IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ORLANDO POLICE PENSION FUND, derivatively on behalf of TWITTER, INC.,	:	
Plaintiff,	:	
v	:	C. A. No. 2021-0041-JTL
JACK DORSEY, MARTHA LANE FOX, OMID KORDESTANI, NGOZI OKONJO-IWEALA, PATRICK PICHETTE, DAVID ROSENBLATT, BRET TAYLOR, and ROBERT ZOELLICK,	:	
Defendants,	:	
and	:	
TWITTER, INC.,	:	
Nominal Defendant.	:	

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Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, September 10, 2021
9:15 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT AND RULINGS OF THE COURT ON DEFENDANTS' MOTION TO DISMISS

CHANCERY COURT REPORTERS
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RAYMOND J. DiCAMILLO, ESQ.
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-and-
JONATHAN K. YOUNGWOOD, ESQ.
JANET A. GOCHMAN, ESQ.
of the New York Bar
Simpson, Thacher & Bartlett LLP
for Defendants/Nominal Defendant

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THE COURT: Welcome, everyone.

MR. DiCAMILLO: Good morning, Your Honor.

THE COURT: Why don't we start with introductions from the plaintiffs, and then we can shift to the defendants and they can get underway.

MR. CURRY: Good morning, Your Honor. Thomas Curry from Saxena White, appearing on behalf of the plaintiff, Orlando Police Pension Fund. I have with me my colleague, Tayler Bolton, also from Saxena White.

MS. BOLTON: Good morning, Your Honor.

THE COURT: Great. Thank you all for being here. I appreciate it.

MR. CURRY: Thank you.

MR. DiCAMILLO: Good morning, Your Honor. Ray DiCamillo for the defendants. Here with me this morning from Simpson, Thacher & Bartlett, Jonathan Youngwood and Janet Gochman. And with the Court's permission, Mr. Youngwood will be making the argument.

THE COURT: All right. That's great. Let's get underway.

MR. YOUNGWOOD: Good morning,

Your Honor. I want to touch very, very briefly on the standard. I'm not sure it matters much, but just to acknowledge the current debate in the cases.

The Supreme Court has not yet overruled *Aronson*. It's undisputed that the plaintiffs here challenge the decision of the board, at least traditionally. That's an *Aronson* analysis, not a *Rales*.

There are many cases since *Zuckerberg* that basically say *Rales* v. *Aronson*, in this situation, which you choose is inconsequential, and I think it's likely inconsequential here. I think your guidance in *Zuckerberg* is we count heads, and that's primarily what I'm going to do. I'm just going to walk through the 11 board members. There were 11 at the time that the complaint was filed, and so we need to get to six if defendants are to prevail on this motion.

Let me start with the easiest one or at least the one probably warranting least discussion, which is Stanford professor, Dr. Li. There are really no substantive arguments as to why Dr. Li would be interested or lacked independence. I think there's nothing really in the opposition. There's limited in

the complaint itself, and I'll just move on past Dr. Li.

Next, I want to take as a group the four directors who are up for reelection in 2021 and 2022, so past the 2020 period, when these events took place. Those are Directors Lane Fox, Rosenblatt, Pichette, and Zoellick. I think they can be handled together, and I think the arguments for them are slightly different than the ones for the 2020 directors and certainly different than the ones for Cohn and for Dorsey.

The argument, as I understand it from plaintiffs, is that they are interested because even though not up for reelection in 2020, they might be up for reelection -- and I'll emphasize the word "might" -- in 2021 and 2022. And, of course, we need to look at this back at the time of the transaction when no one would have known if they would even wish to stand for election either one year out or two years out as it applies to either of them or either sets of them.

The argument to accept plaintiff's view hinges on layers and layers of speculation. One would be that Elliott would actually have gone forward

with a proxy contest in 2020, which was uncertain. And I think that will apply somewhat when we get to the 2020 directors themselves. But it certainly applies in droves to '21 and '22, because then you have to assume that having won the proxy contest in 2020, or perhaps having lost it, Elliott would launch two successive additional proxy contests one year out and two years out.

You'd have to assume, as I already mentioned, that they'd all want to stand for election one year out and two year out and that you'd have to believe that they thought the threat of them being dislodged by Elliott one year out and two year out would be something that would be of significant concern of them in the winter of 2020.

You'd also have to assume that each valued his or her directorship so much that he or she would be willing to breach their fiduciary duties in order to secure those directorships against the hypothetical threat years down the road.

I think you can also look at what agreement was actually reached and layer that on top of these hypothetical situations and speculations.

What I specifically refer to here is

that the ultimate agreement had as part of it a cooperation period that bound Elliott into 30 days prior to the last day of advance notice period established by the company's bylaws for stockholders for the company to deliver notice of director nominations for the 2021 annual meeting.

In other words, if, contrary, just skipping past the speculation and the hypotheticals, you come to the conclusion that the thing most important to these four directors was not to have a challenge for their directorship one year out and two years out, well, they didn't achieve it because the actual agreement that was reached would have let Elliott free, if it had wanted to, to challenge them.

So I think layering that on top of the speculation is a helpful thing to see that this was not a concern to them and they were, indeed, independent, disinterested.

I want to briefly cover a couple arguments in the context of these four directors that I think then apply to most of the others, and then I won't repeat them there unless the Court has questions or there's something specific.

And one is this generalized allegation

that all of them were fearful of an ugly, high-profile, public campaign that's made against all defendants as arguments at least as to why they -- at least all defendants at the time as to why they were not independent and disinterested.

And I think layered on top of that or part of that is that this was a challenge by Elliott that plaintiffs allege had a history of hiring private investigators and being particularly aggressive.

First thing I'll say is if that's an argument that's accepted, that certainly any time Elliott is in a future case, but broader than Elliott, any time an activist with an aggressive history or threatening to be an aggressive history, you'd have to assume that all directors are fearful of these private investigators and are going to forsake their fiduciary duties because of that. I think that is way too speculative and way too generalized.

There are no allegations specific as to what was going to be said about any of these directors, any of them, not just the four, but the others. And so whatever this is, it's, again, speculative and hypothetical and, I think, not worthy of credit in the analysis.

Final argument -- and this applies, again, to these four, but also to others, and I won't repeat it in extreme detail with the others -- is this claim that there was a domination and control by Elliott and Silver Lake and that somehow all directors, all the defendants here are completely controlled by them.

That, too, is speculative and conclusory. They don't really plead domination and control other than in the conclusory way. And so, again, I think that is subject to being disregarded and certainly doesn't affect these four directors.

With that, Your Honor, I'm going to go on to Mr. Cohn and then Mr. Dorsey, and then I'll conclude with a look at the 2020 directors.

With respect to Mr. Cohn, who's the managing partner at Elliott and did end up joining the board subsequent to the approval of the transaction and so is not a defendant in this case, which I think is relevant. He's not being asked to judge whether or not a suit should be brought against himself.

But most of these arguments are based around an assertion that there's some extremely close relationship between Elliott and Silver Lake that

would make an Elliott-associated person incompetent to have any judgment on a claim that might involve Silver Lake.

The claims here or the allegations here are, again, vague and conclusory, and I think the law is clear that they are insufficient to bind Silver Lake and Elliott in a way that would make Mr. Cohn incompetent to have considered a demand in this case had one been made instead of filing a complaint.

They also argue that Elliott desired the share buybacks and, therefore, that ties Elliott to the investment agreement. If you actually parse, I think, the one paragraph of the complaint that does that -- and perhaps there are two, but I'll start with paragraph 58. Paragraph 58 says that Silver Lake proposed that Twitter accept a large investment by Silver Lake, coupled with the stock repurchase. Right?

So the argument they have is that Elliott wanted the share buybacks, the stock repurchase, but the actual allegation they have in here -- and I won't read the whole paragraph. There's another sentence that does refer to Elliott from the

same set of minutes. But the party desiring the investment is Silver Lake, not Elliott. So they through, I think -- and I will say the complaint tells a very compelling story if you read it as a story. But I think as you parse through the specifics -- and this is an example, the complaint doesn't actually tie Elliott to the desire of the share buybacks in the way that it purports to in the briefing.

There's a later reference in the complaint, I think it's paragraph 73, that -- yes, 73 that cites later sets of minutes and does say that Elliott was amenable to a potential investment in the company of the type being proposed by Silver Lake, but that too doesn't get them there that in some way Elliott was controlling things, Elliott was blinded, or Elliott was incompetent here. The share buyback itself was not geared to benefit Elliott. It benefited all shareholders in equal parts. There is no special benefit for Elliott, and so I think this reason too does not disqualify Mr. Cohn.

And then the final, as I understand it, allegation they make about Mr. Cohn to show that he's not disinterested I think has some irony to it. It's that Mr. Cohn effectively would be worried about

what publicity and what bringing a suit here might do and might cast Mr. Cohn and Elliott in an unfavorable light.

The irony there, of course, is part of their other allegation is that Mr. Cohn and Elliott were going to cast others in an unfavorable light.

I submit that if you take the allegations as true -- and I don't mean to -- well, if you take the allegations as true, even the conclusory ones, you would not believe that Elliott or Cohn are shy from public fights on a corporate control-type nature or the evaluation of prior transactions. So I think that, too, can be disregarded.

We can move on to director Dorsey. Mr. Dorsey. The claim here is that Mr. Dorsey was disinterested -- or, sorry, was interested because, in part, one of the things Elliott was talking about was his continued role at the company or certainly, at least, his continued role as CEO.

But the math here and the facts here do not support the conclusion that Mr. Dorsey's position as CEO was imminently threatened. And the simple math is even if they had gone forward with their proxy fight -- speculative -- even if they had

won -- speculative -- and even if they had won all three directors, they would have three directors. They would have had to -- again, this assumes the size of the board doesn't change in the interim. They would have had to have equal success or almost equal success the following year, 2021. And so any threat, just looking at the proxy fight, with respect to Mr. Dorsey was itself speculative, hypothetical, and at least a year-plus in the future.

There's discussion of the Goldman Sachs deck and the various options that Goldman Sachs presented to the company at one point.

There's particular focus on one of the three options, and there were three options presented. That option that was -- well, first, two of the three did not have Mr. Dorsey even starting on the path to leave the company as CEO. That was options 2 and 3. The one they focus on, of course, is option 1 that discussed the possibility of a search for his replacement. But even that option -- even that option had him continuing to serve as CEO while that search continued and no guarantee that search would be successful and no guarantee that he would, in fact, step down.

So I understand that Mr. Dorsey was certainly part of the discussion and one of the things Elliott seems to have cared about -- they cared about a lot of other things. In fact, they ended up in their letter outlining a number of things. But his status as CEO was not, contrary to the conclusion reached by the complaint, imminently threatened by these actions.

Finally, I will address briefly the 2020 directors, which is Kordestani, Okonjo-Iweala, and Taylor. Each of those three were up for election in 2020. We don't dispute that they were mentioned in the letter; that they -- had there been a proxy contest, their positions would have been at risk.

But I think what's missing from the allegations, other than, again, in a conclusory manner, is the -- what they need to prove as well or need to show as well, at least, need to credibly allege as well is that the decision that these individuals made in voting on the investment agreement was the sole or primary purpose of the alleged wrongful conduct, and it's that sole or primary that I think is just absent from the allegations.

The cases are clear that -- and then

second from that is that there was -- or related to it, but second as well is that these directors, again, cared so much about maintaining their positions on this board that they would forsake their fiduciary duties in voting in connection with the investment agreement.

Cases are clear that compensation is not enough to establish entrenchment motive. I don't think there's an allegation here that the compensation for these directors was particularly important to them. I don't dispute that they were compensated for their position, but I don't think there's an allegation that it was particularly important to them.

There's the prestige argument that they make. I won't go through the résumés of each of the directors because I think they all submit prestige for the 2021 and 2022 directors, that these are very accomplished people that are not going to -- I don't think credibly they've alleged are going to, again, put their fiduciary duties at stake to maintain a position on this board if they were put in that position.

And then I won't go through it in detail -- I suspect my friend will -- is the merits of

the investment agreement, which I think is really a second step of this inquiry and perhaps not part of this inquiry at all.

But what I do want to say is there is ample evidence or documents -- I shouldn't say evidence. Allegations and then documents that relate to the allegations in the complaint that point to many strong reasons why this was an attractive investment. And so that, again, goes to the sole- or primary-purpose issue. There's the deck from Goldman endorsing the investment and giving comps that shows that both the .375 coupon and the 24 percent conversion, both of which were improved over the course of negotiations, were attractive. There's the Allen & Co. presentation as well. But there is really nothing in the complaint pled -- again, other than in a conclusory manner -- that would demonstrate that the reason these class of 2020 directors went forward, it was primarily to save their seats as opposed to do the right thing for the company and improving the investment agreement.

Your Honor, that concludes my kind of walk through the individual board members. We need to get to six. I've given you ten. I think all ten were

disinterested and capable of acting on the demand, but we only need to get to six.

I'm going to -- again, because I think we're in this mixed *Rales-Aronson-Zuckerberg* place, I'm not going to focus really much on other aspects that are in those tests unless -- perhaps I will in response or if Your Honor has questions. And I won't belabor this because I think it's briefed, and I will concede to you that it is perhaps novel argument. But we do separately have the argument on the motion to dismiss portion that we don't need to get to six; we need to get to four. And that's because a four-four board here wouldn't have been able to improve this investment agreement. We recognize there are cases that suggest to the contrary. We don't think they went through the full analysis that would be needed to analyze our argument and our analogy is to the demand futility where you clearly would need a majority, but that's in the papers. Happy to discuss it if useful, but we'll rest on the papers on that.

THE COURT: Okay. Thank you.

MR. CURRY: Good morning again, Your Honor. Tom Curry from Saxena White on behalf of the plaintiff.

I guess I want to start by sort of putting our theory of the case in context, what's the big picture here, you know, and then I'll proceed to go through the individual directors, the groups of directors for the demand futility analysis.

But I think that the first thing to recognize here and to think about is that this was what I'd submit was a truly extraordinary series of events. Right? Twitter is not some fly-by-night company. This is not some upstart biotech. This is not a company with any sort of balance sheet problems. Very strong balance sheet. Household name. As my friend on the other side has pointed out, something approaching a blue ribbon board of directors.

And yet in the space of essentially two weeks, ten business days, they went from not even knowing that there was an activist in the stock, placid waters, had no idea; and then ten business days later, they're entering -- they're finalizing and announcing this deal where they are giving away three board seats. It's something like a third increase of the size of the board. They're agreeing to do 2 billion in repurchases that were not previously planned. And they're entering this very interesting

PIPE deal to take on a billion dollars that they admit they had no need or use for.

I think this Court is aware that that is not the usual response from a company like Twitter to an activist, to in ten days capitulate to that extent, give away three board seats, do 2 billion in repurchases, enter this strange PIPE deal with a third party. So it's a situation that sort of cries out for explanation. And that's why we did the 220, got the documents, tried to put the story together here.

And I think that when you go through that nonpublic record and you think about what happened here, there's a pretty clear story. And it's a story in which Elliott's approach and the manner that Elliott approached and the context that it approached and nature of Elliott's sort of proposed campaign here created what we would submit are very severe situational pressures; gave rise to human interests, human incentives, motivations that absolutely colored this board's decision-making; gave each member of the board at the time, all eight members, a very significant, very potent personal interest in finding a way out of this proxy contest, finding a way to get this thing settled, whatever the

cost; and that that motivation led this board to approve a grand bargain that included at least an investment agreement that just did not make any sense for this company; that was not otherwise in the best interests of the company or the stockholders; and would never, ever have been agreed to were it not for the situational pressures of these directors created by Elliott's proxy contest.

And so that's the basic allegation. The interest here and the interest that gets us over demand futility is a situational one. And so I think to consider whether that situational conflict was sufficient to lead these directors astray, you need to do more than sort of what I view as kind of a like loveless and clinical analysis that -- I think we've heard from my friend on the other side: You've got to really get yourself in the boardroom, you've got to see this situation through the eyes of these directors and think about what was this experience over the course of this extraordinary two -- ten-day, two-week period during the lives of these people.

And so what was this like? February 19th, I think Thursday, February 19th, these people filed an upbeat annual report, disclosed, among

other things, an extremely strong balance sheet, aided in part by the fact that they had just raised, I think, some $700 million in December 2019, very strong cash position. Like I said, the waters were placid.

Two days later, things start to change. That's when they get the initial letter from Elliott and, in fact, on the same day submission of nominations for highly qualified candidates to challenge at Twitter's upcoming annual meeting that was a couple months away.

So let's think about what it's like to receive this letter from the board's perspective. Right? There's a couple things they note about this and a couple things about the situation that I think make it different from even a normal sort of activist situation that could create situational pressures, but there's reasons that this approach, I think, would have created particular pressures.

So, one, this is -- there's no soft approach here. Right? There's no friendly first phone call. There's no "let's sit down and meet." They go right to submitting nominations. Here are some nominees. They are going to be on the ballot this year. Get ready. So that's the first thing.

Second, the nature of this letter. The letter is not -- again, it's not sort of a soft approach. It's not -- and it's also not concerning a thesis or theses that sort of would lend themselves to compromise or collaboration. Right? This is a simple and aggressive thesis, and it goes directly to the board's management of this company.

Elliott's letter says it's not -- you know, we have some ideas you're not thinking about. You need to consider spinning off a business meeting. You need to stop investing so much in ABC; invest more in XYZ. That's not what this letter is. The letter is you, in one of your most crucial functions as a board, overseeing the chief executive, making sure that the chief executive's office is in order, you are delinquent. This company lacks adequate governance, they say. And the only solution is that your CEO, Jack Dorsey, be gone. Right?

So this is not the type of activist approach that it's easy to say, well, let's sit down and talk about this, right? This is sort of a binary. It's either are you going to capitulate to this or are you going to go to war? And, of course, if you go to war, you're going to war with Elliott. And I think

there is significance to the fact that the particular activist that approached the board here was Elliott. I think it is different if you get a letter like this from some upstart hedge fund with three employees and a website. This is, I think it's fair to say, perhaps like the most well-resourced, most successful, and, by reputation, most aggressive activist investor in the world.

And we have some testimony in the complaint from fiduciaries of other companies about what it's like to get an approach like this from Jesse Cohn and from Elliott. Right? We quote Jonathan Bush from Athenahealth, who got actually a softer approach. He got approached in the first instance with just a phone call from Jesse Cohn, wanted to talk. He said that when he started researching Elliott after that initial approach, the experience was like Googling this thing on your arm and it says you're going to die.

And so the directors of Twitter, though, maybe they did some Googling, but they didn't need to, right? Because the first time they meet about Elliott on February 26, they get this series of I think truly remarkable presentations from their

advisors at Goldman Sachs and Joele Frank. We quote those presentations at length, both in the complaint and in our papers. I won't read all of the florid language for the Court again right now, but I think there was a loud and clear message to that presentation that this activist in your stock, this is a -- these guys are as aggressive as can be. Their MO is essentially to play dirty, hire private investigators to dig -- the private investigators were mentioned several times. We quote each instance in which they are. Private investigators to dig into the most sensitive aspects of your lives to drum up personal attacks.

And, by the way, not only are these guys aggressive, not only is that their MO, but these guys are winners. 80 percent of the time, I think, the Joele Frank or Goldman presentation reported they've been successful in recent years.

So we're trying to see this from the perspective of the board. One day no activist in the stock. Waters are placid. Now all of a sudden you have an activist in the stock; they've submitted nominations; and you're being told you're in the crosshairs of a very serious opponent here, somebody

who is very aggressive, reputed to engage in bare-knuckle tactics, a repeated willingness to cross ethical boundaries, Joele Frank says in its presentation in wielding pressure on his opponents.

So what do you do? The board decides in the first instance, they're going to try and sit down with these guys. And so that meeting that I just referred to took place, I think, over the course of two days, February 26th and then again in the morning of February 27th. So we don't know exactly when the sit-down meeting occurred between Kordestani and Pichette with Elliott, but I believe it was most likely on the 28th. May have been on the 29th.

And so they sit down and have a meeting. Did that meeting succeed in turning the temperature down? The answer is no. We know from public reporting, that Vanity Fair article, they quote two people familiar that when Kordestani and Pichette -- and I think they were talking about Lemkau, who we'll get to in a little bit -- when they come back, they looked worried because they perceived that Elliott smelled blood and was getting ready to attack.

Okay. And so according to the 220

documents, Pichette and Kordestani and Lemkau and his team from Goldman Sachs, they report on this meeting to the board on February 29th. This is like essentially one week after Elliott first appeared and these directors found out there was an activist in their stock.

What else do the directors hear that day? That's the day they get this truly remarkable presentation from Goldman Sachs -- I think truly remarkable -- where they are told in no uncertain terms, you know, guys -- this is a Saturday meeting, by the way, which I think has some relevance. These directors, one day no activist in the stock, everything's great; a week later, they're spending their Saturday in a series of emergency meetings where Goldman Sachs is telling you, not only is there an activist in the stock, they've nominated directors. If we can't get this thing settled, there's going to be a proxy contest. If there's a proxy contest, you're going to lose. You have relatively low odds of winning, and there is a likelihood that at least some of Elliott's nominees are going to get on this board.

The situation -- and I think my friend and I have somewhat different interpretations of this

document. But the way I read it, Goldman Sachs is saying option number 1 here, and it's the only option for which they include talking points and a strategy for an approach, is that this situation is so dire, this proxy contest that Elliott is threatening is so potent that we think we should consider making a call tomorrow to tell them that we'll let go of Jack Dorsey; we'll announce a search for his replacement.

And, again, I probably sound like a broken record, but I just feel like I can't stress enough how quickly this all happens. One day, everything's fine. A week later, you're in an emergency Saturday meeting being told that this activist that hires private investigators to dig up dirt, they're in your stock. They're going to run a proxy contest. If it goes forward, you're going to lose. You need to do something dramatic to get out of this. One thing we would suggest is maybe just throw Jack Dorsey, face of the company, to the wolves.

So that's what's going on on Saturday, February 29th. That's the situation immediately before Egon Durban and Silver Lake appear to attempt to broker some sort of peace deal here, I guess. And so I think it's worth us stopping there and

considering what was the situation like from the perspective of these directors seeing it through their eyes at that moment, Saturday, February 29th, immediately before Silver Lake shows up and starts trying to negotiate a deal.

I think you have to expect that what you're looking at here is being on the losing side of what is most likely going to be the highest-profile proxy contest in the history of the world. I mean, this is -- I think there's a lot of us in this courtroom are corporate law enthusiasts. Maybe we can find intrigue in even a more vanilla proxy contest. Should Procter & Gamble sell some business units? Should a director get on the board who thinks that's the appropriate course for Procter & Gamble?

This was not like that. This was going to be a proxy contest over whether Jack Dorsey, sort of an iconic business executive, major figure in the recent history of Silicon Valley, pop culture personality, should he be ousted as director of Twitter? This is the kind of proxy contest that I think, if it goes forward, it turns into like a cultural phenomenon. So if you're a director on this board, you know, you're thinking, okay, if we can't

get this settled, what's going to happen here? We're going to have to go to war in a proxy contest. It's going to be above-the-fold stuff -- by the way, it's already -- as we plead, it's already in the New York Times, already in the Wall Street Journal just a couple days in. And what is this going to be like for you? Like, this is going to engulf your life for at least the next couple months, and it's going to be very intense. And your advisor is telling you, if it happens, you're going to lose. You're going to be the losing party in this extremely high-profile proxy contest.

This is like, you know, if you don't play your cards right here, you're going to end up the losing character in like a Jim Stewart book on every -- in every airport bookstore in the world. Right?

So in a situation like that, is there an incentive to find a way out of this? Do personal motivations and personal interests arise that can lead a director astray and cause them to look more favorably than they might otherwise on a deal that would get this thing all wrapped up and settled? I think absolutely, and that's before you even start

considering some of -- sort of the material things or the more practical things that these people have to lose beyond just being subjected to this proxy contest of which they would be the targets. Right?

I think that -- so I'll start with Dorsey, for whom I think it just could not be more obvious that he has significant personal interests implicated here. Right? This is a guy, he's the CEO, the company he founded. This is his main thing. Obviously he is also CEO of Square. But he clearly wants to be the CEO of the company he founded; otherwise, he wouldn't be there. And he went in the space of essentially a week from thinking everything was essentially fine to having to sit in a Saturday meeting where Goldman is walking the rest of his directors through talking points for throwing him to the wolves the next morning. Does Jack Dorsey have a personal interest in putting this thing to bed and getting it settled, whatever the cost? I think the answer is absolutely. Absolutely.

And do the three directors who are on the ballot, who are being told, you are going to lose; you have relatively low odds of winning; it is likely that Elliott will win at least some of your seats --

do they have an interest in avoiding defeat in a contest like this? I think absolutely. And I think that's true based on the situation they found themselves in, and I maybe don't want to harp on it too much. But I think there really is something to this idea that a seat on the board of Twitter is different from a seat on the board of some random company that nobody's ever heard of.

This is one of the most powerful and famous companies in the world. We briefed it, so I won't elaborate on it too much. But I think this is the type of position that somebody, even somebody prominent, somebody wealthy, somebody accomplished, I think they'd cherish a position on a board like this, the type of status and influence that it affords them. I think they at least would prefer not to be unceremoniously ousted in a high-profile proxy contest from that position and have to read about it every day in the Wall Street Journal and watch it every day on CNBC.

So I think for Jack Dorsey and for those three directors, I think the situational conflict could not be stronger. And I think that maybe this is sort of a sliding scale where the

conflict is most intense for Jack Dorsey, and maybe it's nearly as intense for the three directors who are up for reelection. But I think it's also intense for the other four directors. I mean, obviously, their seats are only not being challenged because they're not on the ballot. Elliott's gripe is with the board as a whole. Elliott presumably intends to throw dirt on the board as a whole. They're being told that if this goes forward, they're going to lose. And so what is life going to be like for them following an election? It's not going to be good.

And that is not even getting to the point which we mentioned in the papers and we pleaded in the complaint that Goldman specifically advised these people, you know, you should know, for those of you that are not up for reelection this time, Elliott has this track record of running long, complex contests over multiple election cycles. That's something that you need to watch out for.

So in that situation, when Silver Lake appears the next morning and says, look, I can talk to these guys. I know these guys. I think I can be persuasive with them. You just got to let me into the company, let me make an investment. Does that set of

situational factors, the human interest and incentives that arise in a situation like that, do those shade these directors' analysis of the favorability of doing a deal like that? Does it shade the directors' analysis of what the appropriate terms of an investment like that would be? I think that it could not possibly be otherwise.

And so I guess, depending on how you read the cases, I guess there's -- this is an argument my friends make. Maybe it's right; maybe it's not. I don't know. But there's sort of the suggestion that maybe we need to plead not just to get over the motion. We need to plead not just that they have potent personal interests that would cause them to have their analysis shaded, make them more likely to agree with something that they otherwise would not perceive to be in the best interests of the company and stockholders; we also need to show that it actually did, that those interests -- it actually did cause them to do something. It motivated them to do something that they otherwise would not have done in the ordinary course of attempting to maximize the value of the company for its common stockholders. And I think we absolutely, absolutely have pled that.

This investment agreement, as we allege in the complaint and explain this in detail in our brief, this is a PIPE deal to take on a billion dollars that the company doesn't need. We quote the CFO. He's not a defendant in this case, but he was involved in the events giving rise to this action. He's involved in the events that led to the grand bargain, Ned Segal. He was in the room actually or on the phone, whatever it may have been, during Silver Lake's initial approach. He told conference-goers at this Bank of America conference a few months after the deal was struck, this was a billion dollars that we didn't have a use for in terms of running the business.

I view that at the pleading stage as a pretty strong indication that this wasn't a deal that the board agreed to because the company needed this financially. This was in the best interests of the company financially; we need a billion dollars to do what? I don't know. They didn't need it.

What they needed was Silver Lake's backing in this proxy contest with Elliott, which is what they got, right? And there's all kinds of other reasons to suspect that this is just not a deal they

would have ever done if they were just operating the business in the ordinary course trying to maximize value for the company's common stockholders. We put it in the complaint in some detail. I don't think I need to run through all the numbers right now. But the company in the past, when it did have a need to raise money, it has in the past issued very similar convertible notes to market buyers three times -- and, in fact, a fourth time after this complaint was filed. But as we plead in the complaint, three times prior to these events. And in each of those cases where they were able to go to the market, see what will a market buyer pay for convertible notes of this type, they got dramatically more favorable terms.

The terms -- and it's not -- there's no issue of where maybe the market changed and as of March 2020, the market rates would have been closer to what Silver Lake paid. We know that's not true. We have the Allen & Co. presentation listing off the sort of peer companies, Square, MongoDB, that had in recent months issued their own convertible notes to market buyers.

And what do you know? The terms of those notes issued by Twitter's peer companies were

very similar to the terms of the three prior series of convertible notes that Twitter had issued to market buyers.

And so I think there's just no question here that these directors faced powerful, potent personal incentives to get this thing settled, whatever the cost, and that those interests caused them to cut a deal that just makes no sense but for those motivations, but for that interest. I still don't think defendants have identified any procorporate reason to do this billion-dollar PIPE deal. Right?

They cite some lines in Goldman Sachs' presentation that suggest that there's something favorable about this deal. I actually find the analysis kind of funny. It's like one of the things they've quoted a couple times is Goldman Sachs -- and let's remember this is Gregg Lemkau. We'll get to him in a second. They said this was better than many PIPE precedents.

Like the investment banker speech just jumps off the page, right? We're comparing it to PIPE precedents, first of all. I think the Court knows. And we cite the Investopedia page. PIPE deal is not

something that is often pursued by a company like Twitter with an extremely strong balance sheet and all the cash that it needs. Companies that go for these PIPE deals are sort of dire straits and need cash most often. Twitter didn't need cash, and Twitter didn't have any difficulty in finding market buyers for its debt. The -- like I said, it had just raised $700 million in December. And in recent years, it had thrice previously issued convertible notes to market buyers on much more favorable terms.

And even within that set, PIPE precedents, Goldman Sachs says it's better than many. It's not the best. It's not better than most, but better than many. And I think that sort of jumps off the page to me. I won't belabor the point anymore, but this is a deal. There was no proxy contest. It's just inconceivable that the Twitter board would ever agree to something like this. And I think that's really all you need to show that these powerful personal incentives generated by Elliott's proxy contest, this sort of ten extraordinary days where they're all of a sudden being told you're on the chopping block; you're going to lose, that that's really what drove this agreement. And I think that's

really all you need really under any standard of demand futility to get all eight of these director defendants who were on the board at the time that the agreement was struck.

But -- and I think they should all stay in the case as defendants. But to get over demand futility, we really only need the Court to agree that four of these defendants were interested to the extent that they faced liability and thus could not consider a demand. That would be -- I think the first four are obvious. Jack Dorsey, the man who went from no threat to "should we call and tell Elliott we'll drop you?" in the space of six or seven days. The settlement took that threat away from him. I think he was clearly interested.

And then, of course, you have the three directors who were up for reelection and were specifically told, essentially, if this goes forward, you're probably going to lose after you go through all of the hassle and stress and difficulty of being the target of the world's most aggressive activist with this MO of hiring private investigators, et cetera, et cetera.

So if we get those four, we get to

demand futility if we can also get Durban and Cohn. So defendants do not dispute that Durban is interested here. I don't think they could do otherwise. He is obviously co-CEO of Silver Lake and the public face of Silver Lake. We plead that Silver Lake had a very serious benefit from this highly unusual transaction. And as a result, it's pretty clear that Egon Durban is interested here.

Jesse Cohn, I think it's really much the same. This motion comes down to whether Jesse Cohn, the sort of public face of Elliott's activist activities, equity partner to Elliott, the man who set this whole chain of events into action with his letter to the board on February 21st and subsequently served as Elliott's chief negotiator, the motion turns on whether he could consider a demand to institute this case. I just don't see how we could lose.

And the big, big point here is that he is the chief negotiator on the other side of the table, extracting this deal from the board. Right? This is, I think, unambiguously, we have a grand bargain that has three components; they're all intertwined. We cite some of the documents that my friends put into the record in our papers that sort of

explicitly say Twitter engaged with Silver Lake for the purpose of bringing a solution to Elliott.

Of course, the whole deal is started when Silver Lake says, hey, I think Elliott might like this. We have board minutes that say Elliott's amenable to this. And, of course, Elliott decides to drop its proxy contest for this package of results, this grand bargain, these three interlinked components that are all approved with a single vote.

When I say "interlinked," I think something that is highly relevant is the fact that Egon Durban, who is appointed to the board in addition to Jesse Cohn, that's not part of Silver Lake's agreement with the company. It's not part of the separate agreement. That's part of Jesse Cohn's agreement with the company. His agreement to drop his proxy contest included, put my -- maybe they're not friends, but put Egon Durban on the board with me. You know, I think that's going to be beneficial to the company to have Silver Lake involved here, to have Egon Durban involved here.

And so to me, any notion that Elliott wasn't interested here or that Jesse Cohn wasn't interested here just doesn't make a whole lot of

sense. And there is this sort of practical dimension to it that we make the point in the papers -- I'll make again now -- he's the chief negotiator of this deal. And so asking him a few months later to consider whether to bring this suit is asking him to turn around a few months after he extracted this deal from the board, heated negotiations over two weeks, gets them to agree to it, and then he's going to turn around and say, that deal you just agreed with, that deal that I just got you to agree to, guess what, you breached your fiduciary duties in agreeing to that, and now I'm going to sue you.

It's just unthinkable. We say in the papers, in our complaint, this has a reputational effect on him. Of course it does. What do you think happens the next time in his business Jesse Cohn is negotiating with corporate incumbents at a different company on a different board and they know the last time a board caved and settled with this guy, he turned around and he sued them for agreeing with him. I just don't think that that's realistic.

I think the *Rales* approach calls for a holistic, realistic assessment of what this would have looked like through his eyes, and I just don't think

that it's realistic to think that Jesse Cohn could make a fair and disinterested and dispassionate business decision about whether to bring this suit alleging that many of his fellow directors breached their fiduciary duties by essentially agreeing with him. Just doesn't make any sense.

And so I guess one more point or maybe two more points before I sit down. Maybe my friends on the other side have had an effect on me because I realized I actually left out Gregg Lemkau's name here. That's a name I think that was left out of their papers. I think if this case gets over the motion and we get into discovery, I think it's likely that Mr. Lemkau and Goldman Sachs may end up playing a more significant role than they play now.

I think it's like a little bit uncertain exactly what the relevance of the Goldman, Silver Lake, Egon Durban, Gregg Lemkau relationship is in this demand futility context. But I think it just cannot help but sort of color this analysis, the fact that, in agreeing to this remarkable PIPE deal, taking on a billion dollars that they have no use for, in deciding that was fair, the person that they're relying on is a close business associate and

purportedly a friend of -- that may be negotiating on the other side of the table. It's not even an entity conflict. Right? It's not that Goldman has worked with Silver Lake in the past.

It's that these two guys in this heated two-week period where things are being negotiated probably not as formally as they often are when you have a process that drags out over months -- these two guys are friends, and so that's who you're relying on. So I think that the relevance here is that just underscores the fact that these directors, in agreeing to this investment agreement, they were not thinking about, okay, let's do what we need to do to maximize value for the company. Let's get the best deal we can.

They had basically the minute Egon Durban showed up and said, I can broker a peace deal here, the instinct for the directors was, this is fantastic. Let's get it done. Our banker has a conflict. I don't know whether they just never asked or whether Lemkau disclosed that conflict and they didn't do anything about it. We were not able to get 220 documents going to that issue. But either way, it's just further indication that this was not a board

thinking about how to maximize value for the company, how to maximize value for stockholders.

This was a board that was very focused on doing whatever it had to do to get this thing settled, put this thing to bed, and not have to go through this ugly, high-profile proxy contest that they were being told in no uncertain terms they were going to lose. And so that's my penultimate point.

My last point is on this question of whether an evenly divided board can get business judgment deference. In our view -- it's in the papers, as it is in my friends' papers -- I think it's just settled Delaware law. It's a fundamental premise and assumption underlying, I think, really innumerable cases.

If you don't have an independent majority, the board cannot act without the taint of interest. If you don't have -- if you have a nine-member board -- or let's say you have an eight-member board like here and you have four interested directors. Every decision of that board is suspect because the board cannot act without the taint of interest. The Court could have no confidence that this was an independent, well-functioning body capable

of -- that would be deserving of the protections of the business judgment rule. And I think that's very clear.

That concludes my presentation. Unless Your Honor has any questions, I think I will leave it there.

THE COURT: Step back and give me the big-picture sense. Assume you get past the pleading stage and ultimately the case goes forward and you get to trial. What is the end game? What can you ultimately get out of this lawsuit?

MR. CURRY: So I think at minimum, we can get monetary damages for the harm that the company incurred by entering an unfair agreement. I think this is an agreement that at the time it was struck, there is sort of a difference between the agreement that the board agreed to -- the investment agreement as it was finalized and what they could have gotten from a market buyer, and you can look at that difference as damages.

You can also look at the damages between doing it and not doing any deal of this type because they didn't need the money. And I think it may depend on what the facts show, certain

eventualities. But I think this is something where, conceivably, you could end up getting rescissory damages. If Silver Lake in a couple of months or right now where the stock is trading, they could sort of immediately realize hundreds of millions of dollars of profit as a result of this deal.

I think rescissory damages are a possibility. And maybe this is -- maybe the Court will think this is too speculative at this point, but I don't think it should be any mystery from our complaint that there are, once we get into discovery, potentially there are other potential defendants here, aiders and abettors, potentially unjust enriched parties. And I think we may ultimately be able to pursue monetary or rescissory damages from them as well.

THE COURT: In terms of your view of the world, what should the board have done instead of reaching out to -- or not reaching out to. Silver Lake may be inbound. Instead of jumping on the Silver Lake train or grabbing onto the Silver Lake rope when it was thrown to them, what is your sense of what a properly motivated board would have done?

MR. CURRY: So that is a difficult

question to answer. I think -- so at minimum, if you sort of make the strategic decision that what we want to do here is bring in some sort of other hedge fund, private equity firm to back us here, I think you could have shopped around a little bit better. You could have made some more phone calls and not just gone with the first person to ring you up and cut the deal in three days or however many days it was. And I think you also could have insisted on better terms if that was the strategy you were going to pursue.

Whether that is an appropriate strategy, I just don't know. I do agree that a board could, consistent with its fiduciary duties, evaluate a situation like this and say that it is in the best interests of this company to settle this proxy contest. We have to find a way to do that. But I just don't think there's any indication here that that's what the board actually did.

You can look through these documents. This is not a situation where the board is doing some careful analysis of sort of the effect on the company of a proxy contest. Everything's very focused on, are we going to win or lose? What can we do to avoid losing? And so I think the board needed to more

carefully consider what actually was in the best interests of the company here. It's possible that could have involved some kind of settlement, but I don't think it was a settlement in a couple of days that required us to give away 3 percent of the company to the first third party to call us on below-market terms.

THE COURT: Let me push you on that a little bit.

Imagine that the settlement had just been three directors to Elliott, and let's assume that it's a little bit sweeter than what they got. So let's assume it's two Elliott nominees and an independent.

In terms of your challenge and your demand futility analysis, under that scenario, the, what you say, below-market convertible note drops out as evidence of the directors' entrenchment motive, but you would still have the Goldman presentation. You would still have the Joele Frank presentation. You would still have the rushed timing. You would still have the Elliott reputational effects and the idea that they're going to go bare knuckles. You would still have the express statement from Goldman that

they -- that Elliott persists and goes multiple contests. You'd still have the situational dynamic about being a director in one of the world's most well-known companies and the prestige and network effects that associate that. All those things would all be in play. I'm sure there's more from your presentation that I could list.

So why would that really change the analysis? Even if they entered into the most plain, vanilla activist settlement that I at least can posit, why wouldn't you still potentially be here with a claim that, given the list of other facts that you've relied on under your view of the world, would survive pleading-stage review?

MR. CURRY: I would answer that in a couple ways. First -- and this is probably not the answer Your Honor is looking for, but I think there are as practical considerations here, right? When a -- if you give up two board seats, it's not clear what, in sort of a post-agreement derivative case, sort of what your damages are. Maybe a plaintiff could have some interest in trying to get that rescinded, but what really made our client want to get involved in this case and I think what made this case

attractive was the fact that they didn't do what a board normally does and maybe give up a couple board seats. They did a billion-dollar deal that they didn't need to do. Right? So that's a practical consideration.

But I think there's also a practical consideration in terms of -- even putting aside sort of what the situation might be on a motion to dismiss, thinking about like the practical case, trying to prove that these directors did something to breach their fiduciary duty when they do something that sort of common and vanilla, you know, I think makes a case like that one you're probably unlikely to see or see many of.

But answering your question in the more theoretical, philosophic sense, I think that on a record just like this, just like this, I think you would be able to plead a claim, get over demand futility. You might then end up with a case where you're not going to make it past -- not going to make it very far. If you do, you're not going to recover anything, but that's because it's not really just the outcome here. It's not just that they did this crazy billion-dollar PIPE deal they didn't need to do.

It's also like this process. I think if you -- if in a situation like that, if you get under the hood, you do a 220, and you look and say this all happened so quickly and we see no real indication that the board was approaching this from any perspective other than we're in trouble, we got to get out of this, you know, there's no sort of thorough, systematic consideration of like what is in the company's best interests here, then I think you could plead a claim.

Now, if the 220 documents are different in a situation like that -- if you look at the 220 documents and it's a situation where they say -- you know, you can imagine what those documents will say. It will be we decided that these activists had something to say. Might make sense to bring one or two of them on the board. They might have ideas that could help benefit this company and its stockholders. And I think if you see that type of stuff, what you start to think is that, okay, maybe this was a situation that did give rise to some personal interests, but there's no reason to think that that's really what motivated this.

I think it's different when you have

the clear, potent interests and the director's doing something that is just really kind of crazy and doesn't seem like it could be explained on really any procorporate basis. A billion dollars we don't need, terms below what we could get in the market, did it in three days, did it based on the advice -- I think maybe it's five, six, seven days. And do it based on the advice of the good friend of the guy who made the call once they made the investment. That's sort of what makes this case different, I guess.

THE COURT: And then if the end game is liability and if that leads back into the demand futility analysis from a risk standpoint, is it really fathomable that these independent directors are going to be held personally liable for this?

MR. CURRY: I think it's absolutely fathomable. I think there's absolutely a reasonable doubt that that's what the record will show. I mean, you could -- it is very imaginable for me that you could have an email from an outside director saying something like these terms seem kind of crazy; haven't we done deals in the past that were on better terms? But whatever that'll put this whole thing to bed. I don't want to have to deal with this proxy contest. I

have a vacation scheduled.

That's maybe an extreme example of what the record could show. But I think you could absolutely show these directors, including the outside directors, are sort of scrambling in this extraordinary two-week period. All of a sudden they have this big, high-profile proxy contest to deal with. They're going to lose. They want to get it settled. And I think very well may have recognized that the deal they were agreeing to was not a good financial deal for the company; but because of their personal interest in putting this thing to bed and getting it settled, whatever, the terms aren't that bad. It's only whatever it might be, 50 percent worse than market. Let's do it. It's a hundred million dollars. Whatever. And I think that's really what happened here.

THE COURT: I think what you make out and what your complaint makes out and what the documents make out is an extremely compelling case for why enhanced scrutiny would apply in these settings. Again, it seems to be -- certainly at the pleading stage where you get the inferences, it seems to me to be fairly pled. And it's all over the Goldman Sachs

presentations and the Joele Frank documents and the timing, et cetera.

Doesn't that run into these cases that say that enhanced scrutiny isn't enough for demand futility? In other words, it might be enough if you had come in in realtime and sought to enjoin this thing, but now that we're in the 23.1 world, that those same considerations aren't enough for purposes of demand futility at this phase.

MR. CURRY: I think, again, first, I'm going to have to answer in a practical sense and then sort of move to the theoretical sense.

In a practical sense, this isn't a case that really could have been challenged in realtime. Right? This isn't -- because, again, it all happens behind the scenes over the course of a couple of days really. This isn't a situation where there's some big public fight and it's publicly announced that the board is going to do something crazy, expand the board, push a meeting, that you could run into court and try to get an injunction. This is sort of like announced to the public when it's, like, already papered and final.

And then I think to really challenge

it, you had to have the 220 documents. And so -- and that's a process. I think from the time that we served the letter, it was at least several months before we sort of had the full 220 production.

So in a practical sense, you really could not bring an injunction claim here, I don't think. You're sort of left with trying to pick up the pieces afterwards. And so if it really is a situation where you say, well, in an enhanced scrutiny situation like this, you just -- you can never have sort of a post-closing case; everything has to be sort of at the injunction stage, well, then it's basically going to be that in a situation with a conflict like this, the board can do whatever they want. Right? It's -- here they gave away 3 percent of the company on below-market terms. Next time they can give away 20 percent of the company on below-market terms, but it's all papered and signed and closed up before it gets announced. And you need 220 documents to show what really happened. There will never be a case, and boards can do whatever they want.

THE COURT: It begs the enforcement agent question. We have been talking, as we do, in the context of demand futility and the legal

dimensions of whether this claim gets past the pleading stage. But the overarching policy question is who should be policing behavior like this.

And so one answer is folks like you should be able to come in and police behavior like this. Another answer is, no, the way this behavior gets policed is through the electoral process, and particularly here where these folks destaggered. But the real answer is that if the stockholders are dissatisfied with what the Twitter board did, they get voted out. And it's actually a bad system for this to be brought in front of a law-trained judge, which at this point seems to be an epithet of derision in all of our cases. We can't do that because we're law-trained judges. We're not good at that because we're law-trained judges. I'm the first one to admit that I'm not good at a lot of things.

Why would one bring this business decision in front of a law-trained judge and ask a law-trained judge to weigh in on these issues? I'm being facetious. It's a legitimate concern. From a policy standpoint, should this be something where a stockholder comes in and challenges it? Or is part of the role of demand futility to create that barrier so

that we don't have law-trained judges deciding these things?

MR. CURRY: Well, a couple responses to that.

So, first, I think to some extent that type of view of the world could apply to almost any type of derivative case, right?

Two, I think there's a lot of reasons to suspect that other enforcement mechanisms here would be pretty weak, and so one thing that I point to is that this is a situation where you needed the 220 documents to know what happened here. And I think ultimately, you may really need discovery to paint the full picture, stuff that's not going to be available to other actors.

And then also in terms of institutional competence, I can't think of a better institution for sort of taking a hard look at director decision-making and situational conflicts and determining whether those situational conflicts may have led to an extremely bad deal for the company. This Court has decades of case law in similar circumstances and I think is maybe the best-suited institutional actor.

But taking a step back, I think the types of cases you're talking about -- maybe sort of the ultimate case along those lines is *Ryan v. Armstrong*, the case Vice Chancellor Glasscock decided in that whole Williams fiasco, which was affirmed with a very short opinion by the Supreme Court. And I think that there, Vice Chancellor Glasscock really did, I think, kind of grapple with the same sense that we're talking about here and the problem, and I think that you could do worse than continue to apply that standard in any derivative case where there's any type of claim that we would usually think of as enhanced scrutiny. And what you should require the plaintiff to show is not just that it was a situation where the situational context caused potent personal interests to arise, but also some reason to doubt that -- some reasonable doubt that those interests were really what drove the decision, that were a primary purpose of the decision.

And I think that that's a standard that -- in most of these cases and particularly in the cases that Your Honor might think most strongly should not be subjected to this particular enforcement mechanism. I think they might not be able, even with

220 documents, to be able to get to that second part of the standard of showing not only were there personal interests in play here, created by the situation, but they're really what drove the decision.

I think in this case, given sort of the extraordinary nature of what the board did here, something totally out of the ordinary and something that I think we've pled very strongly just that did not have much of a procorporate justification, if any, that when you sort of take these facts and you weigh the potency of the situational conflict and you also -- and you look at the result, which is a billion dollars we didn't have any use for, on terms worse than the last three convertible notes we issued, with our advisors telling us better terms are in the market. Our advisors we're relying on, who, by the way, are extremely conflicted and we're not doing anything about it. When you have all of that in a case like this, I think you can have some reasonable doubt that these extremely potent situational conflicts -- Jack Dorsey, you're going to be out from the company that you founded. The three directors up for reelection, you are going to lose. And this is going to be painful.

When you take into account the potency of the personal interest and incentives that that type of dynamic creates and then you look at what they did and where they ended up, I think if you were to apply that *Ryan v. Armstrong* way of looking at things and say, is there some reasonable doubt here, it is those situational conflicts that really were the primary driving force of agreeing to this particular deal with Silver Lake, I think for pleading-stage purposes -- we'll see what we can prove. But I think for pleading-stage purposes, I think we're over it. Obviously, otherwise, I wouldn't have filed the case.

THE COURT: I hear you. Again, I doubt that I'm being obscure, but I'll just be transparent. There's an underlying policy concern that at least I have that letting these cases through creates the next great plaintiffs' industry where people see an activist settlement and they file suit. And it can't be the case that those facts alone get you past the 23.1 analysis.

So then the question becomes, okay, here you've got a case where -- and, again, I know the defendants disagree with this. But I think at the pleading stage, the facts are really bad and you've

got a lot of specifics. This is not you just coming in on atmospherics and a prayer.

MR. CURRY: Right.

THE COURT: You have come in with the goods in terms of pointing to specific documents, pointing to specific actions, things like that.

The question then becomes, where is the line that allows the really suspicious case to go through and without opening the door to a new assembly line litigation? Think about how many activist situations there are every year. Most of them are settled. Most of them. Right? And you I think candidly conceded that settlement alone isn't bad, which is why I tested you on the settlement, because you can imagine that in a lot of those cases, somebody can come in and cite at a minimum atmospherics as to why it was an entrenchment-motivated maneuver.

What's your helpful guidance for me in that area?

MR. CURRY: So one thing I want to be clear on is settlement is not always bad. Settlement is often very good. But I'm not conceding that in this case the board did the work it needed to do to determine that a settlement was in the best interest.

And maybe that's a -- part of the -- part of what needs to be baked into the standard here. Right? Because it is -- there are many activist campaigns every year, but I think as I tried to observe at the beginning of my argument, there are very few activist campaigns that go down the way this one did and end up the way this one did. In fact, I am not personally aware of any activist campaign that this fast ends up in this dramatic of a result, billion-dollar deal that makes no sense.

And so I guess I am not as concerned about the policy question here. And I'm speaking to you as an entrepreneurial plaintiffs lawyer --

THE COURT: That phrase is right up there with law-trained judge in the pantheon of complementary epithets.

Anyway, keep going.

MR. CURRY: I expect that in the average activist situation, we'll give you a board seat; we'll study buybacks. It's going to be -- these are not going to be attractive cases. It's very hard to think of what damages are going to be. And they just seem like very hard cases to plead and prove where you don't have the type, as you put it, the

goods, the way we have it here, because I expect if you get under the hood, it's going to be here's three weeks of board meetings where we sat down and considered the activist position, decided that it was in the interests of the company to bring them on the board for their views.

Here I think part of what gets to you, that conclusion that the personal interests were what really drove this, what were the primary motivation is the fact that that record just doesn't exist. This is not a case where the defendants were able to come in and say, Look at all this careful consideration, what was in the best interests of the company. And here's the result. No reason to think that this deal's anywhere outside of any type of range of reasonableness.

Yes, it's never fun to have an activist, but this is a board that carefully considered what was in the best interests of the company. On the basis of that careful consideration, they reached a vanilla result. So there's no reasonable doubt that what happened here is the result of a personal conflict.

But it's very different where -- and

we start with a particularly strong conflict, right? I mean, this is like -- the way this was teed up to the board by its advisors and the way that Elliott approached, it's a particularly strong situational conflict. And then part of what we plead to show that it is the personal interests that drove this is the fact that you don't see a careful consideration of what's in the best interests of the company. And you end up with a result that is just way out there. We didn't plead waste. I guess you can sort of like -- we could sort of squint at this thing and say, yeah, like a board could have reasons to do a deal like this, maybe, but it is getting very close.

THE COURT: Yes. Again, at the pleading stage with the CFO's comments, I hear you on that.

MR. CURRY: No use.

THE COURT: The thing that can't happen, if six months from now or 12 months from now people are starting to come in with activist challenges that then get settled for disclosures in connection with the next proxy contest about how the activist settlement went down, that is not a result that is good for anybody. In fact, that is a result

that, in my view, would be a perversion of the process.

And so from my standpoint, I have an interest in making sure the fiduciaries of Delaware corporations do the right thing. And I think it's not my personal interest; it's Delaware's policy interest. We need to do that.

But we also don't have any interest in creating opportunities for rent-seeking. And so this is why I keep coming back to this, is it seems to me like there's got to be a line somewhere. And it may be just in the framing of the specificity of the facts as opposed to some conceptual or doctrinal analysis. I don't know if you want a final thought on that. I've been pestering you for a while now.

MR. CURRY: I guess would it be possible for the Court to help me understand just in a little more detail sort of the type of case that you're concerned about seeing here? Because I guess -- and maybe I've already sort of said what I had to say on this, but I guess I don't perceive to the same extent as the Court the likelihood that you're going to get cases that have any legs after --

THE COURT: I'm concerned about the

case that you think doesn't have legs because we went through a decade of people suing on mergers that -- where it didn't really seem to have any legs, and it all just resulted in disclosure on the settlements.

And so what I don't want is the activist settlement to be the new disclosure on the settlement industry, and I don't want any type of precedent that points in that direction. And so it's important to me that, to the extent that you were to get past the pleading stage, it would not herald -- it would not be read as an invitation to do that type of thing.

MR. CURRY: Right.

THE COURT: That's why I'm at least pondering how one navigates those waters between the stronger cases where one could see a need to get past the pleading stage, if one believes your view of the world, and the potential knock-on effect systemically.

MR. CURRY: Right. So I guess if I'm sort of hearing Your Honor correctly and seeing it the same way you are, I think maybe it is just some sort of standard about in this particular area, what are the presumptions and what is the specificity that's necessary to get over? And I think it is probably

something close to that *Ryan v. Armstrong* decision that Vice Chancellor Glasscock issued in a *Unocal*-related context.

You start from a presumption that there's nothing wrong with an activist settlement. You can't just say there's an activist in the stock; they settled ipso facto. You face the threat of being removed, and that's all you need. But if you can plead that this was not a board that was afforded meaningful consideration, to the extent necessary, what really was in the best interests of the company here and you can plead that a company, a board, does a deal that is, if not waste, it's getting there; it is really out of the ordinary and there's nothing in the record to really support procorporate justifications beyond the settlement for which the record doesn't include procorporate justifications, just the fact that it is -- you can hypothesize and imagine all kinds of good procorporate reasons for settling a proxy contest doesn't mean that that's what happened here. Right?

And in the average case, I think a defendant is going to be able to come in; they're going to be able to show that -- I think they will

have a record that lets them come in and say this is nothing like Twitter. Like Your Honor, Twitter happened in X days, billion-dollar deal -- the CFO said, we have no use for this money. Our case here is nothing like that. We just settled for two board seats, and the board very carefully considered. If nothing else, it could have a salutatory effect, right?

If this Court issues an opinion sustaining this case, you can be sure the newsletters are going to go out; and in activist situations, companies are going to really make sure that they are doing what they need to do so that they end up generating a record that reflects that they considered a -- what was in the interests of the company and that they didn't do something completely crazy like give away 3 percent of the company on below-market terms. And I think that's sort of, I guess, where I would leave it unless Your Honor has any further questions.

THE COURT: No. That was very helpful. Thank you.

So what I'd like to do now, the defendants are going to get a reply, but I'd like to go ahead, let's take a ten-minute break because we've

been going basically almost an hour and a half.

So we'll come back at 10 of and resume. We'll stand in recess until then.

(Recess taken from 10:41 a.m. to 10:50 a.m.)

THE COURT: Let's resume with the reply.

MR. YOUNGWOOD: Thank you, Your Honor. And notwithstanding the length of the presentation and the exchange, I really only have two points to make, and then I'm happy to answer any questions.

THE COURT: Okay.

MR. YOUNGWOOD: The first one is really just to make clear on the record -- I think it's clear on the briefing -- our strong disagreement with any suggestion that the process here wasn't thorough and proper. Boards do things in two-week time periods. Boards do things over weekends. Boards meet on Saturdays. Boards meet deep into the night all the time. There's nothing unique, special, or, frankly, interesting about that.

And, in fact, this board, by my count -- it depends a little bit how you count meetings that went from one day to the next -- met six or seven times, the 26th, 27th, and 29th of February,

the 1st, 2nd, 5th, and 8th of March. I may even be missing a meeting.

They also hired advisors and worked with advisors. Many have been listed here, but including bankers, who did look at many alternatives to this proposal. That's memorialized in the board minutes of March 1st -- I'm sorry, March 5th and March 8th, among others, and it's memorialized in the decks of the bankers.

And then the second point I want to make is to go to the exchange between Your Honor and counsel, which is what's the standard.

The standard, I think, is -- it's *Zuckerberg*. It's *Rales*. It's *Aronson*. It's the demand futility standard. And the discussion of entire fairness is beside the point for that analysis at this stage in the case, the *Zuckerberg* case. And many other cases make that clear, and so then we just get back to counting heads.

We've told you why we believe it's six. Our briefs say as well. And we have a disagreement on that. But that is the standard for this case at this stage.

And the final point I'll make maybe

goes to the policy point, which I'm hesitant to go to. But I know there were questions, and I don't want to leave that unremarked, which is there are situations involving activists where you're going to have a failure at the demand futility stage. This isn't that.

You could have the whole board up, nonclassified board. You could have at the time clear connections for the people on the board making the decision and the investing party. You don't have that here. I could go through a panoply of potential factual situations that no doubt will face this Court and other courts that just aren't present here.

If there's a line and if there are cases on the other side that should go forward, this just isn't it. We don't think demand futility has been satisfied, and the case should be dismissed. At a minimum, certainly the directors who are disinterested should be dismissed.

THE COURT: Thank you.

MR. YOUNGWOOD: Thank you.

THE COURT: I'm going to go ahead and give you an answer on this now. I'm going to do that because I do think this is, at least in our law to

date, an edge case. You can think of it as a unicorn case. I think it has exceptional facts.

I don't want to create the impression that I'm, at least not in my view, doing anything new or different or creating any different approach to these types of activist situations.

I think what we have here is simply a situation where the plaintiff obtained Section 220 documents, and where those documents evidence specific concern about losing the proxy contest, about the staying power of Elliott and its willingness to fight multi-year contests, about negative consequences for the directors personally. I think that is presented in the context of a setting where the ultimate settlement itself is eyebrow-raising.

The settlement itself involves not only an agreement on director seats, but also a convertible note reflecting a substantial block of stock. I'll say this now, and I may come back to it, but that, to my mind, also affects the ability of other oversight checks to function because in a setting where that doesn't happen, perhaps the directors are voted out at the next meeting or there is a withhold vote at the next meeting and there's

more of a market-based, stockholder-level check.

Here, there is actual altering of the stockholder profile through the convertible note. Yes, it's only 3 percent, but I think that is a significant factor. I think there are questions raised about the terms of the convertible note. All of this does happen in a remarkably or noticeably short time period. That is not to dismiss what defense counsel says, that boards can and do act in remarkably short time periods. If that were the only factor here, that wouldn't be the dispositive. Here it's part of an overarching picture.

This is a fact-specific ruling, in my view. Because it's a fact-specific ruling, I think it's something that I can and should do with you now. I'll also be honest. I've got a lot of stuff right now in the queue. And if I take this on rather than attempting to give you an answer now, it's just going to be that much harder. It's not an entrenchment interest. It's a self-interest in terms of giving you some answers now.

I've alluded to a few things in terms of the factual context. I will say that at the pleading stage, I largely endorse what Mr. Curry said

in his presentation about how the facts set up. I think for pleading purposes, that's how you have to view it.

As defense counsel mentioned, they tell a good story. It may not be the right story. It may not ultimately prove out to be the true story, but it's a story that hangs together. It's a story that makes sense. It's a story that's supported by contemporaneous documents. It's a story that's supported by objective evidence of how the board acted, both in terms of the 220 documents and also in terms of the outcome. I'm not going to go through that story in detail because I think plaintiff's counsel did a good job this morning of articulating it in a manner that I think is a fair reading of the complaint and what I have to operate on for purposes of today.

I'm going to turn to the demand futility analysis. I am going to approach it the way I did in *Zuckerberg*, and not because I think *Zuckerberg* changes the substance of the demand futility analysis. What I tried to do in *Zuckerberg*, and was perhaps unsuccessful in articulating, was simply try to get rid of this initial question about,

does *Aronson* or *Rales* apply? That's the part that I don't personally find very helpful. I think this is another case that emphasizes why that type of parsing is not helpful.

So technically, this is a situation where a majority of the board has not changed. Technically, this is an *Aronson* situation. Yet three new directors are on the board. For at least those three directors, I have to do a *Rales*-ish analysis. I can't do a pure *Aronson* analysis. So even in this binary concept of standards, it's not a binary concept of standards.

I may be wrong about it, but what I am trying to do is to get to the essence of what seems to be the substance of these cases, which is that one asks whether the board currently in office could properly consider a demand. To consider that, to evaluate that, you go director by director. When you're looking at each director, you think about all of the factors that might prevent them from validly considering a demand. Those factors include, for someone who was on the board at the time of the challenged decision and made the challenged decision, the fact that they were involved in the challenged

decision, whether they face potential liability as a result of that challenged decision, or whether they are somehow otherwise interested in that challenged decision.

My approach, again, as I conceive it -- I may not have been successful in articulating this -- but as I conceive it, I'm not getting rid of any of the value of *Aronson*. All I'm trying to do is avoid a false choice at the outset between *Aronson* and *Rales* when even in a setting like this, where arguably I should be applying *Aronson* under the technical view of what *Rales* says, I have to do a *Rales*-ish analysis anyway as to the new people.

So I am going to go through director by director. I'm going to group them similarly to the way counsel has. I'm going to talk about sources of interest. I'm going to count heads. I ultimately get to a point where there aren't sufficient directors on the board who could validly consider a demand and hence demand is refused.

So let's start with two easy ones. They split.

Li came on afterwards. No one lays a glove on Li. Li is undisputedly independent and in

the "can consider a demand" column.

Durban goes to the other side. That makes sense. Silver Lake received significant benefits as part of the settlement. No one disputes that.

All right. The rest of the directors fall, in my view, along a continuum. I'll come back to Cohn. He's in a little bit of a separate category. But the folks who were on the board at the time follow along a continuum. One can start at one end or the other.

I'm going to start with the ones who were up for election at the next annual meeting and then take the steps out from there. That's Kordestani, Taylor, and Okonjo-Iweala. They were standing for election at the next annual meeting when Elliott showed up. Elliott specifically named them and indicated that it was going to contest their seats.

How do we view directors in that setting? Well, my starting point is *Aprahamian*, which held -- in a transactional justification setting -- what I'm now going to quote: "The business judgment rule therefore does not confer any presumption of

propriety on the acts of the directors in postponing the annual meeting." That was a situation where the directors were shifting the date in response to a proxy contest.

Vice Chancellor Hartnett then continues: "A candidate for office, whether as an elected official or as a director of a corporation, is likely to prefer to be elected rather than defeated. He therefore has a personal interest in the outcome of the election even if the interest is not financial and he seeks to serve from the best of motives."

That's the starting point in our law.

What we have recognized is that that can't be the ending point in our law, particularly in a demand futility setting where we're going to go forward and potentially impose liability on directors or some other type of relief. There have to be particularized facts under Rule 23.1 that go beyond just the general reality of the situation. I think they exist here. Plaintiff's counsel has gone through them ably.

To the extent that what is required is some type of imminent threat to these directors' seats, it's present. There is evidence of it in the

advisor presentations. They're frank. They're candid. They're saying what we all know, which is that some activists are tougher than others. This is Elliott. As plaintiff's counsel points out aptly, this is Elliott on a strong approach. This is not Elliott with a soft approach. This is Elliott on a hard approach.

And then, as I've alluded to, and I'm not going to go into the details on, but you have the unfolding of this in a manner where it appears at the pleading stage it is conceivable and supported by particularized allegations that the directors grabbed onto the first lifeline that came along, which is Silver Lake and the proposal of the block conveyed by the convertible note. And it is likewise something that I accept at the pleading stage that that was an off-market deal for Twitter, that it was capital that they had no use for, and that they wouldn't have done it but for the threatened proxy fight and the implications for the proxy fight.

Things like that may not ultimately be true; but for the pleading, for pleading stage purposes, that is how the record sets up.

I think that one can credit and draw

an inference supported by particularized facts that the three directors who faced election of the proxy contest acted for the primary purpose of preserving their seats and entrenching themselves.

The next one out for me is Dorsey. He was the CEO. He was the specific target of the Elliott challenge. The advisors' settlement proposals, at least one of them, one of the three -- and, granted, it was one of three -- specifically contemplated his no longer being CEO.

Dorsey is already in an odd spot in that he's CEO of two public companies. He's obviously a very successful guy, all credit to him for that. But it was thus a logical path for Twitter to conceivably change its governance structure. And, again, there are pled facts from the documents which support the idea that this was under consideration. This is not a plaintiff who's simply saying activist was in the stock. The activist wanted to run a campaign. The activist made reference in its fight letter to governance changes. The CEO, therefore, should be concerned about his ouster.

This is a case where there are concrete pled indications supported by 220 documents

that Dorsey had reason to think, and should have had reason to think, that his position was potentially at risk.

I was going to touch on this later, but I'll touch on this now. The argument was made for Dorsey that really this is a speculative question because if Elliott had pressed forward, if Elliott had succeeded, they only would have had four members. That wouldn't have been a majority, wouldn't have been enough to oust Dorsey, et cetera.

I don't think my job in this situation is to predict the future about what would have happened on an alternative timeline. My task is to ask whether it is reasonable to infer that the directors acted for self-interested purposes and whether they now could consider a demand evaluating their own conduct, a demand to bring litigation that would evaluate and potentially challenge their own conduct.

What we have here is direct evidence that as part of settlements, Dorsey's position was potentially at risk and that there was a likelihood of that, certainly along at least one of the settlement options.

I also think that it would be naive and it would ignore the reality of the dynamics of these situations to think that activists with a minority in the boardroom have no influence.

Our cases are replete with situations where activists who gain a toehold in the boardroom exert significant influence. Boards create committees and place activists on the committees. The committees are charged with carrying out or exploring whatever the activist had ran on. They push. They have influence.

So it is reasonable to infer and supported by particularized allegations that even after the first leg of the proxy contest, there would have been a real threat to Dorsey's position as CEO.

Now I'm going to talk about the directors who were not immediately up. They were more remote in terms of their elections. I get that the inference is not as strong for these folks. I would be prepared on many, many a complaint that pled less to not draw an inference of interest versus out-year directors.

But here we've got specific language in the 220 documents which the plaintiff cites which

talks about Elliott being a persistent, multi-year campaigner. It is also, again, the reality that these types of campaigns, particularly when framed as Elliott's letter framed it, are viewed as referenda.

Now, I'm not finding that as a fact, but that is part of the context here. In other words, even though the four directors who I'm thinking of as the out-year directors -- Fox, Rosenblatt, Pichette, and Zoellick -- weren't immediately up, they had a personal investment in this proxy contest in the sense of it being a referendum on their actions and in the sense that if they lost and if four Elliott nominees were in the boardroom, there would be a real threat to their incumbency the follow-on year.

It is true that one does not know what would have happened, but my job is to try to determine at the pleading stage what is reasonable to infer about the mental state of those directors and, hence, how that feeds into their ability to consider a demand. I think the particularized facts are strong enough here.

The other comment I would make is that I don't view the analysis -- and I don't think it's right to view the analysis -- as a choice by these

directors about whether they would breach their fiduciary duties versus keep the prestige of their office.

The defendants understand the multiple steps in a chain of reasoning when they're talking about the chain that would lead to the actual unseating of these directors, but they disregard the similar chain of events that would have to happen before a director would be found to have breached their fiduciary duties.

So the analysis that the director has to think about is not, do I want to breach? The questions include: Would someone sue on this? Would someone get past 23.1 on this? Would we not then be able to create a special litigation committee and resolve this? Would we not otherwise be able to settle this? Will we ultimately not be able to prove to the Court that what we did was the right thing for the company?

There's many a step before anybody -- certainly anybody like the folks involved here, who are all distinguished people -- would be held to have breached their duties and face liability.

So to frame the analysis that way is

not accurate. It puts too much weight on one side of the scales and too little weight on the other side of the scales.

Again, I think it is reasonable to infer at this stage that, like their fellow directors, the out-year directors participated in this, acted in this for entrenchment purposes. As I said, I would be happy on other allegations to view that as not a reasonable inference to draw. But given the whole constellation that is here, that is not something that I'm willing to do. I think the plaintiff gets the benefit of the doubt.

What does that translate into for purposes of demand futility? I think it makes the directors sufficiently interested in the underlying conduct that they shouldn't be able to evaluate a litigation demand relating to that conduct.

I also think it creates the prospect of liability, a threat of liability. Our cases talk about a substantial likelihood of liability. There is a meaningful threat of liability that I think is sufficient here for demand purposes. I am not suggesting that the directors are going to lose. I am suggesting that if one views the case solely through

the lens that the plaintiff has presented at the pleading stage, that that aspect of the test is met.

In the interest of completeness, I will say that I don't think that any of these folks are beholden to Elliott. That is not a path that I see, nor do I think that they are really beholden on these facts to anyone. What is going on here is the entrenchment issue, the self-interest in preserving the seat, and the particularized facts that relate to that.

All right. Lastly, I'm going to deal with Cohn. He can't consider a demand. He can't consider a demand for the same reason that Durban can't consider a demand. This is a package deal. Elliott got the settlement. Cohn negotiated the settlement. He came on the board as a result of the settlement. He received a direct benefit from the settlement. He is an interested party in the settlement. It is, in my mind, exactly the same analysis in terms of Durban.

And plaintiff's counsel is spot on. It is inconceivable that Cohn would turn around and authorize a suit against the directors who entered into the settlement that brought him on the board.

That is just not something that would ever happen. So in my view of the world, pretty much all these folks, except for Li, are in the soup.

The four where I will happily concede that the defendants have the strongest argument are Fox, Rosenblatt, Pichette, and Zoellick. And on a weaker factual showing, I would not draw that inference against out-year directors. But this is a sufficient factual showing, based on how much was done, how fast, in the context they acted, and with the result they achieved that I think this case needs to go forward.

I do think there are policy questions lurking in the background here, as I indicated to plaintiff's counsel. I think Delaware has a policy interest in ensuring that there are vehicles that hold fiduciaries accountable. Stockholder litigation is one of those vehicles, but it's a vehicle that has its own agency costs. As a result, we have to be sensitive to the incentives that we're creating and whether a ruling letting a case pass the pleading stage opens the door to copycat behavior.

I have thought hard about whether letting this case pass the pleading stage paints a

target on activist settlements and risks a new pattern of litigation where stockholder plaintiffs sue over activist settlements and then settle them for some type of inconsequential relief and we essentially have another industry. I don't think that this ruling opens the door to that. I think that the *Ryan v. Gursahaney* case, I think that the *Gottlieb v. Duskin* case, I think these baseline cases show quite clearly that you can't just come in with an activist situation and get past 23.1.

What you can do is come in with a strong record of particularized facts and a settlement that has features that seem questionable and, if your particularized facts are strong enough, survive a motion to dismiss. That's all I think that I am doing in this case.

In terms of the 12(b)(6), I think that the way I have analyzed the 23.1 issues shows that I think that there is a question here of loyalty; that there will be potential loyalty-based liability; that 102(b)(7), therefore, is not a protection; that at least at the pleading stage, the business judgment rule is not a protection. Therefore, I think my analysis of 23.1 governs the 12(b)(6) arguments as

well.

I'm going to stop there. There's a lot more I could say on this, but I'm going to leave that as sufficient for now.

I am going to ask counsel if you-all have any questions or if there's anything that you think are loose ends that we need to tie up while we are all together.

It's the defendants' motion, so I'll ask the defendants first.

MR. YOUNGWOOD: No questions, Your Honor.

THE COURT: All right. Great.

Plaintiff's counsel?

MR. CURRY: Nothing from me either. Thank you, Your Honor.

THE COURT: Well, I'm grateful for your time today. I appreciate your presentations, your briefing. It was very good.

As I hope I've shared with you, I think this is a factually unique case, at least at the pleading stage. Now, whether the plaintiff's allegations prove out is a different story. And no one should take away on either side the notion that I

have somehow reached some preliminary conclusion on the merits.

All I've done, which I think is my only job at this stage, is to say that this is not a case where the incumbent Twitter directors can properly decide whether to bring these claims. And this is also not a case that can be dismissed at the pleading stage because of how detailed the plaintiff's effort is. How the rest of this unfolds I am not hazarding any thoughts on at this stage.

So I'm grateful for everyone's time. Thank you.

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

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CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 90 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 14th day of September, 2021.

/s/ Douglas J. Zweizig

Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter