHBAR: I believe it did say nonexculpated.

You know, the theoretical underpinning is that people -- directors -- either are or aren't able to exercise business judgment with respect to a demand. If their pocketbook is on the line, then they're not in a position to exercise that judgment. If their mere reputation is on the line, they are. That's why, for instance, the fact that the directors approved the challenged transaction isn't, by itself, sufficient to excuse demand.

So the question is: do they face a threat of liability? And I think the answer here is no. You know, interestingly, what the plaintiffs say -- there's two aspects to this. The first aspect is because it's a self-interested transaction it's under the Lynch standard. And I'll talk about that in

a moment. That's what this really relates to. Then they say, and it could be the product of business judgment because it's a bad transaction. And they have numerous flavors of that that I'll get to promptly.

So the first claim, whether entire fairness applies. I submit that it's not all that clear. First, there's got to be a controlling stockholder. Mr. Riggio is alleged to own 31 percent of Barnes & Noble. Certainly he's been the founder and chair of the company. But it's not clear in what sense he controls the company. He was obviously recently subject to a proxy contest. He won, barely. But I think that may have had more to do with the platform espoused by the person running against him than on the sheer magnitude of his ownership.

Indeed, if Yucaipa thought he was a controlling stockholder, I don't think they ever would have done a proxy contest. Certainly no Delaware case has ever held that ownership of 31 percent constitutes a control block. I suspect that had this deal been structured a little bit differently and Mr. Riggio got 19 percent more stock and became a 51 percent stockholder, people would scream that he had gotten

control without paying a control premium. I think it's hard to make the argument that he's already a controlling stockholder, unless you're prepared to say, and if he got to 51 percent that would be fine.

THE COURT: Again, it's hard to make that argument, if the world is full of the more simplistic choices that we expose children to in elementary school math. There's obviously a difference between owning 31 and owning 51 percent. But there's also a difference between someone who owns 31 percent, and that's all they own, and they don't play any day-to-day management role; and someone who owns 31 percent, retains the chairmanship, when he gives up the chairmanship, installs his brother, has other managerial subordinates, has retained the trademarks. You know, the law -- that's the good thing. We're adults. But that's -- because we're adults, there's more complexity.

One of the things you mentioned -- for example, I don't take heart. I actually find it troubling that this appears to be -- again, all I have is their allegations. You know, you're attacking their allegations. The allegation is that the special committee managed the Revlon's doctrine rather than

used it as an opportunity. Right?

MR. NACHBAR: Well, there's no evidence that there was any opportunity that Riggio would have paid some control premium, which it's hard -- I guess, the way --

THE COURT: I don't mean that. I mean, when you have a situation like this, where there's a fairly fundamental thing on the table and one of the ways you might structure it is by actually using stock, considering whether he pays a control premium, you also consider maybe we ought to use this as a time -- if Len Riggio believes it's a good time to monetize investments in retailing, perhaps it's a good time for us to monetize that on behalf of our public stockholders and to put Len to the test.

But instead there was -- the evidence appears -- we wouldn't want to go down this road because it could invoke upon us the requirement to look at other alternatives and to make sure that we're maximizing value. Or we could have a stockholder vote requirement. And we wouldn't want to do that. Why?

MR. NACHBAR: Well, again, there's -- this really gets beyond the Kahn v. Lynch argument. I can turn to that or go through the Kahn v. Lynch.

THE COURT: You can do both. I'm just wondering: is this a case that we can neatly fit in any box at this point? If I put it in Lynch -- and there is law I can put it in Lynch -- right? --because there's a lot of loose language out there that anything with the controlling stockholder is entire fairness. You know, case goes on.

MR. NACHBAR: That's what I would actually like to address. That's kind of where I was heading. There is a lively debate as to whether Kahn v. Lynch should be limited to its fact situations, which a controlling stockholder seeks to get additional shares or more control, you know, or whether it applies to all transactions with a controlling stockholder.

In considering the applicability of Kahn to the present case, I think it's worth noting the theoretical underpinning of that case, and that's, if the controlling stockholder doesn't get its way, he's going to engage in some type of retributive conduct. The most obvious type of threat was the one that actually occurred in Kahn. What you had there was, I think, a 43 percent stockholder who said, "Look, if you don't do my merger, I'm going to go out

to the public. I'm going to buy 7 percent more of the stock and then I'll be at the magic 51 number. You know, I could buy at the lower price."

It's difficult to see how that rationale is implicated here. If the board said no to the College Booksellers transaction, what's the retributive action that Riggio could take? He certainly couldn't have done the type of thing that was threatened in Kahn. He couldn't go directly to the stockholder and say, "You know, I have 624 book stores. Would you by this one?" You know, that's -- that sort of disaggregated action problem that you had in Kahn simply isn't present here. He wanted to sell College Booksellers. He had to go through the board. I think that's a very important distinction.

Nor could Mr. Riggio easily remove or replace board members. The company has a classified board. He's a 31 percent stockholder. He can't unilaterally do anything. He couldn't be assured of prevailing at an annual meeting. And so the theoretical underpinning of Kahn v. Lynch, I would submit, would appear to be largely absent here.

But let's bypass that. Let's say Kahn v. Lynch did apply. How does that affect demand

futility?

If Kahn v. Lynch were to apply, the most that could be said is that the transaction is subject to an entire fairness standard. That would mean that, if entire fairness was not shown, Mr. Riggio could face personal liability. But I think, critically, for Aronson, none of the outside directors would face any threat of personal liability. To the extent that somebody said they breached the duty of care, they're protected under 102(b)(7), there's no real claim of breach of the duty of loyalty, because none of the directors are alleged to have benefitted personally in any way from the challenged transaction.

What the plaintiffs do is says they were disloyal because they didn't --

THE COURT: The problem under Lynch is that, if it's entire fairness -- L-I-T-E -- the burden of persuasion ends up shifting to you all. At best, you get extra special -- you get an extra special dollop of creme fraiche or a slice of truffle on the analysis; right?

I mean, that's the problem with Lynch. Even if you layer a majority of the minority on top of

the special committee, you, at best, get a burden shift.

MR. NACHBAR: Right.

THE COURT: So how does that get you -- how does that help you? Is it the layering of the 23.1 thing that wouldn't exist in the squeeze-out merger so that you get the particularized pleading standard, where you have to assume that you kind of go through the whole persuasion shifting analysis all on the complaint?

MR. NACHBAR: Because a majority of the board is in a position to function with respect to the demand, in the sense that, A, they are independent of Mr. Riggio. We had a lively debate here this morning about that. If Your Honor rules against us on that, then I guess you don't get to prong two.

THE COURT: It's just always been an oddment of that -- I mean, the continued coexistence of that case in Aronson has always been a bit of an analytical puzzle. That's why I've always been more content with saying that the Lynch doctrine is some squeeze-out merger doctrine because the psychological intuitions are so utterly at odds with each other.

MR. NACHBAR: Right.

THE COURT: But if you assume, once you're in that world of entire fairness burden shifting, how you get out of that at a pleading stage has never made any sense to me.

MR. NACHBAR: I think the way you get out of it is by saying a majority of the board is -- we're assuming independence, because otherwise you lose on prong one. You don't reach prong two.

THE COURT: I'm saying, under Lynch, even assuming you have the conditions for a burden shift, under -- once you're in the entire fairness rubric, the plaintiffs have ultimately the ability to show substantive unfairness and to achieve a recovery, irrespective of the fact that the burden of persuasion on fairness has shifted to them. Thus, I would have to make an economic judgment on the complaint that this transaction was economically -- or that they had failed to plead any facts that suggested this was economically an inadvisable transaction for Barnes & Noble.

MR. NACHBAR: No. I don't think you need to get to that on the pleadings. I think where you have to get on the pleadings is whose threat of liability is it. Because, if a majority of the board

is independent --

THE COURT: This gets back to our prior colloquy about the mere fact that it's just Riggio and Zilavy, arguably -- certainly Riggio, who had -- are interested. Then you don't worry about that.

MR. NACHBAR: Right. Then the other directors -- if it's a derivative claim -- the other directors are in a position to consider a demand because they don't face any threat of personal liability. They can decide whether to sue Mr. Riggio or not, or to settle with him or whatever. And so that's -- that's how you get out of that box.

Obviously, if the plaintiffs state a direct claim, there's no 23.1 demand and you don't go through that analysis.

So we believe that, even if Lynch -- we don't think Lynch applies for the reasons that we've said. Even if it did apply, we don't think it would drive the demand excusal decision.

I guess finally -- well, not finally, because there's a 12(b)(6) motion as well. The balance of the second prong of Aronson is the plaintiffs saying various aspects of the transaction

cast a reasonable doubt on the board's judgment in approving it. So the Court has noted demand excusal under this prong of Aronson is reserved for extreme cases where the transaction is so egregious that it could not have been the product of good faith. That's the Postorivo case. Sorry. Trouble pronouncing that. Or it was so extreme that it warrants further review.

THE COURT: So extreme. Is it equivalent to the waste standard?

MR. NACHBAR: It's not entirely clear. But I'm just -- this is what the Supreme Court said in Tremont.

THE COURT: So extreme. But that's not what they said in Aronson; right? So it's only particularized pleading of an extreme breach of fiduciary duty?

MR. NACHBAR: I think --

THE COURT: That's like, do you take seriously, like, Lyondell. I would be candid with you all in a way that maybe upset my betters in Dover. I don't take seriously the adverb completely in that case. I take very seriously the knowingly. I think a three-quarters, complete, injurious knowing breach of fiduciary duty under Revlon is probably sufficient.

The fact that you didn't finish the job, it's an odd -- well, like, we did it. We like -- you know, we could have completely eviscerated the stockholders to the tune of 100 bucks. That would be the complete loss. But we knowingly breached our duty -- fiduciary duty -- and only took away $80 of the value. Therefore it's not a complete breach because we could have taken this other step that would have been a complete breach, therefore exculpated under Lyondell. I don't take Lyondell to mean that. I take that completely to be a kind of rhetorical emphasis.

In some of these cases, what are we getting at? Where if I find -- I harbor serious doubt, based on the particularized facts, that this was a transaction that was fair to the company and that would have been approved in the absence of the presence of a very influential stockholder, if I conclude that particularized facts provoke that inference and that the independent directors -- the otherwise independent directors would not have acted this way with respect to a noncontrol transaction, would not have approved it, and that this transaction was unduly -- there's a suspicion it was unduly fair to Riggio, at the expense of Barnes & Noble, that I

let it go because it's not extreme, because it could have been even worse, because it's not the most shocking thing that -- because, at the summary judgment stage, I might completely grant your argument, once I had the facts, because I realize the plausibility of putting these two businesses together, even though that plausibility has existed since the companies went public? That's what I'm trying to get at.

MR. NACHBAR: I think the filter there in what the courts are trying to get at is that we don't lightly undo the business judgment of boards. So, for the second prong to be implicated, there has to be some pretty extreme facts. Fertitta -- if I'm pronouncing it correctly -- is a pretty good example. They add a merger agreement. 39 percent stockholder bid 21. Then he dropped it to 17. Then he dropped it to 13. Then he went out into the market and he got 57 percent of the stock without paying a control premium, all while the board sat by and did nothing.

What they ultimately did is they released them from the merger agreement, in sort of the final insult, so he didn't have to pay the 15 million-dollar reverse termination fee for not

going through with the merger agreement while he did his street sweep to get control without a premium. You know, you can understand why somebody would say that's not the product of a valid business judgment. We don't have similar facts here. We don't have remotely similar facts.

The allegations -- really, the ones that the plaintiffs sort of most focus on, is they say that the committee ignored negative information about College Booksellers, didn't quantify -- or thought there were synergies and didn't quantify the threat to College Booksellers from e-commerce or eBooks.

There's no basis for any allegation that the committee or the voting directors regarded synergies as an intended benefit of this transaction. The record shows the contrary. They knew early on that synergies weren't what was going to drive this.

Similarly, the complaint alleges that College Booksellers was not growing, but the plaintiffs' own allegations show the opposite. Same-store sales growth was consistent. It was as low as 1 percent for the fiscal year ended April 30, 2009, in the midst of the worst recession in 80 years. So actually it was growing.

But, more importantly, there is no basis for plaintiffs' claim that the committee failed to take these alleged negative facts into account when negotiating the purchase price. There's no allegation, for example, that companies in this line of business historically sold for ten times EBITDA. This company faced unique threats, but somebody paid ten times EBITDA anyway. That would be a particularized allegation.

You know, put differently, any acquisition could be favorable at the right price, unfavorable at the wrong price. We're on a motion to dismiss, but the record that plaintiffs have incorporated show that that this is a good price. The Credit Suisse report that they trumpet --

THE COURT: I'm -- in the interest of time, I read the Credit Suisse report. I don't know that it does you any good.

MR. NACHBAR: This was at four times EBITDA. That's a low multiple. Obviously, if this company were growing at 15 percent per year and faced no threats and had tremendous synergies, might have been six times EBITDA, might have been eight times EBITDA. It wouldn't have been four. That's the

point.

It's a low-priced transaction. Credit Suisse says that. The reason that it was done at a low price is precisely because the committee did take the negative facts into account.

Plaintiffs next say that paying half the purchase price in notes was an unnecessary expense that enriched the Riggios. Again, this is nothing more than an effort to second-guess the board. Fully drawing one's credit facilities in a volatile economy is not necessarily a winning strategy. It's one that the committee here chose to avoid. In fact, the record that is before the Court shows that Mr. Riggio wanted significantly more cash -- 470 million. That's Waesco Affidavit Exhibit 11. The committee pushed back. It reduced the overall price, but it also reduced the cash component by $130 million. That wasn't Mr. Riggio forcing the board to do something. That was the board forcing Mr. Riggio to do something. So the fact that there's more notes and less cash is something that cuts in favor of the independence and functioning of the committee, not against it.

THE COURT: Yeah. Although I've seen cases -- I had a case where someone asked -- the fact

that the controller asked for an outrageous price, the people said, "Well, see, we approved a less outrageous price."

MR. NACHBAR: The only evidence here is that the price is not only not outrageous, it's inexpensive. Four times EBITDA. You know, people can have reasonable differences of opinion as to whether long-term strategically this makes sense or not. Those are the types of things that I think business judgment comes into play.

But I don't think reasonable people can disagree about whether it was a high price to pay for these assets. It's four times EBITDA. It simply is not a high price. You know, Credit Suisse, who they rely on, expressly says it's a favorable price. It's 30 percent accretive to earnings in the short-term. They question the long-term soundness of the strategy. You know, time will tell if they're right or if the committee is right and the board is right. But that's business judgment.

THE COURT: Mr. Riggio did it as a favor?

MR. NACHBAR: No. I mean, I think Mr. Riggio did it because he's a 31 percent

stockholder of Barnes & Noble and he wants to see Barnes & Noble succeed. And he felt that putting these two together at this time made economic sense. And I think he got a low price for College Booksellers. There's no question about that. If it succeeds in the long run, Mr. Riggio will profit enormously, as will all the other stockholders. If it proves not to be a favorable transaction in the long run, Mr. Riggio will suffer along with everyone else.

THE COURT: With whatever the transactional situation is in his bank account.

MR. NACHBAR: Sure. But there's no allegation and no claim of any particularized claim that the price that was ultimately paid was a high price for this. It wasn't. I mean, again, the only record we had shows that it was a very, very low price. Again, you know, four times EBITDA. 30 percent accretive. 30 to 35 percent accretive immediately. That's not overpaying for an asset. You know, strategically, is it a good asset for this company to acquire? You know, time will tell. But that's a business judgment.

THE COURT: I don't want to cut you short. On the other hand, I think you have -- do you

have friends who want to talk about the other directors?

MR. NACHBAR: I do, and I will yield to them.

THE COURT: Thank you, Mr. Nachbar. I appreciate it.

MR. RIEDER: Good afternoon, Your Honor. I'm Eric Rieder from Bryan Cave. And as Mr. Nachbar indicated, I represent the nonvoting directors -- that's Leonard and Stephen Riggio and Lawrence Zilavy. I'm not going to address Rule 23, except to say we join in Mr. Nachbar's arguments concerning why demand is not excused here.

I just want to address the Rule 12(b)(6) issues with respect to the claims against the nonvoting directors. There are multiple claims against them, but I think there's one important question to focus on, which is this. About the case against the Riggios and Mr. Zilvay, what did they do? What are they alleged to have done in this amended complaint? I think the answer is nothing that states a claim against them.

THE COURT: Even as to Leonard Riggio?

MR. RIEDER: That's correct. When you

look at the complaint, and what it is that's really alleged about Mr. Riggio, it doesn't fit within the categories of liability that they're seeking to invoke here. And in some sense this is really shown by even the cases that the plaintiffs cite.

The Fertitta case that Mr. Nachbar mentioned, or the LNR case, those are cases -- those are the closest analogies in the view of the plaintiffs that they have. Those are cases where the alleged controller did much more than simply propose a transaction with the corporation and then say, "I've got to abstain, allow a special committee to be appointed and have that special committee function," which is really the only inference to be drawn from the facts pleaded here.

THE COURT: In your view, if a controller proposes, you know, buy a quarter of -- he says a quarter million, I want a quarter billion. Special committee set up. Controller says, you know, I have my negotiators to do it. Negotiates it down to 225. All I did was negotiate it. I stepped back. The facts suggest that the special committee is a joke. It didn't really study it. It made no economic sense to do it. Then so long as the controller, all

he did was put this price on the table, agree to the thing, he's not liable even if the transaction is substantively unfair?

MR. RIEDER: That introduces an element: the special committee is a joke. That isn't present here.

THE COURT: But you introduced a stark argument under 12(b)(6), which I think would revolutionize the classic paradigm of addressing interested transactions. I always thought, when you were interested, unless ultimately the business judgment rule applies to protect the transaction, if the transaction is unfair to the company and thus unduly beneficial to you, the difference between what was fair and not comes out of your hide. And it's not a matter of your subjective good faith. It's just: we just didn't even allow these kind of transactions. And it's an indulgence to allow them. And if they're tainted by a fiduciary breach, you got to pay back the difference.

MR. RIEDER: But --

THE COURT: Now you're telling me, because Mr. Riggio stepped aside and all he did was negotiate this, even though he's the major strategic

thinker at Barnes & Noble, he's scot clear.

MR. RIEDER: Well, there are other elements, though. The fact is that what the complaint doesn't plead is a failed independent process. That's the variable that's missing. And it's present in the cases that they cite. Some specific allegation that the alleged controller actually interfered with or got involved in or controlled the independent process. And that really isn't pleaded in the complaint.

I mean, when you look at the paragraphs that the plaintiffs cite where they do purport to say they made specific allegations that Mr. Riggio controlled the process, but when you look at those --

THE COURT: I am not -- look, there's a lot about this complaint that is loose, like the whole part about the committee couldn't say no. It's not really buttressed in the complaint. In case you're concerned, I read the complaint. I marked it all up. Even read the earlier one, until I realized that I was reading the wrong one and then I read all the changes. So I read all that.

But you made a fairly stark argument that even Len Riggio -- I conclude, for example, that

I harbor a doubt that the special committee process was effective. You say Len Riggio didn't do anything. He's out. Is that right?

MR. RIEDER: Well, where I would -- what I would argue is that the complaint doesn't plead a basis to infer that the special committee process was not effective.

THE COURT: Okay. So that's an argument you share with Mr. Nachbar.

MR. RIEDER: Correct. That's an important element here.

THE COURT: Then let's -- I don't want -- I've spent -- I'm willing always to spend a lot of time. But we spent a lot of time doing that. What is it you distinctly want to say -- for example, tell me about Stephen Riggio. Why does it make sense that the CEO can say, you know, "The way I'll deal with this situation is, rather than giving any strategic advice, it's my bro. He wants to propose this icky situation. I can just get out of hot water by not being in the management pot."

MR. RIEDER: Well, the whole idea of abstention presupposes that senior executives or senior people at companies can and should abstain in

these situations.

THE COURT: Here is the problem, I guess. In the ordinary situation, when there's an abstention by the CEO, the CEO is still on the hook. Your first argument would say that he wasn't. Like the classic ex-abstention mode is Len Riggio who doesn't vote on the transaction. But he didn't really abstain in the sense that he's actually on the other side of the transaction. What you have here with Steve Riggio is, "I'm just going to go away for this." Right? He is the CEO. Can the CEO just decide to go away?

MR. RIEDER: I think, if we look at most of the interested party cases, at least some of them involve CEOs or a counterparty.

THE COURT: Don't you understand -- that's what I went through. Most of those cases where the CEO doesn't vote, pretty sure it's because he's interested. What you're saying is, there's some sort of safe harbor here for being the bro of the interested party, even when you're the CEO, if you just simply step aside. When there's an affirmative aspect of the duty of loyalty that involves -- that's why I never really understand the people that

understand the relationship of loyalty and care. You have a duty to try to exercise your duty of care; right? If you don't even try, it's a loyalty problem.

If he can't stand by and watch the train wreck, if it's a preventable situation, by arguing I just needed to take myself out of the equation, what does it mean to be the chief executive officer of a company that's engaging in a half billion dollar transaction and to just take yourself entirely out of the process?

MR. RIEDER: Well, I think my understanding of the law is that there are situations in which people, who aren't directors, may encounter potential situations where they might arguably have an interest, and that the remedy for that is to abstain. That's sometimes done in the case of CEOs when they're a counterparty. It might be done with outside directors who are appointed by a counterparty.

THE COURT: You get the big salary, you get the best office. Somehow I doubt Steve Riggio ever had the best office. Quite. I have a suspicion as who does. It's probably fairly regularly held. But he had the second coolest office there. With the second coolest office in a chief managerial role,

doesn't there come some unique responsibilities?

MR. RIEDER: If there's some basis to believe that the special committee process isn't working, that the special committee with its financial advisors, accounting advisors, legal advisors, wholly independent can't function, that's a different issue. But here --

THE COURT: See --

MR. RIEDER: The abstention is coupled --

THE COURT: When we get to the special committee, that's why the importance -- why advisors are so critical. But advisors are decidedly the second best thing to the normal source of information for directors. And the normal source of information is management. You know, now you took away the founder, you took away the chairman, you took away Mr. Zilvay. Bryan Cave, your firm. Your firm went to the other side?

MR. RIEDER: Again --

THE COURT: That's just the reality, sir. It's not a criticism. It's a reality. Your firm went to the other side and it was allowed to do so. What you're asking me to do now -- I said, if

it's all purchase and business judgment rule under 12(b)(6), everybody gets out. What I'm asking you about is a situation where it's not that, where I find that I've got some real concerns about the process. And your briefs indicate that Steve Riggio gets out because he just gets this safe harbor for an ordinary refusal. Right?

MR. RIEDER: I don't think it's an ordinary refusal. He abstained, as was appropriate, when confronted with a potentially interested party transaction. And the company -- the rest of the board independently functioned.

THE COURT: So if I have serious doubts about whether the business judgment rule -- I can say at this stage that, under 12(b)(6), I just throw it out. Does Steve Riggio stay in?

MR. RIEDER: The Steve -- with Steve Riggio and Lawrence Zilavy, they're actually in a somewhat different position because they are not on the other side of the transaction.

THE COURT: Well, no. That is actually not true in the Zilavy sense. Zilavy was a fiduciary duty of Bookstores. Right?

MR. RIEDER: Of the College Bookstores

company. He was employed by the College Bookstores company.

THE COURT: So he's on both sides of the transaction in a professional role. I have a hard time inferring that the $85 million in bonuses came out of College Bookstores, excluded Mr. Zilvay, given his high-ranking status.

MR. RIEDER: But, he's not a party to the transaction. If Mr. Riggio chose to include him in the bonus group, that's a different issue. It's not something that he -- it's alleged that he had before him the prospect at the time of the abstention, or at the time of the board process.

In any case, he and Stephen Riggio abstained. That's the kind of conduct that the law should reward on the part of directors in this situation. And given the absence of anything more, there is no basis for liability against them. It's not -- the plaintiffs come back and argue, "Well, there are cases that say it's not a per se absolute bar and there may be exceptions to the law that we cite concerning nonparticipation." And I think Vice Chancellor Jacobs addressed that in the Tri-Star case. There could be an exception, if it were alleged that a

director purported to abstain, and formally abstained, but meanwhile took part in the process in some way, or engaged in a conspiracy to actually engage in the process that he's purporting to abstain from.

But as was the case in Tri-Star, there are really no allegations of that here.

THE COURT: So what did Steve Riggio do? He went and sat in his office and played with, you know, fancy toys from the electronic company store that he got, or something like that, while this all was going on?

MR. RIEDER: He was the CEO of the company. He had many responsibilities. He abstained from this process.

THE COURT: Okay.

MR. RIEDER: Now, the abstention, under the law that we cite -- and there really are no contrary cases cited in opposition that abstention defeats the claim of under the duty of care or duty of loyalty against them. And as we've already touched on, when you really look at the complaint, the claims against Mr. Riggio fare no better. In the sense that to trigger the kind of review that the plaintiffs --

THE COURT: This could be unfair. I

could find, after a trial, that no -- that, frankly, folks operating in a market-tested environment would have paid 20 percent less -- likely wouldn't have even done the deal at all but would have paid 20 percent less. But Mr. Riggio, he's just -- because he just put it on the table, just a good guy, given an opportunity to buy something to the folks. If it's unfair, you know, life's unfair and Riggio gets to keep the 20 percent excess.

MR. RIEDER: The plaintiffs don't get there -- don't get to that trial -- unless they can plead some basis to infer that unfairness from the facts they pleaded.

THE COURT: I get that. But see -- remember, I just had -- you got a really good team here, and one of the finest members of our bar just argued longer than the entire both sides get in a Supreme Court hearing; right? You got over an hour. I believe it was almost an hour and a half. And we just went through that.

I'm asking you an isolated legal question. Assume I find that there's enough suspicion here that this was not an effective process. Does your client, Mr. Leonard Riggio, get out at this

stage?

MR. RIEDER: I mean, I've said that the special committee and the lack of pleadings to that are an important part of the argument if that fails --

THE COURT: If that fails --

MR. RIEDER: -- then the argument fails.

THE COURT: Okay. Which is if I -- if it is the case that there is concern about the effectiveness of the special committee process as a cleansing mechanism, then Mr. Riggio, as all interested directors have always been under Delaware law, at risk in the end if there is a fairness inquiry of paying the difference between what the Court finds is fair and what was paid back because he's the interested party? Right?

MR. RIEDER: Where I would take issue with you is only in this respect. You said "if you have concerns." I think the question is, do the plaintiffs plead enough to circumvent the demand requirement and do they plead enough to get past 12(b)(6)?

THE COURT: I'm trying to isolate your

argument. In that respect, your argument is no different than what we went over with Mr. Nachbar. And Mr. Riggio's fate at the pleading stage just rises and falls with those same arguments; right?

MR. RIEDER: Correct.

THE COURT: Okay. What I'm trying to get at is the distinction. Not that I want to short-circuit this. I don't think I can be fairly accused of that, given the amount of time we're spending. I don't want to go over that ground again. I was trying to make sure you're not making some broader doctrinal shift about the fact that controllers get to walk away, or interested parties get to walk away simply because they didn't do some sort of overt act of coercion.

MR. RIEDER: Well, my argument is focused on Rule 12(b)(6) and why the complaint doesn't state a claim. That's really -- I think on the issue of waste, that claim clearly fails for the reasons Mr. Nachbar mentioned.

Let me just briefly touch on claims asserted against the nonvoting directors, not presently involving the other directors. There is an aiding and abetting of breach of fiduciary duty.

THE COURT: You don't even have to address that.

MR. RIEDER: And there is also the unjust enrichment claim. That's only against Mr. Riggio. The issue there is that there is a written contract here and unjust enrichment doesn't apply.

THE COURT: There's more, isn't there? There's a whole body of rules we just talked about that goes over -- the fact is that, if you are an interested director and the transaction is tainted by fiduciary breaches, then you are the warrantor of fairness and you have to give back the excess gain? And if it turns out, under that body of law, that you can't upset the contract, then there's no gap to be filled by unjust enrichment? Right? Isn't the entire fairness doctrine designed to prevent unjust enrichment by interested parties?

MR. RIEDER: Well, I think that's part of the purpose there.

THE COURT: I know we like to layer claims because it's really interesting and stuff like that. What I'm saying is, I don't believe -- I understand your argument and I don't think you need to

press the point. I understand it.

MR. RIEDER: Beyond that, I think we just come back to the point that the complaint fails to state a claim against them, when you really look at what's alleged against these defendants.

THE COURT: Okay. Here's what I suggest, gang. I do not want to sit -- this is an important thing. We are up against lunch time. Would you like to take a half hour and come back at 1:05? You may have to go to the delicious Dunkin' Donuts downstairs, but you can cool your head and come back with the plaintiffs and then we'll finish up. I just hate -- one, our reporter -- everybody needs a break. Some of you may not who are inhuman. Those of us who are human need a break at this point. Might as well take a half hour. You can go down and do whatever and then come back. We can take a longer break if people want. I figure people may want to take something shorter. I really will do what everybody's preference is.

MS. TIKELLIS: I'm fine with a half hour.

THE COURT: Does that work for you? Why don't we just do a half hour then.

(Luncheon recess was had at 12:33 p.m.)

(Reconvened at 1:12 p.m.)

THE COURT: You may proceed, Miss Tikellis.

MS. TIKELLIS: Thank you, Your Honor. We've been here and I know this is a little unusual because Your Honor has so much background about Barnes & Noble. If you would like me just to proceed, or if there are areas Your Honor is interested in my addressing.

THE COURT: No. I think you should proceed. I guess one of the things on my mind is why are there so many kind of loose allegations here and what is the real attack on the financial fairness of this transaction that this complaint mounts?

MS. TIKELLIS: Why don't I address that point. I'm going to proceed and I'm prepared to make the argument. We believe with respect to the second prong of Aronson that entire fairness does apply, that there is precedent for applying that analysis in situations outside of the squeeze-out merger. So we've analyzed it, Your Honor, under the unfair dealing and the unfair price. I think I wasn't

quite sure I caught what Your Honor said to Mr. Nachbar, but I know that Mr. Nachbar was referring to the Credit Suisse report, which I don't know how he takes comfort in. Your Honor said you read it.

THE COURT: I read parts of it. I'm increasingly getting more persnickety about devoting my limited mental capacities to reading volumes of documents that are not incorporated in complaints.

MS. TIKELLIS: I understand.

THE COURT: I think I looked at the front page or something.

MS. TIKELLIS: I think the Credit Suisse was referred to, I believe, in our complaint. Miss Cramer will get me the reference. There were some snippets that Mr. Nachbar relied on. But I think if Your Honor looks at it --

THE COURT: It says "Deal looks good on paper."

MS. TIKELLIS: Exactly. Exactly. I don't think that that helps on fair price, and I think that's the only attempt that defendants have made in their papers to say that the price is fair.

THE COURT: What do you say about why the price is unfair?

MS. TIKELLIS: A number of things. Let me start with this. I want to start with this because, if there's a difference and we're all talking about ranges of fairness and this and that, and at this point of the pleadings, I think it's a little unfair to ask us to engage in a battle of the experts. But say we can agree on some range. The first point of our contention is the note. That's an 80 million-dollar difference, regardless of whatever the price is, fair, not fair. There's an 80 million-dollar payment on top of that price, whether it's fair, unfair, whatever.

In addition to the cash paid, the transaction consisted of 250 million in seller notes. And according to the 8K that was filed in August of 2009, the notes were comprised of the following. The senior subordinated note in the principal amount of 100 million, payable in full on December 15, 2010, with interest of 8 percent per annum.

Second, a junior subordinated note in the principal amount of 150 million, payable in full on the fifth anniversary of the closing of the acquisition, with interest of 10 percent per annum, payable on the unpaid principal amount. Based on

these note terms alone, Mr. Riggio stands to receive an additional $80 million. That's our first point.

Our second point is the impact. And I want to note for the record -- and it will be on the record -- that Mr. Nachbar was very candid. He told Your Honor that there's been a big change in landscape. And our second contention is the impact of the emerging technologies was not factored into Greenhill & Co.'s analysis.

THE COURT: What your friends say is, "Well, it wasn't mathematically baked into the projections." But that doesn't mean that the committee didn't consider it. They just didn't quantify the effect of it on the projections for a bookstore's performance, because they didn't think it could be reduced to a number, as I understand it.

MS. TIKELLIS: I think that's what they point to. I'm not sure where they get it. I'm looking at the documents that were provided in the 220 case. And it's very clear that -- and they make -- what's important here is they make this argument about reliance on Greenhill. And because they relied on Greenhill, they're entitled to some protection. But Greenhill is not the one that said we can't estimate

it. It was Mr. Riggio's people.

THE COURT: That's because they're the ones doing the projections; right?

MS. TIKELLIS: They're the ones doing the projections. They weren't baked in. And basically, the special committee, the board relied --

THE COURT: Is it your allegation they were actually baked into the projections for this other company?

MS. TIKELLIS: Yes. And I think that, from the board minutes that we've seen -- I mean, it's the same time period. This is March of 2009. And Barnes & Noble is purchasing the Fictionwise, one of the largest ebook sellers in the United States. In connection with that purchase, the board was provided with detailed estimates of the digital growth -- book growth. So they not only knew that there was going to be an impact when they were going to buy Fictionwise. They had their advisors, and they considered what is going to be the impact and give us some estimate of that. That wasn't done here.

Our other point that goes to unfair price. Very early on -- and I think Your Honor put your finger on it -- there are people that have sat on

this board for a long time. And Mr. Riggio -- and we have the minutes from December 18th, 2007 -- Mr. Riggio -- and I don't think those minutes were included in the affidavit that defendants submitted, but they're referenced in our complaint. It was Mr. Riggio that proposed the purchase. No one has ever suggested that before. And when he suggested it to the board, he said, "So now let's talk about the synergies and the growth that this combination is going to bring to Barnes & Noble." So let's talk about the synergies and the growth.

The transaction clearly had to be negotiated without regard to synergies and growth. In fact, the special committee disregarded the advice from its advisors. The transaction provided little or no synergies and disregarded Barnes & Noble's College, missed projections for fiscal 2007, 2008, and the projection for dismal growth in 2010.

In Greenhill's first presentation to the special committee, the committee was told that a number of potential synergy opportunities had already been leveraged, and it was unclear whether there was any synergy potential left.

The CFO, though, of Barnes & Noble

would later confirm: "Synergy's just really not what this transaction's about." Likewise, the special committee ignored the missed projections for fiscal year 2008. They missed revenues by 80 million. Net income was lower by 20 percent. For fiscal 2009, again, revenues missed by 150 million, net income by 25 percent, and a forecasted drop in profitability in 2010.

The defendants -- and Your Honor heard them -- tried to blame the general poor economy. But Barnes & Noble's own CFO, Mr. Lombardi, recognized -- Your Honor probably knows this, it's in this record, too, from the prior trial that related to Barnes & Noble -- Mr. Lombardi recognizes, as early as July 2008, when the Borders situation came about, that the industry of Barnes & Noble College was a steadily declining retail marketplace.

THE COURT: Where does it say this in the complaint?

MS. TIKELLIS: Paragraph 49. Am I right? Yes. Paragraph 49.

So we have complaints about the note that go to unfair price. We have complaints about the lack of consideration of the emerging technology. And

we also have --

THE COURT: Isn't the argument that the College Bookstores business is more than -- is different bricks and mortar? You have the ability to -- there's going to be, even with respect to eBooks, there's going to be a place where people are going to go -- if you actually need to get your student at a university, you have to get your reading for physics. He might be doing it electronically. But there's still going to be a place where that's available and it's going to be the College Bookstores.

MS. TIKELLIS: Probably. In near term I suspect that's right. I've gone to the Kindle. And I apologize to the Ninth Street Bookstore, but the Kindle has now come out with the large Kindle. Students will be downloading --

THE COURT: Don't you have a conflict of interest representing Barnes & Noble and you're not using the Nook?

MS. TIKELLIS: I'm not doing the Nook. Yes. Not the Nook. You know, I would agree with Your Honor: it's not going to be unlimiting totally.

THE COURT: Must be going for a nerd niche because kindle has probably weakened up. I

can't see Mr. Walsh, who is like -- you know, you could go 100 days without food or water and still probably trek the Alps. Can't say, "Got my Nook here." Just sounds a little odd.

Mr. Nachbar potentially. Rohrbacher for sure. But Mr. Walsh? No.

Isn't it arguably a different platform because they do have this kind of built-in constituency?

MS. TIKELLIS: A different platform?

THE COURT: Than Borders.

MS. TIKELLIS: Yeah. I don't think you can make that an apples and apples comparison. I would agree with that.

THE COURT: Isn't that what you say? You used the "not looking at Borders" as an example of why they couldn't rationally look at this; right?

MS. TIKELLIS: I think it was more of a recognition. I'm sorry if I said it that way. My point was more that there was a recognition in-house at Barnes & Noble, as early as July 2008, that this was a declining market. And I think I read maybe in Your Honor's opinion that there was some discussion where Mr. Burkle and Mr. Riggio at some point over

purchasing Borders or a piece of it, and I think Mr. Riggio had the same type of observation there, and I think that led to some context. But that's another case.

My point was, in-house, they certainly saw that and recognized it in 2008. I hope that answered Your Honor's question.

THE COURT: So it's principally the note and the fact that this was -- what Mr. Nachbar says is, in some ways, you're attacking the strategy. Like, why did they double down on retail; right?

MS. TIKELLIS: Well, that's what he says. I think this is -- I think this is all about timing. And some people -- I never seem to be in the right place at the right time. I suspect Mr. Riggio has good luck on that. I've looked at past transactions he's done. I think he's a smart guy. He's got -- he owns all of Barnes & Noble College. Yeah, people may say, well, why? He's 31 percent stockholder of Barnes & Noble Bookstore. Why would he want to buy this dog? Why would he want to do this? Well, my answer to that is, he's getting out. He's getting out with his money and he's spreading the risk, going forward with the rest of the public

stockholders.

I'm prepared to -- one thing I would like, if Your Honor doesn't have any more inquiries on that aspect, I wanted to talk a little bit about the special committee.

THE COURT: Yes. Please do.

MS. TIKELLIS: Your Honor had raised with Mr. Nachbar, maybe at the beginning of the hearing, "Gee, I wonder, why, when plaintiffs' counsel saw my opinion, why didn't they amend their complaint?" I have an answer. And we thought about it. Mr. Berry and I talked about it. But we had already amended under the 15(aaa). We were aware of Your Honor's opinion. We thought that there were some points that could be made and would apply to our case in terms of interestedness, and particularly Mr. Del Giudice. I don't know if I'm saying that correctly. But we thought it was Your Honor's opinion it was in the public domain. It was certainly something we took notice of, and Your Honor can take notice of. And quite frankly, to engage in another motion to amend or -- which is where we would have been. We had already had a big go-around with Cravath on whether or not we had to move to amend on 15(aaa)

the last time. They finally relented and said, "Go ahead and amend your complaint."

That's a long way of saying yes, we recognize we didn't do it and, for some practical reasons, we do not have in our complaint the same detail.

THE COURT: I guess what Mr. Nachbar reminded me of, it may go both ways. You have some things that are stronger for you than perhaps -- I mean, was that part of the equation? That it gets stronger as to Mr. Del Giudice, potentially weaker as to others? Like you have a specific allegation about close personal friendships. I think close and frequent socializing with Dillard.

MS. TIKELLIS: Correct.

THE COURT: What's the basis for that? Confidential caddy informant at an exclusive New Jersey based golf club regularly covers the every Tuesday 10 a.m. tee time for these two, or something like that? Did they share a cigar locker at an upscale steakhouse? I guess they may still have the lockers. You just can't use them anymore.

MS. TIKELLIS: They'll find me the source.

By the way, Your Honor, I was the losing party in the Beam case -- Martha Stewart case. I can tell you that I do believe that the allegations here with respect to interestedness are a lot stronger than in that case. And there were -- and at the time I thought they were strong enough. Both courts disagreed with me and basically said, just, you know, mere friendship without anything more is not going to be enough to do it. And I think we've alleged a lot more here.

THE COURT: What is the more, like, with respect to Mr. Dillard? Is it the close -- is it the close friendship, plus the length of service?

MS. TIKELLIS: Plus the length of service. Plus the fact -- and we do believe, and I think if you look at the cases of Cysive and other cases in this court -- I believe Mr. Riggio, if you get beyond the mathematical equation, he's a controlling stockholder. And I think that there's a history here. I'm not just pointing to related transactions. There's a history here, Your Honor. And just 2007, 2006, and 2007 alone -- and this has not been disputed -- $1 billion of Barnes & Noble's money has been spent and being directed to

Mr. Riggio's other businesses.

THE COURT: That doesn't mean that those transactions weren't fair to Barnes & Noble.

MS. TIKELLIS: No, it doesn't. But it does mean that all the freighting business goes to Mr. Riggio's company. All other businesses go. And they point to things like, well, they're at market prices. Well, there are ranges in market prices. And when we say that there are available lower and discounted prices -- to tell me there's market prices doesn't dispute that. The point is that there is a pattern. I'm not saying that's the only connection. But I think, to take friendship, service in isolation, sitting by and saying, okay, instead of being more competitive with what companies you're dealing with, you have to look at them collectively. It doesn't make sense not to.

THE COURT: Well, that's a sort of separate -- his controlling status and what it is about Dillard is the length of service, the friendship, and what you're saying is a pattern of running this company as essentially a family controlled company by inner company transactions, other sorts of things?

MS. TIKELLIS: Correct. Correct. I think, as Your Honor rightfully noted earlier today in these proceedings, I think that it is telling that -- with the long service of some of these board members -- that this transaction was never raised before. And it was only initiated by Mr. Riggio. And Miss Miller -- you know, Your Honor had one case that dealt with the poison pill. This is a different case. This is a different fact. We had the same people. But you've got to look at their roles in connection with what they're being asked to do. And I don't think you can just put one on top of the other.

I really thought about it and I said, I don't know if I'm going to be able to convince Vice Chancellor Strine to hear anything more on Miss Miller, because I read Your Honor's opinion and you said her service was pretty distant. She's had the cooling off period and, you know, I just don't see it, or at least I don't see it in this context.

THE COURT: I didn't see it in the context. But my job is to keep thinking and to deal with this case. And it's a different sort of situation.

MS. TIKELLIS: Agreed.

THE COURT: I am concerned. Maybe it goes with what remaining hair I have. But that I increasingly -- gray has always been something I try to see and not avoid. What you have -- I mean, she was -- it has been a long time since she was technically his subordinate; right?

MS. TIKELLIS: I agree with that. Since 1997.

THE COURT: So, I mean, what is it about her? Except I think you do allege that she's a friend. You know, it really -- this idea that she's a protege of this dude --

MS. TIKELLIS: Exactly. He was her mentor. And even though her service, in terms of executive positions, may be back a bit in time, she's still reaping the reward of that.

THE COURT: One of the things you're saying is, this has been a fairly lucrative board to be an independent director on. But she's the CEO of Coach. Is that like a high leather goods kind of thing?

MS. TIKELLIS: Yes. I'm not saying that everything but -- you do well in one arena, you do well in another. It's all about what we all bill

as professionals. And I think she's done that and done it with the help of Mr. Riggio.

I also think it's interesting -- and the 8K -- I talked to Your Honor a little bit about -- I'll call it the promise of Leonard Riggio that, boy, this combination will have synergies and growth. And I walked through the statistics, Your Honor, that it showed they missed a lot of projections, and they're not projecting growth and profitability.

Miss Miller -- I thought it was interesting, because I think it's Tab 1 to the affidavit that defendants submitted, and it's the 8K dated August 10th 2009. At page two, at the very bottom, Miss Miller tells -- as Your Honor knows, there's been very little transparency about this. It was structured so stockholders wouldn't vote on it. So they're stuck being told what special committee was charged to take care of their interest is going to tell them.

What does she tell the public stockholders? She tells the public stockholders that the B&N College purchase was an acquisition of a profitable and growing company at a very attractive valuation. I don't know how she says that,

notwithstanding her direct knowledge that fiscal 2008 and 2009 projections were significantly missed and that the 2010 forecast was bleak.

THE COURT: She also says reuniting these has long been a top priority.

MS. TIKELLIS: Exactly.

THE COURT: Which I get could cut a few ways.

MS. TIKELLIS: Given all the points we talked about, even if the service itself was distanced, the rewards that come with that -- she sat on the special committee. The statement that they make to the stockholders that weren't asked to vote, and it wasn't structured for their vote for consideration. I think that, taken together at this stage, Your Honor -- and I think you said it right during Mr. Nachbar's argument -- it's not that the Court needs to definitively decide now that at this stage a pleading -- to raise a doubt about the independence of this chair, the special committee. I submit it does.

THE COURT: What about Monaco?

MS. TIKELLIS: I thought -- and I heard Mr. Nachbar and I must have missed it in the

proceedings. I didn't see it. But if it's in there, Your Honor will see it in the transcript and Mr. Nachbar will point it out. I thought our allegations were pretty strong against her. I'm focusing again --

THE COURT: What was strong about it?

MS. TIKELLIS: The 15 years, again, of service.

THE COURT: So it's the years of service. It's the service on the comp committee.

MS. TIKELLIS: Service on the comp committee.

THE COURT: Which blew the options backdating issue; right?

MS. TIKELLIS: And she was removed. That was the remedial action. I believe they were all removed that sat on that committee.

THE COURT: I think there's an allegation of friendship later in the complaint.

MS. TIKELLIS: Right.

THE COURT: And then she was for Bill Bradley. Is it something you guys have against Bill Bradley that you think, if you're for Bill Bradley, inadequate judgment? He's a pretty sound guy, I have

to say.

MS. TIKELLIS: He's pretty tall, too.

THE COURT: He's definitely tall. He wasn't a tall NBA player, but he's tall -- he's no Lowell Weicker, but he's tall.

MS. TIKELLIS: In and of itself, Your Honor, I would say that's, come on. But you know what? We're trying to point -- and it's difficult, and even in a 220 demand we're not going to get documents that are going to show all these various things that people do outside of the boardroom. They're friendships, but also political connections and big fundraisers, and people that go beyond -- the point is, you got Mr. Riggio, Mr. Del Giudice -- and I'm looking at some fellow down here who told me that's how to pronounce it -- and Miss Monaco that are all -- the only one I know is Bill Bradley. There could be others. I haven't alleged that and I'm not telling Your Honor that.

I think it's just, again, the collective facts. And Mr. Nachbar said that there was a lot in the record about the compensation. And if it's there and if it's something different, Your Honor will take it into consideration. But I thought her

allegations were pretty good with respect to why she was an impaired member of the committee. I'm looking through my notes to see if there's anything else that Your Honor raised or if you want to raise. I hate to just sit here --

THE COURT: How is this waste? Things can be unfair and not waste. Waste has been basically a transaction that no -- when you plead facts, a transaction that no person acting in good faith could conceive of as fair. Right? It's easy to think of a person in good faith conceiving that this should be done. Maybe it was too late. Maybe it should have been done earlier. They should have never been separate.

But be that as it may, sometimes things come less than optimal, but they're still the right thing to do under the circumstances.

MS. TIKELLIS: Right. I have two responses to that. One goes back to the conversation we all have been having today about the wisdom of getting in and the timing of this, which seems to be more to the benefit of Mr. Riggio than to Barnes & Noble and the stockholders.

But my second response is, as part and

parcel -- and I think I told Your Honor -- whether you look at this price, and we don't agree or we do agree, I think there is an 80 million-dollar lay on top of that. And I think that component is wasteful.

THE COURT: You don't look at the component. What you have to show is that the transaction, structured as it was, with the consideration coming partially in the form of cash and in the note, that that is such an outrageous transaction. Let's face it. No person acting in good faith could conceivably sanction it as fair.

Where in the complaint really is there any kind of pleading to that effect? I get the point. What you're saying is, there's a dollop of creme fraiche or the shave of truffle. And that might still be enough for an award; right? Eighty million dollars is not trifle. But waste is like a hinkiness factor. When you see something so ridiculous -- you don't know why it's so ridiculous, but on it's face it is ridiculous -- that you get to state a claim. I mean, it's not even clear to me why we have waste claims separate from fiduciary duty claims. What is a waste claim? But an example of a breach of fiduciary duty -- like you did something that was wasteful of

corporate assets. Like you threw a party for the CEO's nieces. Bar mitzvah, bat mitzvah. You got the Flava Flav. And who is the dude who has the heart problems? Bandanna man? I forget. He's one of these hair rock guys. Bret Michaels. You got both of them. And it cost the company $5 million. So it's not like wasteful. It's an ascetic atrocity and you did it on the company dime; right?

MS. TIKELLIS: To answer Your Honor's question, other than the allegations we have that go to unfair price, we don't have anything separate and apart that would go to waste.

THE COURT: Aiding and abetting. What does it mean, if you are a fiduciary already and you knowingly assisted in other breach of fiduciary duty? Isn't it another way of saying you committed a breach of fiduciary duty?

MS. TIKELLIS: It is. And we're not pressing that count, Your Honor.

THE COURT: Like unjust enrichment. If it turns out that the transaction is ultimately a valid business judgment, such that the contract stands, how can you get a remedy for unjust enrichment when the controller isn't liable for breach of the

fiduciary duty of loyalty?

MS. TIKELLIS: If he's not liable, you can't.

THE COURT: If he's not liable then you --

MS. TIKELLIS: If he's not liable you can, if all the other directors are also not liable.

THE COURT: What I'm saying is, if he's not liable for breach of fiduciary duty, the contract stands and you can't use unjust enrichment; right? I mean, isn't the entire -- isn't the whole idea of the interested party being on the hook essentially the way the common law corporations already specifically dealt with the possibility of unjust enrichment?

MS. TIKELLIS: In the context of entire fairness?

THE COURT: Yeah.

MS. TIKELLIS: Yeah. I think the reason our thinking on the unjust enrichment that if, for instance -- and I don't think this is the case. Your Honor found that everybody breached a duty but maybe it was -- everybody breached a duty. But because Mr. Riggio -- and if you follow our friend's

argument here, he's off the hook because he took himself out of the mix and he didn't do anything. I don't believe that's the law and I don't believe that's what the facts show. Then we got a problem because he's got the goods. How do we get them back?

THE COURT: How about Steve Riggio. What did he do? What did Steve do? He already has to be the younger brother, and that's a hard enough role in life. And now you want to hold him liable when he abstained? You don't have any allegations of him injecting himself in this to put pressure on the committee or anything like that, do you?

MS. TIKELLIS: We don't have allegations that he's put pressure or interfered. I think, probably a fair reading of the allegations is, he excepted himself. He abdicated. He didn't join in.

THE COURT: You don't plead in those terms an abdication claim; right?

MS. TIKELLIS: No. And we don't have a specific fact against him that he interfered, unlike Mr. Riggio who, as Your Honor noted, you change hats. He goes from one side to the other side, and he's the negotiator for Barnes & Noble College.

THE COURT: And Zilavy? Is it Zilavy, Zilavy?

MS. TIKELLIS: We do not have any direct allegations of wrongdoing.

THE COURT: Actually now have links where you can get the transcript and it will have links of select audio highlights.

MS. TIKELLIS: Now, he will -- Mr. Zilvay, I mean -- he's a director of Barnes & Noble and he also stood to profit and benefit from the --

THE COURT: Am I to infer -- you're suggesting in the complaint that he was part of the bonus pool?

MS. TIKELLIS: Yes. Yes.

THE COURT: Why is this -- why would I Lynch this situation?

MS. TIKELLIS: Pardon me?

THE COURT: Why would I Kahn v. Lynch the world? Is it your position that every transaction with someone who is a controlling stockholder is under the Lynch standard, and therefore you can't ever get a claim dismissed at the pleading stage because, even if you used the majority of the minority vote, plus a

special committee of Warren Buffett, Bill Gates and the reincarnation of Gandhi, that that wouldn't work?

MS. TIKELLIS: I think -- one thing I want to put on the record. I don't think we ever said, and certainly didn't intend to say, that just because we're saying entire fairness applies that all of a sudden, poof, we get to live, and, poof, demand is excused. We're not saying that. We know we need to show. If entire fairness is going to apply, and I think it can apply, and the Chancellor applied it recently in a case, Monroe versus Carlson, and that was not a squeeze-out, I think that's precedent for applying it in this purchase of an asset -- a substantial asset. We pled our unfair dealing. We pled our unfair --

THE COURT: That's what I was going to say. Is it that the entire fairness standard -- I guess the Supreme Court has used the ab initio word. I call it from the get-go. That's more a Mayberry R.F.D. version of it. If it's an interested situation, and even on it's face it looks like a majority of the people who approved are independent, if the plaintiff can plead facts which suggest that the independent approval process is tainted, then that

can invoke the entire fairness standard, particularly under -- when you get to this Technicolor doctrine, even in a situation where there's nobody conflicted, it says you don't have to plead damages. If you prove a breach, there's some sort of burden to show no damages. In a situation with a controller or another interested party, if you plead that the approval process, which would invoke the business judgment standard, is tainted, then the entire fairness standard can come into play. Is that what you're suggesting?

MS. TIKELLIS: Yes.

THE COURT: That means that Lynch doesn't apply. What I mean is, that's not a formal invocation of Lynch. Lynch says from the get-go, or ab initio, in a particular context, the entire fairness rubric is the rubric. And even if you have both cleansing mechanisms together -- the committee and the vote -- you still don't leave the land of entire fairness. And if the plaintiffs show substantively that the transaction is mispriced, then they win, which means that's why no one's ever -- I know there's an academic -- she wrote something about how every one of you in the Delaware bar for a

generation missed the meaning of Lynch and that Morris Nichols and Richards Layton and Potter Anderson have had low hanging dismissal to be picked by their out-of-town counsel and themselves in Lynch cases and have just failed to recognize that they could just smack these things out under 12(b)(6) so easily. I don't really think that's the case. I think people read the case. Look, wait a minute, if all we get is a burden shift from a preponderance standard, we're still in fairness land and courts can't at the complaint stage deal with fairness. You're not saying we're in that rubric, or are you pushing that point?

Essentially, whenever you have someone called a controlling stockholder, it does not matter what the transaction is. It could be simply the use of the company car. It could be anything like that. You could have -- you start with entire fairness and you end with a fairness of inquiry. It's just a question of who has the burden and it's never a question of the business judgment rule applying.

MS. TIKELLIS: No, I'm not saying that. I don't think you can build in that kind of a blanket rule. As Your Honor said today several times -- and I agree -- texture is really what we're

looking at in a lot of these factual situations.

THE COURT: Do you have anything else?

MS. TIKELLIS: Nothing, if Your Honor has nothing more.

THE COURT: Mr. Nachbar.

MR. NACHBAR: Just very briefly a couple of discrete points.

Your Honor asked about fairness and is the transaction fair. On this record it is. We've got low multiples. I didn't hear plaintiffs --

THE COURT: Where does the complaint say it's a multiple?

MR. NACHBAR: It incorporates the Credit Suisse report which says it's a low multiple. I didn't hear plaintiffs say anything to the contrary.

THE COURT: If I incorporate the Credit Suisse report, it said this is a dumb, bad deal.

MR. NACHBAR: It does say that.

THE COURT: If I incorporate it, how does it help you?

MR. NACHBAR: Because that's a business judgment that people are entitled to make about whether, in the long run, this is strategically

good or strategically bad. It's not a high price. It's a low price. Credit Suisse says that and says that in words of one syllable.

THE COURT: We also note that Len Riggio has had good timing on past purchases and his decision to sell the College Bookstores here has to raise a red flag. He had kept the College Bookstores private until now. At a time when it cuts Mr. Riggio's exposure by about half, it doubles the technology exposure for the rest of BKS stockholders.

MR. NACHBAR: Sure. That's their view of the strategic -- the long-term strategic benefit or detriment.

THE COURT: I think it's an understated way of saying I think it's the kind of smelly deal that is so strategically fallen, that it seems to be the product of Len Riggio trying to diversify his wealth profile by sloughing off Bookstores on to the public company, over which he maintains a good amount of control, at a time when it's favorable for him to do so, and that it increases the risk profile for the public company in a big way that seems to be difficult to rationally understand.

MR. NACHBAR: Again, it's a question

of price. If they had paid a dollar for it, we wouldn't be having this discussion.

THE COURT: You can buy a lot of things. I'm sure you can buy -- at fair market value you could have bought horse-drawn carts in 1912. But if you were Ford Motor Company and you bought at fair value the leading cart manufacturer and it turned out to be owned by Henry Ford, that people might think that that's odd; right? Buying pong, I'm sure, has some fair value to it. But it may not make any sense; right?

MR. NACHBAR: Again, it's a question of price. I mean, there are a lot of people --

THE COURT: Unlike the paradynamic business judgment rule case, we can ignore the reality of the conflict of interest. I mean, I get the business judgment rule. I agree, it's cool. I would hate to be a judge in a world without it because it would be crazy to sit around and like fault people at Coca-Cola because they did the New Coke. This would be crazy.

On the other hand, if they did the New Coke and it turned out that the CEO had come up with some idea and had patented the name New Coke and sold

it to the board, I think that would be seen as a different situation; right?

MR. NACHBAR: Yes. But on the fairness of price, Your Honor asked about the record. Again, these are low multiples. That's undisputed. The plaintiffs don't contend otherwise. The transaction is significantly accretive. That's an undisputed objective fact.

Finally, there's a financial advisor who gave financial advice. It's an independent advisor. This isn't McMillan where, you know, Len Riggio went out and lined up the financial advisor or hired them, interfered with them, spoke to them. None of those allegations exist. And they gave a fairness opinion. And directors are entitled to rely on that. So there is absolutely nothing in this record to indicate that the price was unfair.

Should you be in this business?

THE COURT: How about the note allegation?

MR. NACHBAR: I was going to get to that next. Thank you.

That I find to be extremely curious. Again, we've got a record on that. It's Exhibit 5 to

the Waesco affidavit. We've got --

THE COURT: This is incorporated in the complaint?

MR. NACHBAR: It is.

THE COURT: How?

MR. NACHBAR: It's minutes that are referred to in the complaint.

THE COURT: For this purpose?

MR. NACHBAR: For the purpose of talking about what the board did and when it did it. Yes. So it's part of it. The plaintiffs haven't challenged any aspect of the Waesco affidavit or its exhibits. And we were very careful to only put in things that were expressly referenced in the complaint.

Page four talks about Mr. Steinman, who I believe is Greenhill, right at the bottom, "Mr. Steinman then discussed the committee -- with the Committee Greenhill's view of current market interest rates and other financial terms for similar debt. He noted, in Greenhill's view, that the 8% and 12% interest rates used in Greenhill's presentation to the Committee were materially lower than the interest rates that the Company would have to pay if it issued

senior and subordinated debt respectively to third parties in the current environment."

Okay. That's the financial advice they got.

THE COURT: Where is that incorporated into the complaint?

MR. NACHBAR: We can find it.

THE COURT: I don't think it is. A key paragraph of the complaint is 50 or 51 amended. It says they had a revolving credit line with an interest rate currently less than 5 percent and already had a revolver lower than that.

MR. NACHBAR: Sure. They could have drawn down their entire credit line and could have been left with no credit line and no cushion. Those are business judgments that people make.

Moreover, Riggio didn't want the notes. Again, the record is undisputed.

THE COURT: It's not a record. I mean, it's not.

MR. NACHBAR: Okay. The complaint.

THE COURT: I understand this doctrine. I mean, we've been very assiduous, I think, about looking at the entire things of disclosure

claims and how you're characterizing documents. The Supreme Court's admonished us about how we use things outside the record. You know, I've been submitted about 400, 500 pages of stuff. I'm supposed to now go back and say these minutes are right and the complaint that pleads that this is above what they could have got out of it is just wrong?

MR. NACHBAR: No. But the plaintiffs can't have it both ways. They can't make a Section 220 demand, get minutes that say there was a fairness opinion, and then plead that there was no fairness opinion.

THE COURT: Well, they didn't plead that there was no fairness opinion.

MR. NACHBAR: I understand that. But they pled, for instance, that these notes were, you know, an outrageous giveaway to Mr. Riggio, essentially. Well, the fact of the matter is, they were on interest terms that were better than the company could have gotten from a third-party. And the other minutes that they also incorporate show that Riggio didn't want the notes. He wanted cash. You know, if this is -- you know, cash is king. People want cash for obvious reasons.

And what he wanted was $470 million of cash and $150 million of notes. I think he would take all cash if he could get it. And that was bargained for. The company said, "More notes, less cash." So I don't understand how that could possibly be pled to be a giveaway to Mr. Riggio. It's a giveaway that Mr. Riggio didn't want.

THE COURT: Now I have to get into the ask of Riggio?

MR. NACHBAR: Well, I think --

THE COURT: How can I do that?

MR. NACHBAR: I think, if the plaintiffs are going to plead that these notes were a giveaway to Mr. Riggio, I think the Court can take cognizance of the very documents that they put before the Court that they incorporated in their complaint that show objectively that Mr. Riggio was asking for less notes and more cash. The allegation is, you should have paid cash. And by paying notes instead of cash, you gave him an extra $80 million. It's $80 million he didn't want. He didn't ask for it. He asked for the opposite.

THE COURT: And where is this specifically incorporated?

MR. NACHBAR: Again --

THE COURT: On this point?

MR. NACHBAR: We can get that to you. I don't have that at my fingertips because it wasn't challenged by the other side. We can get it. It's in the complaint. We wouldn't have put it in the affidavit otherwise.

THE COURT: I know it's probably referenced in the complaint -- the document -- but that is not -- I don't believe they were relying upon this document -- that their allegation is lifted from this document.

MR. NACHBAR: Again, they referenced things about the meeting at which --

THE COURT: Didn't they also say, for example, you could have given him stock; right?

MR. NACHBAR: They did say that.

THE COURT: The reason they didn't do that is they didn't want to invoke Revlon duties; right?

MR. NACHBAR: I don't know. They say he's already a controlling stockholder.

THE COURT: We went through that before.

MR. NACHBAR: Right. Again, I'm not sure how you can have it both ways.

THE COURT: You can. In a world where -- again, we're not in second grade math.

MR. NACHBAR: Right. Well, there is just no basis for the allegation that the notes were somehow a benefit to Mr. Riggio and the objective facts that the plaintiffs themselves have put before the Court show it was a detriment. It's something that he bargained not to have.

The last point I would like to address very briefly is the "why now" point. As Your Honor pointed out in the press release, this was said to be -- at least what the press release shows -- a long desired combination. But what made it, in addition to the just general need to diversify that the company perceived, there's another factor that I -- that is in the press release I should have said on the opening, and, that is, that these companies were beginning to compete in a way that they hadn't previously.

The bookstore -- the bricks and mortar store on the college campus -- doesn't really compete with the bricks and mortar store in the shopping mall. Once you get into a world of e-commerce, and you're

talking about web sites, the College Booksellers website competes directly with the Barnes & Noble website. And so what I think was perceived over time was, as more and more of the sales took place over the Internet and through e-commerce, there was more and more direct competition between the two companies, in a way that historically hadn't been the case.

THE COURT: They do compete. The reality is, you probably wouldn't open a Barnes & Noble retail store for the public company in West Philly because, if Barnes & Noble is running the Penn bookstore, you probably wouldn't do that; right?

MR. NACHBAR: I'm not sure about that. I think they sell very -- to some extent different things. They serve different markets.

THE COURT: I said in West Philly. Why would you do it within five blocks when you can get -- you know, if you're hungry for prose, my sense is you can get them both. If you're hungry for a latte poured in a book store, you can get them in both; right? Can you get the Nook in both?

MR. NACHBAR: But if you're hungry for Judith Krantz or somebody, you might get that at one and not the other.

THE COURT: Sadly, College Bookstores are not entirely high-minded.

MR. NACHBAR: But I think, if you looked at the inventory and you went through the shelves of a Barnes & Noble at the shopping mall and the Barnes & Noble at University of Pennsylvania, I would certainly hope they would be different. And they are different --

THE COURT: At certain schools they sell beer bongs.

MR. NACHBAR: Yes, I'm sure they do. A lot of campuses are contained. West Philly is an exception. Most college campuses aren't quite like Penn's.

But when you get into e-commerce --

THE COURT: This would be a good opportunity. I pointed out to Mr. Nachbar and his adversary in another case, Mr. Heyman, that TV shows come up, perhaps as you get a Community episode on Thursday night, about a Barnes & Noble college bookstore at the Community campus, if you've seen that. But we had a Kentucky Fried Chicken case and I was watching -- it was Community. And they had a show about -- the whole theme was about competing with

another community college by doing a space lab. But the space lab was of a previous era and it was the Kentucky Fried Chicken lab. So it could be a new opportunity.

MR. NACHBAR: I did watch that episode, albeit not with Mr. Heyman, regrettably.

But anyway, these companies were beginning to compete in a way that they hadn't before. That was another impetus.

THE COURT: Isn't this the thing? For a judge it can be a situation where someone is making a perfectly good argument, but just in the wrong procedural setting?

MR. NACHBAR: Look, that's what Your Honor has to decide.

THE COURT: I'm just very far afield from what is within this complaint.

MR. NACHBAR: Well, no. But, again, the complaint incorporates the press release announcing this transaction. That's what the company said when it announced the transaction. It's Exhibit 1 to the declaration. If Your Honor feels it's a good argument in the wrong procedural setting, Your Honor will tell us that and we'll move on to the

next procedural setting.

THE COURT: I just know, in the context of cases -- the Supreme Court has been very clear. When you look at a disclosure claim, you can look at the entire proxy statement. If they're unfairly characterizing that -- on the other hand, when you look at, well, oh, they cited for their disclosure statement the proxy thing, that means they have to incorporate the stuff about what happened. No. That's different. Right?

MR. NACHBAR: Right. But I think what was being alleged there -- and I actually litigated that case -- Santa Fe Burlington Northern -- there was an allegation -- a specific allegation that the price was unfair and disclosure allegations. Not my side, but our co-client, Santa Fe, put in the whole proxy statement and asked the Court to accept as true allegations that the transaction was fair, et cetera. And the Supreme Court said no, that was erroneous. And the case was remanded -- reversed and remanded on that ground.

But I think it's different here because these -- what we have here are conclusory allegations that really don't have fact support. When

you actually -- like the note, for example -- and when you actually look at objective facts, not things as to fairness, which is subjective, but what did Mr. Riggio ask for in the transaction, that's an objective fact. He asked for more cash and less notes. That's just the fact. I think the other side needs to deal with that.

That's my only point.

THE COURT: But that objective fact has never been pled in the complaint?

MR. NACHBAR: I think it is pled in the complaint because it's in a document that's incorporated by reference.

THE COURT: Okay.

MR. NACHBAR: Thank you, Your Honor.

MR. RIEDER: Your Honor, I want to come back to the facts that are pleaded in the complaint and plaintiffs' argument. They allege in their argument that Mr. Riggio acted to coerce -- that's the word they use -- to coerce the board into approving the transaction. They say in the complaint, a specific and detailed allegation evidencing his control over the board and the transaction process. That's what they argue. And that's the burden that

they effectively acknowledge. They have to state a claim against him. And consistent with that, they cite authority where there were allegations of that nature against allegedly controlling defendants.

Now, we've not only seen plaintiffs' counsels' brief, but we've heard their argument. And there's still no specific allegations of alleged ways in which he controlled or interfered. I heard one conclusory comment that he wore two hats or interfered, but no examples of that during argument. And there really are none in the complaint. And absent that, simply inferring his control from sort of the overall circumstances or karma of the case does not state a claim.

THE COURT: Karma? What do you mean by karma?

MR. RIEDER: The aura. What I heard --

THE COURT: The aura of his retaining control of the trademarks? That's an aura?

MR. RIEDER: But that doesn't go --

THE COURT: The billion dollars of intercompany transactions between Barnes & Noble and companies controlled by Mr. Riggio in the two years

prior to the transaction? That's karma?

MR. RIEDER: It does not go to the control over --

THE COURT: Mr. Riggio putting in place, when he left as CEO, his brother, and then his brother, the key officer of the company, stepping aside, which I assume is -- you know -- is part of the idea of the Hippocratic oath: "Do no harm." Of course, if you've got an affirmative duty to care for something, doing no harm when someone else is injuring it is not much of an answer to whether one's fulfilling one's duties.

MR. RIEDER: The record, though, shows that in fact Mr. Riggio has nurtured this company. And indeed he retains a very large interest in the company. So both factually, and from an interest point of view, he has every incentive to preserve the value of this company.

THE COURT: I suppose, if you put aside what he received for his shares, he has every interest. That would always be the case, then, in interested transactions where someone owned equity. Right?

MR. RIEDER: Well, maintaining a large

stake in the company is consistent with his interest in preserving the value of the company. That's right.

The key point here is the absence of any real allegations that he exercised control. And even today, even after that was discussed at some length during defense counsel's argument, there has still been no specific responses to that argument. And under the burden, as they articulated in their papers, as they argued it here, and under the case law they cite, that it is their burden to specify some conduct. And they haven't done that.

THE COURT: Even if the transaction was substantively unfair, the cleansing mechanism did not work, so long as your client didn't strongarm the ineffective special committee, he would not be liable for the unfair result? We went over this before. Are you asking me to make new law of that kind? That's never been the law with respect to interested parties in transactions in Delaware that I'm aware of.

MR. RIEDER: But there is no showing here -- there are no allegations that would say --

THE COURT: Why did he not think of this ten years ago? Tell me why he kept them separate? I don't really get it, except it was

potentially good for him. Maybe it will be explained to me why, in 2009, it suddenly became a good idea to put them together.

Now, I'm pointed to something I should read, where I should take comfort in, where Miss Miller said this has long been the goal, which would suggest it has long been the goal of these other folks. Mr. Riggio is only willing to do it when it was a good deal for him.

MR. RIEDER: Again, the issue here today is the sufficiency of the plaintiffs' complaint and whether or not they allege enough to state a claim under Rule 12(b)(6).

THE COURT: That's why I'm asking you doctrinally. Len Riggio teed up in his self-interest. And so long as he doesn't coerce the special committee -- if it's an unfair deal, an unwise deal that benefits him at the expense of the company -- he's off scot-free, so long as he didn't, you know, break their arms.

MR. RIEDER: But where the special committee freely functioned, where it had financial advisors --

THE COURT: We went through that

before. Then you're just essentially reiterating Mr. Nachbar's argument.

MR. RIEDER: My point is that there is no basis to conclude, as the complaint is pleaded, that the transaction is unfair in any way.

THE COURT: Okay.

MR. RIEDER: Just one additional point. With respect to the Stephen Riggio and Lawrence Zilavy, there's been no demonstration of any requirement under Delaware, or any other law, that would require potentially interested defendants -- interested directors in their situation to not abstain.

THE COURT: Wait. To not abstain. If Barnes & Noble is about to go off a cliff, is the CEO entitled to abstain from efforts to involve himself in the situation? Is his, "I have declared myself Switzerland," is that an invariable safe harbor for the chief executive officer of a Delaware public company?

MR. RIEDER: It's a good hypothetical. But the circumstance pleaded here is not Barnes & Noble going off a cliff. It's Barnes & Noble creating a committee with high quality advisors to

question independence and ability, and allowing that process to function.

THE COURT: We're back to whether the cleansing device works or not. Right?

MR. RIEDER: Well --

THE COURT: And when the committee's been deprived of the advice of the chief executive officer, the disinterested advice of the chairman has allowed counsel for the company to switch sides? It's okay. CEO's free, scot and clear, if it turns out that this was unfair because he stepped aside.

MR. RIEDER: He abstained in a principal manner --

THE COURT: He abstained from a vote. His day-to-day job is to be the key dude. This is a half billion dollar -- this is the biggest transaction that Barnes & Noble made in the last decade; right?

MR. RIEDER: It may well be.

THE COURT: A larger one? You know a larger one? Your firm has been involved with the company for a number of years. Is there a larger one?

MR. RIEDER: I can't think of one right now. The situation here is that the company was not abandoned in the way that the hypothetical posits.

The company was under the care and representation of an independent committee --

THE COURT: Why isn't he, just like his brother, dependent on that?

MR. RIEDER: Well, with respect to Steve Riggio, there's not even a conclusory statement that he in any way controlled this process.

THE COURT: That's not the point I'm saying. I hope to gosh that people who are CEOs of Delaware companies realize they have an affirmative duty to try to exercise the duty of loyalty and to care for the company. Not just to not do harm. Try to get your compensation package approved, even by the weakest compensation committee, where you say basically "I do no harm. I'm in office. I'm in the corner. I got classical and new age music and I've got decaffeinated beverages and I sit in there and I don't really talk to the lower level employees, thus I can't say anything that would invoke any employment law. I say please and thank you to everybody. I hold the elevator and I'm not a problem. So I'm an ideal executive. There's no harm." Right? That's not your job. You have actually a job to do something. And what you're telling me is that the younger brother

just took himself out. And that is a safe harbor for him; right?

MR. RIEDER: It's a safe harbor in the sense that a director in that position to abstain from participation in the transaction. And he did that. And the additional facts posited of abandonment do not obtain here because the company had a process that vigorously and effectively enabling -- represented by Greenhill, an independent law firm, an independent accounting firm -- that vigorously and ably protected the company's interests.

THE COURT: Thank you.

MR. RIEDER: Thank you, Your Honor.

THE COURT: Miss Tikellis, anything else?

MS. TIKELLIS: No. If Your Honor doesn't have any questions, thank you.

THE COURT: Well, this is an odd one. It is. It's an odd situation. I'm a big believer in not making ridged doctrinal decisions based on oddments unless one has the full context. You can end up messing up the law. You end up doing reputational harm potentially to people whose situation you don't fully understand because of the nature of the limited

record, and you can also end up foreclosing remedies that should be available to stockholders if you do that.

I am comfortable, actually, disposing of the motion to dismiss right now. There's a few easy issues and there's a few noneasier issues, and I've been thinking about all of them for a while. The easiest issues, let -- me just start with aiding and abetting.

NYMEX is a NY MEX. Sounds like a new kind of cuisine. It's a thin crust -- the pizza -- chopped with a lot of chilies. NYMEX is one of the cases that has the basic elements and talks about you have to have a fiduciary relationship, a breach of the fiduciary duty, and knowing participation by a nonfiduciary defendant to state a claim. Well, if these folks -- if folks here knowingly participated in the breach of fiduciary duty, they committed a breach of fiduciary duty. They didn't aid and abet. They are fiduciaries. And they either breached those duties or not.

There's no room -- I mean, sometimes there's useful redundancy. We talked about the knowing and completely in line Del., which I think was

an emphasis of, when there's a 102(b)(7) case and there's a third-party deal, you've got to show a loyalty problem. It's like -- I had a case a few years ago about indemnified hold harmless and how hold harmless meant something different than indemnify. You can't frankly find the phrase "hold harmless" without its friend "indemnify and on the front." They're married. They have not been torn asunder. The aiding and abetting claims, it just doesn't lie in this circumstance against folks who are directors of Barnes & Noble. It's dismissed.

Count IV, which is the waste claim is also dismissed.

Citigroup, Brehm v. Eisner, other kinds of cases, stand for the proposition that waste is basically -- the exchange has to be so one-sided that no business person of ordinary sound judgment could conclude that the corporation has received adequate consideration. It's a very difficult standard for plaintiffs to meet. And this is a pleading stage. But the plaintiffs haven't come close to a showing called waste. Waste is a form of breach of fiduciary duty. But you really have to show essentially that you got no consideration, or it's

just so outrageously obvious that there was inadequate consideration. That's not pled here.

And I do think in our law there's a distinction. It's something that could be determined to be substantively unfair and outright waste. Those are not the same things. I'm not even sure our good lawyers in the plaintiffs bar would want them to be the same thing. If it were, it would really be good for defense lawyers, I think. But the waste claim is out.

Likewise, Count V, which is the count against Mr. Leonard Riggio for unjust enrichment, is out. I think the point there is, as the defendants point out, usually you don't use unjust enrichment when there's a contract. Right? The contract subcovers the matter.

Now, I think there was a little -- there's another layer of analysis that I would sort of add to the defendants' analysis. Here it's not the usual case, like where you brought in sort of a general equity case, or something where somebody throws unjust enrichment in a situation where people are third parties and you point to the contract and say, "Wait. If you took under the contract, it's not

unjust enrichment. The specific dealings of the parties cover it. There's no room for gap-filling." Here it's actually there's another layer to the analysis that precludes the plaintiffs' claims. It's not just that there's a contract. There's an equitable -- there's an equitable common law way of avoiding the contract that supposedly provide the unjust enrichment, which is, if the contract is tainted by breaches of fiduciary duty, it can be set aside in equity or there can be damages in equity for breach of fiduciary duty.

The entire fairness standard is obviously part of the common law of corporations way of dealing with the fact that interested transactions raise real concerns. They used to be entirely prohibited. But they're tolerated by -- in certain circumstances subject to the accountability mechanism of the fiduciary duty of loyalty. And the notion that the fairness standard ultimately applies and is not met, that the fiduciary who was benefitted at the expense of the corporation is on the hook to make up the difference, and thus the duty of loyalty extracts from that fiduciary any excess gain.

In other words, if the transaction's

not tainted by fiduciary duty, the contract stands and there's no room for unjust enrichment, and there's no need to backup the analysis of the contract with any gap-filling device because you already have that. That's what the fiduciary overlay is. So the unjust enrichment claim against Mr. Riggio is gone.

So we get to the tough part; right? Sort of do 12(b)(6), go to 23.1 now, and probably go back to 12(b)(6). The first question is demand excusal case. It's a derivative case. Everybody argues that the Aronson standard applies. I was wondering whether we were going to get any board change issues. We didn't. And you got the two-prong test. The first prong is whether the majority of the board is independent and disinterested. The second is whether, by particularized pleading, the plaintiffs have pled a breach of fiduciary duty. There's a relationship between the two and it's actually explained in Aronson that you can be less -- you know, there's a lot of concern about structural bias. We can be a little less aggressive about addressing that because we have the safety valve of the second prong.

Now, the first prong is kind of interesting here. Obviously you've got three

directors, I think, who the defendants concede would have to be considered not independent. You got Leonard Riggio, who is clearly interested. Stephen Riggio, there's no claim he can act independently of his brother. Zilavy can't act independently of Leonard Riggio. And I believe it's fairly pled that he took benefits from the transaction. Honestly, even if he didn't take benefits, he was an officer and manager of Bookstores. He's conflicted.

And you get to Mr. Del Giudice. I'm going to admit that I can't unknow what I know. And I take judicial notice of the fact that Mr. Del Giudice runs an investment fund, that Mr. Riggio has been a large investor in that fund. And I stick by what my concern was in the other case. I could not at a pleading stage deem him not independent. In fairness to defendants here, that's not part of this complaint. I can't unknow it, though, and it really wasn't susceptible -- it's not really not an objective fact. It is. It's not something like how often did he kick off. It's a reality of an economic relationship.

The other stuff in the complaint about Bill Bradley. Everybody is beating up on Bill. I

kind of like Bill. That doesn't really do it for me. But it's this other thing. Then you get to form. Then you get to hard.

Questions. Miller. I did have the other case. In that situation involving that context, I did not think that any burden had been met to show she was not independent. As some people probably recall about that, I was very careful not to give anybody their Unocal extra boost for independence. I decided that case and I expressly did not rely upon any material enhancement for the independence of the board. I was very careful in that.

What I looked at is what they considered in that context, which I also very -- I won't say very carefully -- I clearly indicated was not the context in which the entire fairness standard was going to apply. This was not a direct conflict of interest transaction with Riggio, and it was different. I was hesitant, and appropriately so, I think, to make a rule about former managers. And I was also operating under some fairly severe time pressure. And Miss Miller's role was not very prominent. It just wasn't.

Here she's the chair of the committee.

And I have to say, I find it -- it says something -- I think it is unwise for people to fail to admit that they're human and that their own experiences inform their judgment when making common law and applying common law. I think that many of one's most important relationships in life are not familial. Family is wonderful. It's critical. But so are other people, particularly people with whom you've had an incredibly close and important professional and personal relationship with continuously over a generation. When someone has mentored you, when someone has helped build you into who you are, and when you were their protege and you've derived all kinds of material benefits, both financial, but even more in terms of the personal development and other things you have, to be able to put that aside, I confess, I think, I find that personally -- there are a large number of people to whom I owe a lot personally and who I would never pretend -- it would not be on my mind who they are when I'm bargaining with them about a half billion dollar transaction, or something clearly material to that. This is way, way, way material to Len Riggio. Hugely so.

Miss Miller is not just a former

executive. She was not the top dog at Barnes & Noble ten years ago, who is now on the board dealing with some comparatively young pup. Her boss and mentor and friend is still the top dog at Barnes & Noble. She never really fully left Barnes & Noble. She's derived a lot of benefits economically from being on the board. And it's pled, frankly, that she is in a mentor-protege relationship of longstanding with Len Riggio. It's really odd to me. It says, as pled, "Largely owes her career and professional success to Riggio, her former boss and good friend." This is not just being a former executive.

The other thing, she's been resolutely independent for well over a decade. So then you have -- who else is on there? Another long-term friend, Monaco. Been on the board since the middle of '95. Been a monitor before on the comp committee. I didn't read the report, but it didn't work out so well for everybody involved. She got removed from the comp committee because there was this little problem with backdating. Kind of shocking, by the way, the pervasiveness of society. The idea that you don't know that you can't backdate things. But that's -- hopefully we've all learned that. But she wasn't

really -- she apparently had failed in that monitoring role. I'm not saying she failed in any way that made her legally culpable, but it didn't work out great. She gets put over on the audit committee -- kind of a strange relocation position -- and then ends up on this.

Then we have Dillard. I'm going to express to Mr. Nachbar, Mr. Dillard didn't really stand out much in the prior case. And it may be -- and I take seriously, frankly, plaintiffs better be careful with what they allege. If at a later stage it's nonsense, that's not cool. What's alleged in this complaint with particularity is that Dillard and Riggio are close friends and frequently socialize and play golf together. He's also on the nominating committee. People -- frankly, it's hard not to take into account, when the founder and chairman leaves, leaves the CEO, but he's not really a controller, but he just puts his little brother in as CEO and there's no search for anyone else -- that's what's alleged -- just put the little brother in there. And that Mr. Dillard. He's a wealthy guy. I'm not saying in any of this that these folks owed their wealth -- maybe in Miss Miller's case she owed a lot of

management opportunities to Mr. Riggio. And she's done well on the board.

In Dillard's case he has his own wealth. He also controls his own company called Dillard. He may have a certain view with how you deal with controllers and the respect that they're owed. And these are -- he's also been resolutely independent since 1993. 16 years.

The defendants say, this is just like Beam. Mere allegations. Now, Beam, the Supreme Court says, Stewart and other directors moved in the same social circles, attended the same weddings, and described each other as friends. And they keep saying mere allegations of personal friendship. Well, I don't think this is that. I'm not convinced it's just the mere. In terms of Miller's case, it's not. We're talking about a very important mentor-protege relationship, unbroken working relationship over a generation.

Dillard. It's alleged personal friendship. Again, being around this whole time.

Monaco. Friendship. It is -- I say, I do believe that it stresses the notion of independence when you've been resolutely independent

going on a generation. That's a long time.

Now, the problem under the first prong is I have to make some sort of binary labeling. I don't actually want to put an opinion in A.2d saying Miss Miller is not independent. But honestly, I'm not really prepared to put in the A.2d saying that she is.

And the second prong, in my view, in part, exists so that you don't make some sort of irrevocable decision prematurely based on close calls. I don't know that it credits the defendants or the process that three of the four members of the special committee seem to be strange choices, especially where there's a couple others where there's not really anything pled, but they weren't on the committee.

The second prong says very clearly, and Disney and other cases say that, if you plead with particularity facts that support an inference that the process -- that the transaction was the product of breach of fiduciary duty, then demand is excused.

Doctrinally, I would admit that there's much force in Mr. Nachbar's argument about does this mean, in terms of the logical relationship of the first and second prongs, that you have to plead a nonexculpated claim as to a majority of the

directors. Because if it's only one of the directors who faces liability, you know, we're really ultimately looking at the issue of demand excusal. And that's just not enough.

I actually believe I can put that hard issue aside, for reasons that I'm going to discuss. But I admit that it's a real issue. The thing that is troubling is the notion that you would put that aside. That in a case where there's a genuine controller, who is on the board himself, that he's -- that demand would be excused when particularized facts suggest a breach of fiduciary duty, even if exculpated by the outside directors, and a breach of duty of loyalty by that controller. I don't believe there's a Supreme Court decision that says that.

And upon looking at Lear on the break, the context in Lear was quite different. Carl Icahn wasn't even on the board. And I wasn't even clear, having -- I only had a half hour. I was saying a 12(b)(6) claim was stated in Lear. But I admit there's a lot in what Mr. Nachbar says. Part of the second prong is really, if there's a sufficient fear of liability, because they met a particularized standard, it's hard for you to be objective. I

question whether our Supreme Court would let that be a gateway for controllers, particularly at -- if the second prong is to be a safety valve in a situation where noncontrol -- again, maybe we're coming down to control -- noncontrol being important. And I'm going to talk about that now in terms of why I think the second prong -- and I do think the second prong is met.

You know, both sides -- Mr. Nachbar, as usual, is very precise and he makes the point about, "Well, for example, the Revlon point. If he's already in control, why does it matter?" Well, you can have indicia in control and you can be in absolute control. There are gradations. But I do start in looking at this and why the second prong -- Mr. Riggio has a lot of the attributes of control. He is the largest stockholder. He's been the chairman continuously. He structured how this went public. Even when he left as CEO, it seems to be that he has the major strategic vision for the company. I have no doubt he has the best office. And even, if you look at this transaction, when you bought in College Bookstores, it was structured in a way that Mr. Riggio could take the College Bookstores' shares of

Barnes & Noble that were held and he kept them with him.

Was there an opportunity here potentially? Maybe it could have been a sell to the public to reduce his control to actually acquire those shares and increase everybody's interest. I don't know. But he kept them.

When he stepped down as CEO. Who comes? An outside executive? Is there a nationwide search? No. It's his little brother. So, he only has 31 percent of the vote, but he's got the chairmanship and his brother is the CEO. It's rather different than just having 31 percent and being a passive investor, being Warren Buffett and having professional management. The two key officers in the company are both held by people named Riggio.

Defendants point out trademarks. Hey, we could get our trademarks back. Well, who kept them? He kept the trademark for the company who needed it the most in a College Bookstores chain where the stores -- it's not even obvious they're Barnes & Noble stores in the first instance? Does that mean he didn't have control? Sounds like a fairly -- something that could have been a calculated

way of retaining leverage.

Why did it not go to the public company in the first instance? He could use that as a bargaining chip.

I can't ignore -- it may be that it's all fair. But it sounds like a pretty good source of ongoing revenue to a lot of other companies Mr. Riggio controls -- Barnes & Noble, the public company. Even if it's a market rate -- a guaranteed market rate of profitable businesses can be a pretty good thing. Right? That's why there was all kinds of concerns about oligopolies, about public utilities. "Okay. I'll take the market rate. Market rate is 7 percent return on capital. I guarantee I have a shipping company. Every year I'm going to get tens of millions of dollars of shipping business from Barnes & Noble. That makes me able to run a shipping company." That's a pretty good thing.

The client we already have. Right? Mad Men fans were getting over the loss of Lucky Strike. Lost Lucky Strike. It's difficult. You know, a billion dollars of intercompany transactions in the two years preceding the transaction. There's been concerns about other things. The fact that

Mr. Zilvay is on the board, too. There's another subordinate. So we got the little brother subordinate, we got Zilavy subordinate, we got the protege subordinate.

Now, Miss Tikellis took the Lynch pressure off. Right? I'm not going to Kahn v. Lynch this. I don't start with the assumption that every transaction with the controller is subject to sort of the entire fairness from the get-go standard. That does not mean that interested transactions are automatically business judgment rule. They're still an interested transaction. And you have to look at the approval process. And if there are pled facts that suggest that the approval by the disinterested members of the board was tainted, then the interested party has always been on the hook, even if they act in subjective good faith. That's the whole point of it. Otherwise it's not much of a guarantor in the end of fairness.

So I'm going to assume it doesn't really matter. There's enough here that, when we're not doing Kahn v. Lynch, this is a very influential insider. Extremely influential. He controls the trademarks. He's able to get the board to do a

billion dollars of intercompany transactions with his other companies in the previous two years. He's managed to populate the board with three people who are either his current or former management subordinates. He's also able to populate the board with people who are his friends and who have been on the board for 15 years. So, when you get to this -- what is it? All together, frankly, the plaintiffs have pled a bunch of specific facts that, when piled up together, give off a pretty fishy smell at a pleading stage. And they give me a reasonable doubt about the board's compliance with their fiduciary duties. I'll just tick through them.

The committee. I already mentioned it. I think it's a very oddly formed committee. Why would anybody pick Miss Miller to chair this company? Why would you pick Mr. Riggio's protege and friend of 15 years to chair a committee to negotiate this? Why would you then supplement her with another long-term friend and person who got removed from the comp committee in terms of Miss Monaco? Why would you add Dillard on top of that, who is a controller of his own business. Why would you do this?

And then it just -- when you have a

doubt -- as I'm going to get to later -- when you have a doubt, you don't dismiss. I'm not talking about irrational doubt. I'm not talking about some conspiracy theories. I'm not talking about weekly news of the world. I'm talking about something that a rational mind wrestles with.

The committee configuration is odd to me. In that regard, I want to say, I find it odd. And this is part of the transaction approval process, and I'll start with it. I find the conflict waiver eyebrow-raising. I just don't -- I don't really get it. When waivers are given, there needs to be a benefit. It's not a question of no detriment.

Frankly, here, there's a detriment to be explained. The committee is already at an informational disadvantage. The person who knows more in the world about College Bookstores and Barnes & Noble than anyone else is Leonard Riggio. Then his brother. You can't have their advice. You can't trust their advice. So they get to take company counsel with them? Why? What is the justification? Because Mr. Riggio wants it? That's another question right from the start. Why? Why put yourself at any other informational disadvantage. Why give anyone

else any leg up?

Now, maybe I'm being harsh. The reality is, it bears explanation and it's an environmental factor that's created on top of a committee that's already sort of odd.

Now, you get things about the transaction. I think there's -- is it outrageously priced? Who knows. That's not the main theory. There is the suggestion that it's mispriced. I'm fairly edgy. I am not willing to go and rule on this on the note and say, because there was a reference to these minutes, it's substantively true that Mr. Riggio wanted cash, didn't want these notes. These notes were a great deal. That's not what's pled. It's specifically pled the company could have done this, could have gotten access to credit at a lower rate. And they paid him at an above-market rate. Guaranteed 8 or 10 percent investment in this market. Pretty cool.

The larger thing, though, is what's really pled here is -- and this is, again, where I'm going. I beg indulgence of the defendants in some ways because, again, I can't unknow. But Mr. Riggio was saying things about retail in this environment

that are, again, you know, this may be Emersonian. There may actually be no inconsistency. It's a very strange thing. It would be strange at the pleading stage for me to resolve it on that ground and say there's no inconsistency. He seems not to have had a real appetite for retail -- doing more retail. This is more retail. It may be a different kind of retail, a related kind of retail. But I put that on top of a couple factors that lead me to have concerns. One is Borders. Okay. Maybe Borders is different. But you know, when industries are consolidating, I happen to think -- maybe it's because I'm a reader -- I hope bookstores don't go away. The opportunity to perhaps buy Borders and be the singular college -- singular retail, that might be a better opportunity than buying in the company that your founder decided 15 years ago should be separate. Appears there really wasn't any big consideration given to that. That was ruled out.

Okay. Now I've been pointed to this -- deeper in this document -- where I'm supposed to either believe, one, this has been a long-standing desire of the board to bring this in, resisted by Len Riggio, which suggests, as the Credit Suisse report, which I'm also supposed to look at would

suggest, that Riggio's good at market timing. And the fact that he wanted to sell now suggests it was good for him to sell now, which may suggest to other people maybe it's not the right time to buy. It's all redolent of a situation -- again, this is an inference. That's the most important part I want to make clear. It's an inference. I'm at a stage where I have to draw rational inferences in one direction. It is rational to suppose that this is one of those situations where even subjectively, well-motivated people blinkered their options because they were in a situation where they perceived the options to be ones put on the table only by Len Riggio. So maybe the idea is retail is not good. Maybe. Okay. Let's benchmark a stock deal. "Len, you want us to do this? We'll do it with stock."

Oh, that's Revlon. Well, good. Maybe it's a time for us to look at maybe we sell. You want to monetize your investment. Maybe it's a good time for everybody to monetize the investment. It's an opportunity that the special committee exercise leverage. No, we didn't go that route.

We got another record redolent of using the fact that there's legal doctrine managing

the legal doctrine. We've got to stay out of Revlon. We'll do the note. The note is a great thing because I should look into the documents and conclude it's a great thing. I don't know. Why not use stock? Because it would be Revlon.

Well, what's so bad about Revlon? Well, Len Riggio wouldn't like that. Or we might have to have a stockholder vote if we use stock. Well, what's so bad about that? Special committees have actually been known to insist on a majority of the minority vote in situations where one would not be required. You could subject the transaction to require ratification. It appears from what's pled -- again, it's what's pled -- but legal doctrines were managed, not used as opportunities to extract leverage. I think it's a situation -- it said to me this is a plausible transaction. It's time to put these together. That may be a really great argument at summary judgment or at trial.

There's also the notion, if it was such a good argument, why has Len Riggio been allowed to keep it separate for so long? Why did none of these people, who have been resolutely independent for 15 years, never think or insist upon it? I don't

think at a pleading stage I should just pretend that that doesn't leave real doubt and ignore it. It does.

The larger issue of financial fairness here is really teed up in the Credit Suisse report, which is sort of: what are you thinking? If you were going to do this, why now? At a time when ebook and Kindle is coming on, we're doubling down on retail and Len is getting out with a half billion dollars? Why does he want to get out? Why doesn't he buy us? How about he takes College Bookstores and its future awesome capacity and buy us? It's something that comes to mind; right?

If you're thinking as a disinterested person, when someone themselves -- see, I once had a situation where a very, very smart controller sat on the stand and he was talking about why this one company had a really great future and this other company that was a cash cow had a really weak future, when he was doing a transaction in which he was increasing his exposure to the one with the weak future and reducing his exposure to the strong. Because it turned out he owned the one with the strong future. He owned 91 percent of it, and he owned a lot less of the one that was the business of the future.

And he sold the one that he owned more of to the other.

Well, it's pretty easy to say he wanted to keep for him as a good deal. Then he explained -- he actually said on the stand, "Well, it was like taking pocket money out of one pocket and putting it in the other." With all due respect to the excellent counsel representing Len Riggio today, it is not the same profile for him and the public stockholders. He didn't act like he was playing The Monkey song, "I'm a believer," about College Bookstores. If he was playing that song, he would have kept it. What he did is, he sold it, monetized the investment, diversified his family's wealth portfolio, and put the future of College Bookstores, mingled it with Barnes & Noble. That might be good for Barnes & Noble. But there's a powerful, powerful question that has to be asked about the motivation of Len Riggio in that circumstance because, again, if College Bookstores' ready to kick butt, Len Riggio had 100 percent of it. And he could reap all those benefits.

If this was so logical -- it's been logical since early 1990s. Again, I have no desire to

have an appraisal case at a pleading standard situation. I can't. But I would not be being honest if I didn't have myself about a gazillion questions that I have on my mind about why this board did this then, why they went down this route, why they gave a conflict waiver, why they didn't think of other alternatives. Why didn't they insist on asking: why don't you just buy us? Why shouldn't we? Potentially we should be looking at this is a fairly good transformation. Maybe this is an opportunity, Len, frankly, to reduce your influence over the company. Maybe what we should do is sell us your Barnes & Noble stock.

So it gets down to, I'm not going to dismiss under Aronson because I have a particular -- I think there's a host of particular facts which, when put together, create in my mind a reasonable doubt whether there was a breach of fiduciary duty. I can avoid the doctrinal question about nonexculpation for the following reason. Riggio, clearly under 12(b)(6) -- there's a claim stated for breach of the duty of loyalty against Riggio. He took benefits directly from the transaction.

Zilavy. The fair inference is that he

took material benefits from the transaction. He was also an officer, manager of Bookstore. But he took personally -- there was a darn big bonus pool that, but for this transaction, would not have been available to him. So I think, loyalty, nonexculpated claim, 102(b)(7) does not help them.

You have two directors, Campbell and Higgins, who I don't think the plaintiffs have laid a glove on and who are out under 102(b)(7).

You then get down to the hard question. And I've wrestled with this. I really have spent much of the last week on the following issue, which is, do Dillard, Monaco and Miller get out under 102(b)(7)? I believe it's a very close call. For this reason, I am -- I don't want to make a binary determination on a limited record and call someone nonindependent. But I do think that there are multiple questions raised that cast out on their independence and cast out in my mind about the following. Would these directors have approved this transaction in this form if the owner of College Bookstores was anyone in the world other than Len Riggio? And that's -- I also -- I put it down to this and I reserve the right later in the case to hold

the following. These people acted in subjective good faith, but just blew it because of the context in which they were operating. And that could be a situation where they are not liable under 102(b)(7), even if they didn't fulfill their duties as monitor. But they put themselves in a very awkward situation and maybe they get out. But I can't rule out -- it's when you wrestle with something you know. And this is what I want to say. I've been wrestling with this. And when you wrestle with something and you -- you can have a residual doubt about whether people were influenced consciously in their behavior, whether they knew, frankly, that they were going down a road that they wouldn't have gone down for anybody, other than Len. They tried to make it as good as they could, but they still knew it was suboptimal and not the best way to go for Barnes & Noble.

When you have that doubt, our Supreme Court's teachings are clear. I'm not allowed to dismiss under 102(b)(7) in that because there is a potential for nonexculpated breach of duty. So I'm not classifying this. I don't want this cited back to me that Strine held that you're necessarily not an independent director. What Strine held here is, in a

very unusual situation, with a bunch of particularized facts pled, including business circumstances that bear explanation on a fuller record, that I'm not prepared to rule out the possibility that ties of personal friendship and long-standing business relationships influenced these directors to do something that strayed from what was best for the company and that they knew that.

Later on, after a fuller record and realizing it may be that they played miniature golf once at the kids' part of a Ritz Carlton, and that's the only time that Mr. Dillard and Mr. Riggio got together, it may all come clear. That's why I don't want to write something that taints the law or these folks either way.

But at this stage, with respect to three of the four members of the special committee, I'm not going to dismiss the case under 12(b)(6) against them either. And given that that's the situation -- and with respect to Mr. Del Giudice, I'm in the same kind of camp. He wasn't on the special committee but he voted on the deal.

The hard question is, I guess, Steve Riggio. You kind of feel for him, I guess. I don't

know. He's the little brother in the scenario. It's tough being the little brother. But with being little brother, you got to be chief executive officer, a major executive of an American public company. I assume there's a little bit of compensation that comes with that.

What I'm troubled with in applying the abstention doctrine as an automatic safe harbor is just that. He was the chief executive officer. I reserve the right later in the case to say, yeah, he did step aside. No breach of duty. Okay. But there's something that comes with being the chief executive officer. You have a duty to do your job -- to try to do your job. What I'm supposed to take comfort in is that there was a really wonderful group of people dealing with this entirely rational and obviously sensible transaction, and that the CEO could pull himself out of the process and just let them protect the company. And so long as he did no harm, he automatically fulfilled his fiduciary duties.

You know, I think getting the coolest, or in this case the second coolest chair in the company, getting the biggest furniture budget, all that kind of stuff that comes with it, I'm not

prepared to say on this record, without a lot more briefing, that that's an okay safe harbor for a CEO.

I think pulling yourself out -- there's some situations where you pull yourself out because that is what's meaningfully distinct. Most of the cases where the CEOs don't vote, they're Leonard Riggio. They don't get off the hook because they're interested and the entire fairness doctrine, everything else, holds them ultimately accountable in damages if it's unfair. They don't get any free thing.

What we're talking about here is someone who is in a critical -- the most critical -- I'll take formalism on its face. Mr. Leonard Riggio indicated that his brother was the most important source of managerial advice for the company. He was the most important source of managerial authority. And in the largest transaction that Barnes & Noble has faced in recent history, Steve Riggio went missing. I have no doubt. I have no idea whether he felt this was really good or whether this was something his brother just wanted to do. What if he thinks it was stupid? But he just couldn't say boo to his brother. Does he get to just not vote or does he have a duty to

speak? I don't know that you get off so easy being the CEO on the abstention doctrine. You got a job to do.

And I'm troubled by creating this safe harbor. It seems like a very odd situation, like where people get rewarded for being placed in a situation of helpless conflict and not speaking up or doing anything about it. Maybe Strine's made an odd CEO based thing. But that is the CEO. It's not just somebody else. It's not an assistant VP. You didn't put your cousin just in an independent board seat. You made him the principal executive officer of a public company. That's a pretty critical thing.

So I'm -- I believe, given that -- I'm not comfortable saying that Steve Riggio owed no fiduciary duties in this situation, given all the facts pled. So therefore, for all these reasons, I've thrown out the waste count, I've thrown out the aiding and abetting count, I've thrown out the unjust enrichment count. I dismissed the case as to Higgins and Campbell, but the case otherwise goes forward.

I suggest that you all talk about an implementing order and get me over an order that cleans that up, and you talk about a schedule for

discovery and other things going forward. I appreciate your patience with my many questions. It is an interesting and unusual case. That's why, in large measure, I believe it actually should be dealt with at a time when, honestly, I can take freer account for the full factual dynamic that the board faced. I am constrained. That's one of the tactical issues that defense counsel confronts all the time. I have to credit their story. And this is a situation rife with interesting issues that raise questions in a rational mind about why people behaved.

The great thing about our process obviously is that after discovery, and there's the opportunity on a full record for me to consider it more freely, because there are also -- and I want to say, people tend to come out of these things and you only hear what hurts you most. Sometimes you hear what you like most or whatever. But it's all contextual and you have to take into account everything that a judge says.

I recognize that for everything where I've said that there's a question, there's potentially a very good confidence-inspiring answer. But the way our system works is that good confidence-inspiring

answer is one that the Court should consider after the plaintiffs have had an opportunity to actually inquire themselves fairly and then to determine whether, you know, on a fuller record, those answers are sufficient. It's not at the pleading stage for me to say, "Oh, well, yeah, I have about 27 things I'd like to ask that really bother me about this and that create an inference in my mind that there could have been a breach of fiduciary duty and put that aside and assume that what the defendants are telling me is true, and that there are really good assurances." That's just not the way 12(b)(6) or even 23.1 operates in our system.

So I hope the defendants recognize that there will be another day. They get to tell their story. And that the plaintiffs will ultimately have to meet the burden to show that there's something wrong with this. But on the plaintiff-friendly standard that applies today, a large majority of the complaint stands.

Thank you and have a good day.

(Court adjourned at 3:12 p.m.)

CERTIFICATE

I, DIANE G. McGRELLIS, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 163 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 22nd day of October, 2010.

/s/Diane G. McGrellis
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 108-PS
Expiration: Permanent