

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In Re EMULEX SHAREHOLDER ) C.A. No. 4536-VCS  
LITIGATION )

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Chancery Conference Room  
New Castle County Courthouse  
Wilmington, Delaware  
Monday, July 6, 2009  
11:00 a.m.

- - -

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

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OFFICE CONFERENCE

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CHANCERY COURT REPORTERS  
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5 -and-

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1           THE COURT: I guess we don't have our  
2 friends from Broadcom around anymore. Right? I mean,  
3 this is one of the odder situations I have seen, but  
4 -- and I'm not going to waste people's time. You  
5 know, Broadcom is the master of its own offer and may  
6 be the master of its own domain.

7           I can't begin that. Whenever you --  
8 comes out, it's -- the Seinfeld thing is indelibly  
9 imprinted. The case --

10           With respect to the pill, there is no  
11 basis to have a trial this week. There just isn't. I  
12 mean, I understand what the plaintiffs are saying.  
13 And I can understand their frustration. I mean, it  
14 shows why there is separate representation for  
15 stockholders and bidders in this. But Broadcom made a  
16 tactical choice. This Court was available and, you  
17 know, willing to consider the application to pull the  
18 pill when there was an offer pending, the only  
19 obstacle to the presentation of which, to  
20 stockholders, was the pill.

21           Now Broadcom, frankly, it's not making  
22 an offer to stockholders. I'm not even sure why it  
23 should call itself taking a tender offer or a TW -- I  
24 get -- TW Services or SWT? It's always messed up,

1 because one was the plaintiff. Right? I mean, they  
2 have made a tender offer that is really, essentially:  
3 "If you make a friendly deal with us, we will present  
4 a tender offer to the stockholders."

5 MR. GRANT: Your Honor, I'm not sure  
6 that is true.

7 THE COURT: Well, Mr. Grant, that is  
8 what their tender offer says. And you can get  
9 Mr. Varallo. You all, plaintiffs, you can get --  
10 institutional investors, you can to call up Broadcom  
11 today and say, you know, "Are you making an offer that  
12 is only conditioned on the redemption of the rights  
13 plan?" But that is not how that offer is written now.  
14 And as a result, I'm not going to pull a pill when the  
15 bidder doesn't -- the bidder -- I don't know why the  
16 bidder left. This is its tactic. To put pressure on  
17 the target board, it has chosen this approach. It's a  
18 sort of odd approach, and I will say I have no respect  
19 at all for the position that was taken with respect to  
20 discovery obligations by Broadcom, that they are going  
21 to punk out and then not make witnesses available  
22 except through subpoena, or that its investment banker  
23 took that tactic. I have no respect for that at all.

24 Honestly, I think the practitioners,

1 who are excellent ones, who represented Broadcom were  
2 put in an odd position, because I don't think that is  
3 respectful to their colleagues. Formally, you can do  
4 it under Rule 41 because of the procedural posture of  
5 the case, but when you bargained over stuff, and taken  
6 discovery yourself, and have asked for expedited  
7 proceedings, to then decide -- and consolidated things  
8 and decide for yourself that you are not subject to  
9 discovery, I'm not sure there couldn't have been some  
10 objection to the filing of the dismissal order. I  
11 don't know.

12           But with respect to the pill, they  
13 have written their offer the way it is. And what you  
14 have all done in your papers -- this is my ruling. I  
15 don't need comments, because I have read all the  
16 briefs, just so you know, opening and answering. I  
17 read the motion to compel. And I have read the papers  
18 on the trial three times.

19           And I understand the idea of moral  
20 assuasion, that somehow I could order the Emulex board  
21 to redeem the rights plan with respect to an offer,  
22 and then Broadcom might take it. Well, I'm sorry.  
23 I'm not in the business of doing fiction for people.  
24 If Broadcom wanted that, they could be here. Broadcom

1 decided to do what it did. That was its tactic.

2           With respect -- if Broadcom goes away,  
3 plaintiffs may well have a damages case. Who knows?  
4 And there will be a lot of factual issues about that,  
5 given Broadcom's behavior. But then we get to the  
6 issue of the supermajority bylaw. That is clearly not  
7 a moot claim, in the sense that it's still out there.  
8 What I don't have, though, is that -- the party that  
9 was bringing the consent solicitation has dropped it.  
10 And I don't see the need to rush in at the pace we are  
11 on when events -- by Tuesday of next week, there might  
12 be a deal to sell the company, if it's at a price, you  
13 know -- formerly, the plaintiffs were asking me to  
14 redeem a rights plan at \$9.75. It's now \$11, the  
15 offer. I'm assuming a deal at \$11 would not be an  
16 entirely unwelcome development, given that the pulling  
17 of a rights plan, with nothing else in the market --  
18 and if the preannouncement market price had been lower  
19 than 9.75, a lot of pretty sophisticated professorial  
20 writing would suggest there was going to be a lot of  
21 herd mentality toward that price, if that was  
22 ultimately the only price in the market. It's either  
23 going to be accepted or rejected, but the plaintiffs  
24 obviously wanted -- the stockholder plaintiffs want

1 the institutional-investor community to decide it.

2           If a deal is reached at \$11, then the  
3 plaintiffs are going to achieve what you sought out to  
4 do, which is to give the stockholders the ability to  
5 decide, because the board is not going to have the  
6 situation -- not going to have the voting power to  
7 enter into a merger agreement where they get to ram  
8 through a merger agreement without the stockholder  
9 base deciding for itself whether it likes the price or  
10 not. So if there is a deal at \$11, the core objective  
11 of the plaintiffs in the litigation will have -- will  
12 be obtained. In that situation, it's not clear what  
13 the utility, as a practical matter, would be of  
14 litigating over the supermajority bylaw.

15           Now, I admit that there is a lot of  
16 excellent lawyers in the room on both sides who are,  
17 you know -- find it a fascinating question. And the  
18 fact -- but the fact that something is cool doesn't  
19 mean that a court should decide it. That is -- in  
20 fact, if it's not a live issue, you shouldn't decide  
21 it. I mean, that -- judicial discipline requires that  
22 you not just do it because you think it's nifty.

23           What we will know by the end of next  
24 week -- one of the things -- I'm not ruling out that I

1 will have an expedited trial about the supermajority  
2 bylaw. I take very seriously the arguments advanced  
3 by the plaintiffs about this, and I also recognize the  
4 potential obstacle this could present to institutional  
5 investors and others in other areas of corporate  
6 governance. But as a practical matter, none of the  
7 plaintiffs have a consent solicitation pending. We  
8 will know by the end of next week, probably, whether  
9 there is going to be a deal or not. If there is not  
10 going to be a deal, we can all get back together and  
11 talk about how we conclude this case.

12           One of the things I will want to know  
13 at that point will be what is the plaintiffs' -- I  
14 mean, the only plaintiff I know anything about is --  
15 in one of the briefs, is the guy that has one share.  
16 Right? There is one dude that has one share?

17           MR. GRANT: One guy has one share;  
18 another individual who has not a lot of shares, 100  
19 shares; and then there are institutions, two  
20 institutions, who hold several thousand shares. Their  
21 base is over \$100,000 in the stock.

22           MR. LEBOVITCH: Actually, this morning  
23 I received calls from funds holding, they say,  
24 13 percent of the company, wanting to participate. I

1 said, "Thanks for calling."

2 THE COURT: I can understand -- part  
3 of what I'm talking about now, I don't see the basis  
4 of going to a trial on the supermajority bylaw this  
5 week. I understand Delaware passed a fairly important  
6 statute this year dealing with the potential for  
7 stockholders to adopt bylaws in the election. I don't  
8 know how this supermajority bylaw affects the ability  
9 for folks to take advantage of that. I can imagine  
10 why there might be a utility to having a ruling on  
11 this in advance of the annual meeting, regardless of  
12 whether there is a thing. I understand the company  
13 has got this argument about: "Well, it's the same  
14 thing, because we are essentially sunseting it, Your  
15 Honor, and so the stockholders have to affirmatively  
16 choose to keep it in place."

17 These were not exactly the central  
18 focus of this inquiry. I'm not saying the  
19 supermajority bylaw issue wasn't, but that context is  
20 different than -- that it's impeding a tender offer --  
21 or a consent solicitation in aid of a tender offer.  
22 It would be more about the barrier to the potentially  
23 13 percent, or whoever it is, who want to do more  
24 thorough-going or long-standing corporate governance

1 changes. And all I'm saying is I think we ought to  
2 let the dust settle until the end of next week. I'm  
3 not going to, you know, rule out the possibility of  
4 reconvening the trial this summer, or in advance of  
5 the annual meeting, but I'm going to need to hear from  
6 the plaintiffs. I don't think that --

7 I mean, this is sort of an odd  
8 situation, and Broadcom put the stockholder plaintiffs  
9 in an odd position. Frankly, it put everybody in a  
10 sort of weird place, because people did a lot of work  
11 based on the idea that the bidder was going to take a  
12 certain strategy, and then the bidder, it's playing --  
13 it's decided that this is the game of chicken that  
14 it's playing. You know, it's an odd notion. And I'm  
15 not going to go to trial on a bid when the obstacle to  
16 the bid going forward is not the pill.

17 MR. GRANT: Your Honor, if this is  
18 your ruling, I will sit quietly. I think I can put  
19 some -- provide some information to the Court on some  
20 of this, and explain why maybe there is a different  
21 way that the Court could look at it with regard to  
22 what the offer and what the obstacles are.

23 THE COURT: Well, unless -- your  
24 papers -- is a condition of the pill being pulled -- I

1 mean, not condition of the pill. The condition to the  
2 bid is the bid is conditional on the board of  
3 directors of Emulex agreeing to that price. Right?

4 MR. GRANT: No.

5 THE COURT: You show me the tender  
6 offer document.

7 MR. GRANT: It's a very nebulous kind  
8 of thing. It's conditioned on it being friendly. And  
9 as far as I understand, the securities laws have not  
10 quite defined what the term "friendly" means. And so  
11 I believe that if the pill was pulled and the board  
12 said, "Okay. You know, we are not going to accept the  
13 offer, but we are going to pull the pill," it is my  
14 belief that -- that Emulex would go forward with  
15 the -- to the shareholders. It's also my belief that  
16 they were very careful in what they said, because you  
17 know, it says: "As required by law, we will extend  
18 our tender offer for an additional ten business days,  
19 until midnight New York City time on July 14th. We  
20 intend to allow our offer to expire at the end of that  
21 period if the Emulex board has not at that time  
22 indicated its support for the transaction that we have  
23 proposed." Then goes on, and this is a very, very  
24 important paragraph: "Based on our assessment of the

1 information we have and that is publicly available  
2 about Emulex, this proposal represents the best offer  
3 we can make based on an expedited transaction. We  
4 hope it is a proposal the Emulex board will support,  
5 and we look forward to your response."

6           Your Honor, I read those two  
7 paragraphs, I guess, differently than the Court is.  
8 Number one, they could have pulled their tender offer  
9 and said, "You know what? That is it. We are not  
10 going through the tender offer. We are going back to  
11 the bear-hug letter. If you want to do a deal with  
12 us, we will do a friendly deal at 11, but you have to  
13 sit and talk to us."

14           They didn't do that. They left their  
15 tender offer open and raised the price and said, "We  
16 want it to be -- we want you to support this."

17           THE COURT: But there is -- and you  
18 have reread it to me, and that's why your papers  
19 actually didn't even make this argument, and there is  
20 a reason why. You have read me the reason. This is,  
21 again -- they have read -- they read Chancellor --  
22 there is an argument at the end of Chancellor Allen's  
23 decision. One of the things, if you teach this  
24 academically, he seemed awfully reluctant, the

1 Chancellor did, to say that the conditionality had  
2 been eliminated from that offer in that case, when it  
3 arguably had been entirely eliminated. But in this  
4 case, me saying a compulsory order to them dropping a  
5 thing doesn't meet the condition of their own offer,  
6 it doesn't. And there is a perfectly obvious business  
7 reason why they didn't drop their tender offer, which  
8 is if the board decides, in a negotiated way, to  
9 simply redeem the pill, then they can close quicker.  
10 They can take the tender offer route to closing this  
11 down. If they get above the 90 percent, then they can  
12 do a short-form merger, and they can be done.

13           If they drop their tender offer, my  
14 understanding is at the very least, if they want to  
15 reinstitute the tender offer, refile again, it will  
16 start time clocks over. This, they can be done by the  
17 end of next week, potentially. If the board decides  
18 11 bucks is fine, frankly, "That is the best route for  
19 our stockholders, because we don't have to negotiate a  
20 complicated merger agreement, where we make reps and  
21 warranties and we deal -- or we agree to a price," and  
22 you are going to close it by a tender offer -- if they  
23 amend it again, they will have to extend it a little  
24 bit. That's why they did this.

1           I get why it's frustrating, but -- and  
2 Mr. Grant, I don't need any more reargument. If  
3 Broadcom wants to send a clear letter to the Court  
4 saying that its offer is simply conditioned on the  
5 elimination of the rights plan, and it wants to make  
6 that plain to me and the marketplace, then this court  
7 will not be the problem in terms of getting your  
8 claims heard. This Court is here. This Court was  
9 prepared to go to trial this week. Broadcom decided  
10 to do it this way. And unfortunately, you are the  
11 plaintiffs here. You represent stockholders. You are  
12 not the bidder for control.

13           Broadcom is the master of its own  
14 offer, and it has essentially conditioned its offer on  
15 Emulex's board agreeing to some sort of transaction,  
16 or at least agreeing to say, "We think we will support  
17 the tender offer at this price," or, "We can say to  
18 the stockholders, 'You should have the chance to  
19 choose,' and we are going to make the decision,  
20 ourselves, that it's a good enough price to pull the  
21 pill," not a court ordering them.

22           They know how to write their offer.  
23 Again, you can take the transcript. There is nothing  
24 sealed about it. You can take the transcript, and you

1 all are institutional investors. You can call  
2 Broadcom up, and you can get them to clarify it, if  
3 they wish to make it clear.

4 MR. GRANT: That will be done today,  
5 Your Honor. Absolutely.

6 THE COURT: I'm sure by noon.

7 MR. GRANT: As fast as Bill gets it  
8 done.

9 THE COURT: I'm sure Broadcom -- I'm  
10 sure -- actually, I'm sure this has caused a lot of  
11 tumult, and I'm sure the investor-relations folks on  
12 both sides are going crazy.

13 So that is where I am. I mean, do I  
14 wish it were different? I mean, yeah. I think there  
15 has been a lot of waste. I will say this: If you --  
16 if Emulex wants to drop in its discovery, you know --  
17 if you want your subpoenas, or whatever, let me know.  
18 I think this is ridiculous. I think what Broadcom did  
19 -- because the other thing I can't have -- and this is  
20 where the plaintiffs get caught up in this a little  
21 bit -- is really Emulex wasn't finished its discovery.  
22 The plaintiffs may not agree on the scope, or  
23 whatever, of it, but in some ways -- Mr. Grant  
24 indicated you all were the bystander to some of the

1 stuff about the business strategy privilege, but  
2 Broadcom not only walked away; they walked away  
3 without having completed the discovery this Court  
4 ordered. And you know -- and so if you need  
5 subpoenas, or whatever, to get that going, let me  
6 know.

7 I would also ask you to take back to  
8 your colleagues who represented Broadcom that I don't  
9 think that this was the way it should have been done,  
10 and that, you know, it's one thing to just -- if you  
11 want to dismiss your litigations, fine. But they took  
12 advantage of discovery in a consolidated action,  
13 themselves took discovery, used the resources of the  
14 people of Delaware, used the resources of the  
15 plaintiffs, used the resources, frankly, of Emulex,  
16 and then left everybody hanging with respect to this  
17 discovery.

18 MR. GRANT: Your Honor, couple of  
19 discovery questions. First of all, you should know  
20 Broadcom took almost no discovery. We actually did  
21 all of it. They sat there with it. They got the  
22 benefits of it, but they didn't take it.

23 THE COURT: I understand.

24 MR. GRANT: They rode our coattails.

1           THE COURT: In some ways, that is even  
2 worse. They used your resources for their own  
3 advantage.

4           MR. GRANT: The other thing is the  
5 board obviously is going to take some action,  
6 presumably this week, the board of Emulex. Assuming  
7 they turn it down -- because based on everything that  
8 we have done, I will be extraordinarily surprised if  
9 they either accept the offer or by -- what they really  
10 ought to be doing is entering some kind of discussion,  
11 because I think there is even more than \$11 there.  
12 But you know, I have been beating up on Broadcom to  
13 raise their bid, to start at 11, on a regular basis.  
14 And so their raising to 11 didn't surprise me. Their  
15 pulling out of the litigation, by the way, didn't  
16 surprise me, either, because I started four weeks ago  
17 asking them why they are in this litigation. I was  
18 teasing, why are they in the litigation. They said,  
19 "Do you think we can't handle it?" After they decided  
20 what "being in the litigation" means, they decided  
21 they didn't like it so much. Most of that didn't  
22 surprise me.

23           I won't be surprised if they have a  
24 "Sorry. We are not for sale" response. Assuming that

1 happens, we are going to want to continue our  
2 litigation. And the question is: Will we be able to  
3 take discovery on the new material that has happened  
4 post-June 28th?

5 THE COURT: I think we have to come  
6 back together about that. I mean, the offer is to  
7 expire July 14th?

8 MR. GRANT: Yes.

9 MR. FISCHER: Next Tuesday.

10 THE COURT: Next Tuesday. I don't  
11 know what the Emulex board is going to do. I don't  
12 know what Broadcom is going to do.

13 MR. GRANT: Can we get back together  
14 on the 15th?

15 THE COURT: I want to see what  
16 happens. If Broadcom just leaves altogether -- the  
17 reason why Broadcom would be in this -- actually, if  
18 you look at most successful litigation in this  
19 context, bidders are involved. People actually --  
20 courts have taken confidence when there is a bidder at  
21 the table willing to pay real money, and who is  
22 serious. Right? Usually aids the stockholder  
23 plaintiffs when you have that. This bidder chose --  
24 usually, at the point where you think the pressure is

1 most piquant and in your favor, they have chosen,  
2 obviously, to take a different strategy. They may be  
3 right. Maybe they believe there is sufficient heat on  
4 the Emulex board that taking this approach is the most  
5 rapid route to getting this done from a business  
6 thing. I don't know. And I certainly know less than  
7 you what is going on between Emulex and Broadcom, and  
8 whether there is anything at all. But I suspect we  
9 will both know a lot more by the end of next week.

10           If Broadcom goes away, you are really  
11 in a damages phase, potentially. Obviously, you have  
12 got -- you will have to deal with things like you just  
13 said, which is you are hoping for even more than 11,  
14 which is one of the things I'm sure the defendants are  
15 going to argue: "Well, you know, if you wanted 9.75  
16 you could have taken it. Frankly, you guys believe  
17 they should have paid that, too."

18           MR. GRANT: We even said that in our  
19 brief, as Your Honor saw in our footnote. We wanted  
20 them to engage. That's what we wanted them to do.

21           THE COURT: I understand that. That  
22 will raise all kinds of novel and interesting things,  
23 none of which needs to be decided on an emergency  
24 basis, and all of which can be decided in a more

1 orderly frame.

2                   What might be more appropriate for  
3 expedition -- but that would really depend on some  
4 more deliberate and focused consideration -- is what  
5 the effect of having that supermajority bylaw in place  
6 between now and the annual meeting has, if any, on any  
7 of the plaintiffs, whether it's more hypothetical than  
8 real. There is no doubt you raised, on the  
9 plaintiffs' side, serious issues about the impact of  
10 that kind of bylaw, but they have agreed, essentially,  
11 to sunset it. So I have to weigh, prudentially,  
12 whether a court weighs in prematurely on something  
13 like that in the absence of any proposal by a  
14 stockholder that is actually being impeded by it.

15                   MR. GRANT: But Your Honor, they were  
16 already successful. Part of the problem is --

17                   THE COURT: If they were already  
18 successful --

19                   MR. GRANT: Yes.

20                   THE COURT: -- you will be litigating  
21 your damages case.

22                   MR. GRANT: I don't know how much more  
23 time we need to be ready to try our damages case.  
24 It's not very different than the final case on the

1 merits that --

2 THE COURT: It's incredibly different.  
3 You don't even -- who is your valuation expert?

4 MR. GRANT: That is all we would need  
5 to do.

6 THE COURT: That's -- I'm not going to  
7 have damages trial this summer. I'm not. This is an  
8 injunction proceeding. I know, you know -- I guess --  
9 I get how disappointing this is for the stockholder  
10 plaintiffs. I really do. But I'm not in a position  
11 to have a trial simply because, you know, we were  
12 geared up to have a trial. We were geared up to have  
13 a trial when two things were standing in the way of a  
14 live bid for a control of a company. And now those  
15 two things are not what is standing in the way. And  
16 the reason for that is because Broadcom changed its  
17 offer. So I think that's where we are.

18 Get me your subpoena. You guys come  
19 back to me if Broadcom changes its approach. We will  
20 take stock at the end of next week. I expect you all  
21 to speak with each other before you come back to me  
22 within the plaintiff camp. You know, talk seriously.  
23 Like I said, I am sensitive to the amount of time and  
24 effort on both sides that -- of all the lawyers in the

1 room, and the lost time with family, and lost sleep,  
2 and time spent in going through airport security,  
3 which is a brilliant thing. When are they going to  
4 end the liquid ban? I swear, I think you could get --  
5 if you could find a -- somebody should run for  
6 president. The idea is like any person -- any  
7 employee of the airlines can shoot somebody if they  
8 have more than four liquid containers on their tray  
9 and -- you could get elected on that. At least you  
10 would have a very high percentage vote among air  
11 travelers.

12 I get the disappointment, but that is  
13 where we are. Talk to each other before you report  
14 back. Don't just come back to me and say you want to  
15 have a trial to have a trial. Honestly, if this gets  
16 to be a situation where Broadcom goes away, you all  
17 need to really think tactically about how to put that  
18 together, that sort of damages case. You really do.  
19 I mean, this is going to create some very interesting,  
20 if we get to a situation, epistemological problems.  
21 They need to be thought through, because it's going to  
22 be pretty obvious when plaintiffs come in and -- you  
23 are not going to come in and say in a damages case --  
24 and say 9.75 was adequate. You are actually going to

1 say, "No, that is not a price, ultimately, that we  
2 want the company to be sold at." 11, who knows? But  
3 it still wasn't a blow-out price.

4 Mr. Middleton, I'm sure I don't know  
5 what he is looking for. I mean, he has got a big  
6 stake.

7 MR. GRANT: Not the seven-and-a-half  
8 to eight bucks that it will be, my guess is, tomorrow  
9 when the market finds out that the trial is off and  
10 the stock is already down to 9.30.

11 THE COURT: Sure. That is the game of  
12 negotiation you have. But what I'm saying is it is a  
13 complicated theory to bring, because to some extent  
14 you are going to be in a situation where you agree  
15 with the board that 9.75 was not right. You might  
16 even agree with the board that 11 was not correct.  
17 But what you are saying is that they took an obstinate  
18 approach to negotiation, that essentially drove off  
19 the potential for a deal at the right price, by not  
20 taking a more welcoming thing.

21 That is an interesting theory. I'm  
22 not saying it doesn't have color to it, but I do think  
23 -- I wouldn't go to trial on that in a week if I were  
24 you. I would want to be thinking about that, because

1 there are people who use the posture of saying no as a  
2 negotiating tool, and people: "If I engage in  
3 negotiations at 9.75 when that is a ludicrous starting  
4 point, then I'm not going to end up in the right  
5 place. I begin when they put something on the table  
6 that is not insulting."

7 I don't know what is insulting or not  
8 in this. I also would get -- we get into the  
9 situation of whether the standard of review has  
10 changed. Certainly, if Chancellor Allen's decision  
11 was good law -- and this is certainly something we  
12 talk about, people -- if you think about it, there is  
13 a difference to a board between being asked to redeem  
14 a rights plan and being asked to sign up a deal. And  
15 redeeming a rights plan is letting someone else decide  
16 for themselves. Signing up a merger agreement is  
17 arguably saying, "I embrace this as positively good,  
18 myself."

19 I think what Chancellor Allen's  
20 decision in -- whatever the name of the thing is. TW  
21 Services? STW Acquisition Corp.?

22 MR. GRANT: It's TW Services.

23 THE COURT: That's right. Was that --  
24 sort of embrace it. You can choose. It's a different

1 realm. That's why I'm saying to you all don't just  
2 come back reflexively. You want to put together your  
3 theories, and the defendants also have to be able to  
4 put together their theories. The fact that you did  
5 depositions, I mean, you are going to have to do  
6 another round of discovery when the dust settles if  
7 you are going to go with this sort of thing, and I'm  
8 also in a situation where obviously, we were going to  
9 trial because there wasn't -- it was a pill case. We  
10 weren't having a preliminary injunction hearing,  
11 because it's essentially an affirmative kind of  
12 injunction. I don't know whether the defendants will  
13 want to file motions for summary judgment or the  
14 plaintiffs will. But I don't want to make a hasty  
15 decision when there is no reason to.

16           And that's why I'm telling you all I'm  
17 more interested, in terms of expedition, if we get  
18 past this, in the supermajority bylaw. But you want  
19 to be serious with yourselves and the clients. I'm  
20 not talking about Mr. Middleton. I'm not saying he  
21 doesn't have, technically, standing, but in the room  
22 we -- I could make him happy, you know, even with -- I  
23 could take it.

24           MR. SMITH: A Happy Meal would make

1 him happy.

2 THE COURT: I could -- I could double  
3 the 11-dollar offer and make Mr. Middleton happy. And  
4 he would be -- the Middleton Fund would have a great  
5 return for the year. And I mean -- he could go to --  
6 I could recommend if he came here, he could go to  
7 Libby's three days in a row, and he could eat well.  
8 But after that, he would be out of skin in the game.

9 So even with respect to the  
10 supermajority bylaw, I would be looking for the  
11 plaintiffs who might actually be interested in using  
12 corporate governance machinery and explaining to me  
13 why they would need to litigate this before the annual  
14 meeting in light of the sunset provision.

15 I think I have said probably more than  
16 needs to be said. I think it's more productive to let  
17 you all go to your respective corners.

18 MR. LASTER: I hate to interrupt, but  
19 there is a subpoena out to my client. Your Honor  
20 talked about getting subpoenas out to Broadcom. There  
21 is a subpoena currently out to my client.

22 THE COURT: Remind me.

23 MR. LASTER: It's now Bank of America,  
24 Merrill Lynch. It's a question of whether we need to

1 continue to abide by Your Honor's June rulings, as far  
2 as the scope of redactions, or whether we have to go  
3 back, now, and produce synergy valuations and a  
4 witness within 24 hours.

5 MR. FISCHER: I think we can try to  
6 work this out.

7 MR. SMITH: Certainly, not within 24  
8 hours.

9 MR. LASTER: That is good to hear.

10 THE COURT: I'm not inclined to  
11 redefine the contours of my ruling, especially -- I  
12 mean, now, actually, is when the business strategy  
13 privilege is more important than ever, because  
14 remember, it's not -- it's not even a privilege. It's  
15 not really about litigation. It's actually about  
16 business negotiations and options. But what I didn't  
17 like was the idea that -- I'm not saying Merrill Lynch  
18 was more following it's clients' wishes -- that  
19 Broadcom just declared itself instantly something  
20 different, that could have compromised the  
21 stockholders' ability to go to trial, anyway. And I'm  
22 not saying I would have let it, but it obviously  
23 didn't help to not allow Emulex to complete the  
24 record, if this case was going to go forward. I don't

1 think Broadcom was in a gracious position to do what  
2 it did. Why don't you talk with them?

3 MR. WOLFE: We will speak with  
4 Mr. Laster. In light of Your Honor's ruling, I'm sure  
5 we will resolve it.

6 THE COURT: We will look for what  
7 Broadcom says and see whether they can clarify their  
8 meaning.

9 (Recess at 11:34 a.m.)

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