

Case: Airgas v. Air Products
Interview of Kenneth J. Nachbar;
Morris, Nichols, Arsht & Tunnell LLP
Interviewed by: Paul A. Fioravanti, Jr.
Prickett, Jones & Elliott, P.A.
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1 MR. FIORAVANTI: Ken Nachbar, thank you for joining
2 us to talk about the Air Products vs. Airgas case for part of
3 the Delaware Oral History Project. This case arose back in
4 late 2009, really, when the CEO of Air Products approached the
5 CEO of Airgas about a possible acquisition. Ultimately, those
6 discussions did not prove fruitful from the Air Products'
7 side, and Air Products announced an intention to go hostile
8 with a tender offer, and filed litigation in the Delaware
9 Court of Chancery, seeking to have an injunction against
10 various defensive measures, most notably, a rights plan or a
11 poison pill plan. When did you get involved in the case? Were
12 you involved at the negotiating level early on in late 2009?

13 #00:01:34#

14 MR. NACHBAR: I believe we were, sort of just
15 generally - we had a heads up of, what was going on and we
16 talked about some of the strategies, yes. At least I think so.
17

1 MR. FIORAVANTI: And your firm, Morris, Nichols,
2 Arsht & Tunnell joined with Cravath, Swaine & Moore in
3 representing Air Products. What was the strategy in the early
4 stages, if you can talk about that, short of going hostile and
5 with litigation? And then, what was the trigger point that led
6 your side to go hostile? #00:02:14#

7 MR. NACHBAR: Yeah. And I wasn't intimately
8 involved. I mean we'd get, I think, calls from time to time
9 about what was going on and the general strategy, but, I
10 think, like any other situation, the business combination made
11 a lot of sense. I mean, I don't think anybody could doubt
12 that. They were sort of complementary lines of business, for
13 sure, and so, there would be synergies and an opportunity for
14 - let me back up. Airgas was an amalgam of small companies,
15 mom and pops that were very successfully rolled up into, a
16 company. But it served, auto shops and small businesses and
17 provided industrial gases. Air Products, on the other hand,
18 served corporate America for the most part. they would have,
19 a gas facility at an Exxon plant and Air Products would
20 actually build a plant at Exxon's plant and, provide very
21 high-volume industrial gases, you know. And so, they are doing
22 tanker trucks or, sort of bespoke plants, whereas Airgas is
23 mostly doing canisters. But, obviously, the two businesses
24 are complementary, and there is some overlap in the middle.

1 That was the idea. So, I think - I think the thought was that,
2 let's try to do a friendly deal. Let's see if they're willing
3 to sell.

4 MR. FIORAVANTI: And, at the time, the economy was
5 just, in the throes of, or just after the Great Recession.
6 And Airgas' stock price had been beaten down. The company was
7 involved in trying to develop and implement a five-year plan,
8 and they were also developing SAP as part of their strategy.
9 And their position was that they weren't for sale; they wanted
10 to execute their plan. Were the corporate cultures, in your
11 view, different at the two companies? #00:04:43#

12 MR. NACHBAR: They were very different and,
13 ultimately, it's very funny because when I was going over to
14 argue the, sort of one of the last arguments in the case
15 post-trial, I had a car ride, to the courthouse in Georgetown
16 and a lot of people at Air Products actually didn't want the
17 deal to go through. Upper management did. They thought it was
18 synergistic. They thought it was beneficial. But I think the
19 rank and file at Air Products kind of viewed Airgas as a
20 little bit of the Wild West, a little bit of, you know, we're
21 serving corporate America; they're serving, Vito's Autobody
22 Shop. And, I got a bunch of stories about, near accidents
23 that Airgas had had. This was while I am going over to the
24 argument and, I finally turned to general counsel and I said,

1 you're really not doing a lot to psych me up here. And, we
2 all laughed and, we made the argument, and it came out the
3 way it came out. But, yeah, the cultures were actually quite
4 different.

5 MR. FIORAVANTI: So, if there were to have been a
6 merger, the view of some folks was that this would be a
7 difficult integration. #00:06:15#

8 MR. NACHBAR: Yeah. Like I said, I think when you
9 got down to the managerial levels above, -- you got out of the
10 C-suite at Air Products, there was a fair number of people who
11 thought the deal was a bad idea and would really be
12 problematic.

13 MR. FIORAVANTI: When the complaint was filed in
14 February of 2010, did you anticipate the significance or the
15 potential significance of the legal issues that were involved?
16 #00:06:49#

17 MR. NACHBAR: Well, we've all had, in our careers,
18 a lot of poison pill cases, right? I mean lots of people have
19 poison pills and have for a long time. Obviously, if you're
20 doing a hostile offer, one of the things you have to do is you
21 have to challenge the pill. So, it wasn't any more significant
22 than any other case. It became more significant because this
23 one actually went the distance. A lot of them, the bidder
24 goes away if they get rebuffed or, more likely, they cut a

1 deal and they don't really, ultimately, get litigated. So, we
2 knew that it had the potential to be an important case,
3 obviously, but so did the last 20 cases challenging pills,
4 all of which got settled or went away. So, what, what made it
5 unique was really the staying power, of Air Products who
6 pursued this for, I think over a year when all was said and
7 done.

8 MR. FIORAVANTI: In addition to the complaint that
9 was filed by your client, Air Products, there was stockholder
10 litigation, companion litigation that was filed. Did that
11 affect your ability to litigate the case at all? #00:08:09#

12 MR. NACHBAR: No, not really, I mean, we were in
13 the courtroom and being at counsel table with Randy Baron was,
14 a new experience for me. But we worked together well and, I
15 think came to have mutual respect and, I mean I am still
16 friends with Randy. I still - we still talk about it and,
17 it's-- I guess it was a good bonding experience.

18 MR. FIORAVANTI: Do those types of cases present
19 challenges where you, obviously, have a client that has a lot
20 at stake, and you have a stockholder case that's in parallel.
21 Your objective is to make sure that you put on your best case
22 and you don't want somebody else getting in the way or making
23 a mistake that's tactical. How do you deal with that in those
24 situations? #00:09:00#

1 MR. NACHBAR: Yeah, and there were, times with a
2 particular witness where, we would want to emphasize one line
3 of questioning and maybe the shareholder plaintiffs would want
4 to emphasize something else. But mostly, we talked and worked
5 it out and, I mean, ultimately, we divided the time, and we
6 tried to jawbone each other, like don't spend too much time
7 on this, really focus here. But, at the end of the day, if
8 the plaintiffs, if there is a witness and we have an hour,
9 and the plaintiffs have 30 minutes, you, we all do our best
10 to ask the best questions and make, the best record we can in
11 that time.

12 MR. FIORAVANTI: Now, after the litigation was
13 filed, there was the announcement of the intervening proxy
14 contest along with some bylaw proposals that, ultimately,
15 prevailed. Was that something that was anticipated from the
16 beginning when you launched the hostile offer? #00:10:08#

17 MR. NACHBAR: Yes, that was part of the arsenal
18 that we would have, you sort of, you've probably done this
19 in the past, and I am sure most people who are in this
20 business have. You sort of, do almost like a flowchart or a
21 decision tree. If they do this, our countermove is that. If
22 they do this, our counter-move - so, yes, a proxy contest and
23 bylaw amendments were always part of the, potential plan. We
24 hoped it wouldn't be necessary, but that's, it's a way to -

1 like you're trying to get to a deal, hopefully, a consensual
2 deal. And, if the other side says no, we're not for sale,
3 okay, well, we're going to elect people to your board. We're
4 going to have stockholders tell you that they want the company
5 to be sold. We're going to have them pass bylaw amendments
6 that might make it easier for the company to be sold. Maybe
7 you want to cut a deal now. And so, if that's - that's always
8 part of the strategy.

9 MR. FIORAVANTI: An unusual and interesting part of
10 this case is that you had facts develop in real-time while you
11 were going through the litigation as opposed to sometimes deal
12 litigation where there is a deal announced and then there is
13 kind of a post-mortem as to whether or not the board fulfilled
14 its fiduciary duties. Here, you had a real-live proxy contest,
15 hostile offer, facts changing on the ground. You had law firms
16 that were both representing the parties as deal counsel,
17 strategic deal counsel, as well as litigation counsel. How did
18 that play out and did that present challenges? #00:12:02#

19 MR. NACHBAR: It - so, there's really two parts to
20 that question, I think. How did the facts changing present
21 challenges? And how did having deal counsel on litigation? And
22 they each presented challenges and they each presented their
23 own challenges. the biggest fact on the ground was, as you
24 pointed out, we were coming out of a recession. The Airgas

1 price - stock price -- had been depressed and, it kept
2 running up. And there were several times when it rose above
3 our offer, and not just necessarily because, the market
4 anticipates a bump, you know. They were starting to show
5 better results over time and, so, the stock price kept going
6 up as the market kept going up. And, I think probably Airgas
7 outperformed the market. They were kind of in a cyclical
8 business, so they had a cyclical recovery. So, we were chasing
9 the stock price a lot as the saga unfolded. And, that's why
10 the offers kept increasing, but, they were never really a
11 blowout, 40-percent premium or something like that. So, that
12 was that challenge. #00:13:25#

13 The challenge of deal counsel and litigation counsel
14 was a little bit different. And what happened there was,
15 Cravath served in both capacities and, early on, there was a
16 motion for confidentiality, for a two-tier confidentiality
17 order at a hearing that I wasn't at. apparently, somebody
18 from Cravath said that they really couldn't separate out the
19 deal team, who would not be able to get, highly confidential
20 documents from the litigation team, who would. They would need
21 everybody to get it. And Chancellor Chandler responded by,
22 okay, if you can't separate it out; that's fine. None of you
23 can see any of the highly confidential documents, which really
24 left Morris Nichols as the only lawyers who could see the

1 highly confidential documents, which, obviously, are the most
2 important documents in the case. So, at the beginning of the
3 case, I had sort of said that my role in the case would be
4 somewhat limited because I had another trial that was
5 immediately before Air Products. I had the KFC trial. And we
6 were lead counsel in that and, I was going to have a huge
7 role in that case. And I said I sort of have limited time to
8 deal with the Air Products case, and that was the agreement
9 going in. And then, when Cravath came back from court and
10 said, yeah, guess what? This is kind of your case now; we
11 can't see any highly confidential documents. I was not in a
12 happy place, but I did a very smart thing. I went down the
13 hall and I said to Bill Lafferty, "Bill, I got a case I need
14 you to help me with." And he unstintingly did. And so, that -
15 that, I mean I never could have done it without him.

16 MR. FIORAVANTI: How did the use of highly
17 confidential materials play out in the use of those documents
18 whether it's a hearing or in a deposition? Did that present
19 challenges? #00:15:38#

20 MR. NACHBAR: Yeah, I remember the first deposition
21 in the case. Rory Millson took the deposition and, Bill or
22 somebody was there, with all the highly confidential
23 documents. Rory went first. He questioned the witness for like
24 a half-hour, said, "well, I can't see any of the good

1 documents, so, I am leaving." And, because he had to. I mean
2 he couldn't sit there while we showed the highly confidential
3 documents to the witness. He left after a half-hour and the
4 deposition went on and, I mean, obviously, that presents
5 challenges.

6 MR. FIORAVANTI: What about at court hearings? Were
7 there times where you had to clear the courtroom? #00:16:21#

8 MR. NACHBAR: There were a few times during the
9 trial when we did. we - obviously, you try to keep that to a
10 minimum and, I think, by the time we got to trial, a lot of
11 the highly-confidential stuff wasn't quite as highly
12 confidential. it's just how a deal unfolds. But yeah, I
13 recall there were times when the courtroom was cleared.

14 MR. FIORAVANTI: Let's fast forward to the annual
15 meeting and the proxy vote. Your side had a good result. You
16 had three new directors- #00:16:55#

17 MR. NACHBAR: Well, we thought we had a good
18 result. We were very happy at the time.

19 MR. FIORAVANTI: On September 15, the date of the
20 annual meeting, you folks must have been ecstatic. All three-

21 MR. NACHBAR: We were, yes, absolutely.

22 MR. FIORAVANTI: All three of your nominees were
23 elected. Mr. McCausland was, defeated, but then he was put
24 back on the board, but he was no longer going to be able to

1 serve as chairman. You got the bylaw proposals through,
2 including the annual meeting bylaw that would have advanced
3 the annual meeting for 2011 to January of 2011 So, that
4 certainly made your side very happy. What was the mood on your
5 side? And what did you anticipate next, recognizing that there
6 was probably going to be some kind of litigation over the
7 bylaws? #00:17:45#

8 MR. NACHBAR: Yeah, so... so, one thing about
9 the - this is kind of funny. The January meeting - we had
10 great debates about whether that could be moved up to,
11 October of the prior year or November. And, I said, look, you
12 can't have the 20-whatever it was, 2012 meeting in 2011. I
13 mean, come on, you can't - like there's limits. So, that's how
14 January got picked. It was, there were a lot of people who
15 were counseling that we should do it in, December of the
16 prior year, or November of the prior year. I never thought
17 that was going to work. And since, ultimately, January didn't
18 work, a fortiori, November, December wasn't going to work.
19 But, we thought we had a shot with January. But, more
20 importantly, you think the other side is going to maybe cave
21 and maybe try to cut a deal at that point, right? they just
22 got pretty soundly defeated at the polls. The stockholders,
23 certainly expressed their viewpoint. We put in place a bylaw
24 that said that, we can have the next meeting in January; it's

1 just a couple months away. At that point, we are going to
2 control the board. I mean, I give McCausland and the Wachtell
3 team a lot of credit because a lot of people would have folded
4 up shop at that point. sort of the handwriting kind of is on
5 the wall and we were, I think, obviously, at that point -
6 like they do with baseball games now. If you have ever seen
7 them, they have the win probability in real-time. So, it's
8 the top of the fifth. Your team is up one-nothing and, you've
9 got a whatever it is, a 65-percent chance to win. The other
10 team then scores five runs in the bottom of the inning and,
11 suddenly, their probability of winning is 89-percent. Our
12 probably of winning was probably pretty high at that point to
13 anybody objectively looking at it.

14 MR. FIORAVANTI: You also had a dynamic that we
15 will get to a little bit later on in our discussion, which is
16 at the time of the - even at the time of the stockholder
17 meeting -- a lot of the stock had moved into the hands of
18 arbitrageurs. So, they were, for the most part, you would
19 assume, they were looking for a deal to happen because, if Air
20 Products went away, it was likely that the Airgas stock price
21 was probably going to fall, at least somewhat for some period
22 of time. That was, it turned out the be a double-edged sword
23 for your side, but did that factor into your analysis going
24 forward? #00:20:38#

1 MR. NACHBAR: Well, we certainly knew that
2 stockholders, yes, the arbitrageurs were going to support us.
3 And as more arbs moved into the stock, our level of support
4 was going to be high because they wanted a deal. I'd point
5 out, as we pointed out to the court at the time, every single
6 share that was sold to an arbitrageur - or well, almost every
7 single share, was somebody who made a decision that they
8 didn't want to be in Airgas stock. They made a decision to
9 sell. I mean some of them maybe had to sell for financial
10 reasons, but the vast majority elected to sell their shares.
11 So, the other side said, "Oh, well, don't pay attention to
12 the arbitrageurs. They're not real stockholders." Our argument
13 was always, well, they accumulated their position because the,
14 quote, real stockholders didn't want to be in the stock.
15 That's why they sold.

16 MR. FIORAVANTI: Let's get to the trial at this
17 point. You have the - you're litigating both the bylaw before
18 the Chancellor, and then you have the trial on the pill. What
19 were the important factual issues for you to develop at the
20 trial? And who were the key witnesses from your point of view
21 on establishing that there was not a reasonable threat and
22 that the maintenance of the pill was not a reasonable response
23 to that threat? #00:22:10#

1 MR. NACHBAR: Sure. I mean it was a very
2 interesting trial on, on the pill, and I feel like we won the
3 trial and then lost the case on judgment on the pleadings. Why
4 do I say that? Because I think we established, in showing that
5 our offer wasn't a threat that the pill, by the time we got
6 to trial, was both coercive and preclusive. And I think we
7 got, basically admissions on that, and I think the court so
8 found. And then, the ruling was - and you know that had been
9 the law since Moran, right, that you can have a pill, but, I
10 guess coercive and preclusive maybe came later in, what,
11 Unitrin, but in any event, that was the law of Delaware for a
12 long time. We satisfied each element of what was the - we
13 thought was -- the then-existing law only to be told, yeah,
14 but none of that matters. we're really going to treat tender
15 offers like mergers, and, if you don't get board approval, you
16 can't have a tender offer, at least when there is a pill out
17 there. And so, it was, it may be an advance in the law, and
18 it may be the result that should have been in place all along,
19 but it was, it was frustrating to feel like we proved the
20 things that under existing law we needed to prove, but not
21 prevail.

22 MR. FIORAVANTI: One of the facts that came out at
23 the trial, which seemed to influence the Chancellor, was that
24 Mr. McGlade and I believe one other person had testified that

1 65.50, which was the offer price that was on the table at the
2 time, was not the final offer, that there was potentially more
3 there. How do you deal with that issue after the evidentiary
4 record is in and you're getting ready to go and brief post-
5 trial? Because the Chancellor, obviously, was concerned that
6 there is a possibility of getting more for the stockholders.
7 The board said 65.50 was inadequate. How is the judge going to
8 step in and, essentially, if he is going to enjoin the pill,
9 you're likely to get a deal at 65.50, if you get enough people
10 to tender, so that Air Products takes over the company?

11 #00:24:48#

12 MR. NACHBAR: Yeah, no, I mean, obviously, that was
13 a bad fact, but, people, I mean I guess they've got to
14 testify honestly, and, that wasn't the best and final price.
15 So, it's a tough situation. I mean, I guess, I don't know,
16 maybe you could argue that that's an improper question to ask,
17 but, if you object to it, you're kind of implying that there
18 is more there, there. So, you're kind of stuck either way, I
19 think.

20 MR. FIORAVANTI: You also had an additional problem
21 in that regard because of a document that had been produced
22 inadvertently earlier in discovery. #00:25:33#

23 MR. NACHBAR: Yes. Thankfully, not by my firm, but
24 I was sitting in a deposition and got a call at the

1 deposition, and I can't remember what the offer was at the
2 time, but, basically, a document had been produced that
3 stated our reserve price, which was significantly higher than
4 the current offer. Obviously, not a helpful fact. And it was
5 interesting how that played out, though, because, the other
6 side tried to use that document and, basically, I think maybe
7 move for judgment on the pleadings based on it or summary
8 judgment, or some—they tried to make some very aggressive
9 motion. And, the Chancellor sort of smacked them, and, as I
10 recall and said that, look, that was obviously an
11 inadvertently produced document. You had an obligation to
12 return it, not to try to use it to win the case at a threshold
13 stage. So, I think that one, it might have boomeranged a
14 little bit in the short run, but, the Chancellor can't unknow
15 what he knows, so, knowing that our reserve price is more
16 than our offer is, obviously, a problem. I think we ultimately
17 bid the reserve price before it all got said and done in the
18 case.

19 MR. FIORAVANTI: At the close of trial in the fall,
20 how did you feel coming out of that trial with respect to your
21 prospects of prevailing? #00:27:14#

22 MR. NACHBAR: We felt great! I mean, like I said
23 before, under existing law, we had to prove that the offer
24 was not a threat and that the pill was not reasonable in

1 response, if it was a threat and, particularly, we would
2 prevail if it was coercive and preclusive. I think we proved
3 all three of those things, and I think the opinion reflects
4 that. It was very interesting. One of the things, that we
5 uncovered for the closing argument and, sort of a theme of
6 the closing argument was the way the pill jurisprudence--
7 jurisprudence isn't the right word-- the market justification
8 for the pill had morphed over time. And, it's sort of like,
9 we're kind of beginning presidential campaign season and,
10 when you're in the primary, you talk to your base, and then,
11 when you're in the general election, you kind of, come back
12 to the center a little bit. It was like that with the pill a
13 lot. I mean it waxed and waned, when the pill was first out
14 there, it's like this is a showstopper. you can't do a
15 takeover because we have this poison pill. And then, over
16 time, when the pill came under pressure, and people maybe
17 thought it wasn't as good an idea, said oh, no, no, this is
18 only for two-tier offers and it's only for coercion. And, if
19 you ever had a fully financed all shares, same price for
20 everybody premium offer and, the offer was out there for six
21 months or eight months and the company had a full chance to
22 communicate, of course, a pill would never, stand in the way
23 of that offer. And, there were lots of articles and quotes
24 and, as I remember, maybe even a video clip from Mr. Lipton,

1 to that effect. So, we felt like we had checked all the
2 necessary boxes and we were, we had done at trial what we
3 needed to do.

4 MR. FIORAVANTI: And then, Airgas took the court's
5 decision on the bylaw, which was decided, I believe, on the
6 last day of trial, they appealed it to the Delaware Supreme
7 Court. You must have felt confident after the Chancellor held
8 that you could hold your meeting in January. #00:29:49#

9 MR. NACHBAR: We felt great. I—we didn't know when
10 that ruling was going to come. I remember it very well. I was
11 walking with my wife. She had come down after the trial. We
12 were going to stay for the weekend. We were down at Rehoboth,
13 walking on the boardwalk. I got a message that, you know,
14 there was a decision. I read it; it was in our favor. Yeah,
15 we were all feeling really good at that point.

16 MR. FIORAVANTI: But you also knew that the Supreme
17 Court had been alerted that there was likely going to be a
18 request for an expedited appeal. #00:30:25#

19 MR. NACHBAR: Yeah, we knew an appeal was coming,
20 but, obviously, when you win at the trial court and you have
21 a respected judge and you have, what seemed like a well-
22 reasoned opinion, your chances on appeal, it's never certain,
23 obviously, but you feel pretty good about it. And again, that
24 was another moment when we thought they might, cut a deal

1 and, try to work out some arrangement where, maybe they got
2 a little bit more money, and we got a consensual deal done.

3 MR. FIORAVANTI: And that didn't happen.

4 #00:30:58#

5 MR. NACHBAR: It obviously didn't happen.

6 MR. FIORAVANTI: When the Delaware Supreme Court
7 reversed on the bylaw issue, was there anything that gave you
8 pause with respect to the pill case? #00:31:11#

9 MR. NACHBAR: Not really, no I don't think so.

10 MR. FIORAVANTI: The - I noticed in the Supreme
11 Court's opinion, it cites Versata, and at one point, it quotes
12 from Versata talking about a pill and the opportunity over two
13 elections to remove the board and establish a majority, which
14 was what, ultimately, this case came down to. Immediately
15 after the appeal, the Chancellor requests the parties to
16 provide some answers to some questions and, ultimately, opens
17 up discovery following the Supreme Court's decision. What was
18 your strategy at that time in light of the Chancellor's
19 questions? #00:32:04#

20 MR. NACHBAR: Yeah, and I don't remember the
21 specific questions at this point-

22 MR. FIORAVANTI: Well, the important one was, is
23 this your highest offer that you are going to make?

24 MR. NACHBAR: Right.

1 MR. FIORAVANTI: He had a number of questions. How
2 do various things affect the case going forward? But the
3 biggest thing may have been the very first one, which was, is
4 this your best and final offer? And, ultimately, your side
5 proposed \$70.00 a share—

6 MR. NACHBAR: Right.

7 MR. FIORAVANTI: -- and that seemed to throw
8 everything into a cocked hat. #00:32:41#

9 MR. NACHBAR: Yeah, and so... I mean, as I sit
10 back today, I'm not sure that's an appropriate question to be
11 asked. And I'm not criticizing the Chancellor in any way. I
12 mean, obviously a terrific jurist, but, when you think about
13 it, should a judge in these circumstances be able to say, is
14 this your highest offer? I don't know. I mean you could argue
15 both sides of that, but... But, we - there was some tension
16 at the company about how much to pay and how high to go. And
17 that was a leitmotif that played out throughout the case. we—
18 like I said, we—I felt we were always kind of chasing the
19 price a little bit. I, I have little doubt had we offered 70
20 at the beginning of the case, we would have gotten the
21 company. But, obviously, a year or a year and a half later,
22 you had a lot more knowledge, right? I mean the country didn't
23 go back into another recession. We didn't have a double-dip,
24 which, some people were predicting. things were on a much

1 better path, so, you could bid 70 at the time of the ultimate
2 decision, in this case, because you were just in a different
3 economic environment than you were 12 or 18 months earlier.
4 So, yeah, I mean obviously a lot of thought went into what was
5 going to happen. There were some at the company who didn't
6 want to go forward at all, didn't want to raise the price, and
7 just let's walk away from it, or let's just leave our offer
8 out there and whatever happens, happens. Ultimately, they
9 decided to go to 70, which, I think, had been the reserve
10 price. And, that was the decision.

11 MR. FIORAVANTI: In the intervening period between
12 the close of the testimony at trial and the Supreme Court's
13 decision on the bylaw, the company - the three new directors,
14 or the board unanimously had rejected 65.50, and that included
15 the three Air Products nominees. That could not have been
16 helpful to your case? #00:35:21#

17 MR. NACHBAR: No. That was - that was always a
18 terrible fact and, I mean, look, you - and again, I give the
19 other side tremendous credit for, just doing a great job with
20 those directors. And, we always talk about independent
21 directors and there is always a question, are the independent
22 directors really independent and, there is a wink and a nod,
23 I guess, sometimes, or cynics say, yeah, they're not really
24 independent. Well, we put on people who were independent.

1 That's, we understood that. We did think that they would
2 think that the company should be sold. But the other side,
3 did a great job and with the lawyers and the bankers of
4 explaining their vision for the future, which by the way,
5 turned out to be correct. I mean, as we all know, the stock
6 price - yeah, I don't know where it is today, but in the
7 months and, couple of years after the - all the legal
8 proceedings, the stock price got up above a hundred, you know.
9 And so, stockholders did well. There's lots of times when
10 people, it's all entrenchment and, you know; we're protecting
11 ourselves. Here, they said they were protecting the
12 stockholders. The company had great value and, the subsequent
13 events proved that out. So, I give them tremendous credit.
14 But from our standpoint, yeah, I mean you put on independent
15 directors, and they can't be accused of entrenchment or, bad
16 motives or anything like that. They looked at it objectively.
17 They said that 65.50 was inadequate. It was, obviously, a
18 horrible fact.

19 MR. FIORAVANTI: Then, the price went to 70, and
20 two of the three new directors testified in the supplemental
21 hearing. And the Chancellor was candid when we spoke with him
22 that Mr. Clancy's testimony, and also Mr. DiNunzio, from
23 Credit Suisse, but particularly Mr. Clancy's testimony was
24 pivotal for him. I think his view was, I may be paraphrasing,

1 but he was tending to lean toward Air Products until he got to
2 the supplemental hearing and he heard Clancy's testimony. And
3 that was - that was pivotal for him. How did you deal with
4 that in closing argument? How - you clearly had an uphill
5 battle, at least with respect to those directors. How did you
6 deal with that? #00:38:01#

7 MR. NACHBAR: Well, not successfully. But the way
8 we tried to deal with it is, Mr. Clancy, Mr. DiNunzio,
9 everybody has their belief. Ultimately, it's the stockholders'
10 company. It's not the directors' company. Going back to
11 Blasius, these aren't, Platonic masters. These are people who
12 give advice. They are allowed to give their advice to the
13 stockholders, but ultimately, it is the stockholders'
14 decision. And, they had plenty of time to communicate with
15 the stockholders. They had plenty of time to make their views
16 known. This was not any type of rush situation that's, this -
17 a year and a half on. It's not a Saturday night special at
18 that point. Nobody is being coerced or pressured, no
19 stockholders. They have their choice. And if they, if Mr.
20 Clancy is persuasive, they are not going to tender their
21 shares.

22 MR. FIORAVANTI: It seems, in the court's opinion,
23 that that fact along with the fact the stock had moved into
24 the hands of arbitrageurs, who are perceived to have a short-

1 term outlook as opposed to a long-term outlook for the
2 company, established the reasonable threat - at least that's
3 what the court found under Unocal. That seemed to be a very
4 odd factual finding and application of the law. And the
5 Chancellor seemed to say so in his opinion, kind of teeing
6 this up for an appeal. Do you agree? #00:39:52#

7 MR. NACHBAR: Yeah, I think so. And, like I said
8 before, our argument was always, except for the guy who died
9 and, needed to sell stock to pay estate taxes, or something
10 like that, the only reason there were arbitrageurs owning as
11 much of the stock as they did is because the so-called long-
12 term stockholders made a decision that they didn't want to be
13 long-term stockholders. They sold.

14 MR. FIORAVANTI: Once the opinion came out, what
15 was the thinking on an appeal? I mean, the company, decided
16 not to appeal, and just pulled their offer. Did you have any
17 view or were you disappointed? Did you want to take the case
18 up? #00:40:36#

19 MR. NACHBAR: Yeah, I was disappointed. I wanted to
20 take the case up. But we, as I said, there was some tension
21 within the company as to whether to go to 70, whether to
22 either stick at 65 or just pull the offer altogether at that
23 point. The compromise, and I knew this before the hearing, was
24 we'll go to 70. We're not going any further. We're not doing

1 an appeal. If we win, we get the company at 70. If we lose,
2 we're moving on. We've been doing this for a long time. It's,
3 sucking the energy out of the company, and we're just going to
4 get on with our business. So, I knew before the argument that
5 there would be no appeal. Now, I say that. That was certainly
6 what the client had communicated. In the back of my mind,
7 depends what it says, right, and you never say never because,
8 if you had a, a juicy enough issue where you could say we
9 have a 95-percent chance of prevailing, I think we certainly
10 would have made the argument, and we would have maybe lobbied
11 for an appeal. But look, I think the client felt that they had
12 lost at the Supreme Court after a, what they thought was a
13 well-reasoned, favorable opinion. They weren't feeling the
14 love at the Supreme Court, and I think the client's view, like
15 I said, was we've put enough time, effort, and energy into
16 this. We're either going to get the company or we're going to
17 move on.

18 MR. FIORAVANTI: The Chancellor, in his opinion,
19 says, can you just say never. And he says that's not what this
20 opinion says. But a lot of folks seem to indicate - seem to
21 think -- that that's what the case does stand for, that you can
22 say never. #00:42:45#

23 MR. NACHBAR: Well, I think you can say never, but
24 you've got to have the record to support it. So, if you're

1 going to say never, it helps to have three independent
2 directors who say that your best and final offer isn't good
3 enough. If we had responded to the decision by saying, okay,
4 how about if we offer \$85? I guess it wouldn't be never. I
5 mean I assume at that point, Clancy, DiNunzio, and the other
6 guy would say yeah, no, like now you have to sell. But, at -
7 obviously, all of this is highly judgmental. We look at the
8 appraisal cases, which are valuation cases, and you've got one
9 expert saying it's 50 and another expert saying it's 120. The
10 truth is probably somewhere in the middle. But, people can
11 make good faith arguments for all kinds of numbers. So, I
12 think if you're an incumbent board, and you could make a good-
13 faith argument for a high number, I think you can stay with
14 the pill. Now, if somebody is willing to stick around for two
15 election cycles and get control of the board and the board
16 members, unlike the three that we elected, exercise their
17 judgment to say that the - whatever the offer is - is fair.
18 Then, you, it's not a complete barrier, impenetrable barrier.
19 But, the pill is, after Air Products, I think is pretty
20 potent. A lot of companies, obviously, as you know, there's a
21 lot of activists and a lot of energy on the side of you
22 shouldn't have pills and, if you do have pills, they should be
23 very limited. So, there is a whole, for a company, there is a
24 whole political question and strategic question of whether you

1 should have a pill at all, and what that is going to do to
2 your shareholder base, and what outcome that's - what effect
3 that's going to have on corporate elections.

4 MR. FIORAVANTI: One of the things coming out of
5 this decision is kind of a blurring of the lines between what
6 you have to do in order to successfully complete a tender
7 offer versus what you need to do to successfully complete a
8 merger. Because under Delaware law, in the merger context, the
9 board has to approve-- in a tender offer, you could go right
10 to the stockholders. The pill is now that barrier in between.
11 Do you see those lines becoming blurred? Are they essentially
12 one and the same after Airgas? #00:45:49#

13 MR. NACHBAR: I think for companies that have a
14 pill, they're one and the same. I mean, I think the message
15 from Airgas is, you know, you have to have approval of the
16 board. Now, you can get that approval by, if it's a staggered
17 board, by going through two elections. If it's an unstaggered
18 board, by just replacing the board. Obviously, if the new
19 board approves your offer, they can be sued for breach of
20 fiduciary duty if it's too low and, if they're not
21 independent and they're interested, and they didn't act with
22 due care. Although, usually, 102(b)(7) is going to preclude
23 that one. So, there are - there are certainly limits. But,

1 for a company that has a pill, I think you need board
2 approval.

3 MR. FIORAVANTI: Are there any anecdotes, anything
4 that stands out in your mind behind the scenes that anyone who
5 is following the case or reviewing the case, might like to
6 know that they wouldn't necessarily get out of the cold
7 record? #00:46:55#

8 MR. NACHBAR: I think we have touched on most of
9 them. I mean, obviously, the - the inadvertent production of
10 the reserve price was a big moment in the case. The two-tier
11 confidentiality and Cravath not being able to see those
12 documents was a big turning point in the case. And then,
13 obviously, the - the tension within Air Products about
14 whether - how good a deal this was and whether it's something
15 that can be pursued. I think, if you look at the facts knowing
16 that as going on, you sort of say, ah-hah, that's why this
17 unfolded the way it did.

18 MR. FIORAVANTI: Do you think that you may have
19 been - had a better shot of being successful if the case had
20 been on an expedited track? #00:47:49#

21 MR. NACHBAR: No, I actually don't think so.
22 Part of the - for any pill case, I mean the - I think
23 everybody agrees. You can agree or disagree with the Air
24 Products decision, and whether you should be able to leave a

1 pill in place forever if you think the price is inadequate.
2 Reasonable minds can differ about that. I don't think
3 reasonable minds can differ that it's perfectly fine to have a
4 pill in place for six months or eight months so that the
5 company can get its strategy together, communicate with its
6 stockholders, take the steps that are necessary to make sure
7 that when the stockholders decide whether to tender or not,
8 that it's a fully-informed decision. And so, I think that
9 that the case unfolded on the longer time frame. And part of
10 that was, it wasn't all eggs in the litigation basket. It
11 was, we're going to have a proxy contest. We're going to get
12 people elected. We're going to change the bylaws. We're going
13 to do all those things. It was all designed to signal to the
14 company that one way or another, we're going to prevail. You
15 ought to cut the best deal you can. Obviously, the strategy
16 didn't work and I give Mr. McCausland and his team, they had
17 a vision for the company. He knew that business. He had, he
18 had rolled up all those little mom and pop shops and he was,
19 he really knew the business.

20 MR. FIORAVANTI: Ken Nachbar, thank you for your
21 time. I really appreciate it. #00:49:51#

22 MR. NACHBAR: You're welcome. Thank you.

23 MR. FIORAVANTI: All right.

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1 #00:50:01#

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