IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ENCITE LLC, Plaintiff, v. ROB SONI, JAMES DOW, RICK D. HESS, FRANKLIN WEIGOLD, ECHELON VENTURES, L.P., a Delaware limited partnership, ECHELON VENTURES SPECIAL LIMITED PARTNERS I, L.P., a Delaware limited partnership, and ECHELON VENTURES II, L.P., a Delaware limited partnership, Defendants, and ECHELON VENTURES, L.P., a Delaware limited partnership, ECHELON VENTURES SPECIAL LIMITED PARTNERS I, L.P., a Delaware limited partnership, and ECHELON VENTURES II, L.P., a Delaware limited partnership, Defendants/Third Party Plaintiffs, v. STEPHEN MARSH, Third Party Defendant.	*Civil Action No. 2476-VCG*

MEMORANDUM OPINION

Date Submitted: September 13, 2011
Date Decided: November 28, 2011

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GLASSCOCK, Vice Chancellor

This case involves a claim for breach of the fiduciary duty of loyalty. At the center of this dispute are the assets (mostly intellectual property) of Integrated Fuel Cell Technologies, Inc. (“IFCT” or the “Company”), a now-defunct tech startup company founded by Stephen Marsh to develop potentially revolutionary micro fuel cell technology. This technology, if perfected, could have replaced batteries in portable electronic devices such as cell phones and laptops. Despite several rounds of financing, IFCT was never able to develop the technology into a commercially viable product, and the Company never produced a consistent stream of revenue. This was a problem, of course, for IFCT’s investors, particularly Echelon Ventures, L.P. (“Echelon”), a Boston-area venture capitalist firm that was IFCT’s principal investor and a holder of the majority of the Company’s preferred stock. Since investing in IFCT, Echelon had worked consistently to reduce Marsh’s influence at IFCT.

As IFCT approached insolvency, it became apparent to IFCT’s board that a sale of the Company’s assets was the only viable solution. The board, which consisted of two Echelon-appointed directors, Marsh, an independent director, and the CEO, conducted a bidding process to sell IFCT’s assets. The Company received several bids, but the major bids at issue in this case came from a group of investors organized by Marsh and from a group of investors organized by Echelon. Several of the investors in Marsh's group (notably including Marsh himself) went on to form Encite LLC ("Encite"), the plaintiff in this case. Echelon's group comprised individuals and entities that had participated in a bridge loan to finance the sale of IFCT's assets, and most of these participants were holders of the same class of preferred stock as Echelon.

The bidding process lasted about five months, and the board eventually approved the Echelon-backed bid. Marsh believed that the rest of the board had not adequately considered, or had wrongfully rejected, the Marsh-backed bid. While the CEO was working out a consent solicitation with IFCT's lawyers to send to the stockholders, Marsh informed the stockholders that they were about to be sent a bid approved by interested directors, and that superior bids had been ignored or cursorily negotiated. Based on a leaked draft consent solicitation and at Marsh's direct urging, an IFCT stockholder and friend of Marsh's filed a derivative suit. Apparently this was the last straw in the Marsh-Echelon relationship, a relationship that had been difficult since its inception. The board withdrew the Echelon-backed offer, and all of its members besides Marsh quickly resigned. Marsh, then the sole director of IFCT, instead of pursuing any outstanding offers, took the company into bankruptcy, wherein the Marsh-led group of investors

(Encite) submitted the winning bid for IFCT's assets, beating out a competing Echelon-backed bid.

Having secured the intellectual property of IFCT for himself and facing the opportunity to start over with the technology he had created, Marsh could have continued on his way, content with his victory over the venture capitalist firm that from the outset had tried to force him out of any position of power in IFCT. Instead of taking his victory to the bank and proceeding to develop his nascent fuel cell technology, Marsh decided that the best course was to continue his struggle with his former fellow board members and Echelon, and he filed this suit alleging that the Director Defendants breached their fiduciary duties to IFCT, abetted by Echelon.

Among the assets purchased by Marsh and Encite via the bankruptcy proceeding were choses in action, arguably including this breach of fiduciary duty action against the Director Defendants. The crux of the Plaintiff's argument is that the Director Defendants conducted an unfair and disloyal bidding process, whereby they favored the Echelon-backed bid and refused to follow up on or negotiate other superior bids. As a result, according to the Plaintiff, IFCT missed its chance to sell its assets at the peak of their value and was forced to sell its assets at a discount in bankruptcy. The Plaintiff also contends that Echelon aided and abetted the Director Defendants' breach. The Plaintiff claims as damages the highest value of IFCT's assets during the bidding period, less the amount IFCT received for its assets in bankruptcy. For the reasons stated later in this Opinion, I accept this theory of damages with a slight modification.

Such an argument raises an issue on its face as to whether a person can purchase a claim for breach of fiduciary duty in a bankruptcy proceeding. In doing so, the Plaintiff has found itself in a somewhat absurd position. The Plaintiff is essentially arguing that it purchased IFCT's assets at a price that was depressed due to the Director Defendants' breach of fiduciary duty, yet at the same time the Plaintiff is seeking to recover the difference between this depressed value and the assets' true value—all the while holding those very assets, for which it paid only the depressed value. In other words, the better the bargain Encite received, the higher the damages to which it (derivatively of IFCT) is entitled. The Plaintiff assures me that its claim here is the same as any other purchased lawsuit, and the Defendants have not persuasively disputed this point; accordingly, I have assumed that the Plaintiff did purchase the breach of fiduciary duty claim it seeks to prosecute here.

The Director Defendants have moved for summary judgment, alleging that IFCT's board conducted an entirely fair bidding process and that Encite has suffered no damages. Echelon has also moved for summary judgment, restating the arguments of the Director Defendants and additionally asserting that, if a breach is found, Echelon did not knowingly participate. The Defendants also argue that Encite's claim should fail on the grounds that Stephen Marsh has unclean hands.

Echelon filed a third-party complaint against Marsh, accusing him of tortiously interfering with Echelon's prospective business relationship with IFCT and contributing to any damage suffered by IFCT as a result of the bidding process. Marsh has moved for summary judgment against those claims, asserting that Echelon was never a party to any agreement with IFCT and that Echelon did not have a reasonable expectation of a business relationship.

These claims are intertwined and arise from a long and complex history of bickering between the creator of a technology with great potential and the venture capitalist firm that provided the funds to develop that technology. It is a story of strong personalities and soured relationships. If the technology had been successful, the parties' interests would have remained aligned. Unfortunately, the technology was never perfected, the parties made competing moves to claim the intellectual property, feelings were hurt, bids were spurned, and our cell phones are still fueled by batteries.

Given that the Director Defendants have conceded the applicability of entire fairness review and given the fact-intensive nature of that review, I find that the Director Defendants have not met their burden at this stage to achieve summary judgment against Encite. I also find that material facts remain as to the liability of Echelon for aiding and abetting the alleged breach of fiduciary duty by the Director Defendants, and I therefore deny Echelon's motion for summary judgment on that claim. Finally, I find that material facts also remain regarding Echelon's third party claims, and so I deny Marsh's motion for summary judgment.

I. BACKGROUND

A. The Parties

Encite, the Plaintiff, is a Delaware limited liability company that owns substantially all of the assets of Integrated Fuel Cell Technologies, which Encite acquired through IFCT's Chapter 11 bankruptcy proceeding. IFCT was a Delaware corporation with its principal place of business in Massachusetts. It was a startup company developing micro fuel cell technology.

Stephen Marsh is a principal of Encite. He founded IFCT in 1999 and was its CEO until September 2004 and its Chairman until October 2006. Marsh is also the Third Party Defendant in this case.

Echelon, a Defendant, is a venture capital firm based in New England that invests in early-stage technology companies. Echelon was co-founded by Alfred Woodworth (who is now a managing partner) and Scott McCabe (a current partner). Echelon owns over 50% of IFCT's Series B preferred stock, which represents about 20% of the total voting stock of IFCT. Two affiliates of Echelon, Lewis Wharf Partners ("LWP") and James Daniell, also own Series B stock.

Rob Soni, James Dow, Frank Weigold, and Rick Hess are former directors of IFCT (collectively, the "Director Defendants," and with Echelon, the "Defendants"). Soni owns Series B stock and a small amount of Series A and common stock of IFCT. Dow and Weigold were elected to IFCT's board as representatives of the Series B stockholders. Dow and Weigold are also partners in LWP, an Echelon affiliate that owns Series B stock. Hess owns IFCT common stock and served as the CEO of IFCT after Marsh's resignation in 2004.

B. IFCT's Background and Financing

Stephen Marsh formed IFCT in 1999 in an attempt to develop a micro fuel cell that could replace batteries in portable electronic devices such as cell phones and laptop computers. Upon its formation, IFCT's board consisted of Marsh, who initially served as Chairman and CEO of the company, and Aaron Kleiner, a Massachusetts-based investor and friend of Marsh's.

Marsh and his investors had high hopes for the fuel cell technology. According to the Plaintiff, had IFCT succeeded in developing and commercializing a viable product, it could have revolutionized the powering of portable electronic devices and potentially generated large revenues through the sale and licensing of its intellectual property. As is apparent from the continued presence of batteries in our society, Marsh's technology never got off the ground. Rather, from Marsh's foundation of IFCT through the eventual sale of IFCT's assets in bankruptcy, the Company never produced a viable commercial product and never generated a consistent stream of revenue.

1. <u>IFCT Struggles to Raise Capital</u>

Like any nascent technology, Marsh's micro fuel cells needed investors. IFCT initially raised financing through a sale of Series A preferred stock to Marsh's friends and family, including Kleiner and Alan Spiro, an attorney whose law firm began representing IFCT as its regular outside counsel. Marsh also convinced James Daniell, a Boston-area investor, to purchase Series A preferred stock. Daniell began to serve as an unpaid consultant to IFCT.

After depleting this initial investment, IFCT began to seek additional financing. In the process of searching for venture capital ("VC") firms to invest in IFCT, Daniell met Scott McCabe and Alfred Woodworth, the two principals of Echelon. Daniell spoke with them about the possibility of investing in IFCT, and Echelon agreed to contribute to a bridge loan to IFCT that would convert into preferred stock during the next round of financing. Marsh and Kleiner then asked Daniell to serve as president of IFCT, and Daniell accepted.

Daniell prepared a business plan and began making presentations to Boston-area VC firms. Despite his efforts, IFCT struggled to raise money. Potential VC investors found that Marsh over-valued the company.[1] Investors saw IFCT as a risky investment—a tech startup firm that had never developed a commercially viable product. Additionally, many of the potential VC investors were insisting that a new CEO be hired at the time of

[1] Marsh Dep. vol. I 49:16-22, Sept. 21, 2009 [hereinafter "Marsh Dep. I ___"].

their investment, a condition that was anathema to Marsh.[2] Wanting to retain control over his creation, Marsh allegedly rejected a number of potential investors on this basis.[3]

2. Series B Financing

With little success among other VC firms, IFCT returned to Echelon. Marsh and Echelon were able to get along initially because Echelon would not insist on Marsh's stepping down immediately. Echelon made clear, however, that Marsh had to go within a year. IFCT and Echelon eventually signed a term sheet whereby Echelon agreed to lead the next round of financing. This agreement ultimately lead to IFCT's issuing Series B preferred stock to Echelon along with several other investors. Echelon would hold the majority of the Series B stock.

Echelon and the other Series B investors negotiated several rights in connection with their investment. The parties do not dispute that these rights were typical for senior preferred stock in a startup company like IFCT. These rights included (1) the right of the Series B stockholders to appoint two representatives to IFCT's board, (2) the right of the Series B stockholder director representatives to pre-approve any debt secured by the assets of IFCT, (3) the requirement that IFCT hire a new CEO, (4) the right of the

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[2] Daniell Dep. vol. I 60:7-19, Dec. 16, 2010 [hereinafter "Daniell Dep. I ___"].
[3] *Id.* at 61:13-62:13.

Series B stockholders to pre-approve a sale of all or substantially all of IFCT's assets, and (5) a 2X liquidation preference.[4]

Echelon and IFCT also agreed that the Series B 2X liquidation preference would be reduced from 2X to 1X if, by July 10, 2004 (the one-year anniversary of the Series B financing), IFCT technology reached a certain "power density milestone" *and* the board hired a new CEO.

3. IFCT's New Five-Member Board

In connection with the Series B financing, IFCT and its stockholders (now comprising the common, Series A, and Series B holders) entered into a Stockholders Agreement that reconstituted the company's board. Per that agreement, the Series B stockholders had the right to appoint two directors, the common and Series A stockholders together had a right to appoint one director (provided that this director would be IFCT's CEO to the extent that the CEO had a contractual right to serve on the board), Marsh had the right to appoint one director, and all of IFCT's stockholders together would mutually agree upon an independent fifth director who had relevant experience in the industry.

[4] The liquidation preference was payable upon a "Liquidation Event," which generally included any sale or liquidation of IFCT and was equal to two times (2X) the purchase price for the Series B stock, or $124.73 per share. Echelon's Opening Br. Ex. 1 [hereinafter "EOB ___"].

The Series B stockholders nominated James Dow and Franklin Weigold to serve on the board. Dow and Weigold were both partners in LWP, an affiliate of Echelon's and an investor in IFCT's Series B stock. Marsh, who was then the CEO, was appointed to fill the position elected by the common and Series A stockholders. Marsh himself nominated Kleiner to the board. Marsh also suggested and supported Rob Soni for the fifth and independent position.[5] Soni is a partner in a Boston-area VC firm that makes investments in tech startup companies. Soni did not own IFCT stock when he joined the board; however, Marsh later convinced Soni to invest personally in IFCT's Series B stock.[6]

Following the Series B financing and the reorganization of IFCT's board, Marsh controlled a majority of the combined common and Series A stock, and Echelon controlled a majority of Series B stock. Thus, Marsh could unilaterally control any action requiring the consent of the common and Series A stockholders, and Echelon could unilaterally control any action requiring the consent of the Series B holders (namely, the rights earned through the Series B financing described above). With IFCT's founder on one side, its principal investor on the other, and its dearth of revenue-generating technology, the stage was set for conflict.

[5] Marsh Dep. I 136:11-137:5.
[6] *Id.* at 98:9-99:8.

C. The CEO Search

Shortly after the closing of the Series B financing, the board began to look for a new CEO. Marsh initially resisted this process, asserting that Echelon had orally agreed not to push for a new CEO immediately.[7] Dow, however, in the fall of 2003 at one of the first meetings of the new full board, raised the importance of the company beginning its CEO search.[8] Weigold and Soni concurred, but Kleiner joined Marsh in opposition to the search, arguing that it was premature.[9]

In November 2003, the board decided to revisit the CEO issue at the February 2004 board meeting. Following the November meeting, the Echelon board appointees communicated with Scott McCabe, who had been appointed as Echelon's representative to IFCT's board following the Series B investment.[10] In response to a voicemail from McCabe, Dow emailed McCabe on February 18, 2004, saying, "I'll be brief in my response. I feel we should start the CEO search immediately after the February board meeting. I am willing to listen to arguments pro and con for starting the VP

[7] *Id.* at 103:19-108:10.
[8] Dow. Dep. vol. I 26:22-27:1, Sept. 23, 2010 [hereinafter "Dow Dep. I ___"].
[9] Marsh Dep. I 102:24-103:21.
[10] Echelon, as holder of the majority of Series B stock, had the contractual right to appoint a representative to attend IFCT's board meetings. *See* EOB Ex. 2A.

engineering search."[11] The Plaintiff infers from this that "McCabe was urging that the CEO search be further delayed."[12]

At the February 24, 2004 board meeting, the board hired Myron Feld, a friend of Kleiner's, as president of IFCT. Feld had no background in fuel cell technology but was to assist with "business planning."[13] During the meeting, one of the directors suggested that Feld be hired as CEO.[14] When Kleiner sought to clarify that hiring Feld would satisfy the CEO hiring requirement and meet the deadline, McCabe allegedly objected, so the board instead hired Feld as President.[15] Feld replaced Daniell. Marsh had informed Daniell in December 2003 that IFCT would not be renewing his contract.

At the same meeting, the board formed a CEO search committee with Soni, Marsh, and Dow serving as its members. The committee immediately sought proposals from search firms to do a CEO search. Christian & Timbers ("C&T") submitted a bid in early March 2004, although the formal search did not begin until June 28, twelve days before the CEO hiring deadline.[16]

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[11] Director Defs.' Opening Br. Ex. 19 [hereinafter "DDOB ___"].
[12] Pl.'s Answering Br. at 9.
[13] Marsh Dep. I 126:5-14; Weigold Dep. 24:14-25:3, Sept. 24, 2009.
[14] The record is unclear as to who suggested Feld for CEO. Kleiner asserts that neither he nor Marsh was responsible, but he cannot recall who made the nomination. Kleiner Dep. 62:16-63:3, Nov. 16, 2010.
[15] *Id.* at 62:4-63:21.
[16] DDOB Ex. 21.

The delayed start of C&T's CEO search was due at least in part to Weigold's indication to C&T that the search for a VP of Engineering should take priority over the CEO search and that the CEO search was expected to take place in the fall of 2004.[17] Yet Marsh acknowledged in his deposition that he had continued to oppose the hiring of a new CEO at least through the beginning of 2004, believing that IFCT's technology and level of business had not reached the point that would justify the expense of a new CEO.[18]

Compounding the above actions, the power density milestone requirement also appeared unreachable by the July 10 deadline. The March 2004 board meeting materials reported that power output remained low.[19] At the May 2004 board meeting, Marsh reported that reaching IFCT's power goals by July was unlikely, although not impossible.[20]

Nonetheless, in June 2004, IFCT scheduled a test for the power density milestone and managed to meet the requirement. Now needing only to hire a CEO to reduce the 2X liquidation preference of the Series B stockholders, Marsh called an emergency board meeting to nominate Feld for CEO. The meeting was to be held on July 8, 2004, two days before the

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[17] Pl.'s Answering Br. Ex. 7.
[18] Marsh Dep. I 121:5-122:7.
[19] EOB Ex. 42.
[20] *Id.* Ex. 93.

hiring deadline. Soni was unable to attend the meeting, leaving Marsh, Kleiner, Dow, and Weigold to vote on Feld.

The vote was split, with Marsh and Kleiner voting in favor and Dow and Weigold voting against.[21] Dow and Weigold allegedly believed that Feld was not qualified to be CEO.[22] Notably, however, Dow and Weigold were both principals of LWP at the time of the vote. LWP, as a Series B stockholder, would have lost its 2X liquidation preference had Feld been approved. Without a majority vote, the proposal to hire Feld as CEO failed.

Finally, in October 2004, the board hired Rick Hess, the former president of a major electronic manufacturing company responsible for bringing new integrated circuits from development to market. As CEO, Hess also replaced Kleiner as a director of IFCT.

D. Continued Financial Troubles for IFCT

In the first half of 2005, Marsh and Hess met with VC firms to obtain new financing for IFCT. Yet Marsh and Hess had trouble attracting investors. VCs were proposing pre-money valuations that were lower than IFCT's then post-money valuation. Woodworth alleged at his deposition that Marsh's over-valuation of the company was precluding VC deals because Marsh insisted on a pre-money valuation that would prevent his ownership

[21] Marsh Dep. I 129:22-130:3.
[22] *Id.* at 131:5-10.

from being diluted (approximately $18 million).[23] Hess has acknowledged, however, that other members of the board were also concerned that VCs were undervaluing IFCT.[24]

In early September 2005, OnPoint Technologies, a Series B stockholder of IFCT and a private equity investor in technology of interest to the U.S. Army, made a financing proposal to recapitalize IFCT at $5 million.[25] The offer, however, was contingent on Marsh's resigning from the board, which Marsh opposed.[26] Marsh also opposed the offer on the grounds that it diluted the junior classes of stock (of which Marsh was the majority holder).[27] Hess recounted at his deposition that when he told Marsh that if IFCT did not accept the financing, the company would be out of money, Marsh responded that he could take the company into bankruptcy and buy back the technology.[28] The board decided that since Marsh could block any

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[23] Woodworth Dep. vol. II 346:5-348:8, Feb. 24, 2010 [hereinafter "Woodworth Dep. II ___"]. One firm, Fieldstone Private Capital Group, allegedly accepted Marsh's pre-money valuation of $18 million when it signed on to help IFCT raise money. *Id.* at 381:19-24. Fieldstone resigned after failing to engage investors. Pl.'s Answering Br. Ex. 54.

[24] Hess Dep. vol. I 19:13-20:6, May 25, 2010 [hereinafter "Hess Dep. I ___"].

[25] Marsh Dep. I 158:12-159:22.

[26] *Id.* at 158:12-159:9.

[27] *Id.* at 158:12-160:1.

[28] Hess. Dep. I 43:18-24.

financing that would dilute the junior classes of stock, further negotiations with OnPoint were futile.[29]

E. The Board Decides to Wind Down IFCT and Sell Its Assets

After the failed negotiations with OnPoint, IFCT's board decided that the appropriate course of action was a sale of IFCT's assets. The board considered filing for bankruptcy, but ultimately determined that the company could achieve more value outside of bankruptcy.[30] Deciding that the first step was to reduce expenses, the board terminated all employees except Hess and ceased all operations.[31]

1. Series B Stockholders Propose 2X Bridge Loan

Because IFCT was out of money and still had not achieved a viable product, the company needed to borrow money to fund the process to sell its assets. In September 2005, Echelon led a group of primarily Series B stockholders[32] (the "Noteholders") in proposing a $450,000 bridge loan (the

[29] EOB Ex. 124; Dow Dep. I 76:21-77:11.
[30] Hess Dep. I 29:18-24.
[31] *Id.* at 48:9-14, 61:5-17.
[32] A significant majority of the Noteholders owned Series B stock, while the Series A and common stock ownership was inconsequential. The final amount of the 2X Notes was $406,204. EOB Ex. 57. Echelon, a Series B investor, provided the bulk of the funds for the 2X Notes, at $264,621. *Id.* Soni invested $53,720 in the Notes. *Id.* Although Soni owned 40-50 thousand shares of common stock, Soni had invested approximately $400,000 in Series B stock. Soni Dep. vol. I 16:20-17:19, May 27, 2007 [hereinafter "Soni Dep. I ___"]. Daniell, who invested $12,500 in the 2X Notes, was a Series A and common stockholder, but was at the time of the financing working for Echelon. EOB Ex. 57. All in all, the Series B stockholders held a large majority of the 2X Notes, which gave them the right to control certain decisions by the Noteholders. *See* EOB Ex. 18 ¶¶ 1, 7

"2X Notes") to IFCT that would cover operating expenses through the sales process. As originally proposed, the loan would be notes secured by IFCT's intellectual property. IFCT would also be required to repay twice the amount of the principal upon maturity (the "2X Premium"), plus 8% interest.

2. Marsh's September Offer for IFCT's Assets

Around this time, Marsh submitted, on behalf of a group of investors including himself and Kleiner (the "Marsh Group"), an offer to purchase IFCT's assets (the "Marsh Group's September Offer"). This offer consisted of (1) $215,000 in cash, (2) the cancellation of $104,000 that Marsh alleged was owed to him, (3) the cancellation of $21,000 that Marsh alleged was owed to his friend, Don Parker, (4) a non-transferable 1% royalty on gross revenues from product sales up to $25 million, and (5) an exclusivity provision.[33] Notably, the Marsh Group made this "$440,000 plus royalty" offer less than a month after Marsh rejected OnPoint's $5 million pre-money valuation as *too low*.

At a board meeting on September 20, 2005, the board approved the general terms of the 2X Notes and authorized Hess to continue negotiating

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(referring to the "Requisite Majority"). Although the Director Defendants are technically correct in pointing out that the 2X Notes were proposed by Series A and common stockholders as well as Series B stockholders, s*ee* DDOB at 17 (referring to "a group of common, Series A and Series B stockholders"), the Series A and common stockholders almost certainly had no semblance of influence over the Noteholders' actions.

[33] DDOB Ex. 37; Marsh Dep. I 193:22-195:15.

the specific terms with the Noteholders. At the same meeting, the board asked Marsh—and Marsh agreed—to extend the deadline of his offer, on the grounds that the board wanted to see all of the available offers before approving any sale.[34]

3. Marsh Proposes a Competing Bridge Loan

On October 4, 2005, Marsh proposed an alternative bridge loan (the "Marsh Group Notes") to IFCT. The Marsh Group Notes were 1X notes; that is, they provided no premium over face value, as opposed to the 2X Premium offered by the Noteholders.[35] Additionally, similar to the 2X Notes' terms at the time, the Marsh Group Notes were secured by IFCT's assets. This proposed security interest would eventually prove fatal for the Marsh Group Notes, as the attachment of any security interest to IFCT's assets would require the consent of the Series B stockholder board representatives (Dow and Weigold).

Woodworth, in an email to Echelon's investors, acknowledged that the Marsh Group Notes' terms were, at the time, superior to the terms of the 2X Notes, and Woodworth expressed concern that Marsh's involvement with the Marsh Group Notes would jeopardize the rights and interests of the

[34] DDOB Ex. 38.
[35] EOB Ex. 11.

Series B stockholders.[36] The board therefore delayed closing on the 2X Notes and continued to negotiate both financing offers.

4. Negotiation and Approval of the 2X Notes

Dow and Weigold, not surprisingly given the concerns expressed by Woodworth and their own participation as Series B stockholders in the 2X Notes, were unwilling to approve the Marsh Group Notes' security interest.[37] But the board could not simply approve the 2X Notes on terms plainly less favorable than the Marsh Group Notes', so the board continued to negotiate with the Noteholders. The board received several concessions: First, the Noteholders agreed to make the bridge loan unsecured and open to all stockholders.[38] Second, the Noteholders agreed that the 2X Premium would not be payable if (1) the Noteholders sought to use the 2X Notes in a bid to purchase IFCT's assets, (2) proceeds from the sale of IFCT's assets would not satisfy the 2X Premium, or (3) proceeds from the sale of assets exceeded the Series B stockholders' 2X liquidation preference.[39] The

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[36] Pl.'s Answering Br. Ex. 24.
[37] Marsh Dep. vol. II 252:9-17, Sept. 22, 2009 [hereinafter "Marsh Dep. II ___"].
[38] EOB Ex. 125.
[39] *Id.* In other words, the Noteholders could not count a waiver of the 2X Premium as consideration in a bid for IFCT's assets, the Noteholders would not get any part of the 2X Premium if a sale of IFCT's assets yielded less than the full 2X Premium, and if a sale of IFCT's assets fully satisfied the Series B 2X liquidation preference, the Noteholders would also not receive any part of the 2X Premium. Put simply, the only way the Noteholders could have received the 2X Premium was if IFCT was profitable enough that it could pay the 2X Premium when the 2X Notes became due.

Noteholders also agreed to reduce the 2X Premium to the extent necessary to pay other creditors.[40] The effect of these provisions was that the Series A and common stockholders as well as any pre-existing creditors would suffer no adverse economic impact as a result of the 2X Premium.

When the board requested that the Marsh Group amend its proposal to remove any security interest, the Marsh Group refused.[41] Unable to accept the Marsh Group Notes without the consent of the Series B stockholders' board representatives (Dow and Weigold), which consent was withheld, the board approved the 2X Notes. Dow, Weigold, Soni, and Hess voted in favor, and Marsh voted against.[42] Dow asserted that the approving board members felt that unsecured 2X Notes were preferable to secured 1X Notes because in the event of a default on the Marsh Group's Notes, the Series B stockholders (including Dow himself, through LWP), who had negotiated to be first in line, would lose IFCT's assets to creditors.[43]

The financing for the 2X Notes closed on October 17, 2005, and the loan was made available to all IFCT stockholders on a pro rata basis.

[40] *Id.*
[41] DDOB Ex. 31.
[42] *Id.*
[43] Dow Dep. I 134:19-135:12.

F. The Bidding Process for IFCT's Assets

While still in the process of approving the bridge loan, IFCT's board began to search for potential buyers for IFCT's assets. The board did not engage a financial advisor to assist with the sales process, allegedly because the company could not afford one.[44] Rather, the board felt that between themselves and IFCT's investors, they "knew the universe of potential acquirers fairly well."[45]

1. <u>The Board Identifies and Contacts Potential Acquirers</u>

As a first step, the board assembled a list of potential acquirers. The parties differ in their accounts of who was primarily responsible for assembling this list and what the criteria were. The Director Defendants seem to credit IFCT's board with this task.[46] Conversely, the Plaintiff contends that the job fell primarily to Daniell, who did market comparables and compiled valuation data before submitting this information to Hess.[47]

[44] Hess Dep. I 164:16-24.
[45] *Id.* at 165:1-5.
[46] *See* DDOB at 24 ("The board conducted market research and prepared a list of potential buyers.").
[47] *See* Pl.'s Answering Br. at 29 ("Jim Daniell . . . prepared a strategic partner/sale plan and valuation data with help from Mr. Hess and some other investors in IFCT . . . . Neither Mr. Daniell nor Mr. Hess could say what information Mr. Hess provided for this document." (internal quotation marks omitted)). Notably, Echelon discusses in its Opening Brief Daniell's role in compiling the list: "Daniell . . . provided to Hess a list of potential purchasers and market comparables for valuing IFCT's assets." EOB at 18.

Daniell had a background in M&A and was at the time working with Echelon to start a new fund.[48]

IFCT assembled a list of around 100 potential buyers, and it narrowed that list down to around 30 "targets." The Defendants do not specify what criteria moved a company from the initial list to the "target" list, other than a general recommendation from anyone who was at the board meetings.[49] The board gave representatives from Echelon the opportunity to nominate targets in this manner.[50] This process produced a list of 20-30 targets, whom the board then contacted to solicit interest in IFCT. "Contact" involved "at least a phone call."[51]

Through these initial contacts, the board set up meetings with approximately 15 potential buyers, and board members allegedly made presentations to many of them.[52] Several of the potential buyers signed non-disclosure agreements with IFCT to facilitate discussions regarding IFCT's technology.[53] Echelon assisted the board in both identifying and contacting

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[48] Hess Dep. I 125:3-7.

[49] Weigold testified that, generally, if someone at the board meeting proposed an acquirer, that potential purchaser was put on the list of firms to contact. Weigold Dep. 111:21-113:9.

[50] Weigold could not recall whether Woodworth or any of Echelon's representatives had specific input on the list, but acknowledged that "if they were at the meeting, they had the opportunity to do so." Weigold Dep. 113:4-9.

[51] Hess Dep. I 130:16-22.

[52] Hess Dep. vol. II 77:10-15, May 26, 2010 [hereinafter "Hess Dep. II ___"].

[53] Hess Dep. I 147:6-18.

potential buyers, but Echelon asserts that once contact was made, Echelon did not participate in "in-depth" discussions with the target.[54]

Despite its efforts, the board received no offers from potential buyers from October through the first half of December 2005. Neither party specifically addresses the cause of this difficulty. Hess, however, remarked in his deposition that Marsh had refused to speak with certain bidders since Marsh himself was bidding for IFCT's assets.[55] Hess contends that if Marsh, as IFCT's founder, Chief Technology Officer, and the inventor of the majority of IFCT's technology, had talked to bidders about the value of the technology and worked with bidders to understand the technology, he would have enhanced some bidders' understanding of the technology, and consequently Marsh would have enhanced the value that bidders would be willing to bid or their willingness to bid at all.[56]

Hoping to close a deal by the end of the year, the board invited bidders to submit bids by December 20, 2005. After receiving only a few offers by that date, the board extended the deadline to January 30, 2006. By the end of January, IFCT had received only a handful of bids for its assets.

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[54] Woodworth Dep. II 277:23-278:20.
[55] Hess Dep. II 135:9-136:12.
[56] *Id.* at 137:12-138:1.

2. Initial Bids for IFCT's Assets

By the January 30, 2006 deadline, IFCT had received five bids. Two of these—a bid from a group led by Peter Palmer and a bid from David Pelly—were submitted in late December.[57] The other three—a bid from TRK Engineering Services ("TRK Offer"), a bid from Peter Besen, and a bid from the Marsh Group ("Marsh Group's January Offer")—were submitted in late January.[58]

a. The Palmer Offer

The board received a bid from a group led by Peter Palmer on December 20, 2005. Marsh was a member of the group.[59] In discussing the Palmer offer with the board, Hess said that he believed that the board would receive better offers.[60] Hess informed Palmer that the board found his offer to be uncompetitive and incomplete.[61] When Palmer asked for a counter offer that would define what would be considered competitive from the board's perspective, Hess told him that the board had not defined "acceptable" criteria and was still pursuing "market based offers."[62] Palmer

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[57] Hess Dep. I 154:23-155:7.
[58] *Id.* at 167:4-10.
[59] Marsh Dep. II 28:9-18.
[60] Hess Dep. I 158:8-18.
[61] *Id.* at 157:2-10; DDOB Ex. 74.
[62] *Id.* Ex. 74

did not submit another offer and the board did not pursue further negotiations with him.

b. The Pelly Offer

On December 21, 2005, David Pelly submitted an offer with incomplete and very general terms for capitalizing a new company to purchase IFCT's assets.[63] The board responded to Pelly requesting more detail, but Pelly never provided more detail.[64] Instead, Pelly simply resubmitted the same offer by the January deadline and asked the board to reconsider.[65]

c. The TRK Offer

On January 23, 2006, TRK Engineering Services submitted an offer, the terms of which were (1) $200,000 in cash, (2) a $406,000 promissory note payable to the Noteholders (to cover the outstanding 2X Notes), and (3) a 2% non-transferable royalty on gross revenues from product sales capped at $20 million distributed to IFCT stockholders equally. The board allegedly responded to TRK but never heard back.[66]

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[63] Hess Dep. I 154:23-156:3.
[64] *Id.* at 169:23-170:11.
[65] *Id.*
[66] There is reason to question whether the board ever responded to TRK. When the bidding process fell apart in April 2006, Tom Keeler, of TRK, emailed Hess asking why Hess never contacted him to negotiate during the sales process. Pl.'s Answering Br. Ex. 47. Keeler asserted that he had "a valid off[er] on the table as of March 31 that was of greater value to the shareholder[s] than the [Noteholders' Offer]." *Id.*

d. The Besen Offer

Peter Besen submitted an offer to the board on January 30, 2006. The terms were (1) cash in the amount of the face value of the 2X Notes or the conversion of the 2X Notes into stock of the acquiring company, (2) 10% of common stock of the acquiring company to IFCT Series A and B stockholders who were accredited investors, and (3) the assumption of certain obligations such as IFCT's lease. Echelon was involved with and backed the Besen Offer, and Echelon contends that it disclosed its involvement to IFCT's board.[67]

e. The Marsh Group's January Offer

Also on January 30, the Marsh Group submitted an offer. In addition to Marsh, Philip Huyck (Encite's current CEO) participated in the bid. The Marsh Group's January Offer proposed to acquire IFCT's assets through a to-be-created company for (1) $420,000 in cash, (2) a promissory note for $600,000, (3) a 2% non-transferable royalty on product revenue[68] capped at $45 million, and (4) the assumption of IFCT's lease. For this offer, the Marsh Group had solicited the interest and potential participation of Houston Advanced Research Center ("HARC"). Huyck contacted Hess to ask for an

[67] Woodworth Dep. II 277:16-278:20.
[68] Although the board believed that "product sales" did not include licensing fees, the Plaintiff asserts that licensing fees were included and that, had the board negotiated with the Marsh Group more fully, the inclusion of licensing fees would have been clear. *See* Huyck Dep. vol. II 421:1-9, Feb. 25, 2010 [hereinafter "Huyck Dep. II ___"].

extension of the deadline to give HARC time to evaluate the technology and put together a proposal, and the board granted this extension.[69] Huyck hoped to meet with HARC the week of February 6, 2006 to discuss a proposal.[70]

Unfortunately, Huyck failed to set up a meeting with HARC. When Hess emailed Huyck asking for an update on February 7, Huyck responded on February 13 that he had been unable to set up a meeting with HARC and that the IFCT board "should proceed with [its] efforts on the assumption that HARC and its affiliates will not be involved."[71]

The parties have differing accounts of the effect of Huyck's February 13 email. Huyck's deposition testimony regarding his email was contradictory: At one point, he indicated that he meant that HARC's non-participation effectively killed the Marsh Group's January Offer.[72] Later in his deposition, Huyck testified that his email "simply said that HARC . . . would not participate," not that "the offer was off the table."[73] The only way to read these statements consistently is to assume that Huyck expected IFCT's board to consider an offer that Huyck admitted did not have the requisite financing behind it—a tortured interpretation at best. The Plaintiff

[69] Huyck Dep. II 318:22-319:9.
[70] EOB Ex. 88.
[71] *Id.* Ex. 89.
[72] *See* Huyck Dep. II 326:20-327:20 (responding that the offer was not "going to work at all" rather than "not going to work with HARC").
[73] Huyck Dep. II 416:13-22.

nonetheless argues that although HARC had dropped out, the Marsh Group's January Offer was still on the table and open to the board for negotiation.

The Defendants assert that Huyck's February 13 email terminated the Marsh Group's January Offer. Accordingly, the board did not pursue negotiations with the Marsh Group on the terms of its January Offer. Nonetheless, Hess, in his response to Huyck's email, made it clear that the board was still interested in negotiating with Huyck: "Please let me know if there is anything I can do to make this possible. The board was hopeful that in extending the process you could participate."[74] The status of the Marsh Group's January Offer was further muddied when the board responded to all of the bidders on February 9 (two days after Hess asked Huyck for an update but four days before Huyck responded that HARC would not be involved).

3. The Board's Response

On February 9, 2006, having determined that none of the initial offers were acceptable, the board decided to outline what it considered to be a good structure for bids. The board proposed: (1) that the 2X Notes held by the majority of Series B stockholders would be paid at face value ($431,000), (2) that the IFCT stockholders would receive a 20% ownership interest in Series A preferred stock of the new company based on an initial capital

[74] EOB Ex. 89.

investment by new investors of $3 million, and (3) the current stockholders would receive a note for the full amount of their current invested capital in IFCT ($7.9 million) with 8% interest, payable in five years and secured by IFCT's intellectual property. The board then forwarded this outline to at least some of the bidders, asking them to respond by February 15, 2006.[75]

4. The Marsh Group and Besen Revise Their Offers

The Marsh Group responded on February 14, 2006 with a new offer (the "Marsh Group's February Offer"): (1) $431,000 in cash, (2) IFCT would receive 15% of the non-voting common stock of a new company, Encite, created to receive and utilize IFCT's assets,[76] which stock was to be distributed on an IFCT common stock equivalent basis undiluted until Encite raised $3 million in capital, and (3) existing preferred IFCT stockholders would receive non-voting, non-participating, non-convertible junior preferred stock with a $3 million preference, redeemable at par at Encite's discretion.

Peter Besen also submitted a revision of his January offer, adding more specificity. The new Besen Offer raised the offer of common stock in the acquiring company to 20% and provided that the common stockholders

[75] The Marsh Group received the proposed structure, *see* DDOB Ex. 82, but Hess could not recall at his deposition which other bidders received the outline. Hess Dep. I 172:21-173:7.

[76] At the time of the Marsh Group's February Offer, Encite did not exist. For the sake of clarity, however, I will refer to the to-be-created company as Encite.

would have the right to participate pro rata in any additional financing, up to and including the first "qualified financing." Besen no longer offered, however, to assume any obligations of IFCT, and the new offer required a "stand still agreement (no shop)."[77]

Shortly before receiving the Marsh Group's and Besen's revised offers, Hess emailed Woodworth to ask him what terms Echelon, as the largest of the Noteholders and Series B investors, would find acceptable in a bid for IFCT's assets. Echelon's input was important because the Series B stockholders had a right to veto any sale of all or substantially all of IFCT's assets, and Echelon, as the majority Series B holder, could exercise that right unilaterally. Woodworth responded:

> In the absence of a bid with either a cash portion that substantially repays the Notes and the Series B and/or includes an attractive royalty from a major corporation, we would be more interested in the future value of the technology than in small amounts of cash that could be paid today.[78]

In the event, however, that a bid was from a company formed for the purpose of acquiring IFCT, Woodworth had other criteria, including the repayment of at least the face value of the 2X Notes and an equity interest in

[77] DDOB Ex. 84. The terms "qualified financing" and "stand still agreement (no shop)" are not defined in the offer letter.
[78] Pl.'s Answering Br. Ex. 32.

the acquiring company at least equal to the Series B current equity holding in IFCT.[79]

After receiving these guidelines from Woodworth, the board then met in mid-February to discuss the Marsh Group's February Offer and the revised Besen Offer. The board was not satisfied with either bid.[80] With the maturity date of the 2X Notes only a couple weeks away, the board decided to update the Noteholders on the progress of the sale of IFCT's assets and whether IFCT would be able to pay the 2X Notes by their due date.

Hess met with Woodworth for lunch to discuss the status of the bidding process and to seek an extension of the due date of the 2X Notes. Echelon ended up granting several extensions to the board, eventually pushing the maturity date to April 9, 2006, allegedly to give the board more time to find a satisfactory offer.[81] Also at this lunch meeting, Hess suggested to Woodworth that the Noteholders should make a bid for IFCT.[82]

5. <u>The Noteholders' Bid and Marsh's Response</u>

Around March 6, 2006, the Noteholders submitted a bid for IFCT's assets, which included (1) deeming the 2X Notes fully paid, (2) converting all outstanding IFCT stock to common stock, thereby waiving the Series B

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[79] *Id.* Ex. 32.
[80] Hess Dep. I 183:5-184:2.
[81] *Id.* at 201:2-24.
[82] Woodworth Dep. vol. I 203:13-204:13 [hereinafter "Woodworth Dep. I ___"].

liquidation preference, and (3) offering to all IFCT stockholders warrants to acquire 10% of the stock in the new company (which came to be called "iProton") that would purchase IFCT's assets. After discussions with IFCT's board, the Noteholders revised their offer to include additional consideration of a $3 million note convertible into 10% of the equity of iProton in connection with a sale, merger, or IPO.

a. The Board Meets with the Marsh Group

The day after the Noteholders submitted their bid, IFCT's board met with Marsh and Huyck to discuss the Marsh Group's February Offer.[83] All four of the Director Defendants were present at this meeting.[84] Hess testified that the purpose of this meeting was to better understand the bid and to "understand [the Marsh Group's] approach, going forward."[85] Hess alleged that the board had questions about who would compose the management team and what the financing of the new company would be.[86] According to Marsh and Huyck, the reaction of the Director Defendants to the Marsh Group February Offer was negative. Huyck testified that Dow told Marsh and Huyck that the board was "not going to let [them] steal [the] company" and that the Director Defendants made it clear that they had "absolutely no

[83] EOB Ex. 67. The board also met with Besen and his group of investors later that morning. *Id.*
[84] Huyck Dep. II 331:9-332:4.
[85] Hess Dep. I 205:1-4.
[86] *Id.* at 205:4-16.

interest in discussing" the Marsh Group's bid.[87] According to Marsh, shortly after he began his presentation and began explaining the cash component ($431,000) of his offer, Soni interrupted him, saying, "No, no, no . . . Echelon will just veto that. If you can't satisfy the 2X . . . you need to go back and sharpen your pencil. We can't take that to Echelon if it doesn't have the 2X."[88]

After the meeting, the Marsh Group withdrew its February Offer. Huyck testified that "there was no reason to leave an offer on the table because [the board] had absolutely no interest in discussing it."[89] Upon receiving the news that the Marsh Group had terminated its offer, Hess emailed Huyck, asking why Huyck withdrew the offer and offering to have a discussion if Huyck was willing.[90] Huyck responded to Hess that he was still interested in acquiring IFCT's assets if the board was willing to take a proposal from the Marsh Group seriously.[91] Hess replied that the board would be "open to a bid."[92] Because the Marsh Group had no offer outstanding, Marsh was invited back into the process of evaluating bids.[93]

[87] Huyck Dep. II 334:3-15, 349:5-24.
[88] Marsh Dep. II 286:3-287:6.
[89] Huyck Dep. II 349:17-24.
[90] DDOB Ex. 92.
[91] Huyck Dep. II 356:24-358:10.
[92] Hess Dep. II 10:6-22.
[93] DDOB. Ex. 93.

b. The Board Approves the Revised Noteholders' Offer

Following its meetings with the Marsh Group and Besen, IFCT's board made additional comments on the Noteholders' revised bid. On March 13, 2006, the Noteholders submitted a restructured bid, the terms of which were (1) cancellation of the 2X Notes ($431,000), (2) payment of IFCT's reasonable transaction costs, (3) assumption of IFCT's lease, (4) for all IFCT stockholders, on an as-if converted to common stock basis, a 3% transferable royalty up to $7 million payable after $10 million of revenues from products or licenses that involved intellectual property covered by IFCT's patents, pre-payable at a 30% discount, and (5) waiver of the Series B stockholders' 2X liquidation preference.[94] As described below, the Noteholders would later add a $25,000 cash payment to their bid.[95]

At this time, the board felt that it was "running out of money" and "running out of time."[96] At a board meeting on March 14, 2006, with no Marsh Group offer on the table and an unsatisfactory bid from Besen[97] outstanding, the board decided to move forward with the Noteholders'

[94] Note that not all of the Series B stockholders were in the Noteholders group; however, Echelon was able to grant this waiver as the majority Series B stockholder.
[95] EOB Ex. 12.
[96] Hess Dep. II 11:14-22.
[97] Besen submitted a slightly revised bid on March 14, 2006, but the board found it had improved little and was still unacceptable. DDOB Ex. 96; Hess Dep. II 6:18-7:9. Hess cannot recall whether the board contacted Besen to further negotiate his bid. *Id.* 8:5-10.

Offer.[98] Marsh did not participate in the portion of the board meeting discussing outstanding bids because he was still interested in submitting an offer.[99] Although Hess had informed the board that the Marsh Group was still interested in bidding, Hess does not recall whether the board informed the Marsh Group that it was approving an offer on March 14.[100] On March 15, 2006, the board notified the Noteholders that their bid had been approved.[101]

6. Marsh and His Mole

Although Marsh recused himself from the board meetings while he was involved in bidding for IFCT's assets, he nonetheless remained updated on Echelon's bid. Luke Pustejovsky, or as Marsh came to call him, "The Mole,"[102] routinely forwarded to Marsh confidential emails between Woodworth and Echelon's investors.[103] Many of these emails contained confidential information regarding Echelon's bid for IFCT.[104] Marsh's willing acceptance of confidential information from The Mole, which he

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[98] DDOB Ex. 97.
[99] Pl.'s Answering Br. Ex. 37; DDOB Ex. 97.
[100] Hess Dep. II 10:6-11:6.
[101] Pl.'s Answering Br. Ex. 38.
[102] DDOB Ex. 99. Marsh and Pustejovsky met while Pustejovsky was working at Echelon. Pustejovsky Dep. 30:1-30:10, Nov. 2, 2010. Pustejovsky left Echelon in 2005 to work for Fieldstone, the investment bank that tried to raise capital for IFCT in 2005 using Marsh's valuation of the company. Pustejovsky appears to have made the introduction between IFCT and Fieldstone's bankers that initiated that process. *Id.* at 33:3-15.
[103] Marsh Dep. II 305:20-306:1.
[104] DDOB Ex. 98; Marsh Dep. II 307:6-14.

failed to disclose to the rest of the board, made his recusal from board discussions of competing bids ostentatious hypocrisy.

How Pustejovsky obtained confidential information regarding Echelon's bids remains unclear. Pustejovsky was no longer an Echelon employee after his departure in early 2005, and he was not an investor in Echelon during the bidding process.[105] At his deposition, Pustejovsky claimed to have no memory of how he received this information, although he admitted that he was friends with Ian Bowles, an Echelon investor who forwarded at least one email to Pustejovsky regarding Echelon's investment in IFCT.[106]

Regardless of how Pustejovsky obtained the confidential information, the parties do not dispute that Pustejovsky obtained confidential information about Echelon's bids and forwarded that information to Marsh, who was at the time participating in the bidding process. Marsh never disclosed his receipt of this information to IFCT's board.[107] Marsh forwarded this confidential information to Kleiner, who was a member of the Marsh

[105] Pustejovsky Dep. 32:15-17.
[106] *Id.* at 40:13-42:11; EOB Ex. 78.
[107] Marsh Dep. I 256:5-12.

Group.[108] Pustejovsky also forwarded emails directly to Kleiner, and he communicated with other Marsh Group members, including Huyck.[109]

7. The Marsh Group's March Offer

On March 15, 2006, Woodworth notified Echelon's investors that IFCT's board had accepted the Noteholders' Offer. Pustejovsky forwarded this email to Marsh later that evening.[110] Several hours later, in the early morning of March 16, Pustejovsky forwarded to Marsh an email that Woodworth had sent to Echelon's investors summarizing the terms of the Noteholders' Offer.[111] Huyck learned of the terms of that offer, ostensibly from Marsh, and later that day sent Hess another bid from the Marsh Group containing terms similar to those of the Noteholders' Offer.[112]

The terms of the Marsh Group's March Offer were: (1) $500,000 in cash, (2) assumption of IFCT's lease, and (3) a 1.5% non-transferable royalty up to $15 million to Series B stockholders and a 0.5% non-transferable royalty to common and Series A stockholders up to $5 million from product sales payable after four years.[113] Notably, the royalty cap in this offer, made with undisclosed knowledge of the terms of the

[108] Marsh Dep. I 252:14-21.
[109] Pustejovsky Dep. 71:15-72:24; Huyck Dep Cont'd. 507:2-519:19, 547:4-551:1, Nov. 15, 2010 [hereinafter "Huyck Dep. III ___"].
[110] EOB Ex. 83.
[111] DDOB Ex. 105.
[112] EOB Ex. 9.
[113] *Id.*

Noteholders' Offer, was lower ($25 million versus $45 million) than the Marsh Group's January Offer.[114]

8. The Board Again Approves the Noteholders' Offer

Despite having already approved the Noteholders' Offer, IFCT's board evaluated the Marsh Group's March Offer at a meeting on March 20, 2006. The board found that the Noteholders' Offer was superior and that the Marsh Group's Offer lacked detail ordinarily included in a term sheet. The board instructed Hess to request further information from Huyck, and the Marsh Group twice submitted a more detailed term sheet.[115] The board also asked the Noteholders to add a cash payment to their offer, and the Noteholders added $25,000 in cash.[116]

On March 31, 2006, after discussing the final Noteholders' Offer and the Marsh Group's March Offer, the board formally approved the Noteholders' Offer by a vote of four to one (with Marsh voting against).[117] The parties do not dispute that all of the directors participating in this vote apart from Hess were interested. The board purportedly believed that the Noteholders' Offer was superior for several reasons: Perhaps most importantly, the Noteholders' Offer was the only offer that could (and did)

[114] Huyck Dep. II 376:4-23.
[115] DDOB Ex. 108; *id.* Ex. 109; EOB Ex. 14.
[116] Hess Dep. II 16:9-17:2; DDOB Ex. 110.
[117] EOB Ex. 131.

waive the Series B liquidation preference, thus allowing royalty payments to be paid to all stockholders at the same time.[118] The board also believed that the royalty stream in the Noteholders' Offer would bring more value to stockholders than the royalty stream in the Marsh Group's Offer because the latter would be paid only on revenue from product sales and not licensing revenue.[119] Finally, although the Marsh Group's Offer had a higher royalty cap, the board believed that reaching the cap was unlikely because it required IFCT to achieve $1 billion in revenue, and it was going to take a considerable amount of time and money to finish developing the technology.[120]

9. The Board Seeks Stockholder Approval

While the lawyers for iProton (the Noteholders' inchoate acquisition company) and IFCT negotiated the documentation for the sale, IFCT's board began to prepare the solicitation materials that were to be sent to stockholders to obtain their approval of the deal. IFCT's outside counsel at Wilmer Hale wrote the initial draft of the consent solicitation. Following comments from Hess, Wilmer Hale revised the letter to disclose that certain

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[118] Affs. of James Dow, Rick D. Hess, Rob Soni, and Franklin Weigold in Support of Mot. for Summ. J. of Defs. Rob Soni, James Dow, Rick D. Hess and Franklin Weigold [hereinafter, collectively, "Director Def. Affs."].

[119] Director Def. Affs.; Hess Dep. II 20:5-21. As described above, the Plaintiff contends that had the board negotiated with the Marsh Group, the board would have found that the royalty included licensing revenues as well as product sales revenues.

[120] Director Def. Affs.; Hess Dep. II 13:15-14:15.

directors were interested in or affiliated with the acquiring company, iProton, although the solicitation did not list the names of the interested directors.[121]

Hess then circulated this revised version (the "Draft Solicitation") to the board at the beginning of the March 31 board meeting.[122] At that meeting, Marsh objected to the Draft Solicitation because he felt that it did not adequately disclose the Director Defendants' interest in the transaction. Nonetheless, the board voted to approve the Draft Solicitation.[123]

Despite the approval of the Draft Solicitation by the board, Hess delayed sending the solicitation to IFCT's stockholders out of concern that, as raised by Marsh at the meeting, the letter did not adequately disclose that a majority of the board was conflicted.[124] Hess voiced these concerns to John Chory, IFCT's outside counsel, and Ken Itrato, IFCT's General Counsel, and over the weekend of April 1-2, Wilmer Hale revised the letter to specifically name the conflicted directors and their financial interests.[125]

G. Marsh Draws Battle Lines

Marsh, however, allegedly believed after the March 31 board meeting that the Draft Solicitation was being sent immediately to stockholders. Over

[121] EOB Ex. 32; *id.* Ex. 47.
[122] *Id.*
[123] *Id.* Ex. 131.
[124] *Id.* Ex. 23.
[125] *Id.* Ex. 31.

the April 1-2 weekend, without consulting the rest of the board, Marsh sent an email to IFCT's stockholders informing them that a conflicted board had approved the Noteholders' Offer and that there was a better offer available; namely, the Marsh Group's March Offer.[126] Marsh's email included the Draft Solicitation, omitted certain important details about the Noteholders' Offer such as its waiver of the 2X liquidation preference, and glossed over the details of the royalty structure offered by the Marsh Group's March Offer by comparing only the caps of the competing royalty schemes.[127]

In addition to sending an email to the stockholders, on March 31 Marsh forwarded the Draft Solicitation to David Jenkins, Encite's current counsel and Marsh's personal lawyer for a short period in late March 2006.[128] Another email from March 28 between Marsh and other members of the Marsh Group indicates that Marsh was preparing at this time for litigation to prevent the consummation of the sale.[129]

Meanwhile, on Sunday, April 2, Huyck informed Hess that the Marsh Group was improving its March Offer by increasing the royalty rate from 1.5% to the Series B and 0.5% to the remaining stockholders to 3% and 1%,

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[126] DDOB Ex. 114.
[127] *Id.*
[128] Marsh Dep. II 40:6-41:24.
[129] EOB Ex. 55 ("I think it is time to start the derivitive [sic] shareholder law suite [sic].").

respectively.[130] Hess could not recall at his deposition whether the board gave any consideration to these increased royalty rates.[131]

H. The Aftermath

1. Jeffrey Setrin's Derivative Lawsuit

The next day, on April 3, 2006, the board sent the final version of the consent solicitation (which named the interested directors) to the stockholders (the "April 3 Consent Solicitation").[132] That same day, Jeffrey Setrin, an IFCT common stockholder, filed a derivative action seeking to enjoin IFCT's acceptance of the Noteholders' Offer.[133] The complaint included as an attachment the Draft Solicitation, which the board had never sent to the stockholders.[134]

Marsh testified at his deposition that he had wanted to bring the derivative claim, but that he "had so many hats on" that he did not think it was appropriate for his name to be on the suit.[135] Marsh therefore asked

[130] *Id.* Ex. 59.
[131] Hess Dep. II 43:17-44:13.
[132] DDOB Ex. 49.
[133] EOB Ex. 132.
[134] How Setrin obtained the Draft Solicitation is not entirely clear, although it is undisputed that Marsh forwarded the Draft to Mr. Jenkins on March 31 and that Mr. Jenkins subsequently represented Setrin in his derivative complaint. Marsh Dep. II 40:6-41:24;
[135] *Id.* at 70:3-71:7.

Setrin if he would consider being the shareholder representative and directed Setrin to Mr. Jenkins.[136]

After Setrin filed his lawsuit, things quickly fell apart at IFCT. On April 4, following the filing of Setrin's lawsuit, IFCT informed Setrin that it would temporarily withdraw the April 3 Consent Solicitation and make a corrective disclosure.[137] Hess emailed Chory the next day advising him that he had "angry shareholders and bidders calling and emailing" him.[138] The board then notified the stockholders on April 6 that it was withdrawing the April 3 Consent Solicitation.[139] Shortly thereafter, all of IFCT's board members except Marsh resigned.[140]

2. <u>Marsh Takes IFCT into Bankruptcy</u>

As the sole director of IFCT,[141] Marsh made no attempt to contact any previous, current, or potential bidders, nor did he seek a further extension of the 2X Notes.[142] Despite the withdrawal of the April 3 Consent Solicitation,

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[136] *Id.* at 70:3-70:18.
[137] EOB Ex. 33.
[138] Pl.'s Answering Br. Ex. 48.
[139] EOB. Ex. 35.
[140] DDOB Ex. 119.
[141] It appears that the Series B stockholders retained their right to appoint two directors to the board; however, they did not exercise this option.
[142] Marsh Dep. II 48:16-49:16; 51:7-52:12. Woodworth called Huyck following the Defendant Directors' resignations to inform him that the Noteholders' Offer was still on the table. Woodworth Dep. II 308:6-16. Marsh also had notice that the Noteholders' Offer was still available through a forwarded email chain. Marsh Dep. II 49:17-51:12. Woodworth did not, however, call Marsh directly. When asked why he called Huyck but not Marsh, Woodworth responded that he "wanted to call a responsible adult."

the Noteholders' Offer was still available, and presumably Marsh's own offers were still on the table. Yet Marsh was hesitant to accept an offer in which he was interested, and, not wanting to make decisions on his own, he appointed a new director on April 11, 2006, to fill a vacant board seat. The next day, with the 2X Notes due, Marsh authorized IFCT to file for Chapter 11 bankruptcy.[143] The Bankruptcy Court later converted the case to Chapter 7 and appointed a Chapter 7 trustee.

Marsh and Echelon butted heads yet again in the bankruptcy proceeding. Marsh formed Encite, which submitted a stalking horse bid. The only other bidder was a group affiliated with the Noteholders. And of course, a bidding war between Marsh and Echelon would not have been complete without "The Mole." Just as he had done during the earlier bidding process, Pustejovsky forwarded to Marsh email updates sent by Woodworth to Echelon's investors, which included a discussion of Echelon's participation in a bid for IFCT's assets in the bankruptcy case.[144] In an email forwarded to Huyck, Marsh indicated that he had some insight into the Noteholders' planned bid for IFCT's assets.[145] Huyck and Marsh rewarded

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Woodworth Dep. II 376:16-17. Neither Huyck nor Marsh responded to any of these communications.

[143] DDOB Ex. 124.

[144] EOB Ex. 80.

[145] *Id.* Ex. 91. Marsh stated, "'They' would rather keep the royalty. I think this is an advantage for us." *Id.*

The Mole by offering him a seat on Encite's board; however, on the advice of Bowles (the alleged source of Pustejovsky's inside information), The Mole declined.[146]

On June 9, 2006, the Bankruptcy Court entered a sale order under Section 363 of the Bankruptcy Code approving the sale of substantially all of IFCT's assets to Encite. These assets consisted mostly of intellectual property but also included, according to the Plaintiff, the right to sue the Director Defendants for breach of fiduciary duty. Encite's winning bid comprised $652,000 in cash[147] and, pursuant to a Profit Sharing Agreement, a 4% royalty on Encite's qualifying gross revenues up to $20 million payable after four years (the "Encite Bankruptcy Offer"). The Bankruptcy Court then approved the Second Amended Liquidating Plan of Reorganization of IFCT, pursuant to which proceeds from the Profit Sharing Agreement would fund a Creditor Trust, which would distribute the proceeds to IFCT's creditors and stockholders.

I. The Parties' Claims

Encite alleges that the Director Defendants breached their fiduciary duty of loyalty by failing to conduct an effective and fair bidding process. Encite asserts that the Director Defendants failed to adequately explore

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[146] EOB Ex. 68.

[147] It is unclear what amount of this cash went toward paying bankruptcy fees and costs.

buyers, ignored some bidders, and wrongfully focused on selling IFCT's assets to the Noteholders. According to Encite, the Director Defendants did this by (1) approving the 2X Notes in an interested transaction, which later gave the Noteholders leverage in the bidding process, and (2) approving the Noteholders' Offer without adequately negotiating with any of the other bidders. Encite claims that, as the purchaser of IFCT's breach of fiduciary duty claim against its directors, it is entitled to recover any damages suffered by IFCT as a result of the Director Defendants' actions. Encite also alleges that Echelon aided and abetted the Director Defendants' breach of fiduciary duty.

The Director Defendants, conceding that they were conflicted, argue that the bidding process and their approval of the 2X Notes and the Noteholders' Offer were entirely fair. The Director Defendants also assert that IFCT was not damaged by the alleged breach and that Marsh should be denied relief under the unclean hands doctrine for obtaining and using confidential information regarding Echelon's bid while the Marsh Group was a competing bidder.

Echelon offers the same defenses as the Director Defendants and also argues that there is no evidence suggesting that Echelon knowingly participated in the Director Defendants' alleged breach of fiduciary duty.

Echelon has also filed a third-party complaint against Stephen Marsh, alleging that Marsh tortiously interfered with Echelon's prospective business relationship with IFCT by misleading stockholders during the consent solicitation process. Echelon also seeks contribution against Marsh in the event that it is found liable for aiding and abetting the Director Defendants' alleged breach of fiduciary duty on the grounds that Marsh was at least partly responsible for frustrating the bidding process for IFCT's assets.

For the reasons stated below, I find that there are genuine issues of material fact requiring a trial regarding the Director Defendants' alleged breach of fiduciary duty, Echelon's aiding and abetting of that alleged breach, and Echelon's third party claims for tortious interference and contribution. Accordingly, I deny summary judgment on all claims.

II. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact requiring a trial and the moving party is entitled to judgment as a matter of law.[148] At this stage of the proceedings, the Court does not weigh evidence, resolve factual conflicts, or determine questions of credibility; rather, the Court views the evidence of record in the light most favorable to

[148] Ct. Ch. R. 56(c); *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008).

the non-moving party.[149] If the parties present conflicting evidence demonstrating the existence of a material issue of fact, summary judgment must be denied.[150]

III. ANALYSIS

There are three motions before me. The Director Defendants have moved for summary judgment against Encite's claim that they breached their fiduciary duties in failing to conduct an entirely fair bidding process. Echelon has moved for summary judgment against Encite's claim that Echelon aided and abetted the Director Defendants' breach. Both the Director Defendants and Echelon also seek summary judgment in favor of their defenses that Encite cannot prove damages resulting from the breach and that Marsh/Encite has unclean hands. Finally, Marsh has moved for summary judgment against Echelon's counterclaims for contribution and tortious interference with Echelon's prospective business relationship. I examine each of these motions in turn.

A. Breach of Fiduciary Duty

The Plaintiff has been inconsistent in the framing of its argument, although perhaps not by its own devices. While its briefing suggested specific and separate challenges to the approvals of the 2X Notes and the

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[149] *Id.*
[150] *Id.*

Noteholders' Offer, the Plaintiff clarified at oral argument that it was challenging the fairness of the bidding process as a whole.[151] This confusion may have stemmed from the Director Defendants' Opening Brief, which analyzed separately Encite's claims regarding the approval of the 2X Notes and the approval of the Noteholders' Offer. This confusion is understandable given the facts of this case. Nevertheless, the Plaintiff has since made clear that it is arguing that the bidding process as a whole was not entirely fair and that the approvals of the 2X Notes and the Noteholders' Offer were only components of this unfairness. This is a peculiar argument and it makes a traditional fairness analysis problematic. The Plaintiff does not seek damages based on the Defendants' approval of the 2X Notes as a discreet transaction. Although the traditional entire fairness analysis focuses on the fairness of a single completed transaction, the complained-of transaction approved by IFCT's board (the Noteholders' Offer) was never consummated. Since no complained-of transaction approved by the Director Defendants was consummated, I do not have a specific transaction the fairness of which I can conclusively determine.

Without a specific transaction to analyze, I see only one way to interpret the Plaintiff's argument comprehensibly, which I set out as follows:

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[151] Oral Arg. on Mots. for Summ. J. Tr. 85:11-21, Sept. 13, 2011 [hereinafter "Summ. J. Tr. ___"].

From the time that IFCT's board decided to sell the company's assets to the time when Marsh took the company into bankruptcy, IFCT's assets had a certain value, and this value was at least equivalent to the highest offer received by IFCT before it filed for bankruptcy in April 2006. In order to fulfill its fiduciary obligations, the board was required to take advantage of this value and approve an offer that provided fair consideration for IFCT's assets. In other words, when the board decided to sell IFCT's assets, the board had a window of opportunity to achieve the highest value reasonably available. The Director Defendants breached their fiduciary duties when they squandered the opportunity to realize the true value of IFCT's assets by failing to consider and negotiate the available offers and ultimately attempting to force through an inferior offer made by the Noteholders. The failure of that attempt by the Director Defendants left Marsh with no choice but to take IFCT into bankruptcy and sell off its assets for less than they were worth at their peak during the bidding process (whatever that amount is). Thus, the damage to IFCT, and the amount recoverable by the purchaser of IFCT's claim, Encite, is the highest value of the company during the bidding process less the value IFCT received for its assets in the bankruptcy proceeding.[152]

[152] Of course, IFCT received this latter value from the Plaintiff, Encite. Thus, Encite is

As a preliminary matter, I do not accept the Plaintiff's argument precisely as stated. The Plaintiff seeks to use the Encite Bankruptcy Offer as the value arrived at due to the Director Defendants' breach, and the Plaintiff proposes to subtract this value from the value that the Director Defendants should have achieved through the bidding process. When the Director Defendants resigned, however, Marsh, as the sole remaining director, had the option to continue the bidding process or accept any outstanding offer, including his own. Marsh, not the Director Defendants, chose to take IFCT into bankruptcy. Therefore, if the Director Defendants did indeed breach their duties and this breach led to a decline in IFCT's value, the only damages fairly attributable to this breach would represent the difference in IFCT's value from the time period before the Director Defendants' resignations, less the value *achievable* by Marsh, as director in exercise of his duty of loyalty to IFTC, after the Director Defendants' resignations. I need not determine at this stage whether the latter value exceeds the amount realized from the bankruptcy proceeding. Put simply, I will credit the Director Defendants with the highest value reasonably available to IFCT from the moment they resigned through the sale of IFCT's assets in bankruptcy.

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now essentially arguing that it is entitled to damages because it underpaid for IFCT's assets.

With the Plaintiff's argument thusly framed, the critical question for entire fairness review (which the Director Defendants concede is the applicable standard) is whether the Director Defendants used fair process in seeking and negotiating bids for IFCT's assets, or whether the Director Defendants breached their duty of loyalty by favoring the Noteholders in such a way that other, higher bids were discouraged or precluded, thus causing IFCT to lose its chance to secure the highest value for its assets.[153] Such a determination requires close scrutiny of the process used by the Director Defendants from the time of their decision to wind down IFCT, which includes their approval of the 2X Notes, the purpose of which was to finance the sale of IFCT's assets.

1. Entire Fairness

The Director Defendants' motion for summary judgment is unusual under the circumstances of this case. In a more typical case involving a breach of fiduciary duty claim, the defendants at the summary judgment stage invoke the business judgment rule and argue that summary judgment should be granted in their favor because the plaintiffs have failed to establish a genuine issue of material fact as to whether the directors were independent,

[153] As explained below, a finding that the Noteholders' Bid or the Encite Bankruptcy Bid was the highest value reasonably available to IFCT would preclude a finding of damages. Encite partially acknowledged this at Oral Argument when it agreed that the less Encite paid for IFCT's assets in the bankruptcy proceeding, the higher its damages would be. Summ. J. Tr. 138:1-7.

disinterested, informed, or acting in good faith.[154] It makes sense for defendant board members to move for summary judgment on these grounds because in most cases, the application of the business judgment rule resolves the case.[155]

In this case, however, the Director Defendants have conceded that the entire fairness standard applies. This concession is significant given that "a determination that entire fairness is the appropriate standard of review is often of critical importance."[156] Entire fairness is "Delaware's most onerous standard,"[157] and it requires the Director Defendants to "demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[158] Despite the heavy burden they face, the Director Defendants have nonetheless moved for summary judgment on the issue of entire fairness. Given the fact-intensive nature of this enhanced scrutiny, a party bearing the burden of proving fairness faces a difficult road when moving

[154] *See, e.g.*, *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *9 (Del. Ch. Oct. 2, 2009) ("The threshold issue is whether the Court should apply the entire fairness standard or the business judgment standard in reviewing the Merger.").
[155] *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989) ("[B]ecause the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of derivative litigation.") (quoting *AC Acquisitions v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986)).
[156] *Orman v. Cullman*, 794 A.2d 5, 20 n.36 (Del. Ch. 2002) (internal quotation marks omitted).
[157] *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 (Del. Ch. 2011).
[158] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

for summary judgment, where the court views the record in the light most favorable to the non-moving party.[159]

Entire fairness places the burden on the Director Defendants to establish "to the court's satisfaction that the transaction was the product of both fair dealing and fair price."[160] Although fair dealing and fair price concern separate lines of inquiry, the determination of entire fairness is not a bifurcated analysis. Rather, the court "determines entire fairness based on all aspects of the entire transaction."[161] Additionally, "at least in non-fraudulent transactions, price may be the preponderant consideration . . . . That is, although evidence of fair dealing may help demonstrate the fairness of the price obtained, what ultimately matters most is that the price was a fair one."[162] The entire fairness analysis thus requires the transaction to be objectively fair; the board's honest belief as to fairness is insufficient to satisfy the test.[163]

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[159] *See Orman*, 794 A.2d at 20 n.36 ("Although not inevitable in every case, in those cases in which entire fairness is the initial standard, the *likely* end result is that a determination of that issue will require a full trial.").

[160] *Reis*, 28 A.3d at 459 (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995)). The Defendant Directors have not argued that the burden of persuasion on entire fairness has shifted to the Plaintiff. *Cf. In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 2011 WL 4907799, at *20-*26 (Del. Ch. Oct. 14, 2011).

[161] *Id.* at *20 (quoting *John Q. Hammons*, 2009 WL 3165613, at *13).

[162] *Southern Peru Copper*, 2011 WL 4907799, at *20 (footnote and internal quotation marks omitted).

[163] *Reis*, 28 A.3d at 459.

This case, of course, presents a few challenges for the traditional approach to determining fair price. Ordinarily, where the contested action is the sale of a company, "the 'fair price' aspect of an entire fairness analysis requires the board of directors to demonstrate 'that the price offered was the highest value reasonably available under the circumstances.'"[164] Here, although the Director Defendants did approve the Noteholders' Offer, that offer was never voted on by the stockholders and never finalized.

The lack of a specific offer to analyze forces me to look instead at the "price" that was still available to IFCT after the board's alleged breach of fiduciary duty. As discussed above, the only possible measure of this "price" would be the best value reasonably available to IFCT in the time from the board's resignation through the sale of IFCT's assets in bankruptcy. If indeed this price was depressed by the board's favoring the Noteholders during the bidding process, I must analyze the process used by the board that led to this decrease in value.[165]

With the above considerations in mind, I now turn to whether the evidence in the record, as viewed in the light most favorable to Encite, the non-moving party, establishes that the bidding process for IFCT was entirely

[164] *Cinerama v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)).
[165] My analysis is mostly limited to "fair process" because the record contains insufficient evidence suggesting what the value of IFCT's assets was following the Director Defendants' resignations, other than the result of the bankruptcy proceeding.

fair. As discussed below, significant questions remain as to the extent of the board's negotiations with bidders other than the Noteholders and the likelihood that further negotiations or follow-ups would have lead to a transaction superior to the value available to IFCT after the Defendant Directors resigned. I therefore find that material issues of fact remain and that a determination of the entire fairness of the bidding process requires a trial.

a. Fair Dealing

The uncontroverted evidence in the record does not demonstrate that the Director Defendants engaged in fair dealing in the events that led to the sale of IFCT's assets in bankruptcy. Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[166] The Director Defendants' Opening Brief is replete with conclusory allegations regarding their diligent search for buyers, their thorough consideration of the bids, and their reasonable reliance on the advice of counsel, none of which finds the sufficient and uncontroverted support in the record that is needed for summary judgment. At one point in

[166] *Weinberger*, 457 A.2d at 711.

their Opening Brief, the Director Defendants even seem to suggest that the burden of demonstrating fair process lies with Encite:

> Encite's challenge to the process engaged in by the Director Defendants is based mainly on supposition and has no basis in fact. In fact, Encite concedes that it does not have personal knowledge of exactly what actions the Director Defendants took during the sales process, including what discussions may have occurred among the directors and what advice was provided to the board by counsel.[167]

The burden of producing such evidence belongs to the Director Defendants, not Encite. Having conceded that entire fairness applies, it is the Director Defendants who must provide the details of what actions they took during the sales process, what discussions they had, and what advice they were provided by counsel, and it is the Director Defendants who, through those details, must demonstrate that the process was entirely fair.

In the same paragraph, the Director Defendants conclude, with no elaboration: "[T]he record is irrefutable and replete with evidence that the Director Defendants' analysis and affirmative vote to approve the Noteholders' Offer was consistent with the advice of counsel and entirely fair—both in process and price."[168] Despite this broad and conclusory assertion, the Director Defendants have left important factual questions unanswered: How did the board identify potential buyers? Did the board

[167] DDOB at 49.
[168] *Id.*

simply rely on the advice of Jim Daniell, an Echelon affiliate? How did the board decide which bids to follow up on, and what did that follow-up consist of? How did the conflicted members of the board replicate an arm's-length negotiation when considering the Noteholders' Offer? Did the board's counsel opine on the propriety of approving an interested transaction? This list is merely an illustration, not an exhaustive recitation, of the factual issues that remain. All of these questions, however, are relevant to a determination of whether the outcome of the bidding process was a product of fair dealing, and the Director Defendants' conclusory assertions provide insufficient answers.

Material factual issues also remain with respect to the negotiations between the Director Defendants and the bidders. It appears that some bidders, like TRK, never received a response from IFCT's board. Other bidders, like Peter Palmer, were simply told that their bids were not competitive. It appears that these bidders were never told that the board was considering a better offer and were never encouraged to beat that offer. It is not clear from the record what discussions the board had with every bidder, but, viewing the facts in the light most favorable to the Plaintiff, an inference can certainly be drawn that the board was favoring the Noteholders' Offer and forcing other bidders to negotiate against themselves. Without a fuller account of these negotiations, I cannot conclude based on the record before me that the board engaged in fair dealing with respect to the bidding process.

The Director Defendants' generalized contentions that they relied on expert counsel during the bidding process are also insufficient to establish fair dealing. "Although 'reasonable reliance on expert counsel is a pertinent *factor* in evaluating whether corporate directors have met a standard of fairness in their dealings with respect to corporate powers,' its existence is not outcome determinative of entire fairness."[169] A defendant may not rely on expert counsel "to opine as to the actual substantive fairness" of a transaction.[170] Rather, the advice given by counsel is relevant to the issue of fair dealing, a question of process. Relevant advice for an entire fairness analysis might therefore include whether counsel advised the defendant that the business judgment rule would operate or that the bidding process was thorough and fair.[171] Importantly, however, general assertions by the defendant that he relied on counsel, without specifics of the content of that advice, are insufficient to establish fair process.[172]

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[169] *Valeant Pharmaceuticals Int'l v. Jerney*, 921 A.2d 732, 751 (Del. Ch. 2007) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd*, 663 A.2d 156 (Del. 1995)).
[170] *Valeant*, 921 A.2d at 751.
[171] *See id.* at 751.
[172] *See id.* at 745, 751 (finding that the defendant's contention that counsel made him "very comfortable in terms of the process" and "never said the process was improper" did

In arguing for the fairness of the bidding process, the Director Defendants repeatedly rely on the defense that they solicited and followed the advice of counsel. Nowhere in these assertions, however, do the Director Defendants specify even the general content of the advice they received. The record evidence fails to demonstrate that the Director Defendants were told by counsel that they could exercise independent business judgment. Additionally, the Defendants have offered no evidence suggesting that counsel advised them of what a fair bidding process requires. The Director Defendants need not provide the substantive details of the advice they received from their attorneys, but some evidence of their counsel's legal *conclusions* is required if they wish to rely on counsel's advice to prove fair dealing. Mere conclusory statements alleging that the board "consistently consulted with, relied on and followed the advice provided by IFCT's corporate counsel" will not suffice.[173]

Finally, the Director Defendants rely overmuch on the fact that Delaware law imposes no specific procedural requirements on the sale of assets or a change of control. While it is true that "there is no single blueprint that a board must follow to fulfill its duties. . . . [and] no

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not establish fair dealing without "credible evidence that [counsel] ever told [the board] that the transaction was fair or that the business judgment rule would operate").

[173] The Director Def. Affs.

requirement that there be a bidding contest or even an active market survey,"[174] a board may not entirely eschew procedural safeguards. Although "[d]irectors are not required to conduct an auction according to some standard formula," they must still "observe the significant requirement of fairness for the purpose of enhancing general shareholder interests."[175] That requirement does not compel the equal treatment of *every* bid and the active negotiation of *every* offer. Certainly, a disinterested and informed board acting in good faith could exercise its business judgment and find that certain offers are not serious or are too inadequate to merit negotiation. Yet if the Defendant Directors seek to establish fair dealing in regards to an interested transaction, they nonetheless must demonstrate that they used procedural safeguards sufficient to convince the court that the negotiations provided the equivalent of arm's-length bargaining. Based on the record before me, I cannot make this finding.

b. Fair Price

The Director Defendants have also failed to establish fair price based on uncontroverted evidence. Fair price "relates to the economic and financial considerations of the proposed [transaction], including all relevant factors:

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[174] *In re KDI Corp. S'holders Litig.*, 1990 WL 201385, at *3 (Del. Ch. Dec. 13, 1990) (citing *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286-87 (Del. 1989)) (emphasis removed).
[175] *Mills Acquisition*, 559 A.2d at 1286.

assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[176] Fair price is an inherently difficult issue in a case like this, where the auctioned company's value is almost entirely speculative. The competing bids did not vary substantially in the amount of cash offered. Additionally, while the bids' royalty payment schemes differed somewhat, the present value of royalty payments from technology that has never in its history generated a consistent stream of revenue is difficult to evaluate, particularly in the absence of expert testimony. In any event, I am unable on the current record to find as a matter of law that the Noteholders' Offer, the Encite Bankruptcy Offer, or any offer reasonably available to IFCT following the Director Defendants' resignations was the best value available for IFCT's stockholders. Since the Director Defendants have failed to demonstrate either fair process or fair price, summary judgment on this ground must be denied.

2. Unclean Hands

The Defendants argue that the doctrine of unclean hands precludes recovery by Encite. Under the unclean hands doctrine, the court may "refuse[ ] to consider requests for equitable relief in circumstances where the

[176] *Weinberger*, 457 A.2d at 711.

litigant's own acts offend the very sense of equity to which he appeals."[177] "[T]he purpose of the clean hands maxim is to protect the public and the court against misuse by one who, because of his conduct, has forfeited his right to have the court consider his claims, regardless of their merit."[178] Vindication of the unclean hands doctrine is principally a vindication of the role and reputation of this Court. "The Court of Chancery jealously guards its domain as a court of equity"; therefore, one who seeks equity from the court must not have acted inequitably himself in the same transaction.[179]

In support of this defense, the Defendants allege that Marsh, often in cahoots with Kleiner or Huyck, refused to consider financing that would have diluted his stock, intentionally obstructed the appointment of a new CEO, received confidential information regarding Echelon's bids for IFCT and used that information to adjust Encite's bid, and intentionally drove the Company into bankruptcy. The egregiousness of some of these alleged offenses depends on the intentions of Marsh and his alleged conspirators, a factual issue that would require a credibility determination at trial. Moreover, the Defendants have not presented evidence regarding Marsh's ownership interest in Encite or the extent to which Marsh's conduct is fairly

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[177] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).
[178] *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 213 (Del. Ch. 1976).
[179] *In re Estate of Tinley*, 2007 WL 2304831, at *1 (Del. Ch. July 19, 2007).

attributable to Encite. Although Marsh's alleged conduct, particularly his use of information from "The Mole," is strongly redolent of inequity and is described with some particularity, I cannot on this record find Encite barred here as a plaintiff as a matter of law under the doctrine of unclean hands.[180]

3. Damages

Even if I were to find that the Director Defendants breached their fiduciary duties, the Plaintiff would still be required to demonstrate some damages. It is well-settled that "[p]laintiffs must prove their damages by a preponderance of the evidence."[181] The Director Defendants argue that the Plaintiff has suffered no damages, and that any recovery would be a windfall.

Admittedly, the Plaintiff's theory of damages in this case has a peculiar equitable flavor. The Plaintiff argues that because the Director Defendants beached their fiduciary duty to IFCT, the resulting claim against the Director Defendants for this breach was an asset of IFCT's, and Encite purchased this asset at the bankruptcy proceeding. The Plaintiff therefore measures its damages as

[180] Echelon's strongest argument for unclean hands would appear to be that Marsh, by obtaining confidential information from The Mole, was able to beat Echelon's bid by the smallest increment. It would be self-defeating, however, for the Director Defendants to raise the unclean hands defense on this ground, since it would be tantamount to an admission that Marsh submitted the best offer.

[181] *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010).

> the cost of IFCT having to file for bankruptcy protection, and the difference between the value of IFCT as of the spring of 2006 (which is no less than the best offer IFCT received for its assets prior to the bankruptcy) and the price at which Encite purchased those assets in the bankruptcy proceeding.[182]

In other words, the better the bargain obtained by the Plaintiff at the bankruptcy sale, the more damages, derivative of IFCT, it is entitled to in this action—thus, in the Defendants' view, seeking the same benefit twice. As discussed earlier in this Opinion, I do not accept the Plaintiff's damages calculation precisely as worded. After the Director Defendants resigned, Marsh—the sole board member—was left with the option of pursuing and accepting an available offer or taking IFCT into bankruptcy, and Marsh decided to declare bankruptcy. Therefore, the Director Defendants are not stuck with the Encite Bankruptcy offer as the price they "achieved," but rather are credited (under the peculiar facts of this case) with the highest value of IFCT's assets following the Director Defendants' resignations. Along that same line, since Marsh had at least one offer for the IFCT assets (his own), and apparently the Noteholders' Offer as well, available *outside* of bankruptcy, and since he alone decided to declare bankruptcy, I find that Encite cannot separately recover for the cost of bankruptcy. It is not as if IFCT was a thriving company before the bidding process, and the Director

[182] Pl.'s Answering Br. at 87.

Defendants drove it into insolvency. IFCT was a doomed company before the Director Defendants reached a decision to auction its assets, and the asset sale in bankruptcy is more appropriately viewed as one of the potential "deals" that was available to IFCT.

With those considerations in mind, I now address the Director Defendants' specific challenges to the Plaintiff's claim for damages. The Director Defendants assert that the Plaintiff's theory of damages fails on its face because it leads to the inequitable result that Encite's damages are inversely related to the price it paid for IFCT's assets in bankruptcy. According to the Director Defendants, the Plaintiff is effectively arguing that because the Director Defendants failed to conduct a fair bidding process, the *Plaintiff* did not pay IFCT enough for IFCT's assets.[183] As stated above, however, the Director Defendants will be credited with the value left to IFCT after their resignations, not necessarily the bankruptcy price paid by Encite.

The Director Defendants further contend that the Plaintiff has suffered no damages because the Director Defendants never rejected or failed to consider an offer that was materially superior to the Noteholders' Offer or

[183] The Plaintiff acknowledged the peculiarity of its damages theory at oral argument. *See* Summ. J. Tr. 138:4-7 (Jenkins) ("The less that Encite paid in the bankruptcy proceeding, compared to the fair market value of the assets, raises the level of damages we seek here. That is correct, Your Honor.").

the Encite Bankruptcy Offer. The Director Defendants maintain that the Noteholders' Offer was superior to any other offer reasonably available to IFCT during the bidding process.[184] For the reasons below, this argument is also insufficient to defeat Encite's claim at the summary judgment stage.

Where this Court finds that a breach of fiduciary duty has occurred, the specificity and amount of evidence required from the Plaintiff on the issue of damages is minimal. "Damages resulting from breaches of fiduciary duty are to be liberally calculated, and will be awarded as long as there is a basis for estimating damages. Also, a duty of loyalty breach 'loosen[s] the stringent requirements of causation and damages.' Any uncertainty in awarding damages is resolved against the wrongdoer."[185] Additionally, "Delaware does not 'require certainty in the award of damages where a wrong has been proven and injury established[,]' . . . [and] [r]esponsible estimates of damages that lack mathematical certainty are permissible *so*

[184] In defending against this argument, the Plaintiff yet again finds itself in an awkward position. On one hand, it argued in bankruptcy court that the Encite Bankruptcy Offer was the best offer available to IFCT's stockholders. *See* Explanation and Support for Proof of Claim of Smith, Katzenstein & Furlow, LLP, Bankr. Proof of Claim (attached as Ex. 44 to DDOB) (arguing that the Encite January Offer was "materially superior" to the Noteholders' Offer and that the Encite Bankruptcy Offer was "slightly superior" to the Encite January Offer). Here, however, in order to prove damages, the Plaintiff must show that the Encite Bankruptcy Offer was not in fact the best offer, but rather that it was inferior to other offers that were reasonably available to IFCT during the bidding process.

[185] *Hampshire Group, Ltd. v. Kuttner*, 2010 WL 2739995, at *50 (Del. Ch. July 12, 2010) (quoting *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996)) (footnotes omitted).

long as the court has a basis to make such a responsible estimate."[186] Despite placing such a minimal burden on plaintiffs who have proven a breach, this Court will nonetheless refuse to award "damages based on mere 'speculation or conjecture' where a plaintiff fails to adequately prove damages."[187]

By a prior ruling of this Court that is the law of this case, the Plaintiff is precluded from submitting expert testimony, including its expert report regarding the value of IFCT's assets as of April 2006.[188] Its ability to demonstrate damages is therefore limited but not eliminated. Although the value of the promised royalty payments seem, to me, difficult to quantify, given IFCT's failure to ever generate a commercially viable product, the various offers that were on the table during the bidding process for IFCT's assets had real, and thus comparable, cash value. Despite the difficulties the Plaintiff faces in proving damages, I cannot at this stage of the proceedings say that the Plaintiff cannot prove any damages or that its theory of damages is facially invalid. As discussed above, this Court takes a liberal approach to calculating damages in the event of a breach of fiduciary duty. Assuming the

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186 *Beard Research*, 8 A.3d at 613 (quoting *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *22 (Del. Ch. Jan. 29, 2010) (emphasis added).

187 *Beard Research*, 8 A.3d at 613 (quoting *Great Am. Opportunities*, 2010 WL 338219, at *23); *see also Cline v. Grelock*, 2010 WL 761142, at *2 (Del. Ch. Mar. 2, 2010) (finding that despite the fact that the defendant had breached his fiduciary duty, the plaintiff had failed to prove any damages because the harm was entirely speculative).

188 *See Encite LLC v. Soni*, 2011 WL 1565181, at *4-*5 (Del. Ch. Apr. 15, 2011).

Plaintiff can demonstrate a breach, the record does not conclusively demonstrate that the Plaintiff would be entirely without demonstrable damages. Given the light burden this Court places on plaintiffs to prove damages where a breach has occurred and because there appears to be some basis upon which the Plaintiff could prove damages at trial, I must deny the Director Defendants' motion for summary judgment on those grounds.

B. Aiding and Abetting

I now address the Plaintiff's claim that Echelon aided and abetted the Director Defendants' alleged breach of fiduciary duty. The Plaintiff contends that Echelon knowingly participated in the Director Defendants' breach by exploiting its relationship with conflicted directors on IFCT's board and improperly influencing those directors' decisions on matters such as the approvals of the 2X Notes and the Noteholders' Offer. Although the Plaintiff has offered limited evidence suggesting that Echelon acted improperly, I find that my analysis of this claim would benefit from a full trial record, and I therefore deny Echelon's motion for summary judgment on the Plaintiff's aiding and abetting claim.

To prevail on an aiding and abetting claim, a plaintiff must prove that a fiduciary relationship existed, that a third party breached that relationship, that the defendant knowingly participated in that third party's breach, and that the breach proximately caused damages.[189] Assuming the plaintiff can prove the breach of a fiduciary duty, "knowing participation" becomes the central question. "Knowing participation in a . . . fiduciary breach requires that the third party act with knowledge that the conduct advocated or assisted constitutes such a breach."[190] The plaintiff can prove knowing participation by showing that a bidder "attempt[ed] to create or exploit conflicts of interest in the board" or "conspire[d] in or agree[d] to the fiduciary breach."[191] Although a bidder "is free to seek the lowest possible price through arms' length negotiations with the target board, . . . 'it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders.'"[192]

Admittedly, the Plaintiff has provided scant evidence suggesting that Echelon participated knowingly in any breach by the Director Defendants. The Plaintiff has not pointed to any specific communications between Echelon and the Defendant Directors that evidence impropriety. Nor has the Plaintiff provided any evidence suggesting that the Director Defendants

[189] *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).
[190] *Gatz v. Ponsoldt*, 925 A.2d 1265, 1276 (Del. 2007) (quoting *Malpiede*, 780 A.2d at 1097).
[191] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011) (quoting *Malpiede*, 780 A.2d at 1097-98).
[192] *Del Monte*, 25 A.3d at 837 (quoting *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984), *aff'd* 575 A.2d 1131 (Del. 1990)).

provided Echelon with confidential information on competing bids. Rather, the Plaintiff seems to infer wrongdoing on Echelon's part simply because Echelon exercised its bargained-for rights as the majority Series B stockholder, and because a majority of the board was interested in Echelon or held Series B stock.

Nonetheless, a key component of any aiding and abetting claim is whether a fiduciary breach occurred, an issue remaining for trial, and given that a majority of the Director Defendants were affiliated with the Noteholders, I find it to be in the interests of justice to reserve judgment on the Plaintiff's aiding and abetting claim until the parties fully develop the facts of this case. Accordingly, I deny Echelon's motion for summary judgment on the Plaintiff's aiding and abetting claim.

C. Tortious Interference with a Prospective Business Relationship

I now turn to the two third-party claims in this case, both of which involve claims by Echelon against Stephen Marsh. In the first claim, Echelon alleges that Stephen Marsh tortiously interfered with Echelon's prospective business relationship with IFCT. Specifically, Echelon asserts that Marsh's actions between March 2006 and April 2006—receiving confidential information from "The Mole," using that information to submit a last-second offer, and giving Jeffrey Setrin the Draft Solicitation to support

Setrin's shareholder lawsuit—wrongfully prevented Echelon from consummating a deal for IFCT's assets and thereby deprived Echelon of the value of the stock Echelon would have owned in iProton. Echelon claims that its damages are the net value of the stock it would have owned in iProton but for the tortious conduct of Marsh. The parties agree that Massachusetts law applies to this claim.[193]

To succeed on a claim for tortious interference with a prospective business relationship, Echelon must prove that (1) Echelon had a prospective advantageous relationship with IFCT, (2) Marsh knowingly induced a breaking of the relationship, (3) Marsh's interference with the relationship, in addition to being intentional, was improper in motive or means, and (4) Echelon was harmed by Marsh's actions.[194] Marsh has moved for summary judgment, challenging Echelon's tortious interference claim on the grounds that (a) Echelon does not have standing to raise that claim because iProton, not Echelon, was a party to the prospective transaction and (b) Echelon did not have a valid expectation of a potential business relationship with IFCT

[193] Summ. J. Tr. 171:4-172:1. The alleged tortious conduct occurred in Massachusetts. Additionally, both Massachusetts and Delaware have adopted Section 766B of the Second Restatement of Torts, and both states require the same elements to be pleaded to state a claim for tortious interference with a prospective business relationship. *See Blackstone v. Cashman*, 860 N.E.2d 7, 12-13 (Mass. 2007); *Empire Fin. Svcs., Inc. v. Bank of N.Y.*, 900 A.2d 92, 98 n.19-20 (Del. 2006).
[194] *Blackstone*, 860 N.E.2d at 12-13.

because the Noteholders' Offer would not have been approved by IFCT's stockholders.

To the extent Echelon is arguing that it had a reasonable expectation of owning an asset (i.e. stock in a corporation that would own IFCT's assets) by way of a business relationship with IFCT, and that because of Marsh's conduct, Echelon lost the net value of this stock, I find that Echelon has standing to sue for tortious interference with a prospective business relationship. Echelon is not claiming its proportionate share of iProton's lost profits, as Marsh seems to argue. Rather, Echelon is arguing that its damages are the lost value of the stock it would have owned in a corporation that would have owned IFCT's assets.[195] Under this theory, Echelon's damages would be the value of the stock it would have owned in iProton had that

[195] Of course, the value of iProton's stock would be the present value of whatever future profits iProton would have realized as a result owning IFCT's assets. This might seem to warrant a conclusion that Echelon's claim is really not differentiable from a derivative claim for iProton's lost profits. Although I need not rule on the issue at this time, it seems to me that had iProton been incorporated and had Marsh thereafter tortiously prevented the consummation of the Noteholders' Offer, the claim for tortious interference would belong to iProton, and Echelon would only be able to bring such claim derivatively. Because iProton never existed, however, Marsh's alleged tortious interference worked a direct economic harm to Echelon and the other potential iProton investors, to the extent that they had a reasonable expectation of owning an asset with a certain value and were wrongfully deprived of that potential ownership. I do not see another way to view this issue without reaching the inequitable conclusion that Marsh is free from liability for tortious interference because his successful interference with the closing of the Noteholders' Offer prevented the only potential claimant against him, iProton, from ever coming into existence.

company been created and had the transaction been consummated, less the amount of Echelon's initial investment in iProton.

With regards to the issue of whether Echelon's expectation of a business relationship was reasonable, I simply cannot rule as a matter of law that the board's approval of the Noteholders' Offer would not have led to an economic benefit to Echelon. This is a fact-intensive issue requiring at least a finding that it was reasonably likely that the stockholders would have approved the Noteholders' Offer had it not been withdrawn. The present record contains little more than conflicting allegations regarding how certain stockholders would have voted. Because I find that Echelon has grounds to assert standing and because there are material facts in dispute as to the likelihood of the Noteholders' Offer being approved by the stockholders, I deny Marsh's motion for summary judgment on Echelon's claim for tortious interference.

D. Contribution

Finally, Echelon seeks contribution from Marsh to the extent Echelon is held liable for causing damage to IFCT. Based on then-Chancellor Chandler's ruling at the motion to dismiss stage of this case, I find that it is law of the case that Echelon can seek contribution from Marsh for the portion of the injury to IFCT for which Marsh is responsible, but only if

Echelon can prove that Marsh caused the same injury to IFCT as did Echelon.[196] Although it seems unlikely that Marsh injured IFCT in the same way that Echelon allegedly did, summary judgment on Echelon's claim for contribution would be premature without a finding of how and to what extent Echelon injured IFCT. I therefore deny Marsh's motion for summary judgment on Echelon's claim for contribution.

IV. CONCLUSION

This Opinion, while denying summary judgment, should have made clear both my concerns with the Director Defendants' (and Marsh's) conduct in their attempted transfer of IFCT's assets and my doubts about Encite's ability to prove damages at trial. This matter has proceeded in this Court for five years, outlasting the tenure of its original judicial officer. In cases such as this, it strikes me that pursuit of litigation may fail where an honest conversation with the opposing side about the costs and benefits of continuing would likely reveal a more rational economic alternative. Perhaps the pursuit of litigation is inevitable, however, when emotions run high and

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[196] *See Encite LLC v. Soni*, 2008 WL 2973015, at *13 (Del. Ch. Aug. 1, 2008) ("Encite has alleged that its injury has been caused by the tortious conduct of Echelon. . . . Echelon, however, . . . alleges that Marsh damaged IFCT by his obstruction of hiring a new CEO, his interference with the sale of IFCT's assets to the Series B Investors, and his exploitation of the bankruptcy process to acquire IFCT's assets for himself at a discount. Thus, to the extent that Encite alleges that Echelon has injured IFCT, Echelon has alleged that Marsh has also injured IFCT—the same injury—and that this injury was caused, in whole or in part, by Marsh. This is sufficient to state a claim for contribution against Marsh.").

“winning” becomes divorced from economic incentive. In any event, given my denial of summary judgment, these litigants are entitled to pursue their claims through trial.

For the reasons stated above, I find that there are material issues of fact requiring a trial on all issues before me on summary judgment. I therefore deny the Director Defendants’ motion for summary judgment, I deny Echelon’s motion for summary judgment, and I deny the Third Party Defendant’s motion for summary judgment.

An order has been entered consistent with this Opinion.