IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ATHEROS COMMUNICATIONS, INC. SHAREHOLDER LITIGATION	:	**CONSOLIDATED C.A. No. 6124-VCN**

MEMORANDUM OPINION

Date Submitted: March 1, 2011
Date Decided: March 4, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

This action arises out of the proposed merger of Atheros Communications, Inc. ("Atheros" or the "Company") with T. Merger Sub, Inc. (the "Acquisition Vehicle"), a wholly owned subsidiary of Qualcomm Incorporated ("Qualcomm"). Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters, City of Pontiac Police and Fire Retirement System, Société Générale Securities Services Deutschland Kapitalanlagegesllschaft mbH, and the Luc Dewulf Revocable Trust (collectively, the "Plaintiffs") brought their purported class actions on behalf of themselves and all other public shareholders of Atheros. Following consolidation of the several actions, the Plaintiffs moved for a preliminary injunction to enjoin the proposed sale of Atheros to Qualcomm (the "Transaction"). Under the agreement and plan of merger governing the Transaction (the "Merger Agreement"),[1] Qualcomm proposes to acquire Atheros for $45 per share in a $3.1 billion all-cash transaction. A vote of the Atheros stockholders is scheduled for March 7, 2011.

[1] Transmittal Aff. of P. Bradford deLeeuw, Esq. ("deLeeuw Aff. 1"), Ex. 5 (Merger Agreement).

II. BACKGROUND

A. *The Parties*

The Plaintiffs have been at all relevant times beneficial owners of Atheros common stock.

Atheros is a publicly traded Delaware corporation in the business of designing communications solutions for wireless and wired communications products using metal-oxide semiconductor processes. The individual defendants, Craig H. Barratt ("Barratt"), Teresa H. Meng, Willy C. Shih ("Shih"), Andrew S. Rappaport, Dan A. Artusi ("Artusi"), Charles E. Harris, Marshall L. Mohr ("Mohr"), and Christine King, comprise the Company's board of directors (the "Board"). Barratt also serves as chief executive officer and president.

Qualcomm, a publicly traded Delaware corporation, is in the business of wireless telecommunications. It manufactures mobile phone chips and develops, makes, and markets digital wireless communications products and services. Qualcomm incorporated the Acquisition Vehicle in Delaware to effectuate the Transaction. That entity will merge with Atheros upon completion of the Transaction and will thereafter cease to exist.

B. *Initial Contacts between Atheros and Qualcomm*

Atheros and Qualcomm formed a strategic partnership in 2005, which allowed Atheros to develop mobile solutions that were compatible with

Qualcomm's platforms. Since that time, there have been periodic discussions about strengthening that relationship.

The possibility of a business combination between Atheros and Qualcomm was raised at an industry event in March 2010 during a conversation between Barratt and Steven M. Mollenkopf ("Mollenkopf"), executive vice president and group president at Qualcomm. When the two later met in May 2010, they scheduled a meeting "among a small group of executives from each of the two companies to discuss the possibility of a transaction."[2] As a result, a management group from Atheros—including Barratt and Jack R. Lazar ("Lazar"), chief financial officer and senior vice president of corporate development—gathered in July 2010 with representatives of Qualcomm. At that time, Atheros made a presentation to Qualcomm,[3] and "the parties discussed the market for [Atheros's] products, [its] strategy and the strategic rationale of a potential combination with Qualcomm."[4]

At a regularly scheduled meeting on August 17, 2010, the Board first learned of the ongoing discussions between the respective management teams of

[2] Decl. of Willy C. Shih, Ex. 1 ("Proxy Statement") at 16.
[3] deLeeuw Aff. 1, Ex. 6 (Presentation for Qualcomm, dated July 26, 2010).
[4] Proxy Statement at 16.

Atheros and Qualcomm. The Board approved of these discussions and authorized Atheros's management to provide Qualcomm with more information.[5]

C. *Efforts to Retain a Financial Advisor*

Around September 8, 2010, Atheros's management and the Board communicated about the need to engage a financial advisor to assist with the Qualcomm acquisition talks. Among the candidates proposed by Barratt was Qatalyst Partners LP ("Qatalyst").[6] The Board supported management-initiated contact with Qatalyst and later instructed management to negotiate the terms of the engagement, subject to the Board's approval. In selecting Qatalyst, the Board had knowledge of its team from an earlier transaction and recognized its expertise in the semiconductor industry.[7]

Barrett and Lazar, among others from management, met with Qatalyst personnel on September 18, 2010, to discuss the ongoing exchanges between Atheros and Qualcomm. Qatalyst later provided Atheros with a draft engagement letter on November 18, 2010.[8] Thereafter, negotiations ensued over the terms of the engagement letter with Lazar, at the direction of the Board, representing

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[5] deLeeuw Aff. 1, Ex. 4 ("Artusi Dep.") at 13-16.
[6] deLeeuw Aff. 1, Ex. 10 (Sept. 8, 2010 Email from Mohr to Barratt, et al.).
[7] Artusi Dep. 31-32, 35; *see also* Transmittal Decl. of Kevin M. Coen, Esq. ("Coen Decl."), Ex. 1 ("Barratt Dep.") at 44.
[8] Decl. of Jack R. Lazar ("Lazar Decl."), Ex. C (Proposed Engagement Letter).

Atheros.[9] Lazar gathered information on fees in comparable transactions, including past transactions involving Qatalyst.[10] The Board at some point delegated authority to a committee "for the specific purpose of helping the negotiations on the engagement letter and the fee compensation for Qatalyst."[11]

On December 14, 2010, Atheros submitted a revised version of the draft engagement letter to Qatalyst that included its proposed changes.[12] Among those changes, Atheros sought to lower the total fee and to minimize the "tail provision" that would pay Qatalyst in the event Atheros closed a future deal with a company other than Qualcomm.[13] Negotiations continued in the following weeks, largely over the fee amount.[14] Ultimately, the final version of the engagement letter was approved and signed on December 28, 2010.[15] That agreement provides that Qatalyst will be paid a flat fee, of which approximately 98% is contingent upon the closing of the Transaction. Notably, the final negotiated fee amount is substantially lower than that originally proposed by Qatalyst.

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[9] Barratt Dep. 44; *see also* Coen Decl., Ex. 2 ("Kim Dep.") at 24, 67, 78-79.
[10] *See* Lazar Decl., Ex. B (Historical Fee Information).
[11] Artusi Dep. 121.
[12] Lazar Decl., Ex. D (Draft Engagement Letter).
[13] *Id.*; *see also* Artusi Dep. 120-21.
[14] Kim Dep. 79.
[15] Barratt Dep. 163; *see also* Supp. Transmittal Aff. of P. Bradford deLeeuw, Esq. ("deLeeuw Aff. 2"), Ex. 25 (Dec. 30, 2010 Email from Lazar to James Lederer) ("We obviously had extensive discussions with [the] Board prior to approving and then signing the engagement letter.").

D. *Qualcomm's Opening Offer to Atheros*

As Atheros and Qualcomm continued to swap information and to discuss the possibility of a business combination in the fall of 2010, the Board received updates from management at its regularly scheduled September and October meetings. At those meetings, the Board reiterated its decision in August to convene a special meeting upon the delivery of an offer and continued to authorize management's exchanges with Qualcomm. From those recurring exchanges came an offer from Mollenkopf—which was conveyed to Barratt—on behalf of Qualcomm on November 8, 2010, to purchase Atheros.[16] That all cash offer was subject to the completion of due diligence by Qualcomm.

Upon receipt of Qualcomm's offer, Barratt communicated the offer to the Board and a special meeting was convened later that day.[17] At that meeting, Barratt and Lazar further apprised the Board of management's discussions with Qualcomm. Thereafter, the Board considered whether to pursue a transaction with Qualcomm and requested that Qatalyst—representatives of which had attended part of the meeting—address the Board at its next meeting on various topics including the Qualcomm proposal, the Company's strategic alternatives, and a

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[16] Barratt Dep. 135-36.
[17] *Id.* at 136.

valuation analysis.[18] Thus, at the conclusion of that meeting, "[t]here was no decision related to providing a response to Qualcomm."[19]

To continue its earlier discussions regarding the Qualcomm offer, the Board convened another special meeting on November 15, 2010. In accordance with the Board's November 8 request, Qatalyst made a presentation "regarding [Qualcomm's] proposal and the Company's strategic alternatives."[20] The Board also discussed approaching other potential bidders that might have an interest in completing a transaction at a higher price than the opening Qualcomm offer. For that reason, Qatalyst was directed to prepare information for the Board on issues relating to other possible acquirors. After it determined that Qualcomm's original offer price was not sufficient,[21] the Board authorized management to make a counteroffer within parameters specified by the Board and it "instructed . . . management to inform [Qualcomm] that its proposed acquisition price was inadequate."[22]

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[18] Coen Decl., Ex. 7 (Meeting Minutes, Nov. 8, 2010).
[19] Barratt Dep. 137.
[20] Coen Decl., Ex. 8 ("Meeting Minutes, Nov. 15, 2010"); *see also* deLeeuw Aff. 2, Ex. 21 (Qatalyst Presentation, dated Nov. 15, 2010).
[21] Artusi Dep. 89.
[22] Meeting Minutes, Nov. 15, 2010.

E. *The Atheros Counterproposal*

Based on the Board's directive, Barratt spoke with Mollenkopf on November 17, 2010; he declined Qualcomm's original offer and conveyed the Company's counteroffer.[23] In response, Mollenkopf informed Barratt that the Board's counteroffer "was well above any range that Qualcomm was considering."[24]

In subsequent weeks, Mollenkopf and Barratt kept open a dialogue on the price issue. As they attempted to bridge the gap, both suggested alternate prices with the caveat that those figures would require board approval before either side could commit to a firm offer.[25] Barratt informed the Board of these developments in a November 25, 2010 email[26] and at a December 1, 2010 special meeting.[27]

F. *The Board's Consideration of Other Potential Acquirors*

In addition to learning of the then-current state of negotiations with Qualcomm from Barratt, the Board also discussed the possibility of initiating contact with other potential acquirors at the December 1 special meeting. The Board, with the assistance of Qatalyst, analyzed a list of eleven companies—including Qualcomm—that may have had an interest in consummating a

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[23] Barratt Dep. 141.
[24] *Id.* at 142-43.
[25] *See* Barratt Dep. 144, 146, 148; Coen Decl., Ex. 3 (Mollenkopf Dep.) at 74-75.
[26] Coen Decl., Ex. 4 (Nov. 26, 2010 Email from Shih to Barratt, et al.).
[27] Barratt Dep. 149-50.

transaction with Atheros.[28] In evaluating that list, the Board "considered a number of factors" and also deliberated on whether a financial investor might consider acquiring the Company.[29]

After contemplating the universe of potential acquirors and various factors relevant to any potential transaction, the Board identified three companies "that it believed were most likely to pay the highest price for the Company . . . ."[30] Among the three companies was Qualcomm with the other two referred to as "Company A" and "Company B" in the Proxy Statement. The Board authorized management and Qatalyst to continue negotiations with Qualcomm and to initiate discussions with the other two companies. In addition, the Board sought information from Qatalyst regarding a fourth company, referred to as "Company C."[31]

Qatalyst contacted Company A and Company B, on December 1 and December 2, respectively, in accordance with the Board's decision.[32] Company A stated that it would consider a transaction with Atheros internally before

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[28] Kim Dep. 47.
[29] Coen Decl., Ex. 9 (Meeting Minutes, Dec. 1, 2010).
[30] *Id.*
[31] Kim Dep. 52. The Court has been apprised of the identities of the alphabet companies. It suffices to note that all are well-known, operate in the same environment as Atheros and Qualcomm, and could be expected to have the financial wherewithal to complete a transaction in excess of $3 billion.
[32] Barratt Dep. 82, 100; Proxy Statement at 19.

answering.[33] When, on December 6, Qatalyst again asked Company A if it was interested in discussing a transaction with Atheros, Company A replied that it had not yet made a determination.[34] Company B responded the day after Qatalyst's original query that it had no interest in a merger with Atheros.[35]

The Board, after receiving additional information from Qatalyst, determined that Company C was unlikely to complete any kind of business combination with Atheros based on the historical lack of any large-scale transactions involving that company.[36] Thus, the Board decided not to pursue acquisition discussions with Company C.

G. *Continued Negotiations with Qualcomm*

While Qatalyst was contacting the other two companies to gauge their interest in a possible transaction, negotiations continued with Qualcomm.[37] As a result of those discussions, Qualcomm submitted to Barratt a written indication of interest on December 6, 2010.[38] That non-binding proposal increased Qualcomm's offer price from its earlier bid. Qualcomm, however, conditioned the offer on the completion of due diligence and by requiring Atheros to enter into an exclusivity

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[33] Kim Dep. 77.
[34] Proxy Statement at 20; *see also* Kim Dep. 77, 86-87.
[35] Artusi Dep. 112; Kim Dep. 104.
[36] Artusi Dep. 146; Kim Dep. 52-53.
[37] Barratt Dep. 151.
[38] *See* deLeeuw Aff. 1, Ex. 19 (Qualcomm Acquisition Proposal).

agreement—a proposed form of which was attached—before actions in furtherance of any transaction would continue.

The Board held a special meeting the next day to consider, among other things, the Qualcomm proposal. After discussing the offer price and the proposed exclusivity agreement, the Board determined that negotiations with Qualcomm should continue. Specifically, the Board decided that it needed to review a draft of the proposed merger agreement and to modify certain terms of the proposed exclusivity agreement before moving forward with a transaction at Qualcomm's offer price. For that reason, the Board provided guidance to management regarding future negotiations, and, at that point, withheld agreeing to exclusivity.[39] Barratt conveyed the Board's position to Mollenkopf later that day.

H. *Meeting Request by Company A*

After repeated inquiries by Qatalyst into Company A's interest in Atheros, Company A, on December 8, 2010, requested a meeting with the Company.[40] Although that meeting was scheduled for December 11, a senior executive of Company A was unable to attend on that date. As a result, Barratt met with that executive a day earlier to discuss Company A's interest in acquiring Atheros.[41] The next day, on December 11, representatives from Company A, a management

[39] Coen Decl., Ex. 10 (Meeting Minutes, Dec. 7, 2010).
[40] *See* Kim Dep. 77.
[41] Barratt Dep. 84-86.

team from Atheros, and personnel from Qatalyst met. At that meeting, Atheros provided Company A with a presentation largely the same as that given to Qualcomm[42] and informed its representatives that Atheros was imminently entering into an exclusivity agreement.[43]

I. *Exclusivity and the Merger Agreement*

At a special meeting on December 11, 2010, the Board met to consider developments regarding negotiations with Qualcomm and discussions with other potential acquirors. Since the Board's last meeting, Atheros had been provided with a draft merger agreement; however, Qualcomm continued to demand exclusivity before it would further discuss the terms of that agreement. Management updated the Board as to negotiations between Atheros and Qualcomm on the terms of exclusivity and confidentiality. Qatalyst then reported to the Board on efforts to evaluate the interest of companies other than Qualcomm—in particular, Qatalyst informed the Board that Company B "had indicated it was not interested" and that Company A "had not made an offer . . . or indicated on what timeline, if any, it might make such an offer."[44]

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[42] *Id.* at 88.
[43] *Id.* at 89.
[44] Coen Decl., Ex. 11 (Meeting Minutes, Dec. 11, 2010). At no time since that date has Company A expressed further interest in acquiring Atheros.

After determining that a significant risk existed that Qualcomm might abandon any transaction with Atheros in the absence of exclusivity, the Board unanimously authorized the Company to enter into an agreement of that sort with Qualcomm; the exclusivity agreement was executed the next day.

In the weeks following exclusivity, Qualcomm conducted due diligence and the parties negotiated specific terms of the Transaction. The Board and its compensation committee convened numerous times to evaluate the proposed transaction.

On January 4, 2011, the Board met to consider the Merger Agreement and Qatalyst's opinion that $45 per share was a fair price to the Atheros shareholders. The Board unanimously approved the Merger Agreement, and that agreement was executed on the following day.

III. CONTENTIONS

The Plaintiffs contend that the Transaction should be preliminarily enjoined because the Board breached its fiduciary duties by implementing an inadequate sales process and because Atheros seeks shareholder approval by means of a Proxy Statement containing material omissions. As described more fully below, they argue that interim injunctive relief will do no harm to the Company as it will simply require the Board to fulfill its fiduciary obligations in accordance with

Delaware law. The Plaintiffs request that the Court enjoin the shareholder vote and require the Board to address the deficiencies identified in this action.

In response, Atheros and the Board argue that the Plaintiffs have not demonstrated a reasonable probability of success on the merits of any of their claims and have failed to show that the Plaintiffs will suffer irreparable harm. They further contend that the equities weigh against issuance of interim injunctive relief because the shareholders of Atheros will be deprived of the opportunity to vote on the Transaction, which offers a significant premium and is the only offer currently available. Should the Plaintiffs' request be granted, they suggest that Qualcomm may abandon the Transaction altogether.

IV. ANALYSIS

A. *Preliminary Injunction Standard*

In order to obtain the "extraordinary remedy" of a preliminary injunction, the Plaintiffs must show: (i) a reasonable probability that they will be successful on the merits of their claims at trial; (ii) that they will suffer imminent, irreparable harm if an injunction is denied; and (iii) that the harm to the Plaintiffs, if their application is denied, will outweigh the harm to the Defendants and the class if an injunction is granted.[45]

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[45] *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *5 (Del. Ch. June 27, 2008).

B. *Probability of Success*

1. Price and process claims

When it decided to explore a sale of Atheros that involved a change of control, the Board "was charged with the obligation to secure the best value reasonably attainable for its shareholders, and to direct its fiduciary duties to that end."[46] For that reason, *Revlon*[47] and its progeny teach that the Court must carefully evaluate the adequacy of the sales process employed by the Board here.[48] Specifically, the Court is called upon to "(1) make a determination as to whether the information relied upon in the decision-making process was adequate and (2) examine the reasonableness of the directors' decision viewed from the point in time during which the directors acted."[49] The Board need not follow one single path in reaching the ultimate goal of maximizing shareholder value.[50] Instead, "directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there."[51] Thus, Delaware courts recognize that, in assessing directors' conduct, there is no single sale-process blueprint to

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[46] *In re Dollar Thrifty S'holder Litig.*, 2010 WL 5648895, at *17 (Del. Ch. Sept. 8, 2010).
[47] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986).
[48] *See In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *15 (Del. Ch. Feb. 14, 2011) (emphasizing both the subjective and objective aspects of the Court's enhanced scrutiny analysis).
[49] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 497 (Del. Ch. 2010).
[50] *Id.*
[51] *Dollar Thrifty S'holder Litig.*, 2010 WL 5648895, at *17.

follow,[52] and the question to be answered by the Court "in a sales context is whether the directors made a reasonable decision, not a perfect decision."[53] It is the Board's burden to prove it was sufficiently informed and acted reasonably.[54]

The Plaintiffs suggest that the $45 per share offered by Qualcomm represents an unfair price resulting from an unreasonable process. They also contend that the purportedly unreasonable process caused excessive benefits to accrue to the Company's management as a result of the Transaction. Because Qatalyst only contacted two other potential acquirors, the Plaintiffs also argue that the Board limited its ability to garner a higher offer than that set in the Merger Agreement.

In addressing the Plaintiffs' contentions, the question that the Court must answer is whether the approach adopted by the Board represented a reasonable choice under the circumstances it faced. As this Court has noted, "[w]hat typically drives a finding of unreasonableness is evidence of self-interest, undue favoritism or disdain towards a particular bidder, or a similar non-stockholder-motivated influence that calls into question the integrity of the process."[55]

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[52] *Simonetti*, 2008 WL 5048692, at *5.
[53] *Dollar Thrifty S'holder Litig.*, 2010 WL 5648895, at *17 (internal quotation omitted).
[54] *Cogent, Inc. S'holder Litig.*, 7 A.3d at 497.
[55] *Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *15.

Here, the record indicates no basis to question the Board's good-faith desire to maximize shareholder value. Of the Board's eight directors, seven are disinterested and independent, and their motivation to act in the best interests of the Company and its shareholders is unchallenged. Although the Plaintiffs question management's part in negotiating the Transaction, the Board took an active role at an early point in the lengthy sales process. During that period, the Board met twelve times to discuss with management the state of ongoing discussions with Qualcomm. At those meetings, the Board provided guidance for management to follow in responding to Qualcomm's overtures. Moreover, at many of those meetings, the Board had discussions with its financial advisor, Qatalyst, and the Company's outside legal counsel. As a result, it deliberated on the Company's strategic alternatives throughout the process, including the potential for other suitors to offer a higher price for Atheros, and it demonstrated its willingness to discuss a sale with other serious acquirors. Ultimately, that robust process resulted in extensive negotiations with Qualcomm and netted a significantly higher offer for the Atheros shareholders—Qualcomm originally proposed $40 per share in November 2010, Atheros countered soon thereafter at $50 per share, and the parties eventually agreed on $45 per share.[56]

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[56] The proposed $45 per share price represents an approximate premium of 21% over Atheros's closing price of $37.02 on January 3, 2011—which was the last full trading day before rumors of a transaction involving the Company were made public. *See* Proxy Statement at 72.

The Plaintiffs focus the Court's attention on the Company's dealings with other potential acquirors. Specifically, the Plaintiffs argue that Company A may have submitted a superior offer to Qualcomm had the Board refrained from authorizing the exclusivity agreement when it did. In support of that contention, the Plaintiffs point out that on December 12, 2010—the day after the Board authorized exclusivity but at a time before management had executed the agreement—Company A had requested information on any long-term, significant contractual obligations of Atheros[57] and had notified Qatalyst, which relayed the message to management, that it would be reviewing the information it had received at its earlier meetings with Atheros in the coming days.[58] The exclusivity agreement with Qualcomm was executed sometime later that day. Although Barratt testified that the Board was subsequently informed of these developments regarding Company A, it was his belief that the information was not communicated until the Board's next meeting, held some days after Atheros went exclusive.[59]

As early in the process as December 1, 2010, the Board, with the assistance of Qatalyst, had identified eleven potential acquirors. From that list, which included Qualcomm, the Board decided to pursue communications with three

[57] *See* deLeeuw Aff. 2, Ex. 23 (Dec. 12, 2010 Email from Adam Tachner to Jason DiLullo, et al.).
[58] *See id.*, Ex. 24 (Dec. 12, 2010 Email from Jason DiLullo to Lazar, et al.).
[59] Barratt Dep. 94-95.

companies and to gather information on a fourth. The Board made a reasonable judgment that many of those companies listed did not have the financial ability to complete such a large transaction and that others were competitors that might improperly use any information received from Atheros in the event it remained a stand-alone company.[60]

As for the specific circumstances surrounding the exclusivity agreement with Qualcomm and the discussions with Company A, the Plaintiffs are unlikely to prove that the Board acted unreasonably in preserving the increased offer from Qualcomm—which was merely a non-binding proposal at that time and the only offer then available—that had resulted from a careful negotiation process. There is no suggestion in the record that the Board was biased against Company A or that it was trying to short-circuit discussions with other potential bidders. Rather, Company A, despite its awareness that Atheros was moving quickly with another acquiror and that it intended to go exclusive in the coming days, offered little indication that it anticipated making a serious offer. That, combined with its initial tepid response to scheduling a meeting with Atheros, supports the Board's decision to ask Qatalyst to contact Company A one last time while also authorizing management to enter into an exclusivity agreement with Qualcomm. Thus, the Board made a reasonable judgment to pursue Qualcomm's definite offer—which

[60] Artusi Dep. 83, 145-46; Kim Dep. 47-48.

was conditioned on exclusivity—instead of continuing discussions with Company A at the risk of Qualcomm abandoning any transaction altogether. Because Company A, a highly sophisticated entity, was aware of Atheros's compressed timeline and because of its sufficient capabilities to complete a deal of this magnitude, had it wished to be heard, it could have expressed an interest, before, or even after, Atheros entered into the exclusivity agreement; all indications are that the Board would have listened.[61]

On the whole, there is nothing in the record to indicate that the Board acted unreasonably. It was an independent board with deep knowledge of the Company's industry and it employed a robust and sophisticated process. As a result, the Court will not second-guess the Board's conduct, and the Plaintiffs have failed to demonstrate any reasonable probability of success on the merits of their price and process claims.

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[61] Related to its assertion that the Board limited Company A's ability to submit a higher offer, the Plaintiffs also suggest that the Board, by agreeing to burdensome deal protection terms in the Merger Agreement, precluded other bids. Compl. ¶¶ 2, 51. The terms complained of include: (1) a no solicitation clause (*see* Merger Agreement § 4.02(a); Proxy Statement at 57-58); (2) a matching rights provision (*see* Merger Agreement § 4.02(b); Proxy Statement at 58-59); and (3) a termination fee of $103,700,000, which represents approximately 3.3% of the total value of the Transaction (*see* Merger Agreement § 5.05(b); Proxy Statement at 64). Delaware courts have repeatedly recognized "that provisions such as these are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty." *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009). Here, the Plaintiffs offer no evidence that these provisions would prevent another potential acquiror from submitting a competing offer and ignore that no other interested suitor has emerged.

2. Disclosure claims

When soliciting stockholder action, the directors of a Delaware corporation are bound by their fiduciary duties of care and loyalty to:

> "disclose fully and fairly all material information within the board's control . . . ." The burden of establishing materiality rests with the plaintiff, who must demonstrate "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[62]

Non-material facts need not be disclosed, but once a board voluntarily makes a partial disclosure, it has "an obligation to provide the stockholders with an accurate, full, and fair characterization" of the facts relating to that partial disclosure.[63]

(a) *Compensation of the financial advisor*

Qatalyst served as the financial advisor to the Board and offered its opinion that the Transaction "is fair, from a financial point of view, to" Atheros's stockholders.[64]

Financial advisors, such as Qatalyst, serve a critical function by performing a valuation of the enterprise upon which its owners rely in determining whether to support a sale. Before shareholders can have confidence in a fairness opinion or

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[62] *Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009) (quoting *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)).
[63] *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).
[64] Proxy Statement, Annex B, at B-1.

rely upon it to an appropriate extent, the conflicts and arguably perverse incentives that may influence the financial advisor in the exercise of its judgment and discretion must be fully and fairly disclosed.

> Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts.[65]

The Proxy Statement informed Atheros's shareholders that Qatalyst would "be paid a customary fee, a portion of which is payable in connection with the rendering of its opinion and a substantial portion of which will be paid upon completion of the Merger."[66] Not disclosed in the Proxy Statement is the amount of compensation that Qatalyst will receive. Perhaps more importantly, also not disclosed in the Proxy Statement is a quantification of the amount of the fee that is contingent: approximately ninety-eight percent. The "portion" of the fee that will be paid regardless of whether the Transaction closes is roughly only two percent. Thus, the compensation that Qatalyst will receive if the Transaction closes is nearly fifty times the fee that it would receive if there is no closing.

Although the Proxy Statement reports that a "substantial portion" of the fee is contingent, the percentage of the fee that is contingent exceeds both common

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[65] *Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *16; *see also In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16-*17 (Del. Ch. Oct. 2, 2009), *appeal denied*, 984 A.2d 124 (Del. 2009) (TABLE); *Braunschweiger v. Am. Homes Shield Corp.*, 1991 WL 3920, at *6 (Del. Ch. Jan. 7, 1991).

[66] Proxy Statement at 35.

practice and common understanding of what constitutes "substantial." Contingent fees are undoubtedly routine; they reduce the target's expense if a deal is not completed; perhaps, they properly incentivize the financial advisor to focus on the appropriate outcome. Here, however, the differential between compensation scenarios may fairly raise questions about the financial advisor's objectivity and self-interest.[67] Stockholders should know that their financial advisor, upon whom they are being asked to rely, stands to reap a large reward only if the transaction closes and, as a practical matter, only if the financial advisor renders a fairness opinion in favor of the transaction. In essence, the contingent fee can readily be seen as providing an extraordinary incentive for Qatalyst to support the Transaction. Those facts which reasonably may be understood by the stockholders to raise doubts about the independence and objectivity of Qatalyst should be

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[67] *See* Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 Bus. Law. 881, 900 (2008) ("[I]t should be clear that proxy statements must disclose whether the fee is contingent on the successful closing of the transaction and, in some cases, how much of the fee is contingent. More important than the raw size of the fee paid to the financial advisor is the advisor's financial incentive to ensure the transaction's success. When judging the integrity of the advisor's analysis, stockholders are likely to be concerned with potential financial biases that may affect the fairness opinion.") (citing *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191 (Del. Ch. 2007) ("It follows then that where a significant portion of bankers' fees rests upon initial approval of a particular transaction, that condition must be specifically disclosed to the shareholder. Knowledge of such financial incentives on the part of the bankers is material to shareholder deliberations.") and Oral Arg. on Pls.' Mot. for Prelim. Inj., Tr. 96, *In re BEA Sys., Inc. S'holder Litig.*, Consol. C.A. No. 3298-VCL (Del. Ch. Mar. 26, 2008) ("There is a claim about Goldman's fee, and the issue is that the proxy statement discloses the total fee and discloses that the fee is at least in part contingent but doesn't disclose which part of the fee was contingent and which part wasn't. This might be a good claim if some very large part of the fee was in fact contingent . . . .")).

disclosed. The Court does not imply that Qatalyst has committed a wrong here because of the contingent fee arrangement; it simply observes that the incentives are so great that the stockholders should be made aware of them and that this contingent fee structure is material to their decision to support or oppose the Transaction.

Defendants point out that contingent fees are customary. As set forth above, they are. Defendants argue that there is no magic contingent percentage that mandates something more than a disclosure that a "substantial portion" of the fee is contingent. Defendants are correct in this assertion as well. The Court, however, need not, in its current effort, draw any bright line. That fixing such a line might be difficult, if perhaps impossible, does not necessitate a conclusion that disclosure of the contingency percentage is always immaterial and of no concern. Regardless of where that "line" may fall, it is clear that an approximately 50:1 contingency ratio requires disclosure to generate an informed judgment by the shareholders as they determine whether to rely upon the fairness opinion in making their decision to vote for or against the Transaction.

The parties debate whether the amount of a financial advisor's fee needs to be disclosed or whether merely disclosing that the fee is customary (which it is in

this instance) suffices.[68] It is not necessary to resolve that general debate here. Given the late agreement between Atheros and Qatalyst as to financial advisor compensation,[69] coupled with the contingent fee concerns set forth above, the stockholders should be afforded an opportunity to understand fully the nature and means by which Atheros will compensate Qatalyst. Thus, that would include the amount of the fee as well.

In sum, the Plaintiffs have demonstrated a reasonable probability of success on their claim that the disclosure of the contingent fee arrangement by which Qatalyst will be compensated is inadequate.

(b) *Methodology employed by the financial advisor*

The Plaintiffs next contend that the Proxy Statement contains material omissions regarding the financial projections performed by Qatalyst when it

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[68] *See id.* at 899-900 ("[W]hile 'customary' may be fairly informative in the context of a $200 million merger, it may be insufficiently detailed for a multi-billion-dollar merger. Moreover, the identity of the financial advisor or unusual aspects of the transaction itself may strip the term 'customary' of informative content so as to allow a disclosure claim to succeed.") (citation omitted).

[69] The Defendants note that, as set forth above, the fee agreement between Atheros and Qatalyst was reached abnormally late in the transaction process—only a few days before the Merger Agreement was executed. It follows, they argue, that the risk that the Transaction with Qualcomm would not move forward to closing was very small and, thus, the percentage of the fee that is contingent is not material.

If anything, the unusual timing supports the fullest disclosure. More specifically, the potentially pernicious incentives warrant disclosure regardless of the time remaining and, of course, the critical time is not how long until an agreement is reached, but how long until the merger closes. Moreover, intervening events might require a renewed effort by the financial advisor, and those efforts might reasonably be perceived as subject to influence by the incentive fee arrangement.

prepared its fairness opinion and that the Proxy Statement inaccurately states the discount rate Qatalyst used in its calculations. The Plaintiffs argue that these omissions and inaccuracies are material because they affect shareholders' ability to judge the reasonableness of the offer price and to assess the wisdom of pursuing an appraisal action.[70]

According to the Plaintiffs, the disclosures regarding the methodologies used by Qatalyst to value the Company are inadequate. "[W]hen a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation method used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed."[71] The Proxy Statement contains a detailed summary of Qatalyst's fairness opinion.[72] The summary explains methodologies Qatalyst used to arrive at "a range of values for Atheros' common stock of approximately $39.86 to $51.82 per share."[73] It illustrates that Qatalyst reached this valuation in part by comparing "Wall Street analyst research, certain publicly available financial statements and press releases" regarding Atheros (the "Street Projections") to similar information regarding the companies involved in sixteen comparable merger transactions.[74]

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[70] Pls.' Opening Br. in Supp. of their Mot. for Prelim. Inj. at 28.
[71] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203-04 (Del. Ch. 2007).
[72] Proxy Statement at 28-35.
[73] *Id.* at 34.
[74] *Id.* at 33-34.

The Plaintiffs argue that, in addition to using the Street Projections, Qatalyst should have also generated a valuation based on Atheros's own internal projections. They contend that using the internal projections would have produced a per share value of $64 and given shareholders a reason to evaluate the Transaction's deal price more critically. This argument, however, boils down to a complaint that Qatalyst should have conducted its analysis differently. The Board provided Atheros's internal projections to Qatalyst;[75] Qatalyst decided that, under the methodology it employed, the internal projections were not useful because they would not allow for an "apples to apples" comparison with the information available for comparable transactions.[76] Thus, it instead used only the Street Projections in its valuation analysis. The Plaintiffs may disagree with that decision, but, as the Court has observed, "[t]here are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy within those methodologies. Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim."[77]

Next, the Plaintiffs contend that the Proxy Statement inaccurately reports the discount rate used in Qatalyst's calculations. They find a discrepancy between the

[75] *Id.* at 35.
[76] *See* Kim Dep. 121-22.
[77] *3Com S'holders Litig.*, 2009 WL 5173804, at *6.

Proxy Statement, which states that projections for future years' earnings were "discounted to present values using weighted average cost of capital ['WACC'] ranging from 10.0% to 14.0%,"[78] and portions of a presentation by Qatalyst to the Board indicating that Qatalyst had also calculated the WACC in a range from 9.9% to 13%.[79] The Plaintiffs analogize these facts to those of *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, in which the Court enjoined a transaction in part because the proxy had reported that the target's financial advisor had used a WACC range of 23% to 27% in its analysis, when, in fact, the highest WACC the advisor had calculated was 22.7%; the higher range suggested that the merger price was "far more attractive than what [the financial advisor's] valuation would have shown had it used the discount rate" it had actually calculated.[80]

Here, in contrast, Qatalyst did calculate the range of discount rates that appears in the Proxy Statement. Just as the presentation slide the Plaintiffs cite shows that Qatalyst arrived at the 9.9% to 13% range using one methodology, it also shows that a different methodology produced a range of WACCs from 9.9% to 13.8%, which when rounded, represents the range that Qatalyst ultimately used in the rest of its presentation to the Board and the range that appeared in the Proxy

[78] Proxy Statement at 31.
[79] *See* deLeeuw Aff. 2, Ex. 27 ("Project Keystone: Materials for Discussion") at Qatalyst.Atheros_0162.
[80] 2010 WL 5648896, at *1-*2 (Del. Ch. May 13, 2010).

Statement.[81] Unlike the range of discount rates reported in the proxy in *Maric Capital*, the range reported in Atheros's Proxy Statement was actually calculated and used by Qatalyst; Qatalyst's decision not to use a slightly narrower range of rates, calculated using a different methodology, does not form the basis of a disclosure claim.[82]

(c) *The terms of Barratt's compensation at Qualcomm*

The Plaintiffs next argue that the Proxy inaccurately describes the negotiations over the compensation Barratt would receive when he joined Qualcomm after consummation of the Transaction. Barratt's future with Qualcomm, Plaintiffs suggest, could have influenced him, in his role as Atheros's lead negotiator, to take a less aggressive stance on behalf of its stockholders. They contend that the Proxy Statement contains a materially misleading assertion that before December 14, 2010, "Dr. Barratt had not had any discussions with Qualcomm regarding the terms of his potential employment by Qualcomm."[83] The Plaintiffs observe that the Proxy Statement does not disclose that Barratt knew—at

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[81] Project Keystone: Materials for Discussion at Qatalyst.Atheros_0134 (using a "discount range of 10.0-14.0% . . . over the projection period"); *id.* at Qatalyst.Atheros_0162 (showing the various discount rates associated with various possible betas, respectively). *See* Kim Dep. 56-61. In his testimony, Kim explained that Qatalyst calculated ranges of discount rates using two methods. The first used a blended beta that took into account both Atheros's beta and the betas of comparable companies; this method produced the 9.9% to 13% range. The second method used only a range of betas applying to Atheros alone, and this analysis produced the 10% to 14% range of WACCs.

[82] *See 3Com S'holders Litig.*, 2009 WL 5173804, at *3.

[83] Proxy Statement at 22.

some point before that date—that he would be employed by Qualcomm after closing,[84] and they argue that emails exchanged between Mollenkopf and Barratt in the middle of November 2010 concerning the "treatment of employee stock options and other related equity awards," indicate that terms of Barratt's future position with Qualcomm were discussed before December 14, 2010.[85]

Plaintiffs argue that the discrepancies between the Proxy Statement and what the record indicates represent a breach of the duty of disclosure under *Maric Capital*, in which the Court required additional disclosures where the proxy statement had created "the materially misleading impression that management was given no expectations regarding the treatment they could receive" from the acquirer.[86] By contrast, the Defendants maintain that the statement that "terms" of Barratt's potential employment with Qualcomm were not discussed before December 14, 2010, is literally true, and therefore, no additional disclosures are warranted. They do not dispute that Barratt understood, sometime before

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[84] Barratt Dep. 17 ("Q. Prior to [December 14, 2010], did you have an understanding with anyone from Qualcomm that you would be employed by Qualcomm following the merger? A. Yes."); *Id.* at 21 (testifying that, at an October 29, 2010 meeting between Atheros management and Qualcomm management, Mollenkopf "indicated that my role potentially could be running the same business that Atheros has today as a new division inside of Qualcomm after the merger closed").

[85] deLeeuw Aff. 1, Ex. 18 (Nov. 12, 2010 Email from Barratt to George Boutros et. al., quoting Nov. 12, 2010 Email from Mollenkopf to Barratt) ("'I caught up with my team. They have given the treatment of employee options/equity awards some initial thought but given the early stage of our conversations additional work still needs to be completed . . . . At the end of the day, we see the Tango team as being a critical part of our strategy . . . . It is our intent to ensure that everybody is treated fairly and that we have the proper incentives in place going forward.'").

[86] *Maric Capital*, 2010 WL 5648896, at *2.

December 14, 2010, that he would have a job with Qualcomm after closing. They only contend that, before that date, management had not engaged in anything more detailed than general "initial exploratory discussions" regarding Qualcomm's treatment of the many Atheros employees it was considering retaining after the Transaction closed. Specifically, they assert that no discussions occurred regarding the particular terms of Barratt's potential employment with Qualcomm before December 14.[87]

The language of the Proxy Statement regarding the date on which the terms of Barratt's potential employment with Qualcomm were first discussed is perhaps ambiguous enough to support Defendants' reading. Further, the Proxy Statement contains robust disclosures regarding the terms of Barratt's post-closing employment that dispel any notion that Barratt had no expectations when the Merger Agreement was finalized regarding how he would be treated by Qualcomm.[88] Nonetheless, the record indicates that, as of a date earlier than December 14, 2010, Barratt had overwhelming reason to believe he would be employed by Qualcomm after the Transaction closed.[89] Because the Proxy Statement partially addresses the process by which Barratt negotiated his future

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[87] Defs.' Answering Br. in Opp'n to Pls.' Mot. for Prelim. Inj. at 34.

[88] *See* Proxy Statement at 36-44. In particular, the Proxy Statement includes a detailed description of Barratt's offer letter from Qualcomm. *Id.* at 37-38.

[89] Barratt Dep. 17, 21.

employment with Qualcomm, the Board must provide a full and fair characterization of that process.

Knowledge that, even though specific terms were not elicited until later in the process, Barratt was aware that he would receive an offer of employment from Qualcomm at the same time he was negotiating, for example, the Transaction's offer price, would be important to a reasonable shareholder's decision regarding the Transaction. Therefore, the date on which Barratt learned from Qualcomm that it intended to employ him after the Transaction closed should be disclosed. If that additional disclosure is made, the date on which particular terms of Barratt's employment were first discussed will be rendered less important in light of the Proxy Statement's current disclosures that the terms themselves had been formally negotiated beginning on December 14, 2010, more than three weeks before the Merger Agreement was executed on January 5, 2011.[90]

(d) *Negotiations over the offer price*

Finally, the Plaintiffs contend that the Proxy Statement should have disclosed the specific prices that Atheros and Qualcomm proposed as they negotiated the Transaction. The Proxy Statement describes Atheros's negotiations with Qualcomm in detail over ten pages; it describes each meeting of the Board, the Company's communications with Qualcomm, the involvement of Qatalyst, the

[90] Proxy Statement at 22, 25, 37.

Board's consideration of Company C, and the interest (or lack thereof) of Companies A and B.[91] It does not detail the exact prices each side offered at every stage of negotiations, except to explain that Qualcomm was not willing to move above $45 per share.[92] The Plaintiffs argue that it is not possible for shareholders to evaluate whether Atheros and the Board seriously negotiated the offer price unless Qualcomm's initial offer and all of Atheros's counterproposals are disclosed.

Although shareholders are entitled to a "full and fair characterization" of the negotiations described in the Proxy Statement, Delaware law does not require Atheros to "give its shareholders a play-by-play description of merger negotiations."[93] As the Defendants argue, the rejected proposals of each side are not material to a shareholder's decision regarding the Transaction where there has been no competitive bidding process and there is, therefore, nothing to compare the various offers and counteroffers against. The Proxy Statement describes the negotiation process in sufficient detail that shareholders can decide for themselves

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[91] *Id.* at 16-25.
[92] *Id.*
[93] *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007) (internal quotation omitted); *see also Repairman's Serv. Corp. v. Nat'l Intergroup, Inc.*, 1985 WL 11540, at *8 (Del. Ch. Mar. 15, 1985) ("The balance of plaintiff's claims . . . involve the failure of [the defendant] to provide an account of proposals and counterproposals made by each side in the ebb and flow of negotiations . . . . But where arm's-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result.").

whether the offer price of $45 per share is the product of arms' length negotiations and whether these negotiations succeeded in maximizing shareholder value.

C. *Irreparable Harm*

The shareholders, now asked to approve the sale of Atheros, are entitled to full and complete disclosure of all material facts before they vote on the Transaction, and "[a]lthough it is theoretically possible to fashion monetary relief in some cases, a breach of the disclosure duty actually results in irreparable harm to the stockholders that is better addressed through an injunctive remedy."[94]

As discussed above, financial advisors serve a critical function by providing fairness opinions regarding the valuation of an enterprise, and, here, Atheros asks its shareholders to rely upon the fairness opinion Qatalyst has provided; the shareholders, therefore, have the right to disclosure of material facts that might provide reason to question the reliability of that opinion. The Proxy Statement currently fails to provide the required disclosures regarding the contingent fee arrangement by which Qatalyst will be compensated, and this, if not remedied, would constitute irreparable harm to Atheros's shareholders' right to an informed vote on the Transaction.

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[94] *Simonetti*, 2008 WL 5048692, at *13 (citation omitted); *see also In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 960 (Del. Ch. 2001) ("Delaware case law recognizes than an after-the-fact damages case is not a precise or efficient method by which to remedy disclosure deficiencies . . . . Therefore, our cases recognize that it is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected.").

Similarly, shareholders have the right to disclosure of all material facts surrounding Barratt's role in negotiating the Transaction. The omission of the fact that Barratt knew, as of a date earlier than December 14, 2010, that he would be employed by Qualcomm after closing is material in light of the Proxy Statement's disclosure of the date on which negotiation of the terms of employment began. A failure to remedy that omission would also cause irreparable harm to the shareholders.

By contrast, the Plaintiffs have not demonstrated a likelihood of success in proving that the Proxy Statement contains other material misstatements or omissions; therefore, the Plaintiffs' other disclosure claims do not suggest that the failure to make remedial disclosures other than those the Court has described above would risk irreparable harm to the shareholders.

Finally, because the Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their price and process claims, and because the Transaction price represents a significant premium to Atheros's unaffected share price, shareholders would not be irreparably harmed by denial of the Plaintiffs' motion for a preliminary injunction on the grounds that the Transaction is the product of an inadequate sales process.[95]

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[95] Thus, the Court need not discuss here the question of whether stockholders' appraisal rights would provide them an adequate remedy at law.

D. *Balancing of the Equities*

In deciding whether to grant a preliminary injunction, the Court must balance the equities between (a) ordering the required disclosures in order to ensure that Atheros's shareholders have the opportunity to vote in an informed manner and (b) the risks to the Defendants or the shareholders that delaying the shareholder vote may present.

In light of the paramount importance of enabling the shareholders to make fully informed decisions regarding the Transaction and the comparatively low risk that the eventual completion of the Transaction would be threatened by a short delay of the shareholder vote, the equities favor enjoining the shareholder vote until the disclosures necessary to remedy the deficiencies in the Proxy Statement can be made.

On the other hand, any extended delay, as would be necessary if Atheros were to be required to restart the sales process, for example, could potentially put the Transaction at some risk (e.g., that Qualcomm would walk away from the deal, thus denying shareholders the premium provided in the offer price) without providing any assurance that another suitor would emerge to offer shareholders a better deal than they will receive under the Transaction. Accordingly, the equities do not weigh in favor of such an extended delay of the shareholder vote.

E. *Injunction Bond*

Finally, the Court must set the amount for the bond that is required to support a preliminary injunction.[96] Because of the limited scope of the preliminary injunction to issue, the costs and damages that may result will likely be limited. In addition, if the Defendants make the curative disclosures and obtain a lifting of the injunction, the short duration of the injunction would also likely mitigate the potential for costs and damages.[97] Under these circumstances, a bond in the amount of $25,000 will suffice as adequate security for the costs and damages that might reasonably be expected to be encountered by the Defendants.[98] With this conclusion, it is not necessary to dilate upon the challenges confronting shareholders representing a large class who might be asked to accept a surety risk for the benefit of the class far in excess of their individual financial investment.

V. CONCLUSION

For the foregoing reasons, Atheros and the Board will be preliminarily enjoined, pending final judgment, from conducting a stockholder meeting or stockholder vote on the Transaction. The injunction, upon application, may be lifted following appropriate distribution of the curative disclosures set forth in

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[96] Ct. Ch. R. 65(c). *See Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467, 469-70 (Del. 2010).

[97] *See Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *27 ("Rule 65(c) requires that [the Court] focus on the costs and damages that may be incurred or suffered by [those about to be enjoined].").

[98] *See, e.g.*, *Simonetti*, 2008 WL 5048692, at *14 n.68.

Parts IV.B.2(a) & (c), above. The preliminary injunction will be conditioned upon the Plaintiffs' posting of a bond in the amount of $25,000. Otherwise, Plaintiffs' motion for a preliminary injunction will be denied.

An implementing order will be entered.