



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

K-BAR HOLDINGS LLC, on behalf of :
itself and all other similarly :
situated stockholders of TILE SHOP :
HOLDINGS, INC., and derivatively on :
behalf of Nominal Defendant TILE :
SHOP HOLDINGS, INC., a Delaware :
corporation, :

Plaintiff, :

v. : Civil Action

: No. 2019-0892-SG

ROBERT A. RUCKER, PETER J. JACULLO :
III, PETER H. KAMIN, CABELL :
LOLMAUGH, TODD KRASNOW, and PHILIP :
B. LIVINGSTON, :

Defendants, :

and :

TILE SHOP HOLDINGS, INC., a :
Delaware corporation, :

Nominal Defendant. :

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Court of Chancery Courthouse
Courtroom No. 2
34 The Circle
Georgetown, Delaware
Friday, November 8, 2019
3:30 p.m.

- - -

BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor.

- - -

ORAL ARGUMENT AND RULING OF THE COURT ON PLAINTIFF'S
MOTION FOR A TEMPORARY RESTRAINING ORDER AND
PLAINTIFF'S MOTION FOR EXPEDITED PROCEEDINGS

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0532

1 APPEARANCES:

2 GREGORY V. VARALLO, ESQ.
Bernstein Litowitz Berger & Grossmann LLP

3 -and-

4 CHRISTOPHER J. ORRICO, ESQ.

JACQUELINE Y. MA, ESQ.

of the New York Bar

5 Bernstein Litowitz Berger & Grossmann LLP

-and-

6 JONATHAN KASS, ESQ.

Offit Kurman, P.A.

7 for Plaintiff

8

9 BROCK E. CZESCHIN, ESQ.

Richards, Layton & Finger, P.A.

10 -and-

11 THOMAS M. RITZERT, ESQ.

of the Ohio Bar

Thompson Hine LLP

12 for Defendants and Nominal Defendant

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1 THE COURT: Good afternoon, Counsel.
2 Thank you for making yourselves available. I
3 appreciate it. We put you in the punishment courtroom
4 not through any fault of your own, just random
5 punishment being handed out for all of us.

6 Mr. Varallo, I see you're standing.

7 MR. CZESCHIN: Mr. Varallo is gracious
8 enough to let me do introductions first.

9 THE COURT: All right.

10 MR. CZESCHIN: Brock Czeschin from
11 Richards Layton & Finger on behalf of the defendants.
12 My co-counsel Thomas Ritzert from Thompson Hine in
13 Cleveland.

14 THE COURT: Welcome both.

15 MR. CZESCHIN: Mr. Ritzert will be
16 doing the speaking today.

17 THE COURT: I'll be happy to hear from
18 Mr. Ritzert.

19 MR. VARALLO: Good afternoon, Your
20 Honor. May it please the Court, Gregory Varallo from
21 Bernstein Litowitz Berger & Grossmann, Wilmington
22 office.

23 THE COURT: That sounds very strange.
24 But welcome.

1 MR. VARALLO: It's my great pleasure
2 to appear before you today. With Your Honor's
3 permission, my colleague C.J. Orrico will be making
4 the presentation. He's been admitted pro hac. I also
5 would take a moment to introduce to the Court my
6 colleague Jacqueline Ma from the New York office and
7 our co-counsel Jonathan Kass from Offit Kurman.

8 THE COURT: Welcome.

9 For those who have come from a
10 distance, we do have a real courtroom here. It's
11 actually a very beautiful courtroom. It's being set
12 up right now for a three-day trial which starts first
13 thing Tuesday morning that predated the scheduling of
14 the TRO, and that's why we're down here. I don't want
15 you to think this is the best we've got. It's just
16 the best that's available.

17 Please go ahead, Mr. Orrico.

18 MR. ORRICO: May it please the Court,
19 good afternoon, Your Honor. C.J. Orrico from the
20 Bernstein Litowitz law firm.

21 THE COURT: You just taught me this
22 the other day on the phone and I already lost it.
23 That's really sad. I'll try to remember it now,
24 Mr. Orrico.

1 MR. ORRICO: Our firm has tough names.
2 You may know my colleague Jeroen van Kwawegen. I
3 still cannot pronounce his last name.

4 In any event, I'm here on behalf of
5 plaintiff K-Bar Holdings, a stockholder of the Tile
6 Shop. I would just like to note for the Court that
7 Kevin Barnes has joined us today. He's the principal
8 of K-Bar Holdings, and he came here from New York.

9 THE COURT: Now, does your client just
10 not know how to spell K-Bar, or is this not the marine
11 combat knife company?

12 MR. BARNES: Your Honor, I'm
13 originally from Wyoming and there's the K Bar Z Ranch,
14 which is a big landholding in the area. So it's in
15 honor of that. But I respect the marines also. Their
16 role is very important.

17 MR. ORRICO: Your Honor, before I jump
18 into my presentation, if I may approach the bench. I
19 have a few documents. I'll also give my colleagues
20 here copies as well.

21 The first is a copy of the court order
22 from the Minnesota court about Mr. Rucker's divorce.
23 The second is a Form 4 that was filed with the SEC
24 yesterday with some more stock purchases. And the

1 third is the 8-K that was filed with the SEC by Tile
2 Shop. And you'll see there's an Exhibit 99.4 in the
3 back of that, which was with the 8-K.

4 So, again, I thank the Court for
5 hearing us under such exigent circumstances. I
6 believe the Court has read our complaint and our
7 moving papers, and I thank the Court for the
8 opportunity to hear us on Wednesday and allow me to
9 speak to the facts. So unless the Court has any
10 specific questions about the background, I plan to
11 keep my presentation short and just dive right into
12 the issues.

13 THE COURT: I'm not only familiar with
14 your presentation, but I have had a chance to read the
15 opposition papers as well. But I'm happy to have you
16 tell me whatever it is you think is important.

17 MR. ORRICO: Sure, Your Honor. And
18 I'll be very brief with background.

19 On October 21st, 2019, three members
20 of the Tile Shop board, defendants Robert Rucker,
21 Peter Jacullo, Peter Kamin, owned approximately 30
22 percent of the company. The next day, on October
23 22nd, the Tile Shop's board of directors announced
24 that the company would go dark, delist from the Nasdaq

1 and deregister from the SEC.

2 Immediately after the announcement,
3 the market price of the company's stock dropped about
4 60 percent and the board members began to purchase,
5 and continue to purchase, the company's stock at a
6 frenzied pace at depressed prices.

7 Since October 22nd to today, Your
8 Honor, defendants Kamin and Jacullo have bought over
9 13 percent of the company and now defendants Rucker,
10 Kamin, and Jacullo own about 42 percent of the
11 company.

12 One member of the board, Christopher
13 Cook, immediately resigned from the board after the
14 board approved the going dark. And the rest have done
15 nothing since the approval to protect the company from
16 the three insiders taking control.

17 THE COURT: Did he vote in favor, or
18 is that not in the record?

19 MR. ORRICO: Your Honor, we learned
20 this morning from defendants' papers that there was at
21 least a representation that defendant Cook voted in
22 favor of the going dark.

23 But, in any event, since the going
24 dark and the defendants buying up the shares, there's

1 been no attempts to reach a standstill, from our
2 understanding. There's been no poison pill put in
3 place. Rather, they've been rushing to complete the
4 going-dark scheme.

5 Now, on November 1st, they filed a
6 notice with the Nasdaq to delist. They expect that to
7 finalize today. And I just want to make some
8 clarification for the Court, because I also had a
9 chance to read their papers this morning and there
10 seems to be a little bit of talking past each. So the
11 delisting is being done now. So for purposes of the
12 TRO, we're not asking to stop that because that's not
13 part of the status quo right now. Obviously, we plan
14 to challenge that at trial on a full record.

15 However, the plan to send the Form 15,
16 which deregisters the company from the SEC, is not
17 supposed to be sent until November 12th. Now,
18 according to that Exhibit 99 to the back of the 10-Q
19 that I gave to the Court earlier, once the Form 15 is
20 filed, the company has no obligations to file its
21 periodic reports. And once deregistered, all of the
22 requirements associated with being an Exchange Act
23 registered company is terminated. And I will get into
24 that in a little bit. But by delisting and by

1 deregistering, defendants are attempting to gain
2 control of the company, extract personal benefits
3 without public scrutiny. It's going to be secret once
4 they go dark.

5 The delisting and the deregistering
6 will significantly reduce the amount of information
7 about the company for public stockholders and will
8 continue to negatively impact the market value for the
9 company's stock, as many institutional investors
10 cannot hold delisted, deregistered stock. Defendants
11 actually recognize this fact as part of their 10-Q at
12 page 27. And if this wasn't troubling enough, since
13 we spoke with the Court on Wednesday, we learned that
14 defendant Kamin purchased another 99,000 shares of
15 Tile Shop.

16 Now, I want to pause on that a minute.
17 I provided the Court with the Form 4. With full
18 knowledge of our complaint, the motions, and while the
19 Court was in the process of addressing this matter,
20 defendants went forward with their scheme to take
21 control of the company, notwithstanding the Court or
22 the parties. And because insider SEC Form 4s are
23 usually due to the SEC by the end of the second
24 business day after the purchases, we will not learn of

1 any additional purchases from yesterday or today by --
2 until later tonight or on Monday. So without judicial
3 intervention, the board will gain control of the
4 company at an unfair price without paying a control
5 premium and destroying value for public stockholders.
6 And it will all be done in secret if the
7 deregistration is allowed to go forward.

8 THE COURT: Is the deregistration
9 reversible and, if so, what has to be done to reverse
10 it?

11 MR. ORRICO: Sure, Your Honor. From
12 our understanding, the way the process works is the
13 following: The Form 15 is filed, they say, on
14 November 12th. Once that happens, they no longer --
15 everything is suspended. They don't have to file
16 anything. It becomes finalized 90 days from there.
17 So that would be early February, let's say. In that
18 time period, my understanding is you can amend it or
19 stop it on your own.

20 So plaintiff seeks a TRO to keep the
21 status quo --

22 THE COURT: I'm still educating
23 myself. So your understanding is that if the Form 15
24 is filed on November 12th, there's a 90-day period in

1 which it could be withdrawn; correct?

2 MR. ORRICO: Yes, Your Honor.

3 THE COURT: And what if it is not
4 filed on November 12th? Is there some obligation that
5 that puts on the company as opposed to it being filed
6 on December 12th?

7 MR. ORRICO: Yes.

8 THE COURT: The reporting requirements
9 would persist for a month, or would they persist for
10 another year, or would it have to be -- is it linked
11 in some way to the Nasdaq delisting? How does this
12 fit together?

13 MR. ORRICO: Sure. So my
14 understanding is that the deregistration from the SEC
15 is separate and apart from the delisting from the
16 Nasdaq. So by delisting from the Nasdaq, it's no
17 longer traded on the Nasdaq. Now it's an OTC-traded
18 stock.

19 Right now it's registered, the company
20 is registered. So it has to abide by the SEC
21 reporting obligations, which include periodic reports,
22 which include insider trade -- it has to disclose,
23 like, the Form 4 I handed Your Honor. There's the 5
24 percent stockholder clause, there's the disclosures

1 about related-party transactions that all have to be
2 disclosed. The minute that the deregistration is
3 filed, everything is suspended. And then it becomes
4 finalized, meaning it's done -- the trigger is -- they
5 would have to reregister after the 90 days.

6 THE COURT: Right.

7 MR. ORRICO: So, theoretically, if we
8 were to delay the Form 15 being filed on, say,
9 December 12th, like a month -- the
10 deregistration would be -- their obligations would be
11 suspended on the 12th, and then it would be 90 days
12 from there for everything to be officially terminated.

13 THE COURT: But they would retain the
14 ability to send the Form 15 on December 12th, in your
15 view; correct?

16 MR. ORRICO: Yes, Your Honor.

17 THE COURT: It's not like if they
18 don't send it on November 12th, they lose the
19 opportunity for some period of time?

20 MR. ORRICO: No, Your Honor. They can
21 send that Form 15 whenever they want. November 12th
22 is not some drop-dead date that they can never
23 deregister ever again, from my understanding.

24 THE COURT: Got it.

1 MR. ORRICO: So plaintiffs seek a TRO
2 to keep the status quo now and the expedited
3 proceedings. It is well-settled in Delaware that the
4 purpose of the TRO is to maintain the status quo.

5 THE COURT: I don't need much help
6 with the TRO.

7 MR. ORRICO: Sorry, Your Honor. I'll
8 move on.

9 So, here -- just what we're seeking --
10 we're seeking a TRO to stop the purchases, to separate
11 the shares that have been purchased since October 22nd
12 to effectuate any control, and just to stop the
13 deregistration, to hold that off for some period of
14 time.

15 THE COURT: Let's take those one at a
16 time. What entities are you seeking to have purchases
17 stopped for?

18 MR. ORRICO: Sure, Your Honor.

19 THE COURT: And individuals.

20 MR. ORRICO: It would be the members
21 of the board, any of their affiliates. So, for
22 example, Mr. Kamin has -- I think it's 3K Limited
23 Partnership which he's making purchase through. It
24 would be their business entities, family members,

1 associates, like that.

2 THE COURT: So that's the first thing
3 you're seeking. The second thing is to sterilize the
4 ability of the board members who have bought shares to
5 vote the shares? I'm not quite sure what you're
6 asking.

7 MR. ORRICO: Sure, Your Honor. Let's
8 take a step back here for just a second. So since the
9 time of the announcement of the going dark to today,
10 they have purchased about 13 percent of stock. All
11 we're asking is that be segregated or in escrow where
12 they can't vote it, or something like that.

13 It's the same thing that Vice
14 Chancellor Jacobs did in the *Ivanhoe* matter. In that
15 case, there was a creeping takeover and he ordered --
16 the Court ordered a TRO for purchases and then
17 expanded it to kind of carve out what was purchased
18 from the time of the wrongdoing.

19 THE COURT: Why would I need to carve
20 this out? What is the harm that would be involved in
21 allowing that 13 percent of stock to be voted and on
22 what?

23 MR. ORRICO: Well, Your Honor,
24 respectfully -- so now they would have 42 percent of

1 control. Again, it's not, technical, over the 50
2 percent threshold, but they could still use that to do
3 some type of transaction, I would imagine. And also
4 just because --

5 THE COURT: You're talking about a
6 transaction that the stockholders would have to vote
7 on for this to make any difference; right?

8 So there are transactions the board
9 can do. They can do them whether I sterilize this 13
10 percent or not. So we're only talking about
11 transactions where the stockholders have a right to
12 vote on the transaction. If that were going to happen
13 and you had a belief that it was detrimental, wouldn't
14 that be the time to ask for a TRO with respect to that
15 13 percent? Now you are just kind of saying, "Well,
16 if they ever do having something in mind, like selling
17 assets or buying assets that would trigger a
18 stockholder vote, you should have this stock put in
19 escrow so they can't vote it." I'm just struggling a
20 little bit to see why that's part of the TRO.

21 MR. ORRICO: Your Honor, after
22 listening to you, I think we can agree that just for
23 purposes of the TRO it should just be to stop
24 additional shares, and then after a trial on a full

1 record, we can discuss if those shares should be put
2 into a trust or something to figure them out. I think
3 that's the best way to proceed.

4 THE COURT: Fair enough.

5 And then the third thing is to enjoin
6 filing the Form 15?

7 MR. ORRICO: Yes, Your Honor.

8 THE COURT: I got it.

9 MR. ORRICO: So, Your Honor, I know
10 you had a chance to read their papers. It appears
11 they are not challenging the colorability of our
12 claims, so --

13 THE COURT: I can't read anything into
14 that because I told them on the phone that you had met
15 colorability. So I don't read anything into that
16 other than it's not really an issue here today.

17 MR. ORRICO: So unless the Court has
18 any questions, I plan to just jump into what I believe
19 are the two debates, which is irreparable harm and the
20 balance of equities.

21 THE COURT: Yes.

22 MR. ORRICO: So in assessing both the
23 TRO motion and the motion for expedited proceedings is
24 an assessment of whether plaintiff has demonstrated

1 sufficient possibility of threatened irreparable
2 injury. The Court will find there is threat of
3 irreparable harm if injury is imminent and genuine,
4 and full relief will not be available if the motion is
5 denied.

6 Here, absent the TRO and expedited
7 proceedings, there is an imminent threat that
8 plaintiff and the proposed class will suffer
9 irreparable harm from the go-dark scheme. Defendants
10 argue that they have not gained control yet and there
11 is no imminent irreparable harm. But actions speak
12 louder than words, Your Honor. As we discussed, since
13 the announcement of the go dark, defendants have
14 bought over 13 percent of the company. They continue
15 to buy shares even after we filed our papers. And
16 without preserving the status quo, control will be
17 lost and it will go to defendants Kamin, Jacullo, and
18 Rucker.

19 As Vice Chancellor Jacobs stated in
20 the *Macmillan Shareholders Litigation*, "[t]here would
21 be no practical way to 'put Humpty Dumpty back
22 together again'" or unscramble the proverbial egg "if
23 the [go-dark scheme] goes forward but is ultimately
24 found to be unlawful." That's 552 A.2d at 1246.

1 THE COURT: Why wouldn't an order and
2 the divestment of the stock post-trial on the merits
3 reach the same result?

4 MR. ORRICO: I'm sorry, Your Honor?

5 THE COURT: Why couldn't I remedy this
6 post-trial by ordering a divestiture of the stock?
7 Why do I need to stop them from purchasing it?

8 MR. ORRICO: Your Honor, let's say --
9 if they are not stopped now, they will continue to
10 buy -- they will reach that 51 percent threshold and
11 then that situation of where there is a transaction,
12 it could be pushed through in between that time
13 period.

14 THE COURT: Okay. I understand.

15 MR. ORRICO: Also, Your Honor, they
16 would also have the right to vote at an annual meeting
17 to change --

18 THE COURT: They would. And that
19 really was my -- as you were discussing the matter,
20 what I was thinking about is, what is the least
21 disruptive way to enter negative injunctive relief?
22 And I don't know that it's to stop them from buying
23 stock. It may be simply to sterilize their ability to
24 vote the stock or do something else. But I'm thinking

1 out loud as you are talking.

2 So that's the acquisition of stock,
3 one. But the other one is the Form 15. What is the
4 irreparable harm faced if I do not enjoin that?

5 MR. ORRICO: Your Honor, I just have
6 one thing to add on the stock purchases.

7 THE COURT: Sure. I didn't mean to
8 cut you off.

9 MR. ORRICO: Very quick. There's a
10 second part to the irreparable harm there. And
11 defendants concede that the lost opportunity to be
12 paid a control premium can constitute irreparable
13 injury but argue that we have not identified how we
14 will lose the control premium here. Again, they are
15 buying up control. So as they buy --

16 THE COURT: But wouldn't divestiture
17 of the stock give you the same remedy post-trial? If
18 I were to say they have to divest themselves of the
19 stock that they bought -- let's say they are breaching
20 their fiduciary duties in buying this stock and I
21 found, after a trial, when they were at 55 percent
22 that they had to disgorge the 13 percent plus whatever
23 they bought since. Wouldn't that give you full relief
24 and, if not, why not?

1 MR. ORRICO: I need to think about it,
2 Your Honor.

3 THE COURT: We're both doing a lot of
4 thinking.

5 MR. ORRICO: I understand. So we go
6 to trial. It's taking back the control essentially
7 and there's damages paid.

8 THE COURT: There are various ways to
9 do that. It would be to allow them to hold the stock
10 and not vote it, force them to disgorge it. There are
11 other ways to achieve that.

12 MR. ORRICO: I guess my answer to
13 that, Your Honor, is that there are market
14 consequences to them gaining control now. So if they
15 do gain control over, say, the next two weeks, the
16 market -- even though there may be a pending trial to
17 take back the stock, control has been effectuated, and
18 the market will most likely react negative to that
19 because it's going to be insiders.

20 THE COURT: Fair enough.

21 MR. VARALLO: May I have just one
22 minute?

23 THE COURT: Sure, Mr. Varallo.

24 MR. ORRICO: As my colleague

1 Mr. Varallo aptly points out, how will we trace the
2 divestiture and to who? because trades are being done
3 on the open market for the stock now.

4 THE COURT: I get that. And that's a
5 good point.

6 MR. ORRICO: Now, on the Form 15 --

7 THE COURT: You can't keep Mr. Varallo
8 quiet. He just has to jump up now and then.

9 MR. VARALLO: Your Honor knows me too
10 well.

11 MR. ORRICO: I'm glad he's on my team,
12 Your Honor.

13 THE COURT: So now the Form 15.

14 MR. ORRICO: Yes, Your Honor. There's
15 no discussion in defendants' papers about irreparable
16 harm to be suffered if defendants are allowed to file
17 the Form 15 next week. But the deregistration poses
18 imminent irreparable harm. The deregistration will
19 give the board control of the information while
20 eliminating transparency to public stockholders.

21 That's very important here with this
22 board, with a history of engaging in self-interested
23 behavior. Indeed, the deregistration will be used as
24 a mechanism for the board to avoid public scrutiny,

1 extract private benefits of control, protect
2 themselves from liability, and hide poor management
3 performance. As the company admits in the 8-K, when
4 the deregistration occurs, the company will no longer
5 have to file if its officers, directors, or 10 percent
6 stockholders are transacting in the stock and they
7 won't be subject to the recovering profits provision
8 of the Exchange Act, meaning defendants will be able
9 to buy more shares in secret. Persons acquiring more
10 than 5 percent of the company will no longer be
11 required to report their beneficial ownership under
12 the Exchange Act. That means that their friends may
13 be able to buy, who are lower in their benefit. The
14 public won't know about it.

15 Also, details about related-party
16 transactions pursuant to Item 404. As we lay out in
17 our complaint -- I think it's paragraphs 36 through 40
18 and 51 -- there's a history here of defendants
19 engaging in related-party transactions at the company.
20 They'll be able to engage in more without even
21 disclosing them.

22 They won't have to disclose material
23 weaknesses in their internal control. So just this
24 past Monday when they filed their 10-Q, they reported

1 that the Enterprise Resource Planning System, which is
2 overseen by defendant Rucker's son, is a material
3 weakness in control. Again, this is another way where
4 they'll be able to hide self-interested strategies.

5 The deregistration, the finalization
6 of it, the actual filing of the Form 15, will also
7 continue to destroy the market value of the stock,
8 which brings me into my next point of irreparable harm
9 for the deregistration.

10 So defendants, in their papers, say,
11 "Hey, listen, the TRO and expedition should be denied
12 because money damages are available here." And I'll
13 agree, money damages are available here. But there's
14 uncertainties, like collectability.

15 Let's take a step back here. From the
16 day of the announcement till today, about \$120 million
17 of market cap has been lost. There's also the chance
18 to lose a control premium if control is effectuated.
19 So based off these rough numbers, there easily could
20 be a \$9 million damages figure. How are we going to
21 collect that? Again, it's uncertain.

22 And like Vice Chancellor Noble stated
23 in the *County of York v. Merrill Lynch*, "[t]he mere
24 theoretical possibility that damages could be awarded

1 does not preclude the Court ... from expediting the
2 proceedings." Where, as here, there is uncertainty
3 about collectability.

4 So unless Your Honor has any more
5 questions on irreparable harm, I plan to move to the
6 balance of equities.

7 THE COURT: Well, the quote you've
8 just given me refers to expedition, not injunctive
9 relief. So collectability usually is not -- are there
10 any problems here besides collectability in computing
11 damages?

12 MR. ORRICO: Well, Your Honor, again,
13 as time goes on -- let's break it up. So now we're
14 talking about the Form 15. So, again, I went through
15 a list of -- and there's more than that -- but a list
16 of things that they will no longer have to do.

17 THE COURT: I get that.

18 MR. ORRICO: To me -- for example, my
19 client bought into this company. And part of his
20 investment was, okay, this company has to comply with
21 SEC rules. And that's being lost. Again, I'm sure we
22 could figure out a way, but it's uncertain of how we
23 will address that.

24 THE COURT: That's really the problem,

1 isn't it? There would be a proof problem as well as
2 how do you calculate the value of lost informational
3 rights. I get it. I don't have any other questions.

4 MR. ORRICO: Your Honor, I'll turn to
5 the balance of equities now for the TRO.

6 So the balance of hardships is
7 essentially a weighing of the benefit to make sure it
8 outweighs any drawbacks of the public or defendants.
9 Here, Your Honor, I submit that the balance of
10 equities is clear in favor of granting a TRO. Without
11 the TRO, defendants will continue the going-dark
12 scheme. They'll keep buying. There will be a loss of
13 value because of the deregistration, a loss of
14 transparency, all the things we just talked about.

15 Now, defendants argue that they'll be
16 harmed because they will not be able to realize the
17 purported expense reduction resulting from the
18 deregistration.

19 THE COURT: That's a monetary
20 detriment that will be addressed in the bond, I would
21 think, if I grant a TRO.

22 MR. ORRICO: Well, Your Honor, I
23 would, I guess, address two things with your question.
24 First with the bond --

1 THE COURT: It wasn't really a
2 question, but you can address it.

3 MR. ORRICO: Sorry, Your Honor. We
4 believe it would be a nominal amount of a bond,
5 unsecured.

6 I would also just like to comment on
7 this purported harm from the TRO. So they argue that
8 they will not be able to realize any of the expense
9 reduction from the deregistration. Now, this is all
10 based off of an affidavit from Mr. Jacullo which is
11 saying that the company is losing money, has negative
12 earnings, and the 1.6 million of purported savings
13 will prevent a financial disaster essentially.

14 First, I'll note to the Court that
15 Mr. Jacullo is a named defendant and he's part of the
16 group buying shares here, including the shares after
17 the announcement. I'll also note that, as referenced
18 in the Minnesota court order I presented to the Court,
19 one of the defendants has previously been found to
20 misrepresent financial information of the company and
21 they are interested to save themselves money.

22 In any event, this argument about the
23 net income is a red herring. It focuses on one
24 quarter of net income. The largest proponent of that

1 slide of the net income in the recent quarter was an
2 inventory shrink, write-off depreciation, both of
3 which are noncash accounting charges.

4 THE COURT: That's not really the
5 point. I know it's in the papers. The point to me
6 is, what is the savings that will be foregone to the
7 company over the period of time it will take to get
8 this matter to trial?

9 MR. ORRICO: And, Your Honor, it's
10 actually much less, if not nothing. And I'll explain.

11 THE COURT: Explain that.

12 MR. ORRICO: So the \$1.6 million of
13 savings -- of that, about 600,000 of it is for its
14 auditor. So there's two things about that.

15 One, in the 8-K that I provided to the
16 Court, it states that the reporting covenants under
17 the company's debt agreements require the company to
18 deliver audited and unaudited quarterly financial
19 statements to its banks. That means that that auditor
20 expense is not going away, even if the company
21 deregisters, because they have to provide audited
22 statements to its bank. So right off the bat, the
23 \$1.6 million in savings is cut in about half.

24 The other important part -- remember,

1 when we discussed the process of the deregistration,
2 once they -- if they were to file the Form 15 next
3 week, they are no longer under any obligation to file
4 a 10-K. But they represented in their 8-K that they
5 are doing it anyway. And they plan to do that on -- I
6 think end of February 2020. That means that they are
7 choosing to incur that expense for the filing of the
8 10-K. So, again, any of the savings, annual savings,
9 isn't going to click in until much later next year is
10 my point.

11 THE COURT: And how long will it be
12 before you are ready to take this matter to either a
13 preliminary injunctive relief hearing or trial on the
14 merits? I think you suggested you thought it should
15 go directly to trial; correct?

16 MR. ORRICO: Yes, Your Honor. First,
17 we would only need, I think, two to three months at
18 the most. Again, I think we would only need -- and I
19 don't want to be held to this -- but we would only
20 need, like, four or five depositions, two or three
21 days of time from you at trial or a preliminary
22 injunction hearing. We think it would be more
23 efficient to just have it ready for trial. We're
24 ready to do so. Again, we will work with the Court

1 and defendants to do so efficiently.

2 THE COURT: All right.

3 MR. ORRICO: So, Your Honor, unless
4 you have any other questions on the balance of the
5 hardships, this concludes my affirmative presentation,
6 unless you have any other questions.

7 THE COURT: No. That was very
8 helpful. Thank you, Mr. Orrico.

9 Mr. Ritzert, are you going to argue?

10 MR. RITZERT: Yes, I am.

11 THE COURT: I'd be happy to hear you.

12 MR. RITZERT: Thank you, Your Honor.
13 Thomas Ritzert for the defendants.

14 THE COURT: Pleasure to see you.

15 MR. RITZERT: First, to acknowledge
16 one of your comments earlier about the colorability of
17 the claims that have been filed to date, we agree with
18 Your Honor. We took from your comment on the phone
19 call a couple of days ago --

20 THE COURT: You are not waiving
21 anything. I understand. When we get to trial, you
22 are going to show me why this is all business
23 judgment.

24 MR. RITZERT: Correct. Yes, Your

1 Honor. Thank you.

2 But that being said, and without
3 getting too much into the facts or rebutting, I just
4 wanted to note for the record that there is a
5 fundamental disagreement, of course, from the
6 defendants' perspective, as to the theme of the case
7 that has been articulated by the plaintiff. The
8 plaintiff's papers set forth a conspiracy theory that
9 essentially three of the directors, Messrs. Rucker,
10 Jacullo, and Kamin, have engaged in a street sweep to
11 obtain control of the company. And they've pointed to
12 a few incidents that can be taken out of context.

13 For example, the resignation of
14 Mr. Cook a day after the vote. In fact, Mr. Cook
15 voted in favor of the delisting. We don't see
16 anything to be read into that fact. And Mr. Rucker,
17 for example, has not been buying any shares. He's not
18 part of a group of three people buying these shares to
19 take over.

20 So some of the circumstantial evidence
21 comments that have been raised in the papers, we
22 believe after a deposition and some discovery has
23 taken place the defendants will be able to come
24 forward with an appropriate explanation for those

1 events.

2 THE COURT: And just so I'm clear, do
3 you represent all of the defendants here?

4 MR. RITZERT: Correct, Your Honor.
5 For purposes of today, we represent the director
6 defendants and the nominal defendant company, Your
7 Honor.

8 In addition, I see the Form 4 that my
9 colleague brought -- opposing counsel brought forward.
10 Again, this is a circumstantial event. This case has
11 been moving rapidly this week. November 6th was the
12 first day that these papers were noticed. So these
13 recent stock purchases that are referenced -- there's
14 a two-day reporting lag period, as Your Honor probably
15 knows.

16 So, again, we fundamentally disagree
17 that there's something to be read into this or that
18 there's any intention to get out ahead of the Court's
19 ruling on the end of this to buy more shares. We
20 fundamentally disagree with that.

21 With all that being said, I understand
22 from opposing counsel's presentation that the scope of
23 the TRO that's being sought today has been refined a
24 bit, in part.

1 THE COURT: Yes. It doesn't involve
2 the Nasdaq delisting.

3 MR. RITZERT: Correct. The Nasdaq
4 delisting and the Form 25 issue, Your Honor, I
5 understand essentially plaintiff stipulates that they
6 are not taking any action to undo the Form 25 filing,
7 the Nasdaq delisting. That process was started on
8 November 1st. Today is the last day of trading.
9 That's going forward.

10 There is this issue, however, of the
11 Form 15 filing, which is due to be filed on Tuesday,
12 which will, in essence, relieve the company, on a
13 going-forward basis after a certain waiting period, of
14 certain SEC reporting obligations and other compliance
15 obligations that the company has determined are
16 creating an ongoing annual significant expense and an
17 ongoing significant use of company time and resources
18 and of its management.

19 As we stated in the papers last night
20 and is supported by the affidavit of director
21 defendant Jacullo, the company is currently operating
22 at a loss of \$217,000. The board of directors decided
23 that in order to stem some of the losses and save on
24 these ongoing expenses -- as a part of a larger cost

1 reduction plan, one step that the company would take
2 would be to delist and deregister, which will save the
3 company from these ongoing expenses.

4 This is not -- so Your Honor knows,
5 this is not the only step that has taken place. The
6 company has also recently downsized its management
7 stream. They've let go a couple of executive vice
8 presidents for sales. They've reduced by half the
9 number of regional management. So in connection with
10 this delisting, they are also reducing the management
11 base that's at the company. So in addition to just
12 the cost savings, the fact that the company believes
13 it can save on the daily attention to matters that are
14 involved with the SEC filings is a legitimate
15 consideration, from the company's perspective, and it
16 allows the company to do things much more efficiently.

17 THE COURT: You can rest assured that
18 I understand there can be business reasons for both
19 delisting and deregistration. I don't know if they
20 are present here or not, but it's not without the
21 realm of possibility that this savings is within
22 business judgment.

23 MR. RITZERT: And I understand the
24 concerns that Your Honor raised and were raised by my

1 colleague during the presentation about the timing of
2 the Form 15 and whether that actually does cause harm
3 to the company over the duration of what this trial
4 would be. From our perspective, when you look at the
5 overall theme of what was raised in the papers, the
6 clear theme of the papers getting us to today was this
7 street-sweep concept. The Form 15 was not referenced
8 in the papers. There were no concerns about
9 shareholder rights, shareholder access to information
10 raised in the papers. This is a late-developing theme
11 that's been raised on this Form 15 item. So we really
12 think that the main direction that this case has taken
13 until today has been the street-sweep concept.

14 But as to the Form 15 issue, to the
15 extent that there are shareholder information concerns
16 that were raised, counsel correctly noted the company
17 has already opted in to reporting the 10-K for this
18 next reporting period. So there will be ongoing
19 shareholder information available during the course of
20 these proceedings.

21 THE COURT: And when will the 10-K be
22 filed?

23 MR. RITZERT: I believe it will be
24 filed within the first four to six weeks of 2020.

1 THE COURT: So you agree, it's
2 February?

3 MR. RITZERT: I agree. Don't quote me
4 on the precise date, but that sounds right.

5 THE COURT: I won't hold you to that.
6 I just wanted a time frame.

7 MR. RITZERT: Of course, we're in
8 litigation. The tools for discovery are at
9 plaintiff's disposal. So we don't believe that any
10 fundamental informational defect is going to transpire
11 here with the company being permitted to proceed as
12 they had planned with the Form 15.

13 Now, what happens if we don't file the
14 Form 15 on Tuesday as we had planned and the company
15 is restrained from doing so for the duration of the
16 trial? Well, if the Form 15 is not filed for the next
17 two to three months as this trial evolves, we're going
18 to be gearing into new reporting periods. By the time
19 we would file the Form 15 next year, the company will
20 have been a registered company in a new quarter. So
21 apart from the delay of the waiting period that
22 follows the time of the Form 15, there's just going to
23 be additional reporting obligations that will carry
24 the expenses and the time commitment for management

1 well into next year if the Form 15 is not filed now.

2 THE COURT: When is the end of the
3 quarter? Is the company on a calendar basis?

4 MR. RITZERT: I apologize, Your Honor.
5 I don't know that. I don't have that information.

6 THE COURT: All right.

7 MR. RITZERT: But it's our
8 understanding that if the Form 15 is not filed on
9 Tuesday, that moving into next year will cause us to
10 continue the SEC reporting requirements well into next
11 year, which will eliminate these cost savings.

12 THE COURT: I understand that.

13 MR. RITZERT: I also understand from
14 the presentation that there's no longer a current
15 request for a constructive trust or any sort of
16 sterilization of the shares that have been held.

17 THE COURT: As part of the TRO.

18 MR. RITZERT: Correct. For today,
19 correct. I understand.

20 In terms of entering a restraining
21 order on additional shareholder -- additional director
22 purchases, Your Honor, we're not aware of any present
23 plan for the directors to take over a controlling
24 interest in the shares. The shares have been publicly

1 traded on Nasdaq through today. They will be
2 available on the OTC markets starting next week. None
3 of the directors are alleged to have undertaken any
4 illegal activity by virtue of acquiring shares that
5 are publicly available.

6 So we believe that there's no risk of
7 irreparable harm that the shareholders would incur by
8 allowing directors to continue to buy shares. If some
9 evidence of an actual transaction or overall plan of
10 these directors does materialize through discovery, we
11 could always revisit the issue. And as Your Honor
12 noted during the original presentation, we think that
13 these are things that can be addressed post-trial
14 through a variety of remedies, whether there's
15 disgorgement, some sort of constructive trust, or
16 through monetary damages.

17 So from the defense perspective, Your
18 Honor, the case that has been laid forward in these
19 papers is essentially a concern over the drop in the
20 share values. This is a damages case. This is not a
21 case where there is clear evidence of any present
22 concrete scheme by the directors to take a controlling
23 interest, and we don't believe that the relief that's
24 been requested is warranted.

1 THE COURT: Thank you, Counsel. I
2 appreciate the presentation. That was helpful.

3 I didn't cut you off, did I?

4 MR. RITZERT: No. That's fine. Thank
5 you, Your Honor.

6 THE COURT: I didn't mean to. If
7 there's something else you want to tell me, go ahead.

8 MR. RITZERT: That's it. Thank you.

9 THE COURT: I was looking down and I
10 didn't notice if you were done.

11 MR. ORRICO: Two quick points, Your
12 Honor.

13 One, just in response to the "there
14 will be no irreparable harm if directors are allowed
15 to continue to buy." We disagree. If they continue
16 to buy, control will be transferred. And for the
17 reasons in our papers and my affirmative presentation,
18 we believe that's irreparable harm.

19 As far as the timing goes -- the
20 company is on a normal fiscal year. The year ended
21 12/31. I'm going off last year. I know every year is
22 different. But their Q would not be due until May
23 9th, 2020. So if you -- remember the 90-day rule of
24 finalizing. So if you work backwards, if there is a

1 final decision on this matter on February 8th, let's
2 say, they would be able to deregister -- say we lose,
3 they would be able to file their Form 15 the next day
4 and would not have to report the 10-Q in the 90 days,
5 I believe.

6 That's it, Your Honor, unless you have
7 any further questions.

8 THE COURT: No. Thank you. That was
9 very helpful.

10 Counsel, first of all, your clients
11 ought to be very pleased with the way you have been
12 able to organize and present this information on such
13 a very expedited time frame. It's impressive to me.
14 I thank you. And thank you for coming all the way
15 down here to do it on a Friday afternoon,
16 accommodating us in these rather tight little
17 quarters. The quality of the work you've been able to
18 produce is very fine, and I appreciate it deeply.

19 There are really two motions before
20 me. The one is a motion to expedite. I've already
21 said on the phone that I believe there is a colorable
22 claim here. That's one of the lowest standards in our
23 law. It simply means a nonfrivolous claim. And I
24 think, at the very least, the timing of the events is

1 such that it would raise -- well, my equitable antenna
2 is set aquiver. When I look at the time frame, which
3 doesn't prove anything, it just tells me, as I have
4 already expressed, that there is a colorable claim
5 here that mischief is afoot. So if that's the case, I
6 think we need to address this quickly.

7 You are well aware of the standard for
8 expedition in this court. It's simply a colorable
9 claim and a demonstration of a threat of irreparable
10 harm sufficient to justify the expense of going
11 forward on an expedited basis. The fact that we're
12 all sitting here not too many hours after the matter
13 was filed indicates that it does, in my view, so
14 justify going forward on an expedited basis. So that
15 motion is granted.

16 Really, what we're here to talk about
17 is a temporary restraining order. The standard is
18 somewhat similar. There's a requirement of a
19 colorable claim, which, for the reasons I've already
20 discussed, has been met here; there must be a
21 demonstration of imminent irreparable harm absent the
22 TRO; and then the Court is required to balance the
23 equities and make sure that the medicine is not worse
24 than the disease it is meant to treat. I wish I could

1 avoid speaking in metaphors, but I don't seem to be
2 able to. I should simply say that a balancing of the
3 equities is then required.

4 So what do we have here? Well, as
5 this matter has been clarified, helpfully, there are
6 really two things going on that the plaintiff asked me
7 to enjoin. One is the continued buying of stock in
8 what the plaintiff describes as a "street sweep" that
9 would transfer control to the defendants. That does,
10 it seems to me, pose a threat of irreparable harm. It
11 is quite true -- and I pushed Mr. Orrico on this --
12 that there are remedies, both in damages and in
13 equity, such as disgorgement or sterilization or some
14 other means, of remedying improper purchases of stock
15 if the board has not adequately protected the
16 corporation and the shareholders from an improper
17 transfer of wealth to some of the directors who are
18 buying stock. But having said that, it would be, I
19 think, difficult if trading goes on to determine how
20 that disgorgement would take place, to whom the
21 damages run, and calculation of damages would all be
22 very difficult questions. So it does pose a risk of
23 irreparable harm.

24 The same is true of the

