IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ORACLE PARTNERS, L.P., a Delaware limited partnership, Plaintiff/ Counterclaim Defendant, v. BIOLASE, INC., a Delaware corporation, Defendant/ Counterclaim Plaintiff.	: : : : : : : : : : : : :	**C.A. No. 9438-VCN**

MEMORANDUM OPINION

Date Submitted: April 25, 2014
Date Decided: May 21, 2014

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NOBLE, Vice Chancellor

Telephonic board meetings are undoubtedly routine for Delaware corporations. They allow dispersed directors to confer quickly over important issues regarding the corporation's business affairs. Despite their prevalence and utility, however, telephonic meetings have certain disadvantages—foremost among them being the lack of non-verbal communication, such as shaking another's hand or nodding one's head in agreement. The comparative strengths and weaknesses of telephonic and in-person board meetings generally may not matter that much. But, as this action demonstrates, when what was communicated on the phone is in dispute—and thereby becomes the subject of a fundamental corporate governance dispute among a corporation's directors, officers, and stockholders—the Court cannot help but wonder whether there would have even been a dispute had the directors simply met in person.

At issue in this action is what was said, and the legal effect of those statements, during a telephonic meeting on Friday, February 28, 2014, (the "Meeting") of the board of Defendant and Counterclaim-Plaintiff Biolase, Inc. ("Biolase"). Before the Meeting, Biolase had six directors: Federico Pignatelli ("Pignatelli"), Frederick Moll, M.D. ("Moll"), Norman Nemoy, M.D. ("Nemoy"), James Talevich ("Talevich"), Alexander Arrow, M.D. ("Arrow"), and Samuel Low, D.D.S. ("Low").[1]

[1] Joint Pretrial Stip. and Order ("Pre-Trial Stip.") § II, ¶ 4.

On March 3, the Monday following the Meeting, Biolase issued a press release announcing that Arrow and Low had resigned from the board and that two individuals—Paul Clark ("Clark") and Jeffrey Nugent ("Nugent")—had been appointed to the board, which still had six members.[2] But, three days later, the company filed a Form 8-K with the Securities and Exchange Commission ("SEC") disclosing that Clark and Nugent had been appointed to the board, which purportedly had increased to eight members. The March 6 Form 8-K included the March 3 press release as an exhibit.[3]

Within a week, Plaintiff and Counterclaim Defendant Oracle Partners, L.P. ("Oracle"), a Biolase stockholder,[4] initiated this action pursuant to 8 *Del. C.* § 225 to determine the proper composition of the board. The directorships of Pignatelli, Moll, Nemoy, and Talevich (collectively, the "Undisputed Directors") are not at issue.[5] Oracle seeks a declaration that the current board consists of the Undisputed Directors, Clark, and Nugent.[6] In opposition, Biolase seeks a declaration that only the Undisputed Directors are current members of the board. Biolase has also asserted counterclaims against Oracle for fraud and negligent misrepresentation.[7]

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[2] *Id.* § II, ¶ 6.
[3] *Id.* § II, ¶ 8.
[4] *Id.* § II, ¶¶ 1, 12.
[5] On March 20, 2014, the Court entered a Status Quo Order providing that the Undisputed Directors would constitute the Board during the pendency of this litigation. By the terms of the Status Quo Order, the Board may only act by supermajority vote (i.e., three of four directors).
[6] *Id.* § IV.A; Verified Compl. ¶¶ 24-27.
[7] Pre-Trial Stip. § IV.B; Answer and Verified Countercl. of Def. Biolase, Inc. ¶¶ 28-51.

This post-trial memorandum opinion sets forth the Court's findings of fact and conclusions of law.[8] For the reasons set forth below, the Court concludes: (i) the current directors of Biolase are the Undisputed Directors and Clark, who was appointed during the Meeting to the vacancy that had been created when Arrow verbally and effectively resigned; (ii) the Biolase board has one vacancy that was created when Low resigned by email after the Meeting; and (iii) Oracle is not liable to Biolase for fraud or negligent misrepresentation.

I. BACKGROUND

A. *The Parties*

Oracle, a Delaware limited partnership based in Greenwich, Connecticut, is a "strategic investment firm solely within the health care industry."[9] Larry Feinberg ("Feinberg") is the managing member of Oracle's general partner.[10] Oracle has never been involved in a proxy contest, a going-private transaction, or, prior to this action, any litigation.[11] Presently, it beneficially owns 16.4% of Biolase's common stock.[12]

Biolase, a publicly traded Delaware corporation with its headquarters in Irvine, California, is a medical device manufacturer focused on the dental industry.

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[8] The Court held a one-day trial in this matter on April 24, 2014, approximately six weeks after Biolase filed its Verified Complaint.
[9] Trial Tr. ("Tr.") 5 (Feinberg).
[10] Feinberg Dep. 9.
[11] Tr. 6 (Feinberg).
[12] Pre-Trial Stip. § II, ¶ 1.

Its main products are laser-based devices.[13] Pignatelli is Biolase's chairman and Chief Executive Officer ("CEO").[14] Arrow is the company's President and Chief Operating Officer ("COO").[15] Frederick Furry ("Furry") is the company's Chief Financial Officer ("CFO") and was offered as its witness pursuant to Court of Chancery Rule 30(b)(6).[16]

For several years, Biolase has had a stockholder Rights Agreement (*i.e.*, a poison pill) under which rights certificates would be distributed when a stockholder acquired 15% of the company's common stock.[17] The Biolase board raised the pill threshold to 20% on February 4, 2014,[18] in anticipation of the private placement by which Oracle became a 16.4% stockholder later that month.

B. *Key Individuals*

1. The Undisputed Directors: Pignatelli, Moll, Nemoy, and Talevich

Pignatelli first became involved with Biolase in 1991, when he financed the company with approximately $1 million. He has been a director since 1991 and the chairman of the board since 2010. Pignatelli asserts that he spends "110 percent" of his time as chairman and CEO of Biolase, but he conceded that he

[13] Joint Exhibit ("JX") 220.
[14] Tr. 266 (Pignatelli).
[15] *Id.* 106-07 (Arrow).
[16] *Id.* 229 (Furry).
[17] *Id.* 274 (Pignatelli).
[18] JX 73.

has engagements with several other businesses.[19] Perhaps because of these other commitments, Pignatelli regularly works remotely.[20]

Nemoy has been a director of Biolase since 2010,[21] and Moll and Talevich have been directors since 2013.[22] Nemoy is the chair of the board's nominating and corporate governance committee.[23]

2. Arrow and Low

Arrow joined the board in July 2010 and became President and COO in 2013. From Arrow's perspective, Pignatelli has run both the business and the board of Biolase with a "dictatorial management style."[24]

Low joined the board in mid-December 2013. Pignatelli and Arrow recruited him to become a director after they had met at an industry conference.[25]

3. Clark and Nugent

Clark has significant experience in the pharmaceutical industry, both at the officer and board levels. As of March 2014, he was serving as a director on three other boards, including of a private company of which Moll was also a director.[26] Nugent likewise has considerable executive and director experience with medical

[19] Tr. 264, 266-67 (Pignatelli); JX 6.
[20] Tr. 167 (Arrow).
[21] JX 6.
[22] Moll Dep. 25-26; Pre-Trial Stip. § II, ¶ 3.
[23] Moll Dep. 43.
[24] Tr. 106-07, 109 (Arrow).
[25] *Id.* 322-23 (Low).
[26] JX 161; Moll Dep. 43.

device and related companies, most recently with an aesthetic dermatology business that used laser technology similar to that of Biolase.[27]

C. *Oracle Becomes Interested in Investing in Biolase*

Based on a suggestion from one of his analysts, Feinberg first looked into investing in Biolase during the summer of 2013. His interest was piqued when Moll, an acquaintance and a medical device "innovator," joined the board. The more Feinberg looked into Biolase, the more he viewed it as an "exciting company" with "great technology."[28]

Feinberg eventually met Pignatelli, and the two discussed a potential "large investment" by Oracle in Biolase.[29] Two of Feinberg's initial concerns were that the company had "very poor corporate governance" and, in particular, that it "need[ed] a real CEO to run the company."[30] He was not discussing a co-CEO arrangement. Pignatelli seemed generally receptive to these ideas, although he was hesitant about a current investment because he believed the company's stock was undervalued.[31]

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[27] JX 161.
[28] Tr. 6-7, 9 (Feinberg).
[29] *Id.* 9 (Feinberg), 269 (Pignatelli).
[30] *Id.* 9 (Feinberg).
[31] *Id.* 9, 103-04 (Feinberg). Pignatelli claimed that he only discussed stepping aside as CEO in "general terms," *id.* 271 (Pignatelli), but Feinberg's contemporaneous notes support the Court's conclusion that Pignatelli and Feinberg discussed this issue from the beginning of their relationship. JX 239 ("Federico would be thrilled to be just chairman, doesn't want to be CEO. He wants to get pushed upstairs.").

On September 4, Feinberg emailed Pignatelli and Arrow a proposed term sheet for an investment of $6 million for stock and warrants. The proposal also contemplated that the Biolase board would expand by two members, with the new directors nominated by Oracle and reasonably acceptable to the company.[32] At Pignatelli's direction,[33] Arrow responded with an $11 million investment proposal under which Oracle would purchase $6 million of Biolase stock then and commit to buy $5 million more by the end of the year.[34] Feinberg found this proposal "ridiculous."[35]

In a series of emails, the parties debated whether Oracle's proposal would be dilutive to other Biolase stockholders or "long-term accretive."[36] During the exchange, Feinberg repeated his views on the company's corporate governance and management needs to both Pignatelli and Arrow:

> We believe Biolase needs to both supplement its current Board of Directors with more experienced operational personnel, as well as bring in a full-time CEO with medical device experience to help fix the operational issues and implement the strategic vision of Federico.[37]

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[32] JX 16, 17.
[33] Tr. 112 (Arrow).
[34] JX 17.
[35] Tr. 102 (Feinberg).
[36] *Id.* 13 (Feinberg).
[37] JX 17; Tr. 14-15 (Feinberg). At trial, Pignatelli denied ever receiving this email, suggesting that the document may have been altered or forged. *Id.* 273, 299 (Pignatelli). The Court cannot accept Pignatelli's speculation in light of the weight of conflicting testimony.

This subject was not new to Arrow; he had frequently discussed the possibility of hiring a new CEO with Pignatelli, who regularly agreed that it would be "appropriate for him to step aside when the right person could be brought in."[38]

Frustrated by the company's response, Feinberg and one of his analysts considered other options. At one point, it was suggested that Oracle might want to "add on weakness and go hostile anytime."[39] Feinberg's understanding of the term "hostile" in this context was that Oracle would "actively attempt to influence management . . . to improve the board of directors and improve management."[40] In other words, Oracle was not seeking to "control" Biolase—Feinberg wanted strong, independent directors to manage the company.

Another possibility they considered was that Pignatelli might eventually be replaced as CEO. At no point did Feinberg suggest that he wanted to be the CEO of Biolase or that some specific person should have that position. Feinberg testified that this was not so much a plan, or even a goal, but rather a discussion of "what might transpire with this investment over time."[41] At least in part, it appeared to be a reaction to the lack of commitment and business sophistication

[38] Tr. 112-13 (Arrow). Arrow testified that Pignatelli told him explicitly, on more than one occasion, that he would like to step aside as CEO; this sentiment even was part of Pignatelli's pitch to persuade him to join the company. *Id.* 110-11.
[39] JX 20.
[40] Tr. 44-45 (Feinberg). Feinberg further explained that he wanted "to have enough influence on the company that they will listen to their largest shareholders." *Id.*
[41] *Id.* 61-62, 66-67 (Feinberg).

that Feinberg perceived in Pignatelli during their negotiations. Oracle did not directly invest in Biolase at that time.

D. *Oracle Buys Biolase Stock on the Open Market*

Throughout the fall of 2013, Oracle bought Biolase stock in the public markets. Some of these purchases were made before Biolase announced its 2013 third quarter results, which revealed that the company was running out of cash.[42] Feinberg had exchanged at least one email with Moll about this problem.[43]

Oracle continued to accumulate Biolase stock. In November 2013, it filed a Schedule 13D with the SEC disclosing that it beneficially owned 9.89% of the company's stock.[44] The "Purpose of the Transaction" section of the Schedule 13D stated, in part:

> To the extent permitted by law, the Reporting Persons [*i.e.*, Oracle and its affiliates] may take such actions with respect to their investment in the Issuer [*i.e.*, Biolase] as they deem appropriate in order to protect their investment and maximize shareholder value. Such actions may include, without limitation, discussions with other stockholders and/or with management and the Board of Directors of the Issuer concerning the business, operations or future business and strategic plans of the Issuer and composition of the Board of Directors, as well as purchasing additional Shares, selling Shares, engaging in hedging or similar transactions with respect to the Common Stock or taking any other action with respect to the Issuer or any of its securities in any manner permitted by law . . . .[45]

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[42] JX 27.
[43] JX 23.
[44] Pre-Trial Stip. § II, ¶ 1.
[45] JX 28. Oracle's lawyers at Kane Kessler, P.C. ("Kane Kessler") prepared the initial Schedule 13D and the subsequent amendments. Tr. 54 (Feinberg).

Feinberg understood this language to reflect that Oracle was "considering all possible options" with a goal of "improv[ing] shareholder value."[46] This section was not modified when Oracle later filed several amendments to its Schedule 13D.

E. *Feinberg's Thoughts on Biolase's Need for Management*

Around this time, Feinberg expressed his view privately to Clark, a casual friend with whom he occasionally invested,[47] that he felt Biolase needed "new management, two boards seats, and to recapitalize."[48] Earlier, Feinberg had suggested to Clark that "[t]he board will easily swing in our direction" on these points.[49] He based this expectation on conversations he had had with several Biolase directors—namely, Erin Enright ("Enright") and Gregory Lichtwardt ("Lichtwardt")[50]—who wanted Oracle "to get involved to help recapitalize the company and to bring in and effect better corporate governance."[51] Enright and Lichtwardt were in the midst of a significant disagreement with other Biolase

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[46] Tr. 17 (Feinberg). An email he sent to Clark about the Schedule 13D reflected that understanding. JX 34. Separately, after this filing, Feinberg shared his view with at least Clark and a third party that Biolase would likely benefit from different management. Tr. 68 (Feinberg).

[47] Tr. 34-35 (Feinberg).

[48] JX 32; *see also* JX 34.

[49] JX 32. At his deposition Feinberg described this particular email as referring to the board's likelihood of agreeing to "bringing good senior management in to supplement Mr. Pignatelli." Feinberg Dep. 88.

[50] Tr. 22-24 (Feinberg).

During an impromptu meeting in December among Arrow, Pignatelli, Enright, and an Oracle analyst at a dental show in New York, the CEO position was a subject of conversation. The theme seemed to be that Pignatelli would be willing to step aside as CEO, and the Oracle analyst endorsed this sentiment. *Id.* 115 (Arrow); JX 37.

[51] Tr. 20 (Feinberg).

directors, led primarily by Pignatelli, over the financial direction of the company. They wanted to form a special committee to raise approximately $20 million to pay accounts payable, to reduce a line of credit, and to create working capital. Pignatelli strongly opposed this effort.[52] Unable to resolve this fundamental disagreement, Enright and Lichtwardt resigned from the Biolase board on December 4, 2013.[53]

Internally at Oracle, Feinberg explained that he thought Enright was quitting the board because "she thinks we're not being aggressive enough." Specifically, he understood Enright as wanting Oracle "to do a proxy fight."[54] Perhaps reacting to the news that two directors sympathetic toward improving the company's corporate governance had just resigned, Feinberg suggested to a third party that Oracle might "get active and perhaps nasty" regarding its Biolase investment.[55]

F. *Oracle Continues to Buy Biolase Stock*

Almost in passing, Pignatelli suggested in December 2013 that Oracle might want to take Biolase private "in the $5 range."[56] Feinberg never seriously considered that option. Going private was not part of his investment thesis, and he

[52] *See* JX 30, 31; Tr. 116-17 (Arrow).
[53] Pre-Trial Stip. § II, ¶ 2; Tr. 22-24 (Feinberg), 117 (Arrow).
[54] JX 37. Feinberg also wrote, "So I think we should," but nothing came of that comment at the time. *Id.*
[55] JX 38; Tr. 71 (Feinberg).
[56] JX 40.

was concerned that if Oracle attempted a takeover, then "a corporate buyer would step in and take the company" at a higher price.[57]

Near the end of 2013, Oracle bought additional Biolase stock on the public markets. It also purchased approximately $612,000 worth of stock from the company in a private placement.[58] Altogether, Oracle's beneficial ownership had increased to 11.4%. Biolase notes that Oracle's amended Schedule 13D did not include any of the sentiments that Feinberg may have shared with others in the interim.[59]

Feinberg grew more eager to effect corporate governance changes at Biolase as the new year began. In January, Feinberg emailed Clark to let him know that Oracle was "considering launching a proxy contest for 2 board seats in a few weeks," and he apparently wanted to gauge Clark's interest in participating. Feinberg thought they both could get elected, and he expected they would likely "have enough support to force the hiring of a new CEO and a refinancing."[60] Clark said he would "be happy to join [Feinberg] on the board."[61] It does not appear that Oracle took any further steps toward initiating a proxy contest at the time.

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[57] Tr. 25-27 (Feinberg).
[58] *Id.* 24-25 (Feinberg); JX 43
[59] Tr. 74-76 (Feinberg); JX 44.
[60] JX 56; Tr. 77-79 (Feinberg).
[61] JX 56.

Coincidentally, the company's need for financing appeared again in 2014. The company filed a shelf registration statement for $12.5 million, the maximum to which Pignatelli would agree,[62] in January. But, as of the date of trial in this action, Biolase had not yet sold any stock pursuant to this registration statement—perhaps because it already had a willing investor: Oracle.

Pignatelli asked Feinberg if Oracle would be interested in making a $5 million investment in Biolase in February 2014. As the parties negotiated an investment in that range, it became clear that an additional purchase by Oracle of that much stock, at current prices, would have taken its ownership over the company's 15% poison pill threshold. After he discussed the merits of amending the pill with Feinberg, Pigantelli recommended to the board that it raise the threshold from 15% to 20%.[63] The board quickly did so.[64] Oracle then invested approximately $5 million in Biolase through another private placement on February 10,[65] which, with other small market purchases, brought it to its current 16.4% ownership.[66]

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[62] Tr. 117-18 (Arrow).
[63] *Id.* 273-76 (Pignatelli); JX 53. Pignatelli later suggested that had he known that Oracle wanted to control the board, he would not have recommended that the Board approve Oracle's additional investment or raise the poison pill threshold. Tr. 278 (Pignatelli). Whether Oracle ever sought to control the board is a separate issue.
[64] JX 73.
[65] JX 71.
[66] JX 78.

G. *Possible New Directors for Biolase*

The next day, Feinberg again requested to talk with Pignatelli about his corporate governance and management concerns.[67] Feinberg mentioned that he had several director nominees in mind.[68] Pignatelli noted that two current directors—Arrow and Low—would not be up for reelection at the 2014 annual meeting and that he was considering inviting Nugent, who had been the CEO of several companies, to be on the board.[69] Pignatelli also wrote, "I agree on Board,"[70] which Feinberg interpreted as Pignatelli's agreeing that Biolase needed more experienced directors.[71]

Feinberg suggested two candidates: Clark and Mark Gainor ("Gainor").[72] Pignatelli found the resumes of both candidates to be "excellent," but he noted that he "already [had] sort of a commitment for a Board membership with Jeff Nugent."[73] At this time, however, Pignatelli had not offered any board position to, let alone come to an agreement with, Nugent.

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[67] JX 76.
[68] JX 84.
[69] Tr. 279-80 (Pignatelli); JX 84.
[70] JX 84.
[71] Tr. 30-31 (Feinberg).
[72] JX 98; Tr. 278 (Pignatelli).
[73] JX 98.

1. Clark

Feinberg disclosed to Pignatelli that he had been involved with Clark in several past investments.[74] Other than one common investment, Feinberg and Clark have no current business relationships. Clark is also not an investor in Oracle.[75]

There is no evidence that Feinberg and Clark had any agreement, implicit or otherwise, regarding what Clark would do if he became a Biolase director.[76] Feinberg did testify, however, that he had an expectation that Clark, as an independent director with considerable experience, likely "would bring in a new management team, particularly [a] chief executive officer."[77]

2. Gainor

Gainor, like Clark, has extensive management experience in the healthcare and pharmaceutical industries.[78] He and Feinberg have been friends for over a decade.[79]

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[74] JX 108.
[75] Tr. 34-35 (Feinberg).
[76] This is not to say, however, that Feinberg had not shared his views about Biolase with Clark in the past. In particular, Feinberg had expressed his belief that "Pignatelli would not make it in the long run as CEO" and that "a new CEO would be a likely outcome." *Id.* 36 (Feinberg).
[77] *Id.* 36-37 (Feinberg).
[78] JX 98.
[79] Tr. 105 (Feinberg). The parties did not provide additional information about Gainor.

3. Nugent

Nugent grew interested in Biolase because of the possibilities of its laser technology. After talking to Arrow at an industry conference, however, Nugent arranged to meet with Pignatelli.[80] Before he had even met Pignatelli, Nugent already believed that Biolase was "poorly managed, . . . and as a result, . . . undervalued."[81]

Feinberg was at first annoyed that Pignatelli had suggested Nugent—not because Feinberg knew Nugent, but because he did not. Feinberg and Nugent had met only once, and briefly, about an investment opportunity in 2010. They have no business relationship or common investments, and Nugent is not an investor in Oracle.[82] Feinberg was initially concerned that Nugent might not be a truly independent director but might instead be "teaming up" with Pignatelli.[83]

These feelings soon changed. As part of what he considered his "due diligence to find out if this was something [he] really wanted to do," Nugent met with Feinberg, the representative of the company's largest stockholder. The two

[80] *Id.* 176-77 (Nugent).
[81] JX 82.
[82] Tr. 31-33, 39-40 (Feinberg), 176 (Nugent).
[83] *Id.* 32 (Feinberg); JX 90. The whole point of adding two new directors, in Feinberg's opinion, was to get individuals who were independent, not those who might be Pignatelli's "friends . . . that would do what he wanted." Tr. 33 (Feinberg).

met briefly in mid-February to discuss Biolase, including its corporate governance and leadership.[84]

Based on their conversation, Feinberg came to expect that Nugent, as an experienced, independent director like Clark, would "effect change in the CEO position."[85] There is no evidence that they had any agreement, in general or specific terms, as to what Nugent would do as a Biolase director. Any understanding that the two shared was, according to Nugent, "to put stronger, independent directors on the board in order for those individuals to make the right decisions to be able to improve the value of that company."[86] After this meeting, Oracle came to view Nugent's involvement as a strength, not a weakness.[87]

Feinberg later told Pignatelli that, although he did not "really know" Nugent, he nonetheless thought that adding Nugent to the board could be a "very good

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[84] Tr. 189-91 (Nugent). Feinberg recalled that Nugent suggested he might be interested in the CEO position, but he had several other opportunities to consider. *Id.* 38-39 (Feinberg). Nugent would later express a similar sentiment to Clark after the Meeting, but he was cautious that any senior position with Biolase would require relocating his family, which he did not take lightly. *Id.* 190-91 (Nugent); JX 151.

[85] Tr. 39 (Feinberg).

[86] *Id.* 189 (Nugent).

[87] Although the exact chronology is unclear, sometime around this meeting an Oracle analyst expressed the view that the firm might get "control" of the board with Moll, Oracle's two nominees (Clark and Gainor), and Nugent. JX 83. Feinberg explained at trial that his understanding of the term "control" in this context did not mean having directors beholden to him but rather having a "majority of directors who would be independent, logical, normal thinking directors." Tr. 82-84 (Feinberg).

In other words, Feinberg sought to have Biolase under the "control" of independent directors, and thus not beholden to him—or, more importantly, Pignatelli.

idea" for Biolase.[88] Feinberg did not disclose their recent meeting. When asked why, Feinberg testified that he "didn't want to potentially lose whom [he] believed would be a huge improvement as a director on the board of Biolase," because he feared that "if Mr. Pignatelli thought Mr. Nugent had [a] dialogue with [him], then [Pignatelli] would no longer consider Mr. Nugent."[89] For the same reason, Feinberg also encouraged others not to disclose that he may have known Nugent.[90] It appears that Feinberg wanted Nugent as a Biolase director not because Oracle could control him, but rather because Feinberg thought Nugent was exactly the type of independent director that the company desperately needed.

H. *Pignatelli Informally Interviews the Director Candidates*

1. Pignatelli Discusses the CEO Position with Nugent

Nugent and Pignatelli first met on February 20, 2014.[91] At their dinner meeting, they discussed two main subjects: first, the company and its technology; and second, the opportunity for Nugent to join the board and have a "CEO/chairman position." Pignatelli told Nugent—as he had said several times in the past to Arrow and Feinberg—that he was ready to step down as CEO if he was

[88] JX 108.
[89] Tr. 40-41, 91-92 (Feinberg).
[90] *Id.* 95-96 (Feinberg). JX 125.
[91] Tr. 309 (Pignatelli). Nugent and Feinberg exchanged emails about what to expect during the meeting, but they did not discuss anything substantive or otherwise material. *See, e.g.*, JX 95, 96, 102; Tr. 92-94 (Feinberg).

able to find someone who could do a better job,[92] implying that Nugent might be that person. Pignatelli sent Nugent a text message to that effect the next day.[93]

2. Pignatelli Chooses Clark over Gainor

Feinberg's two director candidates, Clark and Gainor, met with various Biolase executives at the company's California offices on Tuesday, February 25. Pignatelli and Arrow made presentations, and Furry participated in these meetings for several hours. Furry could not recall any discussion of Oracle. Of the two candidates, Pignatelli ultimately preferred Clark.[94]

3. Nugent Tours the Biolase Offices

Two days later, on February 27, Nugent toured Biolase's offices. He likewise met with several people, including Pignatelli, Arrow, Furry, and Talevich.[95] But, even before these meetings, based on his diligence with investors and dental surgeons whom he knew personally, Nugent believed there was a "serious question as to Mr. Pignatelli's competence as chairman and CEO and his ability to dramatically change the performance of that company." During his day

[92] Tr. 178-79, 186 (Nugent).
[93] JX 210; Tr. 179-80 (Nugent). Although Pignatelli denied that he ever mentioned to Nugent that he was ready to step down as CEO, *id.* 309 (Pignatelli), the weight of the evidence demonstrates that the opposite more likely occurred.
[94] Tr. 231-33 (Furry).
[95] *Id.* 180 (Nugent). Again, while Furry was in the room, Oracle did not come up in the meetings with Nugent. *Id.* 234-35 (Furry).

in California, Nugent's view of Pignatelli changed "dramatically," and for the worse.[96]

One scene in particular demonstrated the weaknesses of Biolase's corporate governance practices. Nugent was in the room when Pignatelli called Nemoy, the head of the board's nominating and corporate governance committee, and "told" Nemoy what he wanted to happen during the Meeting: for Arrow and Low to resign, and for Clark and Nugent to be appointed. Within an hour, Nemoy sent an email to the board reflecting what Pignatelli had requested.[97] Nugent viewed this dynamic—a chairman and CEO unilaterally dictating what the board would do—as very problematic.[98] Throughout the day, Nugent was also becoming very troubled by Pignatelli's management style of "striking fear" into employees.[99]

At some point, Feinberg and Pignatelli came to an agreement on the two persons to add to the Biolase board: Clark and Nugent.[100] Each nominee was likely informed that the other would also be nominated as a director. Clark told Pignatelli that he did not know Nugent, but he did find Nugent's background

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[96] *Id.* 180-83 (Nugent). For example, Nugent was very concerned about the "preposterous" and unrealistically positive guidance that Pignatelli planned on giving analysts during the company's upcoming earnings release. Nugent was very vocal about this issue with Pignatelli and others. *Id.* As he did with similar testimony critical of his management, Pignatelli denied having such a conversation with Nugent before the Meeting. *Id.* 280-81 (Pignatelli).
[97] JX 118.
[98] Tr. 184-85 (Nugent).
[99] *Id.* 183 (Nugent).
[100] *Id.* 33 (Feinberg).

"impressive."[101] Separately, Feinberg would later inform Gainor that he would not be a director of Biolase.[102]

I. *Pignatelli Tells Arrow and Low that They are Going to Resign from the Board*

Part of the agenda for the Meeting was to nominate a slate of directors for Biolase's 2014 annual stockholder meeting. By February 21, Pignatelli had decided that Arrow and Low would not be re-nominated and that Clark and Nugent would be nominated in their stead.[103] That plan continued to change, however. Talevich proposed a few other options,[104] but Pignatelli ultimately decided, no later than February 27, that Arrow and Low would resign during the Meeting and be replaced immediately by Clark and Nugent.[105] Expanding the board from six directors to seven or eight was never considered before the Meeting, according to Furry, because of these "planned" vacancies.[106]

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[101] JX 116.
[102] Although the exact timing is unclear, sometime on February 27 or 28, Feinberg also wrote that Clark and Nugent "will immediately call a board meeting to review the CEO position and eliminate Federico from that job." JX 148. The point of sending the message was to "placate" Gainor, his friend, and let know him what was happening. Tr. 105 (Feinberg). Regardless of whatever Feinberg may have expected, Nugent flatly rejected that they had any agreement to terminate Pignatelli as CEO. *Id.* 211-12 (Nugent).
[103] JX 103.
[104] JX 135.
[105] JX 118, 119.
[106] Tr. 250 (Furry).

1. Arrow

Pignatelli first told Arrow that he did not want him on the board long-term in December 2013. The possibility that Arrow might resign did not come up in earnest, however, until around February 27. That day, when Pignatelli requested that Arrow resign from the board during the Meeting, Arrow was "surprised and unhappy." The two debated for some time over whether Arrow should resign or serve out the rest of his term.[107]

That night, Arrow had dinner with Pignatelli and Nugent. On the drive there, Arrow discussed the resignation with Nugent, who encouraged Arrow to "not get too exercised on it right now."[108] Primarily two topics were discussed at dinner: Arrow's resignation from the board, and Nugent's opportunity to become the CEO of Biolase. At some point, Arrow likely said that he wanted a few days to think about resigning because he felt that he had been given short notice about it.[109]

But, by the end of the meal, Arrow agreed to "resign the next morning" during the Meeting. He and Pignatelli even shook hands to memorialize their agreement.[110]

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[107] *Id.* 119-21 (Arrow).
[108] *Id.* 187 (Nugent).
[109] *Id.* 121, 149-50 (Arrow).
[110] *Id.* 122 (Arrow). During dinner, Pignatelli intimated that he would keep Arrow as President and COO for as long as he was CEO. *Id.*

2. Low

After he became a director in December 2013, Low grew concerned that his membership on the board might jeopardize his consulting agreement with the company. By the middle of February 2014, Low informed Arrow and Furry that, if he needed to pick one position, he preferred to be a consultant instead of a director.[111] Likely the day before the Meeting, Pignatelli called Low and asked him to resign. Low testified that he told Pignatelli that he would consider resigning "if it was in the best interests of the company." Based on this conversation and the emails circulated by Pignatelli and Nemoy, Low understood that he and Arrow would be resigning from the board and that Clark and Nugent would be appointed as their replacements.[112]

J. *February 28, 2014*

1. The Meeting

The board convened the Meeting at 10:00 a.m. PST. Furry and Michael Carroll ("Carroll"), Biolase's Secretary and General Counsel, had prepared the agenda.[113] Carroll began the meeting by bringing up the resignations of Arrow and Low.[114]

[111] *Id.* 326-27 (Low).
[112] *Id.* 328-29 (Low).
[113] *Id.* 236 (Furry); JX 126.
[114] Tr. 122. (Arrow).

Arrow quickly interrupted Carroll to discuss whether the expiration date on his director stock options could be extended. He also likely suggested that the board could be expanded to seven. Pignatelli reacted negatively to Arrow's comments, demanding that Arrow follow through on that "hand shake deal" to resign. The two probably argued for between fifteen and thirty minutes. Arrow eventually asked Moll about what he should do, and Moll encouraged him to follow Pignatelli's lead on this point.[115] Arrow testified that, at the end of the debate, he said, "Okay, I agree, I go along with that."[116] With those words, Arrow believed that he had verbally resigned from the board.[117]

Low recalled that the agenda provided that he would be resigning from the board, but he testified that he never spoke during the Meeting.[118] In fact, no one could recall that Low said anything during the Meeting.[119] Despite Pignatelli's statements to the contrary,[120] Low's resignation was not conditioned on his accepting any consulting agreement.[121] Low further testified that he intended his resignation to become effective "[w]ith the completion of a written resignation." That is, he "assumed that [he] would not be a board member after [he] had

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[115] *Id.* 123-24, 154-55 (Arrow).
[116] *Id.* 124 (Arrow).
[117] *Id.* 124-125 (Arrow). The deposition and trial testimony of other witnesses supports Arrow's understanding that he had resigned. *Id.* 237 (Furry); Low Dep. 33; Moll Dep. 59; Talevich Dep. 45. Only Pignatelli claimed that Arrow did not agree to resign. Tr. 315 (Pignatelli).
[118] Tr. 324 (Low).
[119] *Id.* 161 (Arrow), 238 (Furry), 283 (Pignatelli); Moll Dep. 57; Talevich Dep. 45-46.
[120] Tr. 313 (Pignatelli).
[121] *Id.* 329-30 (Low).

tendered a written resignation," which he planned to do, presumably after the Meeting.[122]

After the discussion of the resignations, the board unanimously voted to appoint Clark and Nugent as directors.[123] Furry was fairly confident that Arrow affirmatively participated in this vote, but he could not recall if Low said anything.[124] Arrow believed that he voted on the appointments. He did so not to suggest that he was still a director, but rather to avoid "mak[ing] it seem like [he] was spiteful that [he] had just been forced to resign."[125]

Carroll prepared a draft of the board minutes of the Meeting.[126] The draft reflects that the resignation discussion occurred before the appointments and that the Meeting concluded at 11:12 a.m. PST.[127] Because of this proceeding, the board has not yet adopted the minutes.[128]

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[122] *Id.* 325, 330-31 (Low).
[123] *Id.* 127 (Arrow), 239 (Furry); Moll Dep. 123; Talevich Dep. 46-47.
Only Pignatelli testified that the Board voted for the appointments of Clark and Nugent before the discussion of the resignations. Tr. 282 (Pignatelli). Even when challenged at trial that his testimony on the chronology differed from that of everyone else, he maintained that he had "a very clear recollection of that meeting." *Id.* 314-15 (Pignatelli). Given the weight of evidence to the contrary, the Court cannot adopt Pignatelli's testimony on this issue.
[124] Tr. 239 (Furry).
[125] *Id.* 156 (Arrow).
[126] *Id.* 240 (Furry).
[127] JX 227.
[128] There was testimony at trial suggesting that this draft may have been edited on March 21. Furry acknowledged that if the metadata on the draft minutes reflect edits on March 21, then that would have been during the course of this litigation. Tr. 252 (Furry).

2. Arrow's Conversation with Pignatelli

After the Meeting, Arrow again asked Pignatelli why it could not have been another director—namely, Nemoy—who resigned. Arrow argued that, as an officer, he received no director compensation, but Biolase paid $42,000 to Nemoy to serve as a board member. He also still wanted to be a part of the new slate of directors for the 2014 annual meeting.[129] Pignatelli was not persuaded, and this conversation did not change anything for either of them.

3. The Resignation Emails

Shortly after the Meeting, Carroll provided Arrow and Low with a template resignation email for them to send to Pignatelli. The template stated, in part:

> Dear Federico:
>
> This letter is notice to Biolase, Inc. (the "Company") that I am resigning as a member of the Board of Directors of the Company, effective as of 12:00 p.m. Pacific Time today.
>
> Yours very truly,[130]

Arrow copied the template into a new email, added additional comments about his time on the board, and then sent it to Pignatelli and Carroll.[131] Unlike Low, Arrow did not think that he needed to tender a written resignation to resign; rather, he sent the email because he was "instructed to do so by [Biolase's] general counsel." Because it was "obvious" that he had resigned during the Meeting, it "did not

[129] *Id.* 161-62 (Arrow).
[130] JX 128.
[131] Tr. 125-26 (Arrow); JX 137.

occur" to Arrow to change the effective time or to note that he was "confirming" his prior resignation.[132]

Low sent his resignation email, with no modifications, to Pignatelli and Carroll within an hour of the Meeting.[133]

K. *Clark and Nugent's Conduct as Purported Directors of Biolase*

Even though Clark and Nugent had never talked substantively before the Meeting,[134] that did not stop them from immediately getting to work as directors to understand the business and affairs of Biolase. Late on February 28, they jointly requested certain information from the other directors, including the financial results for the fourth quarter and year-end of 2013.[135] Furry then circulated a draft of Biolase's 2013 Form 10-K filing to the board.[136]

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[132] Tr. 126, 166, 171 (Arrow).
[133] *Id.* 324 (Low); JX 136.
[134] JX 121.
[135] JX 139. Nugent would later forward this request, which he did not view as confidential information, to Oracle. JX 144; Tr. 213-15 (Nugent).

The day before the Meeting, Nugent signed a confidentiality agreement with Biolase not to disclose any material, non-public information. JX 130. Nugent conceded at trial that he likely provided confidential information to Oracle regarding certain board activities, but he believed that the unusual circumstances warranted doing so. Tr. 204-07 (Nugent). *Compare* JX 160, *with* JX 157; *see also* JX 171, 186.

At first, Feinberg testified that he did not believe that Clark or Nugent had ever provided material, non-public financial information about Biolase to Oracle. Tr. 45, 52 (Feinberg). He subsequently noted that he may have learned certain non-public, financial information during a phone call from Clark or Nugent in which they expressed their pessimism about Biolase meeting its numbers in the upcoming Form 10-K that was soon to be released. *Id.* 96-98.

After the purchases in February, Oracle did not trade in, and has no current plans to trade in, Biolase stock. *Id.* 42.
[136] JX 138; Tr. 286 (Pignatelli).

Feinberg had limited conversations with Clark and Nugent after the Meeting. But, based on what the three of them did discuss, Feinberg understood that Clark and Nugent believed that "the situation was much worse than they thought," especially regarding potential guidance that Biolase would soon issue to investors about its expected growth for 2014.[137] There is no evidence suggesting that Feinberg directed or controlled Clark's or Nugent's actions or decisionmaking process after the Meeting.

Over the weekend, Clark and Nugent "shared [their] observations" about Biolase. Both thought that the company was in "a very dangerous situation" with Pignatelli as chairman and CEO. Nugent described the feeling as "all red lights[,] . . . no yellow lights." They both agreed it was necessary and appropriate to seek to make a change in the CEO position—and sooner rather than later.[138]

L. *The Dispute Arises*

1. The March 3 Press Release

Biolase announced the purported changes to its board in a press release it issued on March 3. The press release stated, in part:

> [T]he Board of Directors (the "Board") has appointed Paul Clark and Jeffrey Nugent to the Board. Dr. Alexander K. Arrow and Dr. Sam Low tendered their resignations from the Board on February 28, 201[4]. As a result of these appointments and resignations,

[137] Tr. 47-48 (Feinberg).
[138] *Id.* 193 (Nugent).

> BIOLASE's Board currently consists of six directors, five of whom are independent directors.[139]

Pignatelli is quoted as being "thrilled" by these new appointments.[140] Furry, who helped draft the press release, believed it was accurate.[141]

2. Clark and Nugent Ask Pignatelli to Resign

That same day, Clark and Nugent called Pignatelli and tried to convince him, "as nicely as [they] could," that it was "an opportune time for him to step down."[142] Pignatelli was "furious" that he was asked to quit as CEO and chairman, and as a director.[143] He told Clark and Nugent that he would raise this issue with the board and then quickly hung up the phone. Pignatelli claims that when he reached other directors that day—Moll, Nemoy, and Talevich—they were all "shocked" by what Clark and Nugent had requested.[144]

After speaking with Pignatelli, Nugent called Feinberg and relayed much of what had just happened.[145] Feinberg would subsequently talk to Pignatelli and

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[139] JX 161.
[140] *Id.*
[141] Tr. 241 (Furry).
[142] *Id.* 193-94 (Nugent).
[143] *Id.* 286-87, 317 (Pignatelli).
[144] *Id.* 287-88 (Pignatelli).
[145] *Id.* 219 (Nugent).

express his own "shock[]" at the situation.[146] The evidence does not show that Feinberg directed Clark or Nugent to ask Pignatelli to resign.[147]

3. Pignatelli Solicits Arrow and Low to Rescind their Resignations

Pignatelli then spoke with Carroll and Furry, and they considered their options. One of the ideas they discussed was expanding the board from six members to eight members to try to prevent a majority of directors who might vote to remove Pignatelli as CEO. To that end, they considered whether Arrow and Low could be asked to rescind their resignations.[148] Pignatelli ultimately solicited Arrow and Low to do so.[149]

Each of Arrow and Low purported to rescind his resignation on March 3.[150]

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[146] *Id.* 289 (Pignatelli).

[147] Although he had made his feelings about Biolase's management known generally, Feinberg never talked with Clark or Nugent about asking Pignatelli to resign from the board. He testified at trial that their doing so was a bad idea. His view was that Pignatelli, who had been an "ambassador" for the company for years, "should remain involved until the board could rule as to what his role should be going forward." *Id.* 49 (Feinberg).

Around this time, Feinberg and Moll exchanged several text messages about recent developments at Biolase. Feinberg suggested that he had asked for Clark and Nugent to remove Pignatelli as CEO, but at the same time he expressed his frustration about the way in which Clark and Nugent acted on March 3. JX 228. The Court cannot infer control or an agreement from these messages, particularly when other evidence strongly implies that Feinberg, Clark, and Nugent had each independently, and for different reasons, come to the same conclusion: Biolase management needed to change.

[148] *Id.* 256-57 (Furry).

[149] *Id.* 129 (Arrow), 260 (Furry), 317 (Pignatelli), 332 (Low).

Pignatelli wanted Arrow back on the board if he was willing to go along with a proposal for the board to form a special committee of all Biolase directors except Clark and Nugent. This special committee would have all the powers of the full board, including the ability to nominate a slate of directors for the company's upcoming stockholder meeting. *Id.* 129 (Arrow). Arrow agreed to go along with it. *Id.* 130-31 (Arrow).

[150] JX 162, 163. Despite doing so, Low understood was that it would take a board action for him to return to the board. Tr. 333 (Low).

4. The Board Asks for Information from Clark and Nugent

Several Biolase directors sought to learn the full extent of Clark's and Nugent's possible motivations for asking Pignatelli to resign. The board's nominating and corporate governance committee, chaired by Nemoy, requested information from them on March 5 about their possible relationships and communications with Oracle since the Meeting.[151] In response, Clark and Nugent each claimed to have no material relationship with Oracle or Feinberg.[152]

M. *The Events of March 6-7*

1. Biolase Files a Form 8-K Regarding the Meeting

Pignatelli instructed someone at Biolase to file a Form 8-K with the SEC on March 6.[153] The Form 8-K stated, in part:

> On February 28, 2014, the Board of Directors (the "Board") of Biolase, Inc. (the "Company") appointed Paul Clark and Jeffrey Nugent to the Board. . . . As a result of these appointments, BIOLASE's Board currently consists of eight directors, six of whom are independent directors.[154]

The Form 8-K made no mention of the resignations of Arrow or Low, but it did include the March 3 press release as an exhibit. Despite the obvious contradiction

[151] JX 169, 177.
[152] JX 182, 190.
[153] Tr. 260-61 (Furry).
[154] JX 145.

between the Form 8-K and the attached press release, Furry believed that the March 6 Form 8-K was accurate when it was filed.[155]

2. A Biolase Board Meeting with Eight Purported Directors

Pignatelli scheduled a telephonic board meeting for March 7 with eight director invitees—the Undisputed Directors, Clark, Nugent, Arrow, and Low.[156] Kane Kessler, Oracle's counsel, drafted or reviewed a letter that Clark and Nugent submitted to the board regarding the Form 8-K and the upcoming meeting.[157] Biolase points to the possible relationship between Kane Kessler and Clark and Nugent as proof of Oracle's influence over, and control of, these individuals. The evidence does not support Biolase's contention. Nugent testified that one of the key reasons why he contacted Kane Kessler was that he wanted prompt legal advice on certain issues, but he was not able to retain independent counsel until approximately March 11, when he, Clark, and several others retained Ropes & Gray LLP ("Ropes").[158]

It is likely that all eight individuals dialed in to this telephonic meeting.[159] When the meeting began, Pignatelli proposed a motion—likely one that would create a special committee comprised of everyone except Clark and Nugent and

[155] Tr. 242 (Furry).
[156] JX 171.
[157] JX 179, 183; Tr. 55 (Feinberg).
Feinberg also likely reviewed this letter. *Id.* 56-57 (Feinberg). Nugent could not recall who drafted which parts of it. *Id.* 197-99 (Nugent).
[158] Tr. 225-26 (Nugent).
[159] *See, e.g.*, *id.* 131-32 (Arrow); Low Dep. 45.

invested with all the powers of the board—but he was soon cut off by Talevich, who stated that another motion was pending. Nugent then moved to remove Pignatelli as chairman and CEO.[160] Nugent's motion was seconded, but Pignatelli quickly declared that the motion was out of order and thus would not be up for a vote. At that time, Biolase's counsel, Jones Day, suggested to continue the meeting until the following week.[161] It is likely that Clark and Nugent talked with Feinberg after this telephonic board meeting.[162]

3. Oracle Notifies Biolase of its Intent to Run a Proxy Contest

In light of the uncertainty (and possibly serious dispute) regarding the composition of Biolase's board, Oracle filed the materials necessary to nominate directors at the upcoming annual meeting with the SEC on March 7.[163] Feinberg felt that, with what had happened during the past week as only more evidence of the company's poor corporate governance and weak management, he "needed to take action and get serious representation on the board of directors."[164] Oracle nominated four directors: Moll, Clark, Nugent, and Eric Varma, an Oracle analyst.[165]

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[160] Tr. 131-32 (Arrow). The next day, Nugent circulated a draft of this motion. JX 195.
[161] Tr. 132 (Arrow). Arrow thought Nugent's motion would have passed. *Id.* 133.
The adjourned meeting was rescheduled for March 10, and then March 12, before it was ultimately cancelled. Pre-Trial Stip. § II, ¶¶ 10-11, 13.
[162] Tr. 223-24 (Nugent); JX 193. The substance of any phone call remains unclear.
[163] JX 184.
[164] Tr. 49-50 (Feinberg).
[165] *Id.* 86 (Feinberg).

Feinberg's testimony as a whole reveals that he is not interested in controlling Biolase; he wants independent directors to be in control. To that end, he acknowledged that he might not agree with the decisions made by independent directors. But, Feinberg understood it to be the role of the board, not Oracle as a stockholder, to direct the company's business affairs, which would include choosing management.[166]

N. *The Effect of this Dispute on Biolase's Business*

As the company's CFO, Furry believes that the dispute over the composition of the board has had a negative effect on Biolase. Specifically, he testified about its consequences on the company's ability to raise capital, employee morale, and line of credit with its primary lender.[167] Pignatelli echoed these comments, claiming that this litigation has had a "dramatic" effect on Biolase.[168]

The notice of intent paperwork purportedly reflected that, unbeknownst to Feinberg, Clark had purchased Biolase stock sometime after Feinberg informed him in November 2013 that it was going to file a Schedule 13D. *Id.* 86-87 (Feinberg).

[166] *Id.* 45-46 (Feinberg).

[167] *Id.* 242-47 (Furry).

[168] *Id.* 290-92 (Pignatelli).

Separately, the Court notes that Arrow testified that Pignatelli had repeatedly tried to influence his testimony. The evidence ranged from an employment agreement offered as a "bribe," *id.* 135-37 (Arrow); JX 202, to a demand for Arrow's personal cell phone records, Tr. 141 (Arrow); JX 233, to even a threat "to crucify" Arrow over the situation, Tr. 142 (Arrow); JX 235.

II. CONTENTIONS

A. *Oracle's Claim Regarding the Composition of the Board*

Oracle contends that a preponderance of the evidence confirms that the parties intended for Arrow and Low to resign from the board, and for Clark and Nugent to be appointed to these vacancies, during the Meeting.[169] It argues that Biolase's bylaws, which include language similar to 8 *Del. C.* § 141(b), permitted Arrow and Low to resign verbally, which it claims they did.[170] Oracle submits that all of the evidence, other than Pignatelli's testimony, establishes that these resignations occurred, and were thereby effective, before the appointments.[171] Alternatively, to the extent that one or both of the resignations may not have been effective before the appointments, Oracle argues that Clark and Nugent were duly appointed under 8 *Del. C.* § 223(d) as of the effective date of the resignations.[172]

Biolase rejects Oracle's presentation of the facts and interpretation of the relevant case law. Foremost, Biolase argues that only a written or electronic resignation by a director is permitted under the company's bylaws, if not also the relevant statute, 8 *Del. C.* § 141(b).[173] Were the Court to conclude that its bylaws permit verbal resignations, Biolase submits that the preponderance of the evidence

[169] Pl.'s Pre-Trial Br. ("Oracle Br.") 38-39.
[170] *Id.* 35-38.
[171] *Id.* 38-39.
[172] *Id.* 41-43.
[173] Biolase, Inc.'s Pretrial Br. ("Biolase Br.") 30-33.

demonstrates that neither Arrow nor Low resigned before or during the Meeting, meaning that there were no vacancies to which Clark and Nugent could have been appointed.[174] It further contends that the facts here are outside the scope of 8 *Del. C.* § 223(d) and that, in any event, the Court should deny Oracle the relief it seeks under the unclean hands doctrine.[175]

B. *Biolase's Counterclaims for Fraud and Negligent Misrepresentation*

Biolase contends that Oracle is liable for fraud, or at least negligent misrepresentation, for two alleged "deceptions": (i) concealing that it wanted board representation to oust Pignatelli as CEO; and (ii) failing to disclose its purported "agreements" with Clark and Nugent to fire Pignatelli once they became directors. It argues that Oracle's Schedule 13D in particular was false because it did not disclose Oracle's intent to change management or to start a proxy contest.[176]

In opposition, Oracle argues that Biolase has not carried its burden on either of the counterclaims for several reasons. First, Oracle contends that it was not, despite Biolase's suggestions otherwise, seeking to obtain control over the company.[177] Second, it argues that the evidence does not show that it had any arrangement or understanding, especially regarding Pignatelli's position as CEO,

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[174] *Id.* 33-36.
[175] *Id.* 37-43.
[176] *Id.* 44-51.
[177] Oracle Br. 45-48.

with either Clark or Nugent before or after their appointments to the board.[178] Third, Oracle maintains that it had no affirmative duty to inform Biolase about the limited, informational conversations between Feinberg and Clark and Nugent.[179] For these and other reasons, Oracle submits that the Court should reject Biolase's counterclaims.

III. ANALYSIS

A. *Oracle's Claim*

A stockholder may petition the Court pursuant to 8 *Del. C.* § 225(a) to "determine the validity of any election, appointment, removal, or resignation of any director" of a Delaware corporation. Biolase's bylaws provide that the number of directors shall be fixed by resolution of the board,[180] and it is undisputed that the Biolase board has had six seats at all relevant times. An individual cannot be appointed to a board with no vacancies.[181] Accordingly, Oracle, as the petitioning stockholder in this action, must demonstrate, by a preponderance of the evidence, that Clark and Nugent were validly appointed by the Biolase board to vacancies created by the resignations of Arrow and Low.[182]

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[178] *Id.* 49-52.
[179] *Id.* 52-54.
[180] JX 1 ("Biolase Bylaws") § 3.2.
[181] *See Bossier v. Connell*, 1986 WL 12785, 12 Del. J. Corp. L. 1052, 1060 (Del. Ch. Nov. 12, 1986).
[182] *See, e.g.*, *Boris v. Schaheen*, 2013 WL 6331287, at *12 (Del. Ch. Dec. 2, 2013) (citing *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 453 (Del. Ch. 2012)).

Delaware law generally permits directors to resign verbally. The relevant statute, 8 *Del. C.* § 141(b), provides that "[a] director may resign at any time upon notice given in writing or by electronic transmission to the corporation." This Court has long interpreted the word "may" in this statute as permissive rather than mandatory, which necessarily implies that a director may resign in other ways—such as verbally.[183]

A corporation's governing documents may modify this default rule. Biolase's bylaws provide, in relevant part:

> Any director or member of a committee of, the Board may resign at any time upon written notice to the Board, the Chairman of the Board, the Executive Vice Chairman of the Board, the CEO or the President. Unless specified otherwise in the notice, such resignation shall take effect upon receipt of the notice . . . . The acceptance of a resignation shall not be necessary to make it effective.[184]

Delaware courts interpret a corporation's bylaws using contract interpretation principles.[185] A bylaw provision that is not reasonably susceptible to more than one interpretation is unambiguous, and an unambiguous bylaw should be construed by the Court "as it is written," with "[w]ords and phrases . . . given their commonly

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[183] *See Gen. Video Corp. v. Kertesz*, 2008 WL 5247120, at *17 (Del. Ch. Dec. 17, 2008) ("The question then is whether these statutory provisions [*i.e.*, 8 *Del C.* § 141(b)] require written notice to the corporation before a resignation can take effect. They do not."); *see also Boris*, 2013 WL 6331287, at *17 (citing *Dionisi v. DeCampli*, 1995 WL 398536, at *9 (Del. Ch. June 28, 1995), *amended*, 1996 WL 39680 (Del. Ch. Jan. 23, 1996)) ("First in dicta, and then twice as a legal conclusion, this Court has interpreted the use of 'may' in this statute to mean that it is permissive, rather than mandatory, for a director to resign with written notice. The Court concurs; a director may resign orally.").

[184] Biolase Bylaws § 3.3.

[185] *See Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

accepted meaning."[186] Section 3.3 of Biolase's bylaws is unambiguous because "may" in this context can only be interpreted as permissive, not mandatory. Just as under 8 *Del C.* § 141(b), Biolase's bylaws permit, but do not require, a director to resign in writing. Thus, by necessary implication, a Biolase director may also resign verbally.

"[W]hether a director has resigned is a question of fact to be determined from the circumstances of each case."[187] In general, a director may resign verbally through a sufficiently clear manifestation of his or her intent to resign.[188] Although the magic words "I resign" may not be necessary, there must nonetheless be some objective manifestation of words or actions to that effect.[189] An individual's subsequent statements and conduct may also be relevant in determining whether he or she previously resigned as a director.[190]

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[186] *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983).
[187] *See Bachmann v. Ontell*, 1984 WL 8245, 10 Del. J. Corp. L. 149, 152 (Del. Ch. Nov. 27, 1984).
[188] *See Dionisi*, 1995 WL 398536, at *8 (quoting *Bachmann*, 10 Del. J. Corp. L. at 152) ("Loose and ambiguous language will not be regarded as sufficient to prove the resignation of a corporate officer, at least where the subsequent acts and declarations of the officer are inconsistent with any such contention.").
[189] *See Gen. Video Corp.*, 2008 WL 5247120, at *17-18 (concluding that a director had verbally resigned by making what the Court described in its post-trial opinion as an "unequivocal[]" statement that he "couldn't do it anymore, . . . wanted out, . . . [and] was all done"); *cf. Hockessin Cmty. Ctr.*, 59 A.3d at 458 (determining for a nonstock corporation that several directors had not resigned where their communications specified that they would resign in writing in the future).
[190] *See Bachmann*, 10 Del. J. Corp. L. at 152 (concluding that the evidence and conflicting testimony did not demonstrate that a director had resigned verbally because, in part, he continued to conduct himself as a director and other directors, including those who testified that he had resigned, continued to treat him as a current member of the board); *see also Boris*, 2013 WL

1. Did Arrow or Low Verbally Resign during the Meeting?

A clear preponderance of the evidence demonstrates that Arrow verbally resigned from the board during the Meeting. Arrow may not have said "I resign," but the overwhelming weight of the trial and deposition testimony—namely, that of everyone except Pignatelli—shows that he made a sufficiently clear statement to that effect. Moreover, Arrow's own intent and understanding were that, with his statement of "Okay, I agree, I go along with that,"[191] he had resigned as a Biolase director, effective immediately. His subsequent acts—such as possibly voting during the Meeting to appoint Clark and Nugent and then submitting a written resignation email after the Meeting—do not change the Court's factual or legal conclusions. In particular, the Court credits Arrow's testimony that he submitted the email resignation not because he considered it necessary to resign, but rather because he was instructed to do so by Carroll, the company's General Counsel.

Thus, Arrow resigned during the Meeting.

The Court cannot reach the same conclusion regarding whether Low resigned during the Meeting. Even though the board (including Low) may have understood going into the Meeting that Low would be resigning to create a vacancy for a new director, the Court cannot conclude that Low sufficiently

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6331287, at *18 (finding, in light of conflicting testimony, that two individuals had resigned verbally by the time that each signed, under penalty of perjury, the corporation's annual franchise tax reports on which neither was listed as a current director).

[191] Tr. 124 (Arrow).

manifested his intent to resign—primarily because the preponderance of the evidence, including the testimony of Low himself, demonstrates that he did not speak at all during the Meeting. Low also did not sufficiently manifest an intent to resign effective at a future date because his intent was merely to resign later in writing. On these facts, the Court cannot infer an intent to resign from a director's silence.

Therefore, during the Meeting, Low neither resigned during the Meeting nor resigned then effective at a future date.[192] Instead, and consistent with 8 *Del. C.* § 141(b) and Section 3.3 of Biolase's bylaws, Low resigned when he tendered his resignation email, the effective time of which was 12:00 p.m. PST—that is, after the Meeting.

2. Was Clark or Nugent Appointed to the Board during the Meeting?

Only one vacancy existed during the Meeting when the Biolase board unanimously voted to appoint two new directors. A board's appointing two directors where there is legally only one vacancy cannot mean that neither nominee was duly appointed. Determining which of Clark or Nugent was appointed to Arrow's vacancy is not a decision to be reached after a well-defined legal analysis

[192] Because the Court concludes that Low did not resign effective at a future date, Oracle cannot rely on 8 *Del. C.* § 223(d), pursuant to which a board may, where a current director resigns effective at a future date, appoint a new director to the fill the vacancy when the resignation becomes effective. *See, e.g.*, *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 439-40 (Del. Ch. 1972) (applying the provision of 8 *Del. C.* § 223(d) in the context of a summary judgment motion where it was not disputed that a director had resigned and where the new director was elected "for a term to begin with [the] resignation.").

but rather one in which the Court must look to the practical realities of the situation. The draft Meeting minutes reflect, in the following order, that Low and Arrow would be resigning and that Nugent and Clark were appointed to the board.[193] Accordingly, under a parallel reading of the minutes, the Court concludes that, after Arrow verbally resigned during the Meeting, the Biolase board duly appointed Clark to that vacancy.[194]

3. Does the Unclean Hands Doctrine Prevent Oracle's Request for Relief?

Unclean hands is a long-recognized equitable doctrine under which this Court may "refuse[] to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals."[195] The Court may invoke this public policy principle when a party's particularly egregious conduct offends the integrity of this Court.[196] For the Court to deny relief on the grounds of unclean hands, the supposedly inequitable conduct must "relat[e] directly to the matter in controversy."[197]

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[193] JX 227.

[194] Biolase did not otherwise challenge the resolution by which the board appointed the new directors.

Separately, the Court acknowledges that Ropes, as counsel for Clark, Nugent, and several other individuals, informed the Court after the trial that Clark and Nugent decided that if there was only one vacancy during the Meeting, then Clark should be appointed to it. Letter from Richard L. Gallagher, Jr., Esquire (Apr. 29, 2014). The Court did not consider this letter in reaching its conclusion on this issue.

[195] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).

[196] *See id.*

[197] *Walter v. Walter*, 136 A.2d 202, 207 (Del. 1957).

Biolase argues primarily that Oracle's failing to disclose its intent to seek control of the company and its agreements with Clark and Nugent to fire Pignatelli are sufficiently egregious conduct for the Court to bar its relief.[198] The Court concludes otherwise. The evidence adduced at trial revealed that Oracle did not want or seek to control Biolase—it only wanted to have stronger, independent directors on the board. In the same way, the evidence did not show any agreements between Oracle and Clark and Nugent as to their conduct as directors.

Biolase also argues that Oracle's inducing Clark and Nugent to share material, non-public information justifies applying unclean hands to bar Oracle's request for relief.[199] Regardless of whether Clark, Nugent, or both may have shared such information, the Court concludes that Oracle did not induce them to do so. Even if Clark later breached his confidentiality agreement with Biolase, this alone does not warrant applying the unclean hands doctrine to Oracle's claim regarding the composition of the board after the Meeting.[200]

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[198] Biolase Br. 41-43.
[199] *Id.* 42.
[200] *See Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 81 (Del. Ch. 2008) ("Portnoy responded by engaging in conversations that, I have little doubt, involved literal violations of Archibald's confidentiality agreement. . . . Portnoy's conduct, while being far from pristine, falls well short of disqualifying him [under unclean hands] from seeking relief.").

B. *Biolase's Counterclaims*[201]

Biolase asserts claims against Oracle for fraud and negligent misrepresentation regarding two alleged "deceptions": (i) failing to disclose that it was seeking to oust Pignatelli as CEO; and (ii) failing to disclose that it had agreed with Clark and Nugent that, were they to become directors, they would fire Pignatelli as soon as possible.[202] Oracle denies that it ever made any such misrepresentations.[203]

To prevail on its claims for fraud under Delaware law, Biolase must prove five elements:

> (1) [Oracle] falsely represented or omitted facts that [it] had a duty to disclose; (2) [Oracle] knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) [Oracle] intended to induce [Biolase] to act or refrain from acting; (4) [Biolase] acted in justifiable reliance on the representation; and (5) [Biolase] was injured by its reliance.[204]

"In addition to overt representations, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak."[205] To recover on its claims for negligent misrepresentation under Delaware law, Biolase

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[201] The Court notes that the parties did not brief or argue the governing law for Biolase's counterclaims. Consistent with the parties' submissions, the Court assumes, without deciding, that the counterclaims arise under Delaware law.
[202] Biolase Br. 46-50.
[203] Oracle Br. 45-52.
[204] *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005); *see also In re Wayport, Inc. Litig.*, 76 A.3d 296, 323 (Del. Ch. 2013).
[205] *H-M Wexford LLC v. Encorp., Inc.*, 832 A.2d 129, 144 (Del. Ch. 2003).

must prove largely the same elements as for its claim for fraud, except it need not establish scienter; negligence would suffice.[206]

The Court concludes that Biolase has failed to carry its burden of proof for its fraud and negligent misrepresentation claims for want of a valid premise: Oracle did not make any false statements or omissions. From the very beginning of their relationship, Oracle (through Feinberg) informed Biolase (by way of Pignatelli) that it wanted first, to add independent directors to the company's board, and second, assuming that the reconstituted board found it appropriate, to improve the company's management. These statements by Oracle, especially those made during their initial negotiations regarding a multi-million dollar direct investment,[207] were clear. That Biolase or Pignatelli may not have effectively listened to what was said cannot be the basis for a claim of fraud or negligent misrepresentation.

In addition, there is no evidence from which the Court could conclude that Oracle had any agreement, especially an agreement to terminate Pignatelli, with Clark and Nugent. Feinberg may have shared his views on replacing Pignatelli with Clark and Nugent, but that does not mean that Clark or Nugent had agreed to do what Oracle wanted. Based on the evidence, especially Nugent's testimony about Biolase's poor corporate governance practices and hostile work

[206] *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996); *see also Wayport*, 76 A.3d at 327.
[207] *See, e.g.*, JX 17.

environment, there were more than sufficient grounds on which Clark and Nugent, as experienced and independent directors, could have reasonably concluded that a change in the CEO position was appropriate. Overall, the substantial weight of the evidence reveals that Oracle and Feinberg did not make any misrepresentations, even negligent ones, to Biolase.[208]

IV. CONCLUSION

For the foregoing reasons, the Court concludes that the board of Biolase is currently comprised of five directors: Pignatelli, Moll, Nemoy, Talevich, and Clark. There is also one vacancy on the board.

The Court also concludes that Oracle is entitled to judgment in its favor on Biolase's counterclaims.

An implementing order will be entered.

[208] As the parties properly recognized during post-trial argument, this Court is not tasked with determining whether Oracle's Schedule 13D filings were consistent with federal securities laws. *See, e.g.*, *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 20-25 (Del. Ch. 2009) (recognizing that only federal courts can hear claims asserting a violation of the federal securities laws but nonetheless concluding that this Court has jurisdiction to hear a common law fraud claim that the information disclosed in an SEC filing was false or misleading). Even if it is the case that Oracle should have disclosed more (or differently) than it did publicly, the Court nonetheless concludes that Oracle did not defraud or negligently misrepresent its intentions to Biolase privately. *See* JX 17.