

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GFI GROUP INC. : Civil Action  
STOCKHOLDER LITIGATION : No. 10136-VCL

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Chancery Court Chambers  
New Castle County Courthouse  
500 North King Street  
Wilmington, Delaware  
Friday, February 6, 2015  
3:30 p.m.

- - -

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

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TELEPHONIC SCHEDULING CONFERENCE

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CHANCERY COURT REPORTERS  
New Castle County Courthouse  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801  
(302) 255-0523

1 APPEARANCES: (Via teleconference)

2 STUART M. GRANT, ESQ.  
3 MARY S. THOMAS, ESQ.  
4 BRENDA F. SZYDLO, ESQ.  
Grant & Eisenhofer, P.A.

5 -and-  
6 KEVIN H. DAVENPORT, ESQ.  
7 Prickett, Jones & Elliott, P.A.  
8 -and-

9 MARK LEBOVITCH, ESQ.  
10 JOHN VIELANDI, ESQ.  
11 EDWARD G. TIMLIN, ESQ.  
of the New York Bar  
12 Bernstein, Litowitz, Berger & Grossmann LLP

13 -and-  
14 DANIEL ALBERT, ESQ.  
15 MICHAEL C. WAGNER, ESQ.  
of the Pennsylvania Bar  
16 Kessler Topaz Meltzer & Check, LLP  
17 for Plaintiffs

18 EDWARD B. MICHELETTI, ESQ.  
19 JENNESS E. PARKER, ESQ.  
20 Skadden, Arps, Slate, Meagher & Flom LLP  
for Defendants CME Group Inc., Commodore  
21 Acquisition Corp., Commodore Acquisition LLC,  
22 Cheetah Acquisition Corp., and Cheetah  
23 Acquisition LLC

24 SAMUEL A. NOLEN, ESQ.  
KEVIN M. GALLAGHER, ESQ.  
Richards, Layton & Finger, P.A.  
-and-

18 GLENN M. KURTZ, ESQ.  
19 ANDREW W. HAMMOND, ESQ.  
of the New York Bar  
20 White & Case LLP  
for Defendants Frank Fanzilli, Jr., and  
21 Richard McGee

(Appearances Cont'd) ...

1 ... (Appearances Cont'd)

2 WILLIAM M. LAFFERTY, ESQ.

3 LINDSAY M. KWOKA, ESQ.

4 Morris, Nichols, Arsht & Tunnell LLP

5 -and-

6 TARIQ MUNDIYA, ESQ.

7 TODD G. COSENZA, ESQ.

8 of the New York Bar

9 Willkie Farr & Gallagher, LLP

10 for Defendants Michael Gooch, Colin Heffron,

11 Nick Brown, Jersey Partners Inc., New JPI Inc.,

12 and GFI Brokers Holdco Ltd.

13 KATHALEEN ST. J. McCORMICK, ESQ.

14 PAUL J. LOUGHMAN, ESQ.

15 Young, Conaway, Stargatt & Taylor LLP

16 for Defendant Marisa Cassoni

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1 THE COURT: Good afternoon, everyone.  
2 This is Travis Laster speaking. Who will be speaking  
3 for the plaintiffs?

4 MR. GRANT: Your Honor, Stuart Grant  
5 will be speaking, at least in the beginning, and then  
6 we'll turn it over to Mark Lebovitch.

7 THE COURT: Thank you, Mr. Grant.  
8 Who will be speaking for the  
9 defendants?

10 MR. LAFFERTY: Your Honor, this is  
11 Bill Lafferty. I will, I think be doing the talking  
12 at least for the management defendants, and I don't  
13 know about the other defendants. So --

14 MR. NOLEN: Your Honor, it's Sam Nolen  
15 at Richards Layton. I have here with me Kevin  
16 Gallagher in my office, and also Glenn Kurtz and Andy  
17 Hammond of White & Case. We'll be speaking for the  
18 special committee defendants and, with Your Honor's  
19 permission, Mr. Kurtz will be doing the speaking.

20 MR. MICHELETTI: Your Honor --

21 MS. McCORMICK: This is Kathleen --

22 THE COURT: I have Mr. Lafferty's  
23 letter, but I didn't want to interrupt whoever it was,  
24 if there's somebody else that wanted to say something?

1 MR. MICHELETTI: I just wanted to let  
2 the Court know, Your Honor, that you have Ed  
3 Micheletti and Janness Parker from Skadden Arps on, on  
4 behalf of CME.

5 THE COURT: Thank you, Mr. Micheletti.  
6 And I got your letter as well. I appreciate it.

7 MS. McCORMICK: And --

8 THE COURT: Mr. Grant, do you want to  
9 go ahead.

10 MR. GRANT: I think the court reporter  
11 wanted to say something.

12 THE REPORTER: I believe that was Ms.  
13 McCormick trying to introduce herself.

14 MS. McCORMICK: Kathaleen McCormick on  
15 behalf of defendant Marisa Cassoni. In the event we  
16 need to speak, I will be speaking on her behalf.

17 THE COURT: Okay. Sorry about that,  
18 Ms. McCormick. It was nothing personal.

19 Mr. Grant.

20 MR. GRANT: Your Honor, I guess a lot  
21 of letters in and some discussions, and maybe some  
22 agreements on certain things. I'm not sure anyone is  
23 opposing the expedition, but having been burned once  
24 by what we shall call a miscommunication, the idea of

1 getting burned a second time was not high on my list.  
2 So that's why I asked and pushed if we could continue  
3 on with this conference. And I just, on the merits, I  
4 will just turn it over to Mr. Lebovitch, with the  
5 Court's permission.

6 THE COURT: Sure.

7 Mr. Lebovitch, go ahead.

8 MR. LEBOVITCH: Thank you, Your Honor.  
9 I know Your Honor's received the papers, so I'm really  
10 not going to rehash every one of what we think are the  
11 wild twists of the past few weeks. I do want to just  
12 briefly observe that what started out as kind of a  
13 strong disloyalty case has just evolved into a set of  
14 circumstances I don't know that anyone could have  
15 envisioned and that's rarely seen. When I last argued  
16 before the Court, it was our first motion to expedite,  
17 and what we had was the CME sale and a management  
18 buyout of the IDB business and we spoke of the parties  
19 claims, we spoke of bribery, kind of the concept with  
20 greed. Back then, when that was it, you had  
21 conflicted directors who understood that fiduciary  
22 duty 101 is create and empower a special committee and  
23 the conflicted directors excuse themselves from the  
24 board's process.

1           Today, the situation has turned  
2 upside-down. We're seeing exactly the conflicted  
3 directors whose plan has been rejected by the  
4 shareholders, and they're now in a box, and they're  
5 facing a complete loss of control over their company.  
6 And what I mean by that is they used their -- Gooch  
7 and Heffron, they used their equity veto to force the  
8 CME deal on the board and to prevent the special  
9 committee from exploring any real alternatives. Now  
10 that the CME deal is voted down and BGC made an offer  
11 that very deliberately side-steps the equity veto,  
12 those fiduciaries, they do face losing essentially  
13 their position and becoming a minority in a company  
14 controlled by a man that they personally detest. And  
15 that's BGC and its owner.

16           And ironically, the dead hand tail  
17 that was part of our case from the beginning is  
18 playing an important role here. Gooch and Heffron  
19 cannot tender to BGC at any price. And more than  
20 that -- and it becomes relevant when we're going to  
21 talk about this search for strategic alternatives --  
22 they can't tender to anyone for an entire year, even  
23 if they liked the person.

24           Their financial interests really are

1 completely adverse to the other shareholders, who now  
2 have the opportunity to sell their shares at the  
3 maximum price that came out of a very public, very  
4 active bidding war. And the other shareholders do not  
5 have to become minority investors. So really, what  
6 we're seeing is, I think, the acts of desperate  
7 fiduciaries using sheer bullying and, frankly, an  
8 unapologetic abuse of power. But I want to focus on  
9 the 14D-9 that we provided the Court this morning,  
10 because it came out last night well after we filed our  
11 motion, and it changes the landscape in numerous ways  
12 that we think are important. Basically, because of  
13 the company's admissions.

14           When we filed our emergency motion  
15 Wednesday night, that was obviously following getting  
16 the e-mail we got from Mr. Kurtz, we knew some of the  
17 special committee's story, at least their position as  
18 reflected in the e-mail. We didn't know where the  
19 company would be. So we were asking for discovery, we  
20 were asking for a prompt hearing or trial, kind of  
21 wanted to see how things were going to play out. But  
22 we knew that for the Court to grant equitable relief,  
23 there may be a need for discovery and, essentially,  
24 factual determinations if the company disputed what



1 the special committee said.

2           While we acknowledge that for some of  
3 the aspects of relief that we would be seeking at some  
4 point there may well still be a need for discovery,  
5 the company's admissions in last night's 14D-9, we  
6 think, show that there isn't a dispute and that the  
7 Court may well have the power and ability to very  
8 rapidly grant the very necessary equitable relief.

9           And I just want to maybe turn to page  
10 9 of the 14D-9, if Your Honor has that, and walk you  
11 through it. But what we learn in the 14D-9 at page 9,  
12 and consider how it affects the relief that's being  
13 sought, is, first, the special committee told us in  
14 that e-mail that they did not authorize what we  
15 believed was a truly cynical exploration of strategic  
16 alternatives. And at page 9 we learn that that's the  
17 case -- at least can infer that -- because the  
18 disclosure in the paragraph -- the first paragraph  
19 that starts with the words "Later that day," we learn  
20 that on January 30, after the CME deal was voted down  
21 by shareholders, we learned that a majority vote of  
22 the board recommended to terminate the amended CME  
23 agreement. But it says "... upon the recommendation  
24 of the Special Committee." And then there's another

1 sentence that says "At the meeting, the board also  
2 determined to explore strategic alternatives . . . ,"  
3 And it goes on. I think in light of Mr. Kurtz's  
4 e-mail, the company's own disclosure of last night  
5 confirms that the special committee did not support  
6 the search for alternatives, and that affects  
7 potentially what actually went down at the board  
8 meeting and the loyalty of the directors who voted to  
9 do that.

10           And second, this is confirming our  
11 February 2 press release theory. We said that the  
12 board never approved the February 2 press release.  
13 The company has confirmed it under the paragraph that  
14 talks about "On February 2, 2015, GFI issued a press  
15 release." The next paragraph says, "Later that day,  
16 the Board met and had extensive discussions regarding  
17 potential strategic transactions."

18           So I think that what we learn, what is  
19 now confirmed, is that having previously sent letters  
20 in his own name which the shareholders chose to  
21 ignore, Mr. Gooch issued a press release on behalf of  
22 the board without even holding a meeting to figure out  
23 the board's position, whether or not that meeting  
24 included the special committee. And I'll note that,

1 you know, as we point out in the papers, considering  
2 how close BGC got to achieving their 45 percent tender  
3 condition, I think it's very fair to infer that  
4 Gooch's deception had its intended effect.

5           Now third -- and this is, I think, the  
6 most remarkable fact that's in this 14D-9, I think it  
7 brings to mind several of the most egregious loyalty  
8 cases that have ever come before this Court. Gooch  
9 and Heffron have effectively disbanded the special  
10 committee, or at least stripped it of its power. When  
11 this deal was announced, or I guess when the process  
12 was ongoing in 2014, Gooch and Heffron created and the  
13 board created a special committee that was broadly  
14 empowered, pursuant to a board resolution, to review  
15 any strategic alternatives.

16           Now, on page 9, what we see is that  
17 the board, in the same paragraph I just quoted from,  
18 on February 2, the board authorized management to  
19 engage in discussions with third parties and to  
20 further explore these potential transactions. And  
21 then on page 10, under the heading "The Board has  
22 Authorized the Exploration of All Strategic  
23 Alternatives," we see, in the third sentence, "The  
24 Board has authorized GFI Management to explore these

1 potential transactions."

2                   And so we think the company's now  
3 confirming that notwithstanding the resolution,  
4 notwithstanding the special committee's opposition,  
5 they have essentially given power to management, which  
6 we can all rightly, I think, conclude is giving power  
7 to the two people who are subject to the tail and who  
8 would never want to be subject to being a minority  
9 under the thumb of Howard Lutnick, and who have shown  
10 their opposition and essentially the conduct through  
11 which they're going to oppose BGC at all costs.

12                   Now, this does bring to mind some  
13 cases. We cited them without even really appreciating  
14 how deep the special committee had been undermined.  
15 But in *Hollinger vs. Black*, Conrad Black, his equity  
16 position was not enough to force the board to do his  
17 bidding. He used his fiduciary power to override the  
18 special committee, and we know that then-Vice  
19 Chancellor Strine had absolutely no problem using the  
20 full breadth of the Court's equitable powers,  
21 including not only enjoining Black from selling his  
22 shares to Barclays, but actually restraining him from  
23 interfering with the strategic review process and  
24 enmeshing himself with that. And what the Court said

1 is his own conduct "made it impossible" to include him  
2 in a strategic process as the leader.

3           And then we also cited the T. Rowe  
4 Price vs. Rubin case, where you had a conflicted  
5 fiduciary essentially neutralize and side-step a  
6 special committee that was not doing his bidding and,  
7 again, the Vice Chancellor had no problem granting  
8 injunctive relief here.

9           Here what we see is currently, today,  
10 as of today, the shareholders have a choice between  
11 6.10 per share, which is less than 6.20 that BGC did  
12 in fact have on the table, I believe as of last  
13 Monday. But it's -- but the choice is 6.10 or some  
14 higher number versus the far lower price where the  
15 stock is going to trade if BGC walks away. And so we  
16 will be asking the Court to exercise its power  
17 quickly.

18           You know, the 14D-9 affects what we're  
19 seeking, and this is why we wanted to have this call.  
20 Because of the facts that aren't contested, we believe  
21 there's not really a need for a full evidentiary  
22 hearing on all of these issues. And we're also  
23 looking at the Court's time. It may be that it's  
24 perfectly sufficient if the Court wants to have an

1 oral argument essentially on an injunction sometime  
2 even early next week, where we just go on the facts  
3 that are here. And we think that that's enough for  
4 the Court to enjoin the conflicted directors from  
5 enmeshing themselves and interfering with the special  
6 committee, and even the board process, as it relates  
7 to BGC.

8           We think it would be a problem for the  
9 board to meet today or tomorrow to consider BGC with  
10 Gooch and Heffron participating. And we frankly think  
11 that if that relief is granted, it's entirely possible  
12 that one or two board meetings where Gooch and Heffron  
13 aren't present might sort this all out. And, you  
14 know, that said, we recognize that if the Court is  
15 either not inclined to decide this promptly, we will  
16 pursue discovery, we're going to seek the earliest  
17 possible hearing. And if, after additional board  
18 meetings where Gooch and Heffron are present, or even  
19 if there's meetings where they're not present but  
20 Ms. Cassoni still does what we think inexplicably  
21 favors Gooch and Heffron over the obvious interests of  
22 the shareholders, we think that then you would have to  
23 have discovery and an evidentiary hearing.

24           In particular, last night's 14D-9 may

1 well tip BGC over the 45 percent. They only need a  
2 few shares to get there. And we're going to have the  
3 board condition. It is not like other conditions that  
4 are dependent on outside forces. It's not an  
5 antitrust condition. It's not a financing condition  
6 or something else that relies on third parties. This  
7 is a condition wholly within the control of the board.

8           And I'll just posit, Your Honor, that  
9 if a director, acting in good faith, concludes that  
10 6.10 or 6.20, or whatever can be negotiated, is better  
11 than letting this company go into free-fall, then it's  
12 a necessary corollary that you expand the board to  
13 allow that tender offer to happen. It's not a big  
14 deal because you're going to be transferring control.  
15 That's the whole point.

16           And we think, you know, frankly,  
17 turning against the shareholders, where the sole  
18 effect is entrenching Gooch and Heffron, it is  
19 inexplicable. It does look like bad faith. But if we  
20 get there, we would need discovery. And if we can't  
21 get a hearing really quickly, then we would seek that  
22 discovery into the conflicted directors and  
23 Ms. Cassoni so that we can get whatever relief is  
24 there.

1           And my last point, Your Honor, is I do  
2 admit, for all the admissions that have come out of  
3 the parties that have been, I think, pretty funny,  
4 including Mr. Kurtz' e-mail and what we see in the  
5 14D-9, Mr. Kurtz was obviously pretty cautious and, I  
6 would say, very deliberate in what he shared with us.  
7 And respectfully, I mean, we would be in a much better  
8 position, and perhaps the Court would be in a better  
9 position, if we learned a little bit more -- if  
10 Mr. Kurtz, you know, is permitted to speak with the  
11 Court, a little bit more of an explanation of what's  
12 been going on. Because all we know is something is  
13 very deeply broken in this board process with the  
14 special committee, but we don't -- we don't know  
15 exactly why or how that's played out.

16           But I'll just save any further  
17 comments till after I hear from the Court, if I can  
18 answer any of your questions, or if we hear from other  
19 counsel.

20           THE COURT: Let me ask you a few  
21 questions. So let's differentiate between your  
22 loyalty claim, which I think is clearly colorable,  
23 probably even much stronger than colorable. But  
24 that's only part of the question, in terms of



1 scheduling. If these guys have really done the types  
2 of things you say they've done, why don't we have a  
3 damages case? I've got a price out there that I can  
4 key off of. We're going to know where the stock  
5 settles if the deal's lost. Why can't I let you-all  
6 go after these two, and maybe three, folks for a  
7 damages remedy?

8 MR. LEBOVITCH: Your Honor, I'll give  
9 two answers to that. First of all, we are talking  
10 about hundreds of millions of dollars of lost value.  
11 We referenced -- I think it was S&P or Fitch, saying  
12 that if no deal gets done here, this company is going  
13 to be downgraded, its business is deteriorating. We  
14 would expect the stock to drop by hundreds of millions  
15 of dollars. And so I don't know that a monetary  
16 recovery from these individuals is viable.

17 And more importantly, I know that --

18 THE COURT: Is it going to drop more  
19 than 40 percent?

20 MR. LEBOVITCH: Sorry?

21 THE COURT: Is it going to drop more  
22 than 40 percent? I mean, we know they've got 40  
23 percent of the company.

24 MR. LEBOVITCH: Well, we don't know,

1 because what we've had is a premium to the unaffected  
2 price that's now 90 percent. And we know that.  
3 That's where -- 6.20 is 90 percent or close to 90  
4 percent higher than where the stock traded before the  
5 deal was announced. And, Your Honor, I'll concede  
6 that if there wasn't a pending all-cash tender offer,  
7 Your Honor might say, well, Mr. Lebovitch, that's the  
8 way the cookie crumbles because there's no competing  
9 bid out there. But the shareholders have an offer out  
10 there that followed the heated bidding war. And I've  
11 been through this, where if there's not a competing  
12 bid, and the Court will say, well, there's disloyal  
13 conduct here but we don't have another bidder.

14                   Here, there is another bid. And I  
15 always felt that has legal significance, and so I  
16 thought that that would mean the Court would use its  
17 powers to fix the problem as it goes. And I'll tell  
18 you, Your Honor, it may be that if Your Honor has a  
19 hearing -- either decides today or we have an argument  
20 on Tuesday that's more fulsome -- about whether the  
21 existing admissions justify enjoining Gooch and  
22 Heffron from interfering with the process, okay, I  
23 think we can do that. It's exactly what happened in  
24 the Black vs. -- in the Hollinger vs. Black case. If

1 Your Honor grants that relief, it's possible that --

2 THE COURT: The Hollinger vs. Black  
3 case was nowhere near that fast.

4 MR. LEBOVITCH: No, I understand that.

5 MR. GRANT: Your Honor --

6 MR. LEBOVITCH: I understand that, but  
7 I --

8 MR. GRANT: Mark, can I jump in for  
9 one second?

10 MR. LEBOVITCH: Yeah.

11 MR. GRANT: Your Honor, this is Stuart  
12 Grant. In answer to your very direct question, I  
13 think the defendants have a little under 40 percent  
14 and, quite frankly, right now the stock is almost 100  
15 percent, or if a deal at 6.20, it's almost 100 percent  
16 of the unaffected price. So quite frankly -- first of  
17 all, we don't know, if they did a negotiated deal,  
18 whether it would be more than 6.20. So I don't know  
19 what the -- you know, it's not enumerated. Whatever  
20 the first part of the subtraction equation is minus  
21 whatever it settles down to could well be more than  
22 what Gooch and his colleague can afford. So I think  
23 there is a real question of whether that judgment  
24 could ever be paid.

1 THE COURT: All right.

2 Next question, for whoever wants to  
3 field it as to you and Mr. Lebovitch. Why isn't this  
4 the special committee's water to carry? If they have  
5 the powers that you believe them to have, such that  
6 this is the board improperly overriding them and  
7 violating their prerogatives, why aren't they the  
8 people who should be bringing this claim, rather than  
9 you?

10 MR. LEBOVITCH: Well, Your Honor,  
11 we've been on them for a long time as this process  
12 unfolded. And they are defendants. When we started  
13 this case, you know, they were named as defendants. I  
14 think the crux of what that question is maybe should  
15 be directed to Mr. Kurtz, but my answer for you is the  
16 fact that they have so far only sent out, I think,  
17 that very cautious e-mail, and not taken a litigation  
18 position, should not prejudice the right of the  
19 shareholders to say this process is broken and we're  
20 the ones that are going to be hurt by that.

21 But I suppose Mr. Kurtz can answer why  
22 he hasn't sought to essentially realign, if we're  
23 right about these facts.

24 MR. GRANT: Your Honor, this is --

1           THE COURT: I want to stay with you  
2 guys for a while. Was that you, Mr. Grant, or was  
3 that going to be Mr. Kurtz?

4           MR. GRANT: No. This is Mr. Grant.  
5 Just to follow that up, I think the special committee  
6 has shown in numerous instances that they are  
7 spineless. Cassoni, you know, seems to waffle back  
8 and forth and, you know, is part of the process, not  
9 part of the process. But for whatever reason, she --  
10 and potentially others -- seem to be under Gooch's  
11 thumb, and they're not stepping up. You know, quite  
12 frankly, had they stepped up right at the beginning  
13 and done the right thing, we might not even be here.  
14 But I think the special committee has shown several  
15 instances where they have, at a minimum, shall we say,  
16 not shown best practices and, quite frankly, I believe  
17 have breached their fiduciary duty.

18           MR. LEBOVITCH: You know what? I'm  
19 sorry to --

20           MR. GRANT: They actually --

21           MR. LEBOVITCH: Actually, Mr. Grant,  
22 there's one thing that we didn't put in our papers  
23 that I do want to raise for Your Honor. Ms. Cassoni  
24 was on the special committee originally. I don't

1 know -- again, Mr. Kurtz can answer this. But it's  
2 occurred to me that having represented Ms. Cassoni  
3 until she decided she wanted different lawyers -- I  
4 don't know who supplied the lawyers, but until she  
5 decided she wanted to break off of White & Case and, I  
6 guess, Richards, Layton's representation, they  
7 represented her. And so maybe -- I'm speculating,  
8 maybe that constrained the special committee from  
9 essentially taking action adverse to Ms. Cassoni. I  
10 don't know the answer to that.

11 THE COURT: You don't think that's  
12 just a testament to Ms. McCormick's abilities as a  
13 lawyer?

14 MR. LEBOVITCH: I have nothing against  
15 anyone hiring Ms. McCormick at any time, but it's  
16 clearly unusual for a special committee member to vote  
17 in favor of a lower-priced deal that has greater  
18 conditions and then gets her own lawyers and decides  
19 to align herself with the controller.

20 THE COURT: Well, I think obviously  
21 that's between Young Conway and Richards and White &  
22 Case. They're all good shops. I wouldn't draw any  
23 inference from that, either.

24 MR. LEBOVITCH: Absolutely.

1                   THE COURT: I'm focusing on your  
2 relief on page 8 of your motion. Does the D-9 moot  
3 the need for (i), which was a request for a disclosure  
4 requiring that Gooch and Heffron correct the  
5 statements made in the January 30/February 2 press  
6 releases?

7                   MR. LEBOVITCH: The answer to that, I  
8 think, is no, because this talks about just the  
9 process, frankly, in light of the disclosures that  
10 were made. And even though I've read through the  
11 14D-9 and I'm reaching conclusions that the special  
12 committee posed, I think there would have to be  
13 disclosures about the basis for the special  
14 committee's position, because I believe the tender  
15 offer came to its closing where investors thought that  
16 the board as a whole reached conclusions. There was  
17 no hint that the special committee had taken a  
18 different position.

19                   And it's our position -- why I started  
20 hounding Mr. Kurtz to explain himself. So I think  
21 that would have to be further disclosure of what  
22 happened. And, frankly, in light of the 14D-9  
23 yesterday, it does reflect a fissure on the board.  
24 Shareholders considering the tender offer now would

1 have to understand the whole process that led to this  
2 so that they can assess what they're going to do about  
3 any recommendation by Gooch or board members who are  
4 siding with him.

5 THE COURT: All right. That should  
6 cover it for now. I thought I had another question,  
7 but it's left my mind. Perhaps it will return to me.

8 Now, Mr. Lafferty, I saw your letter  
9 saying that you don't oppose expedition. Do you have  
10 a preference as to when and how?

11 MR. LAFFERTY: Your Honor, I think the  
12 way we looked at it was that, you know, as I said in  
13 the letter and as I said to Ms. Thomas last night,  
14 that we don't oppose expedition. We did ask for some  
15 clarity about what precisely it is the plaintiffs were  
16 asking for. And indeed, I've now heard that change  
17 yet again.

18 I mean, our point is simply we want to  
19 know what the claims are they're going to proceed on  
20 and what relief they want, and -- I mean do they want  
21 a trial? Do they not want a trial? Initially they  
22 asked for a trial. Now I hear Mr. Lebovitch asking  
23 for some sort of a hearing next week, which doesn't  
24 seem at all ripe to me, because I think, you know, as



1 you've heard, there are facts that need to be  
2 explored. There needs to be a record made. No matter  
3 whether it is a trial ultimately or a preliminary  
4 injunction hearing, there needs to be some factual  
5 development for the Court.

6           And, you know, Mr. Lebovitch and  
7 Mr. Grant wanted the conference, notwithstanding our  
8 agreement, because they wanted to go through all that  
9 and they wanted a soapbox to get on. I wanted to be  
10 clear that we don't agree with them on all the facts,  
11 that we intend to oppose them, and we intend to oppose  
12 the relief, but I'm not going to sit here and go  
13 through facts that I'm not comfortable sort of  
14 putting -- you know, sort of putting my stamp of  
15 approval on. Mr. Lebovitch basically gave testimony  
16 today, and I'm not prepared to do that. The facts  
17 will need to speak for themselves. We intend to  
18 oppose them on the merits when it's heard.

19           I think ultimately, you know, again,  
20 our belief is, again, whatever the relief is they are  
21 ultimately seeking, we think, is not going to be  
22 granted. And so we're prepared to go forward on  
23 whatever basis the Court says we should go forward on.  
24 I do think that Your Honor's point about damages is

1 true. I mean, there will potentially some day, you  
2 know, potentially be a damage claim here. You know,  
3 the plaintiffs well know that there are now  
4 discussions, and the fact that there are discussions  
5 going on with BGC is public. Both the company and BGC  
6 have said so. That is going on, and we're going to  
7 know wherever that comes out at some point. But those  
8 facts are still in flux, so that's sort of a whole  
9 other developing saga that is going to be the subject  
10 of, I'm sure, further factual development.

11           So, I mean, my final mind is we're  
12 indifferent. We're prepared to go forward on whatever  
13 basis Your Honor thinks, if there's going to be any  
14 basis, as long as the plaintiffs put their stake down  
15 and tell us clearly, "These are the claims. This is  
16 the relief we want," we know what we're shooting at.

17           THE COURT: Okay. Thank you,  
18 Mr. Lafferty. And I did not take you as conceding any  
19 of the factual points. So that's understandable.

20           Mr. Kurtz, do you want to share with  
21 me your thoughts?

22           MR. KURTZ: Yeah. That would be  
23 great, Your Honor. Maybe I can go through a few of  
24 the items and respond at least to plaintiffs'

1 allegations about the committee. I think it's worth  
2 noting at the outset that we represent two totally  
3 independent directors. They have been for some time  
4 fellow board members of, and they enjoy relationships  
5 with, the insiders, but they have no interest in the  
6 insider deal. They took on a job to maximize value  
7 for disinterested stockholders and to replicate an  
8 arm's-length transaction. And frankly, they had no  
9 idea what they were getting themselves into.

10           There's been a satisfying component of  
11 the work, which is the committee has been successful  
12 in generating a strong auction which produced, at one  
13 point, 100 percent premium to the unaffected trading  
14 price at the time of the announcement of the CME deal,  
15 but it's also been incredibly frustrating, because the  
16 committee's not been able to actually deliver that  
17 value to stockholders, because their independent  
18 recommendations have been rejected by insiders and  
19 they have only two of the three votes that are needed  
20 to take action.

21           I -- let me start with a disclosure  
22 issue. Then I would like to talk about plaintiffs,  
23 and then we can decide whether you want to hear about  
24 process. But the disclosure issues have been becoming

1 increasingly problematic, from our standpoint. At the  
2 outset, of course, the full board was provided with  
3 notice of an intention to make a disclosure or  
4 securities filing and provided drafts and an  
5 opportunity to comment. That's no longer the case,  
6 and the most recent disclosures, we think, are not  
7 accurate. We didn't know they were going out, we  
8 didn't have an opportunity to comment on them. Some  
9 of that's been addressed in the papers. I think what  
10 I would address is the 14D-9, since that's new.

11           Mr. Lebovitch relies on it as  
12 confirming some facts, but we actually have some  
13 problems with it, because it says, on page 9 -- which  
14 is where Mr. Lebovitch was reading -- that "Based on  
15 the result, the Board determined by a majority vote of  
16 the Directors, upon the recommendation of the Special  
17 Committee, to terminate the amended CME merger  
18 agreement and ..." some other agreements.

19           The actual facts for that was that the  
20 special committee resolved and submitted as  
21 recommendations a five-step process, which started  
22 with the termination of the CME agreement, in order  
23 to -- and then subject to the endorsement, the signing  
24 of the BGC agreement, and then the satisfaction of the

1 BGC conditions -- primarily the board condition -- the  
2 supplying of disclosure schedules, and some other  
3 actions that were required in order to consummate the  
4 deal.

5           So there wasn't a recommendation just  
6 in a vacuum to terminate the CME deal. And when we  
7 got to the board meeting, which lasts all of about  
8 five minutes, the special committee members said,  
9 "Wait a minute, we got to talk about BGC. It's  
10 expiring Monday morning." And the chairman of the  
11 board, Mr. Gooch, the insider, said, "We're not going  
12 to have any discussion about that," and then proceeded  
13 to a vote to terminate the CME agreement in a vacuum.

14           Not only was it not, quote, the  
15 "recommended action by a majority" but, in fact, the  
16 special committee said if we can't ask questions, we  
17 can't vote on it. And they said, "We don't need your  
18 vote," and they proceeded to pass it without any  
19 participation by the special committee.

20           So we're seeing problems. Another  
21 problem we're seeing in the process is sort of unhappy  
22 with having any other voice in the room. The board  
23 has silenced the special committee's personal  
24 advisors. Initially White & Case and Richards Layton

1 would speak in the boardroom. And just as soon as  
2 there started to be some movement to support BGC, the  
3 insiders declared that counsel for the special  
4 committee could no longer speak. And then, maybe more  
5 troublingly, the last two meetings -- or at least the  
6 meeting on this Monday and a meeting before then, we  
7 were actually barred from listening in or  
8 participating. The special committee members said  
9 they needed their legal counsel. The insiders said  
10 you can't have it, notwithstanding Your Honor's recent  
11 article about the need for personal advisors, which  
12 seemed to us to be particularly forceful where you're  
13 in such a complex environment, with a 30 percent  
14 shareholder with negative control, litigation, and a  
15 live auction.

16           At this point, even though the special  
17 committee was authorized by resolution of the board to  
18 be exclusively in charge of transactions, it's the  
19 insiders that are now negotiating with BGC. They  
20 haven't apprised the board of the status of those  
21 negotiations, the relevant facts, and they said they  
22 won't do that unless the committee members agreed that  
23 they won't disclose that to their personal advisors  
24 for purposes of getting legal advice. So we're really

1 neutered, and we're really put in a difficult  
2 position.

3           That's probably an appropriate time to  
4 talk about the allegation of plaintiffs about  
5 spineless activity. That's actually a pretty reckless  
6 allegation to make. The record -- and Your Honor will  
7 see it at some point -- is going to prove it to be  
8 incredibly wrong. This has been one of the most  
9 hard-fought processes that Delaware will have seen,  
10 and I think Delaware will be pretty proud about.  
11 Everyone on the special committee is very unpopular.  
12 At the bottom of the caption, advisors, like we said,  
13 aren't even allowed to speak or show up anymore.

14           There were restrictions on what the  
15 special committee could do or say until the CME deal  
16 was terminated, because there was a no-shop in there.  
17 And since that time has come, there really hasn't been  
18 any opportunity or, we really understand, a basis for  
19 seeking any kind of injunctive relief. We sort of  
20 thought long and hard, and we can't really come up  
21 with a legal claim to do something here, given what  
22 directors are allowed to do. And we're not sure how  
23 you get an injunction that kind of gives the process  
24 over to two-fifths of the board.

1           We'd love for that to happen. If that  
2 happened, I think we could pretty quickly deliver  
3 value, but we haven't seen it. We view it sort of as  
4 Your Honor initially questioned, which is isn't it  
5 really a damages case. And if there's a damages case,  
6 there's already a plaintiff here and they're handling  
7 it, and they're more than capable of handling it. We  
8 haven't brought a claim, and we're probably not the  
9 right party to bring a damages claim. In fact, we're  
10 a defendant.

11           But if anybody has sat around, we  
12 really -- we did kind of walk close to where we  
13 thought we could get to when we filed an opposition to  
14 the motion -- it was really a partial opposition to  
15 the motion, application for a preliminary injunction,  
16 and we disclosed what was going on. And the process  
17 has been difficult. We've had difficulty getting  
18 meetings scheduled. We've been able to meet almost  
19 immediately when we were supporting the CME deal, each  
20 and every time they matched, but it takes repeated  
21 requests to be able to get a meeting for BGC. And  
22 sometimes the insiders don't let the meeting take  
23 place at all.

24           The insiders dominate the meetings



1 when they're there. I've already mentioned the  
2 silencing of the advisors. They determine the agenda.  
3 They dominate the discussions and the deliberations.  
4 And although for a while they actually tried to pursue  
5 abstention, so to speak, by not casting votes until we  
6 got to 5.85 -- at which time the insiders actually  
7 cast aside the last remnants of abstention and started  
8 voting against the BGC deal.

9           So we've had difficulty with that.  
10 There's been -- the non-special committee members have  
11 cited concerns with the conditionality of the BGC bid  
12 and with their ability to fund. We don't have any  
13 problem with that. We disagree with those objections.  
14 But of course, the only way we could have addressed  
15 those matters is to be able to negotiate. But because  
16 we had -- with BGC. And because we had a no-shop, the  
17 only way to do that was to get a determination that it  
18 was reasonably likely to lead to or could lead to a  
19 superior proposal. That's something we were able to  
20 get through early, but once it got up to 5.85, the  
21 board would no longer give us that opportunity. They  
22 wouldn't make that -- they wouldn't follow that  
23 recommendation. And as a consequence, we couldn't  
24 even speak to BGC to try to resolve any concerns

1 anybody legitimately had about conditionality.

2           Matters sort of got worse after the  
3 CME deal terminated. And I've given you some  
4 background on that shouldn't have been terminated, in  
5 our view, without adopting a new deal. Unlike the  
6 non-special committee members, the disinterested  
7 stockholders understood the \$6.10, and at one point  
8 \$6.20, was more than 5.85. And so they voted down the  
9 CME transaction. That meant that we had nothing left  
10 but BGC. And of course, the special committee wanted  
11 to be able to sign that up with the caveat that they  
12 would, before they signed it, try to negotiate it back  
13 up to the 6.20. And that was the meeting where the  
14 board just refused to even have a discussion about it  
15 and terminated the board meeting, you know, within a  
16 matter of minutes. And then it expired, before we had  
17 another meeting, the following Monday at 8 a.m.

18           Instead, what the insiders said is  
19 they were going to explore strategic alternatives. We  
20 have problems with that. The first problem is we've  
21 already done that. The insiders spent months doing  
22 that before coming to terms with CME, or at least  
23 deciding that they might come to terms with CME, and  
24 forming a special committee about a year ago in

1 January. And the special committee then spent about  
2 12 months on alternative strategies and developed, as  
3 I said, a pretty furious auction which had a lot of  
4 bidding going on.

5                   And we've had, therefore, a long  
6 opportunity for any interested bidders to emerge and,  
7 of course, nobody has emerged. And on top of all  
8 that, the 38 percent shareholder, JPI, is locked up  
9 with CME for 12 months. And so we don't know how  
10 they're able to do anything to even generate a new  
11 market. And the reality is that the insiders were  
12 advocating last Friday morning that the shareholders  
13 needed to quickly tender in to them or vote in favor  
14 of their deal at 5.85, without a further market check.  
15 And, therefore, sort of difficult to understand how  
16 you can't then take a higher number at 6.10 without a  
17 market check.

18                   And the idea that BGC's not real or is  
19 too conditional and they're bad faith, and lots of  
20 other things that have been said about them, seems  
21 inconsistent with the fact that the insiders are  
22 themselves, in usurping the special committee,  
23 negotiating with BGC in an effort to get for  
24 themselves \$6.10. And we don't really know if they're

1 trading away anything to get that, but obviously if  
2 \$6.10 is a good deal when the insiders can take  
3 advantage of it, it's a good deal when it's offered to  
4 the disinterested shareholders.

5           The CME merger agreement contains a  
6 fiduciary out, consistent with Delaware law. That was  
7 designed to permit the special committee and GFI to  
8 negotiate superior proposals, even if the insiders  
9 would be unable to take advantage of them because they  
10 had partnered up with a lower bidder. And you can't  
11 just sort of time it all out and move to a brand new  
12 process just because the insider's no longer able to  
13 participate in the sale of the business or the  
14 purchase of the business.

15           So we've had a pretty difficult time  
16 with it. The record's going to demonstrate that we've  
17 been trying really hard to do something. We're not  
18 sure what we can do. We're still not sure what we --  
19 even seeing plaintiffs' papers, we're still not sure  
20 what's out there, other than damages. And maybe  
21 there's something creative that we missed. If that's  
22 the case, we'll chime in.

23           We're supportive of any kind of  
24 relief, which helps us maximize value on behalf of the

1 disinterested shareholders. We will continue to  
2 oppose as long as the committee is in place, any  
3 action that purports to diminish the returns to  
4 disinterested stockholders or would favor an insider,  
5 and we'll do -- we've been doing our work hard, and  
6 we'll do our work right until the end of this thing.

7 THE COURT: All right. Thank you,  
8 Mr. Kurtz. That was very helpful. It's helpful to  
9 have your views as well as, through you, the views of  
10 your clients, and I appreciate it.

11 In terms of time, would you  
12 rather -- the plaintiffs have put two things on the  
13 table. One would be some type of abbreviated  
14 paper-based application that would happen, sounds  
15 like, early next week. The other would be some type  
16 of mini-trial on the merits on limited issues on the  
17 17th. Without limiting you to those -- if you've got  
18 some other idea, that would be fine with me -- what  
19 are your thoughts on the manner in which we should  
20 proceed? Do you have a preference for one of those  
21 alternatives or some different approach?

22 MR. KURTZ: My view is if we can do  
23 anything quickly and on an expedited basis, and even  
24 maybe commentary as we go through the claims may move

1 this process. The ultimate problem, the big gorilla  
2 in the room here, is you need to -- the only way you  
3 can satisfy the conditions in order to be able to  
4 consummate a tender offer with BGC that matter at this  
5 point is to be able to provide them with two-thirds of  
6 the board. There's actually a way to do it, it's a  
7 really simple way to do it, and that is a majority of  
8 the board of directors, which is now at five but can  
9 be expanded to nine. Just take new designations, and  
10 then the two special committee members would resign.  
11 And that would give you what you need to satisfy the  
12 condition.

13                   But we're not -- you need three votes  
14 on the board in order to be able to designate and  
15 expand the board of directors in order to satisfy that  
16 remaining condition in the BGC tender offer. And I  
17 don't know whether the plaintiffs have a way that they  
18 think we can get there, other than through maybe fear  
19 as to what the alternatives might be for those that  
20 aren't participating in efforts to bring value to  
21 disinterested stockholders. And if there's a way and  
22 it requires an evidentiary hearing, then I support  
23 that. If there's a way that can be done on what  
24 really shouldn't be a highly contentious record,

1 because the facts are the facts, I support that. But  
2 I'm just not -- I still haven't figured out a way to  
3 satisfy that condition without a third vote.

4 THE COURT: All right. Well, that's  
5 helpful.

6 MR. GRANT: Your Honor --

7 THE COURT: Who is that?

8 MR. GRANT: Stuart Grant. You know,  
9 one of the things of relief that we will ask for is  
10 basically to preclude Gooch and Heffron from being  
11 involved in this whole process, neutering them based  
12 on their fiduciary duty. That will give them three  
13 votes left, and 2 to 1, I believe they can expand the  
14 board. That's one of the areas of relief. Now,  
15 whether that requires a full trial or they can be  
16 enjoined from interfering with a process because of  
17 the breaches of fiduciary duty, I don't know.

18 I guess that's part of the reason why  
19 we wanted to have this conference, because we wanted  
20 to make sure that whatever procedurally we set up, the  
21 Court has the ability to provide the relief that's  
22 needed. Because we agree with the special committee  
23 that that is what's needed to meet the tender offer  
24 condition. It is within their power, but the two

1 interested directors are abusing their power to  
2 prevent the balance of the board from doing what they  
3 need to do.

4 MR. KURTZ: I'm sorry. But just to  
5 clarify that so we don't go down the wrong road -- and  
6 maybe Mr. Grant has an idea I don't have -- my  
7 understand of the governance documents is not that  
8 it's a majority of a quorum, but that it's a majority  
9 of the board. And, therefore, we would need three.  
10 If we thought we could have done it on two, we may  
11 have actually come in for relief ourselves. So maybe  
12 somebody has a different read, but it's not our read.

13 MR. LEBOVITCH: Your Honor, this is  
14 Mark Lebovitch. Just to clarify our position, you do  
15 need three directors, and that's why, when I spoke  
16 earlier, I said that it may or may not sort itself out  
17 if we enjoin Gooch and Heffron from interfering with  
18 the board. Clearly Ms. Cassoni has switched sides for  
19 some reason or another, and that's why we thought  
20 right now, while the board has to be able to act, it  
21 would be appropriate to have -- because we believe  
22 there aren't contested facts about Gooch and Heffron's  
23 role here -- an order that would leave three people on  
24 the board.



1           It is possible that you would then  
2 have a three-person board meeting at which Ms. Cassoni  
3 would hold out, and that's why there may have to be a  
4 second stage. Again, I don't know what Mr. Kurtz  
5 knows, and so we may be naive to think that if it's  
6 three people in the boardroom, that they would come to  
7 what we believe to be the obvious conclusion for the  
8 benefit of shareholders, but it may be that keeping  
9 Gooch and Heffron out of the boardroom wouldn't change  
10 the outcome. We just don't know. And maybe that's --  
11 maybe Mr. Kurtz has a deeper insight than we do.

12           THE COURT: Thank you, everyone. I've  
13 heard what I want to hear.

14           MR. LAFFERTY: Your Honor, this is  
15 Mr. Lafferty. Can I just say one other thing? And  
16 I'll stand down if you've heard enough. I'll --

17           THE COURT: Well, since you're the  
18 only one who hasn't been talking, I should give you at  
19 least a couple of minutes, but I really do not want to  
20 get into governance documents speculation or people's  
21 respective views about that. I don't think it's most  
22 helpful. But go ahead.

23           MR. LAFFERTY: And I apologize, Your  
24 Honor, and I'm not trying to prolong this. I thought

1 we were going to have a scheduling conference, not an  
2 ever-developing -- yeah. Honestly, this is pretty  
3 extraordinary, because the plaintiffs aren't sure what  
4 they're asking for. It keeps changing. My point has  
5 always been, look, we're prepared to move forward.  
6 There needs to be a factual record, I believe, put  
7 before Your Honor. And we don't agree with everything  
8 that Mr. Kurtz said. I also am of the view that it's  
9 far from clear to me what role the special committee  
10 has, now that there is no interested-party transaction  
11 on the table. The CME deal is -- it's over. It's  
12 been voted down. It's been terminated.

13           So, you know, the idea that we're  
14 going to have some presentation next week at which the  
15 Court could possibly conclude that certain directors  
16 ought to be stripped of their rights as directors,  
17 with no factual development or factual record or  
18 factual presentation, to me, is utterly extraordinary,  
19 and I would not agree with that concept. I don't  
20 think that makes any sense. And if there's going to  
21 be a hearing at which that type of relief is  
22 considered, there ought to be facts put before Your  
23 Honor.

24           THE COURT: Great. Thank you,

1 Mr. Lafferty.

2                   So here's what we're going to do: We  
3 are certainly going to have some type of factual  
4 development. I would be shocked if Mr. Gooch and  
5 Mr. Heffron agreed with events as Mr. Lebovitch views  
6 them or as Mr. Kurtz has described them. That doesn't  
7 mean that I won't be ultimately swayed and find quite  
8 credible the testimony of independent directors who  
9 don't have a dog in the fight or any other reason to  
10 shade their testimony or their views and, hence,  
11 generally can be counted on to call things straight.  
12 But it is possible that Mr. Gooch and Mr. Heffron may  
13 disagree with the account that the independent  
14 directors put forth, and that would require me to  
15 make -- either on a probabilistic basis or, in the  
16 event of some type of merits hearing, a preponderance  
17 basis -- an assessment of the facts. In light of  
18 that, I think that what makes the most sense is to  
19 proceed to a merits hearing, and I will reserve two  
20 days, rather than the one that the plaintiff has  
21 requested. We'll block out the 17th and the 18th.

22                   I am going to adopt the schedule that  
23 the plaintiffs proposed on pages 18 and 19 of the  
24 motion to expedite, with the modification that the

1 plaintiffs will have until close of business  
2 tomorrow -- and I'll be more specific. Let's say a  
3 little bit before close of business, since I know we  
4 don't like close of business. We'll say 4:00  
5 tomorrow -- to file their supplement to the complaint.  
6 By giving the plaintiff that extra time, I'm expecting  
7 you-all to be as targeted as you can in terms of  
8 identifying the relief that you're planning to seek  
9 and the matters that are going to be subject to this  
10 highly expedited discovery.

11           Similarly, in terms of the updated  
12 document production that's contemplated by February 9,  
13 I don't think it's fair for you just all to say  
14 "update." I think you should be more directed in  
15 telling people what you want. Whether the depositions  
16 are limited to Gooch and Cassoni, I leave that to the  
17 plaintiffs. I think, in something like this,  
18 notwithstanding the fast pace, it may well be  
19 important to depose more than those two, and so I  
20 won't limit you to two depositions. I don't want you,  
21 you know, going crazy, but if you want to take  
22 additional depositions, or if Mr. Lafferty wants to  
23 depose the special committee members, if he's worried  
24 that they will provide testimony that he won't be able

1 to anticipate, that all needs to happen, and you're  
2 just going to have to get it done.

3           The opening brief that's going to be  
4 filed on February 13 needs to be specific about the  
5 exact relief you're seeking. The reason why I'm  
6 allowing for some development between the complaint  
7 and the 13th is it may be that, depending on the  
8 testimony, you can forego some type of relief or seek  
9 others. But what I'm not going to do is have  
10 Mr. Lafferty have to respond in his answering brief to  
11 a moving target. So whatever you guys put in your  
12 opening brief on February 13th, that's what we're  
13 going with. And then we'll have the 17th and 18th for  
14 a merits hearing.

15           The reason why I think it's important  
16 to go to a merits hearing is so that I can make  
17 factual determinations. And I think it's highly  
18 likely that some form of affirmative injunctive relief  
19 may be appropriate if the plaintiffs are correct in  
20 terms of establishing what they say. Normally a  
21 disclosure injunction is negative. It says, "Don't go  
22 forward with the transaction until you have done X, Y,  
23 and Z." And X, Y, and Z includes, in the disclosure  
24 context, disclose the specified facts.

1           Here, what the plaintiffs are seeking  
2 is an order requiring that Gooch and Heffron correct  
3 the statements made in the January 30 and February 2  
4 press releases, and Mr. Lebovitch has indicated today  
5 that he may want additional affirmative disclosure.  
6 This doesn't strike me as something where I would be  
7 issuing a negative injunction. The negative  
8 injunction would be, in theory, don't close BGC until  
9 this stuff goes out, but that's precisely contrary to  
10 the type of relief that people are contemplating.  
11 Namely, people want to be able to proceed with BGC.  
12 Not only that, but BGC isn't one of the wrongdoers.  
13 So it would be odd, to me, to think that there would  
14 be some type of injunctive relief of a prohibitive  
15 nature, of a negative nature, directed at BGC.

16           So consequently, at a minimum, to  
17 preserve the possibility of that type of  
18 mandatory-disclosure-related relief, I think we need  
19 to go to a merits hearing. I also think that to the  
20 extent some of this other more muscular relief that  
21 the plaintiffs are contemplating is in play, it would  
22 be prudent to hear some live testimony, rather than do  
23 something on a preliminary record.

24           What I will also allow -- did I drop

1 you-all?

2 THE REPORTER: We're here, Your Honor.

3 THE COURT: I had another call coming  
4 in, and I suddenly had a fear that what that meant was  
5 you-all were calling me back to say that I had lost  
6 everyone, which does happen from time to time. So  
7 thank you for alleviating my concern.

8 What I will also allow is if there is  
9 some type of preliminary TRO-based relief, I will be  
10 willing to entertain that early next week, Tuesday or  
11 Wednesday, if it's needed. And what I'm envisioning  
12 there, I'm really more envisioning that it might be  
13 something that the special committee might want to  
14 file in terms of some type of claim. If there really  
15 is this situation where directors of the company  
16 aren't even able to fully function because they're not  
17 being able to participate in meetings or they want to  
18 have their advisors involved, and it's a party where  
19 it's entirely reasonable for them to want to have  
20 their advisors present and that is being hamstrung,  
21 well, that's the type of thing that I think might need  
22 to be addressed on an interim basis. And I don't want  
23 to rule out that possibility, or if there is some  
24 immediate application that even Mr. Lebovitch or

1 Mr. Grant want to make on some type of limited  
2 prohibitive basis early next week.

3           But I only want you-all to do that if  
4 you absolutely have to. Frankly, the situation  
5 Mr. Kurtz described, I agree with Mr. Lafferty, it's  
6 pretty amazing to hear that type of recitation. I  
7 don't say that because I doubt Mr. Kurtz. I just say  
8 it because it's the type of thing that is really  
9 profoundly disturbing from a corporate governance  
10 perspective. I don't doubt that he's accurately  
11 representing the views of his clients.

12           If independent directors are going to  
13 testify that that's what has been going down and is  
14 going down in the boardroom, that is very persuasive  
15 stuff. And it's very persuasive stuff that something  
16 really bad is happening. I'm not prejudging that.  
17 Obviously, as I said, I'm going to hear from people.  
18 Mr. Lafferty gets to make his record. His clients may  
19 be equally persuasive, even more persuasive, and they  
20 may be able to show from contemporaneous documents, et  
21 cetera, that these independent directors really just  
22 misunderstood.

23           So I'm not deciding based on today.  
24 We're going to hear everybody out. But that's the



1 type of thing that seems to me to warrant some  
2 emergency relief, if a director can't participate in  
3 board meetings as contemplated by 141(a) and isn't  
4 being able to be adequately advised because they are  
5 being restricted or otherwise limited or don't have  
6 access to advisors. So that's the type of thing that  
7 I would hear very quickly. I would be happy to hear  
8 that early next week if that's the type of thing that  
9 needs to happen.

10           So that's how I would like to proceed.  
11 It would be helpful if you-all implemented this in the  
12 form of a stipulation that I could then grant as an  
13 order. There may be some other items that you-all  
14 want to put in there. As I say, it's basically the  
15 schedule that is on pages 18 and 19 of the plaintiffs'  
16 brief, but with those additional modifications.

17           Mr. Grant or Mr. Lebovitch, what  
18 questions do you have?

19           MR. GRANT: Your Honor, this is Stuart  
20 Grant. I just want to make sure the Court is  
21 expecting live testimony at the hearing, and assume  
22 that everyone who is a party will have some obligation  
23 to show up so that the independent directors in  
24 particular -- I mean, we'll depose probably all five

1 of the directors, but we'd like the independent  
2 directors to be there so that Your Honor could hear  
3 them and ask them any questions Your Honor has. And  
4 obviously whatever we're going to put on or Mr. Kurtz  
5 is --

6 THE COURT: I'm on record on this as  
7 to my views on this. You know, I've written on this.  
8 I could be wrong. I've written on things and been  
9 wrong, so that doesn't necessarily mean anything. But  
10 my view is that when you're a party and you're a  
11 director, officer, managing agent of a Delaware  
12 corporation, the Court has subpoena power over you.  
13 And that subpoena power includes trial subpoena power.  
14 So people can contest it. They can go back and  
15 research it and try to explain to me why I'm wrong,  
16 but my presumption going in is that if people don't  
17 want to voluntarily appear then, yeah, you can issue a  
18 trial subpoena and make them appear. You've got  
19 service over them. They're defendants. They can be  
20 there on that basis as well. So I don't think that's  
21 something that you need to worry about.

22 And yes, part of the reason why I'm  
23 scheduling two days for this is I am anticipating  
24 hearing fact testimony. And I particularly am

1 interested in hearing the different sides of this  
2 boardroom dispute from people who have been there.

3 Any other questions, Mr. Grant or  
4 Mr. Lebovitch?

5 MR. GRANT: None. Thank you, Your  
6 Honor.

7 THE COURT: Mr. Lafferty, any  
8 questions from you?

9 MR. LAFFERTY: I don't think so, Your  
10 Honor.

11 THE COURT: Okay. Mr. Kurtz or  
12 Mr. Nolen, any questions from your team?

13 MR. KURTZ: None, Your Honor.

14 MR. NOLEN: No, Your Honor. Thank  
15 you.

16 THE COURT: Okay.

17 Ms. McCormick, I realize I ignored you  
18 the last time, and I apologize for that. Any  
19 questions from you?

20 MS. McCORMICK: No questions, Your  
21 Honor.

22 THE COURT: All right. Thank you,  
23 everyone, for getting on the phone. I appreciate your  
24 presentations. I will look for that order. I

1 apologize for inflicting this amount of work on  
2 you-all, but we all have things that now you-all need  
3 to get to. So thank you again, and have a good rest  
4 of the day.

5 (Hearing concluded at 4:30 p.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 4 through 52, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 6th day of February, 2015.

/s/ Julianne LaBadia  
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Julianne LaBadia  
Official Court Reporter  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Delaware Notary Public