Cases: In re: Siliconix // In re: Cox Communications
Interview of:

- **Stephen E. Jenkins, Esq.; Ashby & Geddes P.A.**
- **Kevin G. Abrams, Esq.; Abrams & Bayliss LLP**

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September 24, 2019

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MR. WELCH: I'm Ed Welch. We are here this afternoon to discuss a couple of very significant cases by the Court of Chancery. The first is the Siliconix case decided by Vice Chancellor Noble on June 21, 2001. The second is the Cox case, decided by then Vice Chancellor Strine, later Justice and Chief Justice Strine on June 6, 2005. We are fortunate here to be able to interview a couple of the key players in both of those cases. Kevin Abrams and Steve Jenkins are both going to talk to us this afternoon. We are also fortunate to have with us here today, and although I am not sure he is going to speak up, but one of the most distinguished professors in the topic of corporation law, and that is Larry Hamermesh.

Kevin, as I understand it, you represented the plaintiff in Siliconix, is that right? #00:01:31#

MR. ABRAMS: That is correct. We represented the lead plaintiff, who assumed that status after we had a discussion with our colleagues and with the court about who

should be the lead plaintiff and who should be the lead counsel.

MR. WELCH: Okay, all right. But then, in contrast, in the Cox matter, you represented a number of the defendants, and we will talk about who they were and when – when we get to that issue. But, you represented the defendants in Cox, is that– #00:01:57#

MR. ABRAMS: I represented the controlling stockholder, referred to in the opinion as "the Cox Family." And that's – I wouldn't say typical of most people's practice in Delaware, but I have had the experience of being both the plaintiffs' lawyer and the defendants' lawyer in several big cases.

MR. WELCH: Right, no doubt about it. Okay. Steve, you, in Cox, represented the objectors to a settlement, is that right? #00:02:22#

MR. JENKINS: Yes, that is who we represented.

MR. WELCH: Okay. And that was Mr. Zoub and Franklin Mutual Advisors, is that right? #00:02:29#

MR. JENKINS: That's who they were, but, in fact, the objection was driven by my co-counsel, a lawyer from – and a professor, a law professor from Arizona, Elliott Weiss, who had written on the subject.

MR. WELCH: Why don't we – let's get into this a little bit later, but why don't we talk first about Siliconix. It came first, and it is discussed to a certain degree in the Cox matter as well. Siliconix, again, June 2001. Kevin, you were the attorney for the plaintiffs in that case, which I take it you led, in essence, as plaintiffs' counsel. Why don't you talk – let be back up for a second. How did you get involved, Kevin? #00:03:13#

MR. ABRAMS: The individual plaintiff was somewhat unique by the standards of plaintiffs who typically appear in these types of cases. He was a lawyer from New York who was referred to me by one of the largest firms in New York. He had a personal investment of four million dollars in the company, and he had a history of dealing with Vishay and appeared to have a pretty good understanding of both the law and the facts and was, frankly, irritated with the conduct of Vishay over the years and they proposed a negotiated transaction at the outset that was not to his liking. And, certainly, when the exchange offer was announced unilaterally by Vishay, he became even more perturbed, and he asked us to consider steps that could result in the use of litigation to try and secure a better offer from Vishay and/or to block the transaction. So, we cranked up the preliminary injunction machinery in short order and took the discovery and presented what we thought was

a solid preliminary injunction application to Vice Chancellor Noble.

MR. WELCH: Understood. Okay, well, and we will talk about that at some length. I noted that, in looking at the opinion, that the Vice Chancellor purported to summarize your three main arguments up front in the opinion. Could you just talk a little bit about what those three primary arguments were, Kevin? #00:04:38#

MR. ABRAMS: Well, we primarily sought the preliminary injunction on the basis of a showing that the disclosures made by Vishay and Siliconix, in conjunction with the exchange offer, were misleading and incomplete. We had no less than 16 separate arguments in that regard. At the time, I was with a very prominent Delaware firm, and we had a tactical choice to make about whether to present the Vice Chancellor with 16 and run the risk of overwhelming him, or cherry-pick them and present only our best. We decided to present all 16 because, actually, we thought all 16 were potential winners and because we wanted the Vice Chancellor to have an appreciation for the paucity and the misleading nature of the disclosures that were being made. In addition, we argued that the exchange offer could not satisfy what we thought would be the test of entire fairness for a variety of process-related and structural reasons. We also had very solid arguments on

the economics of the deal to explain to the court that the price being offered through the exchange offer was manifestly unfair.

So, it was a combination of process disclosure and price unfairness arguments that we presented, and we expected that the court would take seriously all of those arguments and attempt to parse through what we believed at the time to be the doctrinal inconsistency between two strands of Delaware law, one relating to tender offers and one relating to mergers. But, in the final analysis, we were hoping that the disclosure claims, in particular, would get us the injunction and give us the negotiating leverage to try and procure a better deal for our client.

MR. WELCH: Okay. All right, so, just sort of by way of background. Vishay was a manufacturer of what – semiconductor components, things of that nature? #00:06:28#

MR. ABRAMS: Yes.

MR. WELCH: And it owned, what? A little over 80 percent of Siliconix? #00:06:35#

MR. ABRAMS: Yes.

MR. WELCH: Siliconix was Nasdaq traded? #00:06:37#

MR. ABRAMS: Yes.

MR. WELCH: Okay, all right. Now, the stock price, as I recall, and I'm just trying to bring back what the court

said in the opinion, but the stock price had been considerably higher at one point, up in the 160's and it had dropped considerably to under 17 at the time of the proposal – the cash tender offer proposal. Is that basically right? #00:07:05#

MR. ABRAMS: That's basically right. We thought that Vishay, the controlling stockholder, was acting in a particularly opportunistic fashion to try and pick off the minority shares at a down cycle in the Siliconix economic experience. And we had significant valuation arguments to suggest that the price was worth considerably more than the implied value by the exchange offer. In addition, the deal was noteworthy because, unlike the deals that all of us had litigated, it involved a controlling stockholder, marking to market its stock against the Siliconix stock so that there was not only no fundamental analysis on the valuation issues related to Siliconix, or to Vishay, which you would have expected in a stock–for–stock deal, there was also no premium offered to the minority stockholders in conjunction with the buyout transaction, which is extraordinarily unusual, and we hoped would get the attention of the Vice Chancellor.

MR. WELCH: Okay. Now, Vishay said that, if it got 90 percent, it was going to take a shot at a short form. Is that the– #00:08:04#

MR. ABRAMS: Not really–

MR. WELCH: – that was disclosed up front, or not? #00:08:07#

MR. ABRAMS: Depending on which perspective of the disclosures you read. Our perspective was that Vishay said it intended to effect a short-form merger. It did not commit to do so. It did not commit to do so on the same terms and conditions as the exchange offer. And it expressly reserved the right not to proceed or to proceed with a different transaction, thereby, in our view, negating any probative benefit or persuasive value associated with the so-called second step condition.

MR. WELCH: Okay, so was a special committee appointed? And if so, what role did they undertake at the outset? And I know there were some different things that happened down the road, but up front, how did that play out? #00:08:49#

MR. ABRAMS: The proposed transaction was unique in my experience because Vishay, the controlling stockholder, appointed one of the two members of the special committee. Both members of the special committee had significant financial ties and professional relationships with Vishay, the controlling stockholder. One of the members of the special committee, in our view, pre-cleared his proposed financial

advisors with Vishay, a step that never should have been taken. So, from the outset, we were very suspicious about the composition and motivation of the special committee.

MR. WELCH: Okay. Now, the special committee, again, bringing back what I read in the opinion, but the special committee met with Vishay and argued, I think, up front, that the price, which I think was 22.82 in cash, was unfair. Was that right? #00:09:40#

MR. ABRAMS: Yes. The special committee at the time of the proposed negotiated transaction was attempting to secure a higher price. In the subsequent litigation-related discovery, we learned that the controller did not recall ever being asked by the special committee to increase the exchange ratio in the second transaction that was unilaterally put on the table by Vishay. So, there was a substantial question in our minds as to what the special committee was doing once Vishay put its foot down and decided not to proceed with a negotiated transaction and then put on the table the unilateral exchange offer.

MR. WELCH: Okay. And that unilateral exchange offer was at, what, 1.5 shares of- #00:10:31#

MR. ABRAMS: Call it thirty dollars in round numbers for implied value - with no premium and no fundamentals analysis of either company.

MR. WELCH: Okay. Now, the special committee then proceeded to meet with respect to that modified offer, is that right? And what happened then? #00:10:50#

MR. ABRAMS: The special committee, in our view, never negotiated with the controller to increase the exchange ratio, never asked for an increased price and, ultimately, determined to take no position on the offer. All of this coming against the backdrop of what we construed as Lehman Brothers, the financial advisor, telling the special committee that thirty-four dollars was the bottom end of their fair value range. That was highly contested by the parties, but in the code that all of us are used to dealing with investment bankers on, it was pretty clear that Lehman was not impressed with the implied value in the exchange offer. The special committee knew that and, nevertheless, decided to take no position. So, we argued that the special committee had abdicated its responsibility under the McMullin doctrine to affirmatively represent the public stockholders.

MR. WELCH: Okay. And is it correct - again, I'm flashing back to the opinion here, that the special committee did not ask Lehman Brothers for an opinion on- #00:11:54#

MR. ABRAMS: That is correct. They were told by Lehman that 34 was a number they were focused on and, at that point, with thirty dollars implicitly on the table, the

special committee, in our view, rolled over and took no position.

MR. WELCH: And there was some dispute, was there not, about whether Lehman ever said thirty-four dollars was the minimum? #00:12:17#

MR. ABRAMS: It depends on how you parse the language and understand the codes that are used in conversations with investment bankers. But, it was clear Lehman did not want to be asked for a view, much less an opinion, on the adequacy of thirty-four dollars.

MR. WELCH: Okay. Now, what about the registration statement itself. Did it speak to the question of whether the committee would likely or not likely approve the exchange offer? #00:12:49#

MR. ABRAMS: It did, and the special committee abstained from taking a position on the offer. They had three options under the federal securities laws, and notwithstanding their own economic analysis from Lehman, and consistent with their failure to ask for an increase in price in the exchange offer, the special committee, in our view, rolled over and took no position on that.

MR. WELCH: Did you view that as unreasonable, Kevin? Or as - was that something that surprised you at all when that happened? #00:13:16#

MR. ABRAMS: Sure. It's highly unusual for a special committee to decline to ask for more. It is highly unusual for a special committee to decline to negotiate. But, we ultimately realized that, from our perspective, effectively, the fix was in from the beginning. Two people with very close ties to the controlling stockholder were on the special committee, and it, ultimately, was not surprising to us that they declined to take a position and declined to negotiate. We thought all of these facts, put together, should have set off the alarm bells in the Vice Chancellor's mind and led him to be much more focused on the substantive and procedural and economic unfairness of what was going on.

MR. WELCH: Okay. Steve, I am mindful that you weren't personally involved in Siliconix, but you certainly were involved in Cox in a big way. And certainly, Siliconix is discussed at some length in Cox as well. Based upon where we are now, do you have a reaction, did you have a reaction at the time to, you know, to where things stood as Kevin has described them? #00:14:24#

MR. JENKINS: Well, I guess my reaction today would be that Siliconix represented part of the ongoing movement of the law. And the court in Siliconix, looking at some of the disclosure arguments, was unimpressed by the arguments dealing with the projections. Now, if those arguments were made today,

a) the plaintiff would have won. If they had been made ten years ago, the plaintiff would have won. But if they had been made back in say, 1980, a court would have said, what do you mean? Projections don't need to be disclosed. There has been a movement in the law over the years on projections, and I think Siliconix really is the last gasp of the "projections are made up numbers, so they don't really need to be disclosed." After that, the courts said, well, but people look at them and rely on them to a certain amount and, therefore, they should be disclosed. I think on the fundamental element of Siliconix, it's the argument that it was a tender offer and, therefore, different from a merger. And that the Kahn vs. Lynch line of cases, which said when you have a controlling stockholder in a merger, and even if you have a special committee, you have to prove the entire fairness of the case.

MR. WELCH: Very hard to get rid of the case.

#00:15:47#

MR. JENKINS: Exactly. It's very hard to get rid of the case; you have to prove the entire fairness. But tender offers are different. And there was a line of tender offer cases, as Kevin was saying, that said, if everything is disclosed, all material information is disclosed, and there is no – you can't point to any elements of real coercion and that the stockholders should be allowed to make up their own minds

whether to accept the tender offer or not, and you don't need to do an entire fairness analysis. That's what the court found here. Kevin would say, well, come on, there was a bunch of coercion in this case. It's the way it was structured in the timing, and I think he would say that, even more, there was a lack of disclosure on important points. And as I say, today, the disclosure arguments would win. Today, the coercion arguments would win. And today, also, the distinction between tender offers and mergers has collapsed. Now, while I think that makes sense – the tender offer argument by itself, standing alone, made by the court there and before then, I believe, also makes sense. You can do this in two ways. We have chosen a different way than what is represented in Siliconix.

MR. WELCH: Kevin, are you on board with that? #00:17:10#

MR. ABRAMS: I agree with Steve's perspective. We thought, at the time, that we had powerful arguments to show the procedural unfairness of what was going on for the reasons I explained with respect to the composition and conduct by the special committee and the overreaching by the controlling stockholder and aspects of the special committee process, which would clearly not pass muster today. Steve is absolutely right that the disclosure issues in Siliconix would have been

a laydown injunction today. We thought they should have been a laydown at the time, but we were still going through the formulation of the importance of projections in order to inform appraisal decisions. So, that was disappointing to us. And, ultimately, the Vice Chancellor, in 2001, chose to rely upon a series of opinions in the tender offer context holding that there was no duty to pay a fair price as long as the disclosures were adequate and there was no coercion. We thought those decisions were fundamentally inconsistent with the Kahn v. Lynch decision from the late 1990s by the Delaware Supreme Court. And, unfortunately, we just drew the wrong Vice Chancellor to – in terms of getting somebody who would be willing to take on those issues. And, of course, only a year later, we had then Vice Chancellor Strine's decision in Cox, which took on these issues and proposed a framework which clearly did not pass muster in the Siliconix context. So, we were a year too early and just the wrong Vice Chancellor for our particular claims at the time.

MR. WELCH: Okay, so just to button that one down. The court did deny your application for a preliminary injunction based upon what you just related and notwithstanding the arguments that both of you are making. #00:18:49#

MR. ABRAMS: Right. The court ultimately decided that an injunction was not warranted on the merits, and the court took the judicial escape valve of finding that a money damages remedy could be appropriate and, therefore, an injunction should not interfere with what the court thought would be the duly informed decision by the stockholders on whether to participate in the exchange offer.

MR. WELCH: Okay. So, looking at the application for PI, its probability of success, irreparable harm, and balance of the equity, that sort of thing, on probability of success, Kevin, what did the court say with respect to that? I mean, I think you have touched upon that already, but in this context, I think it would be helpful for you to speak to that.

#00:19:32#

MR. ABRAMS: One of our core arguments on–

MR. WELCH: And maybe I can be more specific. The duty to offer a fair price, I think, was something both of you have touched upon, but touch on that if you would.

MR. ABRAMS: We thought that, under the Kahn v. Lynch framework of entire fairness, that any controlling stockholder transaction, whether structured as a two-step tender offer and squeeze out merger or simply as a long-form merger, would have a fair price component to it. And, we had what we thought was very clear evidence that the economics

proposed by Vishay were not even close to the realm of fairness. We also argued that the procedural aspects of the offer were deficient because of the activities related to the special committee. And, we thought there was both inherent coercion and structural coercion under the Kahn v. Lynch doctrine as a result of the sheer presence of a controlling stockholder attempting to jam the minority with a tender offer in a short period of time. And there was structural coercion by virtue of the failure of the controller to commit to a second step merger on the same terms. There was also a threat of delisting, and that was hotly contested. And we thought that if you put all of these factors together, the court should have found, either as a result of disclosure violations, or as a result of process violations, as a result of the controller's inability to show a fair price, and because of the coercion that we thought was existing in the offer, that some or all of those factors would have gotten us over the hurdle on the probability of success prong for an injunction application.

MR. WELCH: So, based upon what the court did, and I think it's accurate to say that – but correct me if I am wrong, that there was no duty to offer a specific fair price unless there was an actual coercion or disclosure violation. Is that essentially– #00:21:16#

MR. ABRAMS: That was the holding of the court.

MR. WELCH: – the position that the court took?

MR. ABRAMS: Yeah. So, and that was the application by the court of the Unocal Exploration decision, and the Pathe Communications precedent decision and the court was relying on existing doctrines for the, what I will call, the pro-tender offer rules. But, we thought those rules were completely inconsistent with Kahn v. Lynch and, unfortunately, it took us – it took the Delaware courts one more year to start to focus on exactly what the rules ought to be between long-form tender offers and two-step squeeze-outs involving tender offers.

MR. WELCH: All right. So, the court found that there were significant differences from a substantive standpoint between tender offers and merger transactions. And that seems to have played a role in the outcome that the court reached. Could you speak to that for a minute or two?

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MR. ABRAMS: The court did note the fundamental inconsistency of the entire fairness doctrine applicable to long-form mergers and the so-called less stringent, less fiduciary-exacting standards applicable to tender offers. And the court identified what it referred to as two simple concepts to explain the difference. Neither were satisfactory from our perspective and, ultimately, Vice Chancellor Strine

did take these issues head-on in the decision we're going to talk about shortly in Cox Communications, and in other decisions. But, this particular Vice Chancellor, in the admittedly expedited context of a preliminary injunction, chose to go with what he viewed as the safer, sounder doctrine applicable to tender offers.

MR. WELCH: Okay. Steve, reaction to where we are now, if you would. I would appreciate that. #00:22:59#

MR. JENKINS: Well, and to what – let me ask Kevin one question on this. Even if you were right on the other things and the way the law has turned out, the law today would say you were right on a lot of things here. What was the irreparable harm?

MR. ABRAMS: The irreparable harm was the controlling stockholder coercing the stockholders into participating in an exchange offer rather than allowing the process to operate through disinterested fiduciaries operating at arms' length and with truly capable advisors to secure the best available price. Now, at the end of the day, can a judge always deny an injunction on the grounds that money damages are appropriate? Sure. But in the dynamics of the bidding process, we thought the better course of action would be to give the stockholders, first of all, full and fair information regarding the tender decision they were being asked to make.

And then, to allow the process to work itself out with the parties jointly understanding the applicable legal framework, all of which would have been hugely beneficial to the minority. #00:24:01#

MR. JENKINS: And I think the law would say, today, that bad disclosures are irreparable. Some of the other things, I think, the court could still say today, look, if you've got Lehman at 34 and they're barely at 34, why not go to a trial and get 40 or 45 or whatever the – whatever would be shown.

MR. ABRAMS: That is certainly a defendant's argument that I have made for decades. In this particular case, however, we had such a plethora of serious process-related flaws. We had inherent and structural coercion associated with the offer. We had massive disclosure problems. And, if you put all of this together, this was – should have been the poster child for stopping a controlling stockholder transaction. This particular judge, under these circumstances, and, given the fluid nature of Delaware law at the time, chose to let it go through.

MR. WELCH: All right. And there was some discussion, as well, was there not, about McMullin v. Beran. I think you had touched upon that earlier, but McMullin played a role in the court's analysis and, ultimately, found that it

didn't – that it didn't apply in these circumstances. #00:25:12#

MR. ABRAMS: But, we argued that McMullin imposed an affirmative duty on a special committee to act vigorously and at arms' length in dealing with a controlling stockholder. On the facts presented, we thought it was a laydown, but this special committee was supine and conflicted. The court saw it a different way, at that stage of the case, and ultimately determined to allow the transaction to proceed.

MR. JENKINS: Even before McMullin and Chancellor Allen in the TWA case hit a special committee very hard for not negotiating and just accepting saying it looked at a price and they had a fairness opinion it's fair, okay, we'll take it. And he said a special committee has a duty to go out there and try to negotiate to get the best price, not merely a fair price.

MR. WELCH: Sure, sure. But, in this situation, the court ultimately found that McMullin didn't require application of entire fairness in this context, with this kind of structure, right? Is that— #00:26:10#

MR. ABRAMS: That's my understanding—

MR. WELCH: I think that's what was held. Now, Kevin, there was one comment in the opinion that – a lot of comments in the opinion, that they got my attention, but one

of them was this focus on the failure of the board to guide shareholders with respect to what is fair and what is not, under the circumstances. The court went on to say, at one point – and it did sound like the court had considered the issue and thought about it with some care -- the court goes on to say there may well be circumstances where there is no answer on whether or not to advise to accept or reject. And the court said it couldn't take a position that may have been – the whole situation may have been okay, but the court was not persuaded, and the court was not persuaded otherwise. That seemed to be at least somewhat responsive to the points you're making, which are powerful. But, at the same time, that seemed to be where the judge was at that point, recognizing that he was going to explore, later on, the coercion, as well as the disclosure issues. #00:27:13#

MR. ABRAMS: Delaware judges have a history of denying injunction applications unless there is a manifest disclosure problem or an obvious process problem or clear overreaching by a controlling stockholder. We felt we had all of the above. In this case, the Vice Chancellor saw it differently and applied one prong of Delaware law that was under severe attack at the time and which was, ultimately, effectively abandoned as a result of doctrinal developments led by then Vice Chancellor Strine.

MR. WELCH: Okay. And you're talking about now Cox, which we will get to in a little bit. #00:27:43#

MR. ABRAMS: Cox was one of the decisions. It ultimately resulted in CNX Gas was an important decision by my former partner, Vice Chancellor Laster, which ultimately resulted in the MFW opinion, which is now the touchstone for controller transactions.

MR. WELCH: Okay. Let's talk a little bit about disclosure because it seemed as if Vice Chancellor Noble was acknowledging that, if there was a disclosure problem or if there was a coercion problem, that, under those circumstances, there may well be an injunction. And he ultimately found, and we can and should talk about this, that there were no disclosure issues, although you made a whole host of very strong articulate claims about disclosure, and you also talked about the coercion issue, too. Why don't you pick out, if you would, some of the disclosure claims that you thought were the most persuasive and that perhaps should have gotten more attention than – from your perspective -- than they got under the circumstances. #00:28:46#

MR. ABRAMS: We focused on two particular disclosure claims relating to the financial projections of Siliconix and the disparate statements being made by the management of Siliconix. On the projections, they were threadbare. They were

not detailed. There were no assumptions. The context of preparing the projections was not explained. There were multiple problems with the scrawny projections that were disclosed. And, at the time, we thought with the emergence of the importance of appraisal law, that the court would give us the benefit of the doubt on that argument. In fact, I thought we were really strong that the projections were so weak in this particular case that we had to get an injunction. The court saw it the other way as a continuation of the then declining view that projections were soft information and not material.

The second big problem with the disclosures related to the fact that management was telling analysts that the future for Siliconix was bright. That they were at the bottom of a trough and that the economic cycle would reverse, that there were new products and sales opportunities, particularly overseas. Those statements were not included in the exchange offer circular and, instead, the exchange offer circular had a dominant view regarding the challenges facing Siliconix. So, we thought there were two-faced statements being made by management, which were not being disclosed accurately and completely to the stockholders. Either one of those in today's environment would have resulted in an injunction. Back then, it was regarded as less material than it would be today.

MR. WELCH: Now, you had a host of disclosure arguments. Those two were prominent, no doubt about it. You know, as to the pessimism regarding Siliconix's future and that sort of thing, I think the court responded by saying, in essence, that the registration statement did, in fact, predict a rebound in Siliconix's business and that it was going to come around. It was at the low mark in its pricing on the exchange, and it was going to come back. I think that was the essence of what the judge said in response. Your reaction to that, Kevin. #00:30:52#

MR. ABRAMS: We displayed a chart at the time of the preliminary injunction proceeding contrasting the exchange offer statements against what was in the analyst presentation. And it was clear to us that management had a then semi-privately expressed belief to the street that they were going to take the upturn and we didn't think the exchange offer fairly presented that perspective.

MR. WELCH: Okay. Now, as to the projections issue, again, I have a recollection of what the court said in substance and I may not have this completely right, but that the shareholders were not misled, that they were a Siliconix issue and not a Vishay decision with respect to the projections. Your reaction to that. #00:31:35#

MR. ABRAMS: Today, the level of disclosure required on a stock-for-stock transaction is quite significant and, indeed, the disclosures that were made at the time were threadbare and would not have allowed a stockholder to have access to the universe of information that would have been included today. So, again, we were a little bit early and with the wrong judge in terms of presenting the arguments on the depth of the projections and the depth of the – the two sides of the story regarding the rebound that needed to be explained.

And I'd give the Vice Chancellor credit. I mean, he was operating in a compressed timetable. He had a lot to deal with. He did have Delaware decisions to rely on with respect to the more flexible tender offer rules. But, ultimately, it was a very disappointing decision because of the failure of the judge to understand the process defects, the disclosure defect, and the problems with his approach to the law.

MR. WELCH: Understood. And I want to talk to the coercion issues as well. But Steve, again, recognizing that you were certainly involved in Cox in a huge way, but you were not involved in this particular Siliconix matter. But reaction to the disclosure issues, which you have talked about already, but I would like to hear again – from your mouth. #00:32:46#

MR. JENKINS: The disclosure issues are interesting because, where we started off – and it's where the federal judges started off with – in proxy statements in the securities law cases -- is projections are inherently soft information --they're guesses – and so you don't have to disclose those. Nor do you have to disclose hunches and things like that of management of how you're going to do – you have to disclose hard numbers. But, over the years, it became clear that in the financial industry and, in industry generally, for example at Siliconix and Vishay, those numbers – the soft numbers -- are looked at very hard by the managers, by the directors. They want to see the projections. They want to evaluate whether they make sense. They want to know, in their board meetings, where are we going in the future? Because the future – the value of a company is its future, not its past. And it's taken, you know, really, 40 years, or more, for that understanding to percolate through the American judiciary. But, I think now, what's understood widely is, if these numbers are going to be used internally and used as important information internally, then stockholders deciding whether they are going to sell their Siliconix shares and receive Vishay shares, should get that kind of information for both companies. They should have gotten it for Siliconix; they should have gotten it for Vishay. It wasn't there then, but

this was back in 2001, and the former mindset was still strong. And there is some merit to what that – these, in some ways, are soft numbers, they are soft numbers, but they are used by management and directors, and that's what they are looking at – what the future is.

MR. WELCH: Sounds like you agree with Kevin. #00:34:51#

MR. JENKINS: I agree with Kevin on what the law should be and it is, I think, the law now. And it's – but it is, you know, it takes a while for law to develop as the realities become apparent to judges, to courts, to practitioners.

MR. ABRAMS: In this particular case, it didn't take that long. Siliconix was issued in 2001, and Vice Chancellor Strine explored the doctrinal inconsistencies between Kahn and the tender offer rules in the 2002 opinion in Pure Resources, which was the precursor of the Cox Communication which, ultimately, ended up, many years later, to be MFW. So, the law was in transition and Vice Chancellor Strine, in the Pure Resources decision, only a year later, again, in the context of an injunction application, went on at great length to explain the fundamental doctrinal problems with not applying entire fairness to a controlling stockholder freezeout via a tender offer. So, it was an area of transition in the law—

MR. WELCH: Evolution of the law, at that point, was moving forward, I think- #00:35:56#

MR. ABRAMS: I think the Siliconix opinion reaffirmed prior law that a controlling stockholder has no duty to satisfy entire fairness standards or to pay a fair price in a tender offer, which would be the first step of a squeeze out, as long as there were adequate disclosures and no coercion. That was completely turned on its head when Vice Chancellor Strine, in Pure Resources, and then in Cox Communications, said no, you can't have different doctrines of law applied to economically equivalent transactions. And so, the Vice Chancellor, in a very delicate dance over many years, both to, I think make sure that he developed the law correctly and appeased the Delaware Supreme Court because he, at bottom, was proposing to both reject Kahn and to develop new rules applicable to tender offers that led him through a series of decisions – the three I have pointed to: Pure Resources, Cox Communications, and MFW, to impose a new legal regime, much different than the past, where liability avoidance procedures were set forth and that allowed transaction planners to avoid all of the negative consequences of the Kahn doctrine.

MR. WELCH: Let's take a couple of minutes and talk about the coercion issue since that was the other potential way that this thing could have come out differently. And I had

down that there were roughly three coercion points that were made. The first one was with respect to the timing of the offer. I think you felt there were coercive elements to that. Could you speak to that, Kevin? #00:37:29#

MR. ABRAMS: The timing issue arose because the controlling stockholder originally proposed a negotiated transaction with a special committee. And, even if you take the special committee at face value, which we didn't, and even if they had done a good job, which we didn't believe they did, there would have been a timeframe to allow for extended negotiation and more fulsome disclosures and greater time for the stockholders to consider a long-form transaction.

Vishay saw that the price of its stock and the Siliconix stock was attractive to initiate an exchange offer. So, in one particularly coercive move, we thought they unilaterally dropped the negotiated transaction with the special committee and went to a tender offer, which gave the stockholders very limited protections and very limited time to decide. And this was important, and we explained this to the Vice Chancellor, that the Kahn long-form doctrine would have resulted in a special committee, which would have taken its time to look at the deal. The insiders on the special committee would have had the benefit to non-public information, and the stockholders would have been better

protected because they would have had fiduciaries with capable lawyers and financial advisors looking out for their interest. #00:38:48#

That did not exist to a large extent in the tender offer context, where the controller jammed with stockholders with the 20 business days for the exchange offer. The special committee had to respond more quickly. And we don't think the stockholders got the type of information they needed to make the decisions. So, one of the four big problems, from our standpoint, with the reliance by the court on the tender offer cases, was that the two-step tender offer procedure was functionally equivalent and economically equivalent to a long-form merger, but we didn't have all the protections that would have even existed under Kahn, much less the more vigorous protections that, only a year later, Vice Chancellor Strine recognized in Pure Resources when he elaborated on the requirements for a properly functioning committee, the requirement for a committee endorsement, the need for a non-waivable majority of the minority condition. He explained, in greater detail, the absence of coercion requirement. All of these factors came together in a very learned opinion issued again in the context of an injunction application by Vice Chancellor Strine in an effort to try and reconcile the conflicting tender offer and Kahn v. Lynch merger rules.

MR. WELCH: Okay. I noted that on this first coercion point that what the court said, I think, three things, at least as I read it. The court said it wasn't present; there wasn't coercion present. It was not a historic low – that was the first thing that the court said. The second was that the stock was volatile, like many other stocks. And the third point was that all two-step mergers, to a certain degree, have some capping effect on price. That seemed to be the substance, and I may have left some things out, of what the judge was saying in responding to your first coercion argument. #00:40:36#

MR. ABRAMS: Well, we had three coercion arguments—

MR. WELCH: You did, right.

MR. ABRAMS: -- if you recall here. One was the timing of the offer. The second related to the, what we thought was the refusal of the controller to commit to doing a second step merger if it got to 90 percent, on the same terms and conditions. And there was also, in our view, a threat actionable under the Chicago Milwaukee doctrine of delisting the stock after the completion of the exchange offer in the event they did not complete the merger. So, any one of those three theories constituted what the courts referred to as structural coercion and the court did not buy those arguments. And it also did not deal adequately, from our perspective,

with the inherent coercion argument that's been referred to in Delaware law now, for decades, as the 800-pound gorilla problem associated with the controller making any type of a proposal that would affect the minority's economic interest. #00:41:28#

So, we thought there were plenty of coercion arguments that the court could have grasped onto, but instead, the court went with a different doctrine of Delaware law that was, fortunately, I think, from the perspective of all of us in terms of doctrinal development, was on its way out.

MR. WELCH: Steve, your reaction to the coercion points? #00:41:48#

MR. JENKINS: I think two of them are especially strong, and the courts have followed up on that. The first is no back-end merger. No firm promise of a back-end merger. Because that means, to a stockholder, you're holding your stock, and you say, eh, I don't like this price, but, okay, what's going to happen if I keep my stock, if I don't tender in? Well, maybe there is a back-end merger, maybe there is not. But they are also telling me at the same time, because I think the points are not – they work together, is well, they might delist. And so, I may not be able to sell my stock ever again. That is highly — when you have those two together-- that's highly coercive because it's – say, okay, I don't

really have a choice. I have to tender in; otherwise, I am taking risks that I really can't even fathom, and I don't know if there is ever an opportunity to sell the stock. And so, the courts, these days, would say without the promise of a back-end merger and no mention of delisting,it would be seen as coercive, and it is.

MR. WELCH: All right, and the court, ultimately – thank you, Steve. The court ultimately wrapped up by saying if you want to go get damages, you can present that claim, that potential way of turning things around— #00:43:12#

MR. ABRAMS: Yeah, that solution was unsatisfactory to us, from a legal standpoint. The fundamental problem with the Siliconix line of cases is that they effectively held that if a controller makes a tender offer subject to a majority of the minority tender condition, the business judgment rule applies as long as there is no coercion or disclosure violation. We thought, at the time, and Vice Chancellor Strine must have been thinking about this, that that is fundamentally inconsistent with Kahn v. Lynch. In Kahn, if you had – even if you had special committee approval, or if you had disinterested stockholder approval, you still had an entire fairness claim that could not be dismissed. And you would – you, if you represented the minority stockholders, would get a chance to test the process and the fairness of the price

through a non-dismissible case. So, at the end of Siliconix, you know, we essentially had a motion to dismiss opinion written against us by applying one strand of Delaware law when a functionally equivalent and economically equivalent long-form merger, subject to Kahn v. Lynch, would have given us a shot at proving entire fairness. And it's the failure of the court to, in our view, adequately wrestle with those issues, attempt to reconcile them, determine the appropriate path forward that was the legally deficient aspect of the opinion.

MR. WELCH: Now you had the – we can go to Cox in a few minutes, but Cox came what? Four years later? You had the defense in that situation, and it played out considerably differently. #00:44:46#

MR. ABRAMS: It did because we had the benefit, only one year after Siliconix, of Vice Chancellor Strine deciding Pure Resources when he went on at great length about the fundamental inconsistencies between the Kahn v. Lynch approach to transaction approval, entire fairness, and the incentives it created versus the Siliconix structure. And I think the Vice Chancellor was powerfully motivated in Pure Resources, again, only one year after Siliconix, by the incentives that were created by Kahn for good and for bad. First, it encouraged the use of special committees, which I think everybody accepted was a good thing. Secondly, it actively

discouraged majority of the minority conditions because you got no benefit under Kahn v. Lynch for that; you were still subject to entire fairness, and you introduced a considerable risk in transaction approval. And, finally, as was evident in Cox Communications, one of the worst incentives from the Kahn v. Lynch approach to structuring deal approval processes was the very bad incentive it gave to the plaintiffs' bar. There were 10 to 20 law firms that got rich for a decade, filing cases in controlling stockholder transactions, knowing that under Kahn v. Lynch, the defendants' counsel could not get the case dismissed. That led to extortion in settlement value for the cases.

Vice Chancellor Strine, to his credit, took all of that on in Pure Resources and elaborated a set of proposed rules which would have allowed for business judgment protection to a controller transaction if there was a properly functioning special committee with a veto power, if there was a majority of the minority approval, if there was no coercion, and if there were adequate disclosures. If you put all four of those pieces together on the basis of Pure Resources, we had a roadmap by the time we got to 2005, three years later, in thinking about what initially to put on the table, and what to be prepared to concede in the negotiations with both the special committee and plaintiffs' counsel in order to get a

global resolution of the case and to get the transaction accomplished.

MR. WELCH: All right. So, if you are a student or you're an academic, or you are an interested person, or you're a judge, and you're looking at Siliconix today, looking back on this today, what is your bottom line in terms of what the takeaway is for people who are interested in this? What's the takeaway from Siliconix? I mean, was it ultimately an utterly – overruled effectively in later cases? Or is there something else to be taken away today of some value? #00:47:24#

MR. ABRAMS: I regard Siliconix as an aberrational decision because a Vice Chancellor neglected or overlooked or passed off on what we thought were very significant process flaws. I went through—

MR. WELCH: He did.

MR. ABRAMS: -- eleven of them here. There were disclosure violations. I am not in the category of throwing things on the wall to see if they stick. We had 16 disclosure problems. We had a legal argument as to entire fairness that we thought was very sound, even under Kahn v. Lynch. This controlling stockholder exchange offer failed that test. So, we thought the injunction application should have been granted. We were surprised and very disappointed that it wasn't. And, I think, the key takeaway from the Siliconix

decision, and the continuing vitality it has, is that it's part of a very long list of cases filing – finding that irreparable harm does not exist in the transactional context and the courts would prefer, absent some glaring problem, to figure out the problem and the damages later, after the expedited injunction proceeding. That's the only positive thing I can say about Siliconix. I think the rest of the opinion is aberrational.

MR. WELCH: Okay. Steve, I mean, as a practitioner in this area, what do you see as the takeaways for people that are studying these issues and trying to learn from them? #00:48:43#

MR. JENKINS: I mean, as you know, Justice Holmes once said, the life of the law is experience, not logic. And I think this helps show the limits of logic. Lawyers like to think they're smart, but no one is smart enough to figure out all these problems. And so, judges write decisions and then problems come up with them. So that they write other decisions to deal with those problems and, over time, hopefully, limit them. With Siliconix, what happened is, immediately thereafter, every controller was doing a tender offer, if you remember those days, Kevin. Everybody wanted to do the Siliconix. And those lasted into a bit after Pure Resources was decided. It had to get disseminated and, then, suddenly,

people realized that they had a risk. So, a lot of tender offers were done.

But, as doctrine, Siliconix was a dead end. And it was a dead-end because, while part of it – well, a lot – the tender offer argument, I believe is logical, but it didn't really work. And there was a lot of problems with it that Kevin has explained. And you put too much on the disclosures. There's the disclosures become important. And there's structural coercion. It didn't work very well. And so, it disappeared. These tender offers by controllers disappeared over the next several years as people were trying to find new ways to do transactions that wouldn't result in a lot of litigationbecause what we had after the tender offers disappeared is there was no way to do a controller transaction without getting into entire fairness litigation. And that really means without going to trial where you have to prove the entire fairness. And that is a huge burden. And a lot of small stubs, if a controller owns 95 or 90 – 95 or 90, they could do a short-form merger. But say, 85, 80 percent, very often doesn't make sense for them to be independent public companies. The question became, for them, and for some others, even going down the amount of stock you control is, how can you do a transaction that the judges can decide this has all the indications of fairness, or enough indications of fairness

at the initial point that we don't have to spend years in litigation. And I think that was the next big question that came out of this.

MR. WELCH: Kevin, let me just step back for a moment or two. I think it may be helpful, particularly for people who are trying to understand the evolution of the law, the development of the law, what happened and how we got to where we are today, to hear your views about what – about some of the cases that preceded Siliconix that may well have had, indeed, a reference in Siliconix, that had a role in those – in that outcome, but beyond that were part of the landscape at the time. #00:52:06#

MR. ABRAMS: We teed up in Siliconix an argument to the Vice Chancellor that so-called tender offer cases were inconsistent with the primacy of directors, the responsibility of directors, and the burden of proof rules that have been developed in prior cases. In Unocal, for example, in the 1980s, the importance of affirmative responses by the board and the power of the board to deal with an unsolicited bid were emphasized. In McMullin, we have very specific authority on the affirmative duty of directors to push back to secure the best available deal. In Kahn v. Lynch, we have rules for entire fairness applicable to a controlling stockholder, a long-form transaction that dealt with a coercion recognition

by the Delaware courts that clearly existed in the tender offer context and, therefore, we thought should have extended an entire fairness test to a controller go private tender offer

We had decisions in, for example, Unocal Exploration, which presented a different perspective in that Unocal Exploration recognized that controllers are not subject to entire fairness in conjunction with a short-form merger, and then we had Pathe Communications, which is one of several, I think, a minority of cases, recognizing that tender offers were a voluntary transaction and there was no duty to pay a fair price. #00:53:36#

So, notwithstanding the Unocal, Kahn v. Lynch recognition of the importance of directors pushing back on unsolicited offers, and the duties of entire fairness in controlling stockholder transactions, there was a different body of Delaware law, which was cobbled together by proponents of squeeze-out tender offers to argue that there was no duty of entire fairness, no duty to pay a fair price and very limited procedural protections need to be included in the transaction.

That debate was going on at the time and it came to a head only a year later in the Pure Resources decision, in which then Vice Chancellor Strine took on directly the forms

of coercion that are inherent in a long-form merger, as well as a controller tender offer, found that if you buy the coercion argument, you can't have different legal regimes, entire fairness versus business judgment rule applicable. And the court took the first probing soft step to refining the Kahn v. Lynch doctrine to impose a different liability and a different standard of judicial review, depending upon the procedural protections employed by the controller and the representative of the minority in the squeeze-out transaction.

MR. WELCH: Steve, do you have a viewpoint on that issue – on those issues?

MR. JENKINS: I think that's a pretty good list of some of the decisions going into this—

MR. WELCH: All right. Well, thank you both for providing your insights and your views with respect to the Siliconix case. The other case that we wanted to go over and get your thoughts on today is Cox Communications. Kevin, I have a recollection that you represented – I think we talked about this earlier – you represented the defendants in Cox. And I think that was Cox Enterprises, Cox Holdings, and five individuals – individual defendants. Is that right?

#00:55:35#

MR. ABRAMS: I represented the controlling stockholder of Cox Communications and its affiliated directors

on the board of Cox Communications. Separate counsel represented the special committee director defendants.

MR. WELCH: And what was the ownership structure? In other words, Cox Enterprises was at the top. Cox Holdings was under that. And then, Cox Communications was the publicly traded company, is that right? #00:56:01#

MR. ABRAMS: Correct. That was the subject of the proposed going private transaction by what we called Cox Enterprises, the parent company.

MR. WELCH: Okay. And if you don't mind, how did you get involved in this case at the outset? What was the process, and what are your thoughts and recollections as to how you – this whole thing got started? #00:56:21#

MR. ABRAMS: Delaware corporate lawyers have a relatively small network of forwarding counsel for business. We don't have the benefit of being employed by a national law firm like Skadden that can send the business over the phone whenever something happens in one of the Skadden offices. Instead, people like Steve and myself depend upon close personal and professional relationships with counsel who count on us to know the answers and to be able to provide accurate and expedited responses to their questions. In this particular case, I had done work for Cox Enterprises previously and had a

relationship with the Dow Lohnes firm in Washington, which was the principal outside firm to Cox Enterprises.

MR. WELCH: All right, now, when you look at the opinion, it's not short, as I recall; it's eighty-some pages. Now, but, on the other hand, the actual issue that was queued up for decision was itself relatively – relatively simple in the sense that the court had awarded a four million, I think a four million-plus fee and there was an effort by an objector, led by our friend Steve here, to cut that fee down that arose from the settlement of the case. Is that the basic lay of the land in terms of – what was really, intrinsically involved as compared with the many, many topics that the court goes over? #00:57:53#

MR. ABRAMS: There is a narrow holding in Cox Communications which was employed by the court—

MR. WELCH: Yes.

MR. ABRAMS: -- as is traditional in Delaware to allow the court to expound upon the jurisprudential inconsistency between the Kahn v. Lynch line of cases applying to controller freezeouts, and the Siliconix case. And just as in, for example, the Caremark case that I litigated on behalf of the defendant directors, Caremark was a settlement decision. The settlement was approved easily, but then Chancellor Allen went on at great length to expound on the

duty of care and the requirements for procedural oversight by directors to fulfill that duty. Cox Communications presented the same issue. Steve presented the objection, but Vice Chancellor Strine, who clearly was sensitive to the doctrinal split between Kahn and Siliconix, used the controlling stockholder transaction as a basis to suggest a refinement to the Kahn regime, which would allow for a rational procedural approach and liability immunizing approaches to allow transaction planners to structure these deals.

MR. WELCH: All right. Now, Steve, there was ultimately a settlement, and we will get to that in a couple of minutes, but there was ultimately a settlement. The court approved the settlement, as I understand it, and, and then subsequently, there was a fee petition. You appeared as an objector to the awarded fees, which were considerable, as I recall. #00:59:21#

MR. JENKINS: My memory is the settlement hearing was also the fee hearing, and everything was together. Yeah, we came in to object to the fees. I had, as my co-counsel, Professor Elliott Weiss, of Arizona, who had written a paper about litigation in Delaware on these kind of cases. And what his paper showed is that the series of plaintiffs' firms were routinely settling these cases for a big fee and not much else

and that it was not an appropriate use of judicial resources and not an appropriate way to settle cases.

So, we didn't object to the settlement because it was – we didn't see that there was anything wrong here. They had – they did this deal the right way. We didn't see that there was any purpose for paying attorneys' fees in this case. This was not an unfair deal to the stockholders. But what we came in, in and say, hold it. Delaware has gotten out of line on the issue of paying large fees or awarding large fees to plaintiffs in cases in which they're challenging, usually, a controller deal. And there is no way for somebody like Kevin, representing the defendant, to stop the litigation unless he gets a release as part of a settlement early on.

So, defense lawyers who were routinely settling these cases because they were dealing with the Delaware law at the time that said if you don't settle early, you're going to spend years in litigation. So, better to have some small settlement and large attorneys' fees than spending years in litigation and for something that is fundamentally fair. And that's the small issue we were presenting here. Obviously, there was a much bigger issue that underlaid it is, okay, how do we create a structure where a controlling stockholder can do a deal that doesn't have to go through years of litigation? And then, how can we create a structure in which there is not

an incentive for plaintiffs' lawyers to take a quick, although perhaps large, fee and, instead, give them an incentive to only sue in cases where there is real wrongdoing and, then, really litigate those cases. At least from our perspective, that's what we were looking at.

MR. WELCH: All right. So, it sounds to me, from that, that what you are saying is number one, when it came to the substantive efforts of putting the deal together, Kevin and his colleagues and his client did a good job putting it together, but they were faced with this attack by the plaintiffs' bar, or by certain segments of the plaintiffs' bar, and that led to the fee issue, which you were involved in. Is that correct? #01:02:32#

MR. JENKINS: Yeah. The special committee here kept saying no. And they kept – they not only bargained, but they said no until they extracted what I think an outsider would say, without being able to look into people's minds, is probably the highest amount of money that they could have gotten. And now, you never can look into a controlling stockholder's mind, so you can never know that for sure. But the controlling stockholder was giving, I think, all the signals of we're not giving any more money after this, and in fact, said so.

MR. WELCH: Okay. Kevin, let's go back if we could and just paint the picture of what the deal was here. I take it that the Cox family made a proposal to buy what? All of the public shares it didn't own. And if that is correct, or if it isn't, straighten it out, but kind of paint the picture, if you would, for what the deal was and how it evolved.

#01:03:31#

MR. ABRAMS: Cox Enterprises proposed a premium-priced, long-form merger to Cox Communications to squeeze out the public shares. Cox Communications had two independent directors with no affiliation whatsoever with Cox Enterprises. Those two were appointed as a special committee. We gave a standard set of special committee resolutions to the special committee, giving the special committee plenary powers, and that was accepted by the special committee and its counsel. We then proceeded to engage in a series of negotiations. Steve is absolutely right that, at the end of the day, Jim Kennedy, the head of Cox Enterprises and an internationally-respected business leader, met with the chairwoman of the special committee and they had it out over the price, and she was correctly convinced that Cox Enterprises was going to drop the deal unless they accepted the enhanced price that Cox Enterprises was prepared to pay.

At the same time, my job as litigation counsel to Cox Enterprises was to deal with the, as I recall, 13 lawsuits that were filed and consolidated in Delaware, and the five lawsuits filed and consolidated in Georgia. All of the national plaintiffs' firms were involved. The plaintiffs eventually got themselves organized and Arthur Abbey, well-known to all of us, was the top dog among the plaintiffs' lawyers. And it was my job to engage in what is now referred to as the kabuki dance to attempt to get the plaintiffs to agree to a final price and a transaction structure, which would be consistent with where we ended up with the special committee.

There were two independent paths of negotiation, both involved arms' length conversations. You know, frankly, the court is correct in pointing to the – to be charitable, cumulative, or supportive efforts by plaintiffs' counsel. But, there was, by that point, a well-known path we would go down to involve plaintiffs' counsel in the discussions over the price and the deliberations by the controller on what the price and the terms should be. We deliberately left out of the front end of the proposal a majority of the minority voting condition. We knew from Pure Resources, and from our experience in the prior years, that that was going to be something demanded by the special committee, and we expected

to trade that off to try and save some money, to be blunt about it. At the end of the day, the plaintiffs' lawyers made a presentation with their views on financial fairness and demanded a majority of the minority voting condition. The special committee was proceeding on an independent track. And, as was customary at the time, the trains ended up in the middle, and I was able to get the plaintiffs' lawyers to agree to a settlement, which matched the terms that we were prepared to agree to with special committee.

MR. WELCH: Okay. So, I take it that it is accurate to say that from the outset, the proposal was made, but it was negotiable. It was a fully negotiable proposal. #01:06:50#

MR. ABRAMS: Absolutely. We expected and received vigorous pushback from the special committee, and we went through the standard set of conversations with the plaintiffs' counsel as well.

MR. WELCH: Now, where did the – when did the litigation land with respect to that? You announced a proposed deal at, I think, $32 a share, which was a 14 percent premium. You announced a proposed deal that was fully negotiable, and when did the plaintiffs come in? #01:07:17#

MR. ABRAMS: Four o'clock in the morning on the date of the announcement.

MR. WELCH: Okay, well, before any deal was actually agreed to, is that correct? #01:07:24#

MR. ABRAMS: No, we made a proposal just after midnight. The first complaint was filed at 4 a.m., East Coast time. And the rest of them piled on and, ultimately, we went through a multi-month process of negotiating with the special committee and dealing with the plaintiffs' lawyers.

MR. WELCH: Okay, now at some point in the opinion, the court talks a little bit about the Kahn against Lynch that you had described in our earlier conversation. And the point was made with some emphasis that, under Kahn, a controlling stockholder could not structure a transaction and get it readily dismissed. Each case has settlement value. And to a certain extent, I take it, that played out here. There was nothing coercive about your offer in the sense that it was fully negotiable. The lawsuit landed, and negotiations ensued. #01:08:19#

MR. ABRAMS: And as I described in my affidavit and in open court proceedings, the problem facing the controlling stockholder in this context was the inability to secure the immediate dismissal of the case. So, no matter how good a job the special committee did, no matter how high a price we paid, no matter how good the disclosures were, the plaintiffs' lawyers had potentially an opportunity to litigate the case

through, at least, summary judgment with all of the attendant discovery cost and eye off the ball problem for management as well as, you know, immense litigation fees for a special committee, the bankers, and the controlling stockholder.

So, by that time, there was an accepted procedure with a group of plaintiffs' lawyers who were understandably risk averse against trying to take on a deal that had been fully vetted and negotiated by a special committee such that we would negotiate ostensibly with the plaintiffs' lawyers, at the same time we were negotiating with the special committee, and attempt to get everybody to the same place at the same time. The Vice Chancellor recognized that that was a win-win situation for everybody. The plaintiffs' lawyers were getting rich for taking no risk and doing nothing. The controllers in the context of a multi-billion-dollar deal like Cox Communication were paying a relative pittance to the plaintiffs' lawyers to go away and saving themselves a lot of money. And I was able to avoid a quasi appraisal case on entire fairness grounds for my client by throwing some money to the plaintiffs' lawyers.

MR. WELCH: So, Steve, am I correct in understanding that the settlement hearing was undertaken at the same time as the fee analysis. Was that correct? #01:10:03#

MR. JENKINS: Yeah, the fee was heard at the same time.

MR. WELCH: What threw me off on that point was there is a point in the opinion where the court says I am not prepared to revisit my earlier decision to approve the settlement, as Kevin described. I take it that took place at the very same hearing. #01:10:19#

MR. JENKINS: That took place at that hearing, and then he took it under advisement on what to do on the fee. At least that's my memory.

MR. WELCH: So, what's your recollection – first of all, let me back up. Was it – is your recollection of how this case took shape pretty much consistent with Kevin's? Or do you have further thoughts on it— #01:10:34#

MR. JENKINS: Sure. Although keep in mind we're outsiders, so we don't know what's going on. But this is what's happening in every one of these cases is everybody is doing dual track. If they are doing it correctly, they have a good functioning special committee, and then they have a bunch of plaintiffs' lawyers who were putting in lots of things on their timesheets. One doesn't really know what they're doing. And, at the end, they are going to ask for, depending on the size of the deal, five or ten million dollars in fees.

MR. WELCH: Okay. And this was being heard by then Vice Chancellor, later Chief Justice, Strine. Steve, was it a hot bench, in the settlement hearing? How did that shape up? #01:11:16#

MR. JENKINS: It was a hot bench, and as usual with Vice Chancellor Strine. And because he was aware of these issues and he had given, not only had he signaled in Pure Resources his concern about the standards, he also had been heard to say that plaintiffs were making money that – plaintiffs' lawyers were making money -- that they really shouldn't be. And so, we knew we had somebody who was going to hear us in our objection to these fees. Now, I have to say, and I should make this real clear, I think plaintiffs' lawyers can play a very important role in the workings of the corporate judicial system. I think very often they have gone in there and they have really helped stockholders in bad situations. But what we had in Cox Enterprises is basically, because of the doctrine at the time under Lynch, one had to offer them money for no advantage to the stockholders or the slightest possible advantage to the stockholders. And that's not good. It's not good for the Delaware courts; it's not good for the system.

So, we were challenging that because a systemic problem. We were doing at the surface level, and then Vice

Chancellor Strine dealt with it, not only at that level, but a much deeper level of why these things are happening, which is because Lynch needed modification.

MR. WELCH: So, it was a hot benchwhy? #01:12:55#

MR. JENKINS: And it was a hot bench for Kevin. He got asked a lot of questions on exactly what happened on the negotiations with the plaintiffs, and he was absolutely forthright on telling the court that, and Vice Chancellor Strine, in his opinion, essentially says, "yeah, the defendants did what they had to do here."

MR. WELCH: And Kevin, that was effectively a bump from what, about $32 a share up to $34 and change – 34.45 or something in that— #01:13:30#

MR. ABRAMS: Right, correct, but although the two dollars appears de minimis in the context of the price, you have to understand the size of Cox Communications itself.

MR. WELCH: It was a big deal— #01:13:38#

MR. ABRAMS: -- every nickel was hotly contested by Jim Kennedy and the negotiations of the special committee. And I wasn't giving an inch to Arthur Abbey either.

MR. WELCH: And the Vice Chancellor noted that, in essence, this was a— #01:13:50#

MR. ABRAMS: There was arms' length negotiation to get to the end number on price under both paths. I expected,

at the time, because of my extensive prior dealings with Arthur Abbey and his cohorts that they would throw in the towel once I went best and final. I had a history of negotiating settlements with Abbey. He knew I was credible when I said I was done. And he ultimately accepted the price that the special committee was willing to accept.

MR. WELCH: Okay, so, when that happens, and the court approves the settlement, the defendants go away with a release, subject to the fee issue? Am I correct on that? #01:14:31#

MR. ABRAMS: In the Vice Chancellor's mind, there was no question he was going to approve the settlement because he recognized, correctly, that even settlements for no consideration are sometimes beneficial, and this was one of those situations.

MR. JENKINS: There was no case there.

MR. ABRAMS: Right. There was nothing being sacrificed in terms of the interest of the public stockholders. So, he had two issues to resolve, in his mind. One is what is the appropriate amount of the fee under the Sugarland test, which Steve ably saved us a bunch of money on. And, secondly, the Vice Chancellor took it upon himself to rewrite his Pure Resources opinion by adding an addendum to his opinion to explain the structural rules that would be

imposed to modify the Lynch doctrine to effectively throw away or overrule the Siliconix line of cases, and allow transaction planners to have certainty that, if a rubric was put in place, or a framework was put in place to encourage arms' length negotiations, and people had the appropriate approval rights, we weren't going to put up with any more of these kabuki dances, or there wouldn't be a need to.

MR. WELCH: Now, the court also, and maybe this is part of what you just articulated, the court also recommended that the business judgment rule, I think you pointed out in our earlier discussion, be applicable if you have approval by disinterested directors and approval by disinterested stockholders, full disclosure and that sort of thing, which was a modification of the Siliconix approach to this thing, as I think you were discussing at that point. #01:16:02#

MR. ABRAMS: The genius of the Pure Resources opinion was Vice Chancellor Strine's recognition that, if appropriate procedural safeguards were put in place, there should be liability limitations and different standards of judicial review applied even to controller transactions. He stepped cautiously in 2002 in Pure Resources to put that on the table. He, obviously, was mindful of the Kahn v. Lynch precedent from the Delaware Supreme Court. And, ultimately, by the time we got to 2005 and Cox Communications, he felt

sufficiently confident in the movement of the law and the type of transactions that were being implemented that he expanded on Pure Resources and Cox Communications, and laid out the multi-factor test which allows people to get business judgment rule protection rather than the Kahn v. Lynch entire fairness test.

MR. WELCH: Kevin, am I correct that, ultimately, that was all approved by the Delaware Supreme Court in MFW, no? #01:17:00#

MR. ABRAMS: It took Vice Chancellor Strine a number of additional years to get to the MFW opinion where he once again rewrote what he put in Pure Resources and Cox Communications and explained to a fare-thee-well, in the MFW trial court opinion, why these procedural limitations are appropriate from a policy standpoint in terms of incentives for controllers, incentives for special committees, empowering public stockholders, and disincentivizing the plaintiffs' bar. And, ultimately, the MFW decision was adopted wholesale without much comment by the Delaware Supreme Court.

MR. WELCH: Okay. And that's, obviously, a very helpful insight and pulls a lot of these things together. Back to Cox itself, for the moment, though. Steve, when it came to the actual fee battle itself, the settlement had been approved. The whole thing had been successful at this point.

We also had this discussion by Chancellor Strine – Vice Chancellor Strine -- about MFW. What was the analysis – what were you pressing for? Obviously, reduced fees, but to what degree? How did that play out – how did that work? #01:18:11#

MR. JENKINS: Well, what we were saying is if you look at the Sugarland factors, you'll also – the first thing is, what's the benefit to the corporation? And we said, in reality, nothing. The corporation had to go through a kabuki dance, but it didn't get any more money than the special committee because the special committee worked the right way, and it got the maximum dollars. And then we went through, and we said it's really zero, and I think we put that in our brief.

Now, we also understood that, under Delaware law, that the fact that they had filed suit early enough and that the price increased thereafter, they would be deemed, unless there was strong proof to the contrary, they would be deemed to get – deserve some credit for the price bump. Now, I thought then, and I think now that in that particular case, there was not a penny added by their actions. But, nevertheless, because of that presumption and Vice Chancellor Strine, in the end, gave them, what? About a million dollars?

MR. WELCH: A million and a quarter. #01:19:21#

MR. JENKINS: A million and a quarter instead of the original four or five or six million that they asked for.

MR. WELCH: A little more than four, as I recall. So, it was a significant drop.

MR. JENKINS: It was a significant cut—

MR. WELCH: As Kevin said a moment ago.

MR. JENKINS: And he was trying to do the same thing as we wanted done. And he did not think the payment of attorneys' fees, where they hadn't really accomplished anything, was good for the court system or good for the corporation law. I think that's right. So, it was – that little part of it was good. The bigger part – pushing us towards our current MacAndrews and Forbes Worldwide approach, was also good. And that avoids getting into the attorneys' fees. But, it sent a message to the plaintiffs' lawyers, which is, if you are going to bring these suits, don't try to get a bunch of money for something where you are not going to litigate; you're just going to meet to a settlement. It pushed down the amount of money they got for a while, and then MacAndrews and Forbes essentially eliminated it.

MR. WELCH: I know, it was interesting, I mean at least to me, I mean as I read it, the court found no basis, number one, to revisit its decision to settle the thing. But, beyond that, the court went on to identify considerable

weakness in the parties' claims. Not very enthusiastic about the content of the claims and, in fact, fairly critical of what they had done. Beyond that— #01:21:07#

MR. JENKINS: And if I could stop just there. If you think about the first suit – as Kevin says, there was an announcement at midnight, was it? Four hours later, 4 a.m. in the morning, the first lawsuit was filed. Now, how much thought can be given to that suit? And if you went and looked at it, you would see it just took a standard form and took the details of the press releases that it was unfair. How can anybody possibly have looked at that, weighed it, and decided and come up with the conclusion this is an unfair transaction, this is a violation of fiduciary duty? Especially when it said this is just a proposal going to the special committee. I think that fact—

MR. WELCH: Right ... now, it was negotiable, fully negotiable. #01:21:53#

MR. JENKINS: Yeah. I think the fact that they started filing at four in the morning, four hours after it was announced, based on nothing—

MR. WELCH: That's not all the court said. It went on to say that there were really no real novel legal arguments. It was a standby – or no, there was a special committee that was focusing on this. There were no appreciable

risks; it was a very low-risk case. A variety of points to that effect. #01:22:27#

MR. JENKINS: Yeah. It didn't deserve – like a lot of these-- it didn't deserve any significant legal fee.

MR. WELCH: But, nevertheless, and I think picking up on your point of a little while ago, the fact of the matter was that the court – not – even though it didn't see much of any merit to the claims, was still prepared to honor and respect the settlement, and because of the practical side of the issues, to approve a settlement with a reasonable fee that you had been successful in bringing down. #01:22:55#

MR. JENKINS: Yeah, I mean in the end the fee was – didn't make them – because how many different suits were there again, in Delaware?

MR. ABRAMS: Thirteen in Delaware, as I recall, and five in Georgia. And there were separate fee applications paid in both jurisdictions.

MR. JENKINS: But can you imagine the 13 law firms arguing about 1.4 million.

MR. WELCH: I don't want to do that. Okay, so— #01:23:16#

MR. JENKINS: They were not happy with that result, and, thereafter, it caused a diminution of the number of lawsuits coming in on these cases.

MR. WELCH: A positive event, I guess, from some people's perspective, which is understandable. #01:23:34#

MR. ABRAMS: In part, the diminution of plaintiffs' cases attacking controlling stockholder transactions was caused by the realignment of plaintiffs' lawyers' incentives. They understood as a result of the drop from just under five million in the fee application to a fee award of just under two million that they weren't going to make the kind of money they needed to buy their houses out in the Hamptons. But, the more important driver of the refocusing of litigation efforts came as a result of the announcement of the new procedural rules of the road for a controlling stockholder transaction. And the amplification, elaboration, and specification of the procedural rules regarding special committees, no coercion, full disclosure, a majority of the minority tender conditions, all of those were clearly understood years after the Pure Resources opinion as establishing a framework for transaction planners to put together deals that would give people in my position the ability to tell the plaintiffs' lawyers of the world that, you know, we did this according to the rules and you know, this is not a fruitful area for you guys to litigate.

And, as we have discussed earlier today, the plaintiffs' lawyers reacted to that by really starting to

focus more critically on transactions that deserved attack as opposed to going through the rote exercise of filing 13 complaints in the space of a few days and getting bought off at the time of the special committee vote.

MR. WELCH: Kevin, is that the real takeaway from—

#01:25:06#

MR. ABRAMS: Yeah, the empirical evidence is clear that, following the Cox Communications decision, controlling stockholder, go private transactions were structured as two-step mergers. The prevalence of special committee approval requirements and majority of the minority requirements exploded. The number of these lawsuits dropped considerably. The lawsuits that were brought focused on, director conflict, banker conflicts, controlling stockholder overreaching, tipping, the sorts of things that are, obviously, subject to challenge in any merger context, but did not rely upon the false premise of Kahn that there is always coercion and, therefore, entire fairness applied to everything.

So, Cox Communications was an important decision in realigning the rules of the road so that people understood how to structure transactions to keep the plaintiffs' lawyers at bay and, simultaneously, encourage properly functioning special committees, and to empower minority stockholders through the majority of the minority voting condition to

express their view. And the Vice Chancellor was consistent for a decade in the early part of this century in focusing on the rise in institutional stockholders, their sophistication, ability to vote with their wallets and, ultimately, their ability to protect themselves both at the ballot box and through appraisal litigation and through other forms. And so, he took off the table makeweight litigation, which was not socially productive; it had huge agency costs and just diverted money to a handful of plaintiffs' firms. And that was a positive thing. #01:26:46#

MR. JENKINS: So, one of the things, if I can add is—

MR. WELCH: No, please.

MR. JENKINS: -- is this is all predicated on full disclosure. Much fuller disclosure that what you saw in Siliconix. Because, as it has to be the majority of the minority for the vote to be meaningful, has to be a fully informed vote. So, that has led—

MR. WELCH: A little bit of a departure from Siliconix, is that your point? #01:27:10#

MR. JENKINS: It's a big departure from the old way of thinking and Siliconix; it's proxy statements are a lot fatter now. Now, some of it is just repetition. The first third is repeated in the second third, which is repeated in

the third third, but a lot more information is disclosed now, which I think is a good thing because, as Kevin was saying, you have a lot of – most stock these days is held not by mom and pop, but it's held by professional managers. Sometimes they're passive managers, and they don't read the proxies, but it's – you have actual managers out there. They read and understand the material, and it allows a much better-informed vote. And I think that is an important part of where we've gotten is the disclosure part. And, in Cox, were there any disclosure claims, or are they were the plaintiffs satisfied with disclosures?

MR. ABRAMS: No.

MR. JENKINS: Yeah.

MR. ABRAMS: We didn't even supplement.

MR. JENKINS: Yeah.

MR. WELCH: All right. So, from a – this is a milestone case, no doubt about it. It sounds like. From your standpoint, if somebody is studying this area of the law, trying to bring it together – what is the takeaway? Kevin, I think you hit on it once already, but your perspective on what the takeaway really is and should be. Is this case – has only historical precedent? Or does it have other precedent that may have current application that a student would want to know about? #01:28:34#

MR. ABRAMS: I think Cox Communications comes in the middle. It's not the end of the development of Delaware law, development by one of the most fantastic judges we have ever had in the exemplary history of Delaware judges. Vice Chancellor Strine recognized, after the Siliconix opinion in 2001, that the Kahn v. Lynch framework adopted by the Delaware Supreme Court in 1997 was creating the wrong incentives for special committees, for stockholders, and for plaintiffs' lawyers. He attempted, in 2002, through the Pure Resources decision, to propose an alternative framework whereby procedural protections would allow for transaction planners to operate with the benefit of getting business judgment rule protection and, therefore, the dismissal of silly lawsuits.

It then took several years later, until 2005, we get the Cox Communications where the court uses a simple settlement that was approved routinely, and a hotly contested fee application, but, again, it's a sideshow issue in the development of Delaware law. And the Vice Chancellor expanded on his thinking about procedural protections and liability immunization effects in Cox Communications. But, then, it took another eight years to get to MFW. Now, in between, we had CNX Gas, the decision by Vice Chancellor Laster, applying the Pure Resources framework to controller tender offers. And then, Vice Chancellor Strine came up with you know, his third

articulation of the theory and the structural steps that would be required.

So, as I referred to previously, the genius of Vice Chancellor Strine in this area of the law, among many others, was recognition that if you have a special committee, and you have fully-informed stockholders acting without coercion, judges should not be second-guessing these types of decisions, and plaintiffs' lawyers should not have legal frameworks in order to extort settlements.

So, it took a while to get from '97 to 2013, that is Kahn v. Lynch, ultimately to MFW. But, the Delaware courts, as they have for decades, ultimately put in place a set of value-maximizing rules that give dignity to the process and make sure that Delaware corporate law is exemplary in these areas.

MR. WELCH: Steve, and your reaction? #01:30:58#

MR. JENKINS: Yeah, I very much agree with that. It's tough to come up with rules for these kind of things. And, like I say, no one is smart enough to figure it all out at the start. You have to do it over time. But what the Delaware courts have done over the generations is they have dealt with the legal issues between stockholders, directors, officers, controlling stockholders, to try to make a system of rules that apply in an intelligent way, to maximize value for everyone. Now, you can never fix all problems. You always

have, as Kevin was saying, you can have people tipping. You can have investment bankers not doing their jobs. There always will be some problems out there because humans aren't perfectible. Nor are institutions perfectible. But, what the court has done, and Cox was part of this, is try to make intelligent rules that will push fallible people in the right direction and different – kind of fallible people – plaintiffs' lawyers, various controlling stockholders, and others, in the right direction and to minimize litigation and maximize the utility of the corporation form.

They did a really good job here over the years – including some of the decisions that no longer are fully valid. They were a step along the road to where we have gotten now, and, you know, I am proud to have been able to witness this and seen how so many good men and women, as our Chancellors, Vice Chancellors, Supreme Court Justices work very hard to accomplish this.

MR. WELCH: Steve, let me – there is another issue which I think is tied in with some of the things we have been talking about today. When you got the call from Elliott Weiss, right, was it your sense that the whole thing might have some traction? In other words...? #01:33:11#

MR. JENKINS: Ed, I did. At least I thought, if you mean by the whole thing, the attorneys' fees part—

MR. WELCH: Right.

MR. JENKINS: -- I never imagined we'd get the opinion we got that would follow up on Pure Resources, although, obviously, that was underlying it. I thought it was right as a factual matter that Delaware was approving too many settlements and it's giving money for essentially nothing.

MR. WELCH: A point you made, right. #01:33:39#

MR. JENKINS: I also thought that we had the right judge in Vice Chancellor Strine to be willing to dig in and take a look. I thought he probably was not happy about some of these settlements and would like an opportunity to be able to examine them. And it seemed to me this was a perfect one, because there was just no indication of wrongdoing on the part of the defendants. They got sued before – as soon as they announced it – an offer, and then they got several dollars more, and, then, they said absolutely no. A hard case to litigate except under Kahn v. Lynch, where you have to prove the entire fairness. Even there, if you're a plaintiff, it's a hard case to litigate.

So, I thought this was a case that might get some traction and might go forward and help stop what I saw as a problem.

MR. WELCH: And it did. #01:34:38#

MR. JENKINS: It did.

MR. WELCH: Kevin, I think you have touched on these same issues already on a couple of occasions. But your reaction to the same question. #01:34:48#

MR. ABRAMS: We were not concerned about the settlement being approved in general or when the objection was filed. In general, the settlement was well supported by consideration because there was a shared credit case in which representatives of the parent company acknowledged the impact of the litigation on their thinking and determining to increase the price of the go private transaction. In addition, we gave the plaintiff credit, again shared credit, along with the special committee, for the majority of the minority stockholder approval conditions. So, there were two concrete components of settlement consideration which fully supported the settlement. And I suspect that's one of the multiple reasons that led the objector to focus only on objecting to the fee.

So, at the time the objection was filed, the objection itself focused only on the fee. I was highly confident because of the existence of independent settlement consideration that the settlement would be approved and that we would get the class-wide release that we were looking for. I expected the Vice Chancellor to take on the fee application. We were very reluctant to agree to that number, but there were

some higher precedents out there which gave us some risk exposure, but I was ultimately confident that the Vice Chancellor, on his own, was going to cut the fee request. And then, when the objector came in with all of its economic evidence and arguments, my client saved about three million dollars. We still got the settlement approved, and we got the class-wide release. So, it was a beneficial outcome for my client in that particular context. And Cox Communications was a bellwether decision in the development of Delaware law to impose procedural protections in this context, and avoid really wasteful litigation.

MR. WELCH: I want to thank you both very, very much for your thoughts today, your contributions, your analyses. It's really been helpful, and I think there are those who will be very grateful for it. So, thank you very, very much.

MR. JENKINS: Thank you.

MR. ABRAMS: Thank you.

#01:36:47#

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