Original case is

Walter Hewlett v. Hewlett Packard

dated

April 30,2002

II. FACTUAL BACKGROUND

The merger between HP and Compaq was first rumored in the market in late summer of the year 2000. In the spring of 2001, HP began to consider seriously the prospect of acquiring and merging with Compaq. The merger was first discussed by HP's board as a whole at a board dinner in May, 2001. From that point forward, the HP board met thirteen times to discuss the proposed merger before it finally voted unanimously in favor of the merger on September 3, 2001.

In connection with the proposed merger, HP engaged McKinsey & Company ("McKinsey") to assess its strategic alternatives. At a board meeting on July 17, 2001, McKinsey made a presentation to HP's board. One portion of this presentation addressed the long-term strategic options available to HP, a subject on which the board conducted a "pretty rich dialogue."[3] Another portion of the presentation addressed the projected effects of a merger with Compaq and identified five main areas of synergy and risk that would aggregate to create the overall financial impact of the merger. HP decided to focus specifically on two of these five items, hard cost synergy and revenue risk, in its external models.[4] The

[3] Tr. 228:23 (Fiorina). Citations in this form are to page and line numbers of the trial transcripts, with witness names in parentheses.

[4] These two items reappear later as the $2.5 billion cost synergy and 4.9% revenue loss numbers that were repeated by HP throughout the proxy campaign. Those numbers were presented in the first public announcement of the merger and they were repeated thereafter in the S-4 proxy statement/prospectus filed by HP and Compaq and in several presentations made by HP management. HP focused on these numbers, which indicate management's estimate of the effects of the merger on the combined company, rather than on specific revenue or profit targets.

other three items, all of which would have positive financial effects, were purposely omitted from external models in order to allow HP to "under-promise and over-deliver" on its targets?

HP management, including CEO and Chairwoman Carleton S. Fiorina, CFO Robert Wayman, and others, believed that the integration of the two companies would be vital to the ultimate success of the merger. Accordingly, HP began planning the integration process very early on. Fiorina asked McKinsey to present a report about integration to HP's board at a meeting on July 30,200 1, because she wanted to ensure that HP "had thought early and thoroughly about integration."[6] In this report, McKinsey outlined the integration process that ultimately was followed by HP and Compaq in the months following the announcement of the deal.[7]

On September 3, 2001, HP and Compaq entered into a merger agreement, effective September 4,200 1. The merger was announced publicly on September 4.

This was because it wanted to use numbers that would show the effects of the merger in a variety of different economic contexts. Tr. 88:11-89:4 (Fiorina); Tr. 45 1:24-452:15 (Wayrnan); Tr. 735:4-6 (Clarke) ("[T]his merger is about the consolidation of the two firms. It's not about the macroeconomic trends, the changes in our industry.").

[5] Tr. 231:22 (Fiorina). The factors that HP identified but decided not to include in external communications were hard revenue synergies, such as printer pull-through generated by bundling HP printers with Compaq computers in place of the Lexmark printers currently used by Compaq; revenue aspirations, such as improved product momentum; and cost synergy upsides, or cost synergies not yet supported by firm data. DTX 7 (McKinsey presentation to the HP board dated July 17, 2001) at HP 012076. Citations in this form are to the trial exhibits submitted by the defendant. Citations to "PTX" are to the plaintiffs' trial exhibits.

[6] Tr. 239:9-10 (Fiorina).

[7] DTX 8 (McKinsey report to the HP board dated July 30, 2001) at 8-13.

Morgan Chase & Co. and Solomon Smith Barney) over terms of the credit facility, the final contract was not signed until March 15, 2002, just four days before HP's special meeting for shareholders to vote on the merger.

Meanwhile, on November 8, 2001, two days after Walter Hewlett's announcement that he would vote against the merger, HP management received the first of several value capture updates ("VCUs," and each individually a "VCU") from the value capture team, one of many groups involved in the integration process. The value capture team's mandate is to "drive [the] overall top-down corporate planning process to achieve full value of the merger by 2004."[16] The November 8 VCU was generated primarily from clean team reports, with some management oversight, and it analyzed whether the numbers established earlier in the process by management and its consultants were attainable. Although overall revenue estimates were lower than they had been in September due to economic changes affecting the combined entity as well as the standalone prospects for HP and Compaq, the November 8 VCU indicated that the projected effects of the merger remained accurate and were, in fact, conservative. The projected revenue loss arising from the merger remained at or below 4.9%, and the estimated synergy target increased to approximately $4 billion instead of $2.5 billion.[17] HP

[16] DTX 277 (HP Rule 425 filing dated February 27, 2002).
[17] DTX 15 (VCU dated November 8, 2001) at 3, 9.

management viewed this report as a validation of the assumptions it had made and the targets it had created with McKinsey in the summer of 200 1 .[18]

On December 19, 2001, HP filed with the SEC, pursuant to Rule 425, the contents of a presentation to HP stockholders (the "December 19 425 Filing")." This document contained the same information about cost synergies and revenue loss that HP consistently presented since its first public announcement in September 2001. It also contained examples of the effects of these numbers based on management's September 2001 forecasts for fiscal year 2003, as well as analysis based on the then-current Wall Street estimates for that same period. Fiorina and Wayman testified at trial that pages 25 to 28 were always covered in HP management's presentations to shareholders. On page 26, the document explains the basis for the estimated $2.5 billion cost synergies, while noting that that estimate does not include potential revenue synergies and further upside to the cost synergies. On page 27, the document discloses the expected revenue loss for each of several product lines and applies the cumulative effect on exposed revenue to a set of revenue numbers. At trial, the plaintiffs emphasized the title of this page, which is "*Revenue Forecast* Based on Detailed Segment Analysis" (emphasis added). Significantly, however, the footnotes to page 27 indicate that

[18] Tr. 249: 12-22, 277:6-22, 335: l-6 (Fiorina).
[19] This report is found in the record as PTX 66.

point in the integration process at least two weeks earlier than it originally expected.[23] In addition to being ahead of schedule, the integration teams continued to provide positive reports to HP management, especially with respect to cost synergies and revenue loss goals. According to a VCU dated January 30, the integration teams had identified $3.728 billion in cost synergies, well in excess of HP's public target of $2.5 billion.[24] Moreover, the supply chain value capture team had identified significant additional procurement synergies.[25] HP had also exceeded its revenue targets. It had expected immediate revenue loss due to uncertainty surrounding future product lines, especially in areas in which one of the two companies was significantly stronger than the other, but these immediate revenue losses had not occurred.[26] Fiorina testified that by February 4:

> our revenue loss assumptions were validated, that they were conservative and that we were doing better than those revenue loss assumptions in the market currently, during .a period of great

[23] Tr. 249:7-8 (Fiorina) ("We entered [Phase III] several weeks earlier than our original schedule called for."); DTX 29 (Master Schedule Overview) at HP 011586 (showing, as of January 15, 2002, that HP had entered Phase III, ahead of its January 30 target).
[24] See Tr. at 289:19-23 (Fiorina); DTX 179 (VCU dated January 30, 2002) at HPE 8248.
[25] Tr. 720: 14-721: 12 (Clarke) (discussing procurement savings, which were expected to be one percent of $60 billion, or $600 million, but are now estimated to be between two and three percent, $1.2 to $1.8 billion); Tr. 276: 15-23 (Fiorina) (same).
[26] For example, HP management "assumed that Compaq would lose 40 percent of its UNIX revenues because of this combination because we figured customers would figure out that HP UN-IX was the stronger surviving platform. In fact, during this period, Compaq's high end grew sequentially. We thought we would lose 30 percent of our NT [industry server] business . . . [a]nd in fact, we were seeing sequential growth." Tr. 270: 18-271:4 (Fiorina); *see also* Tr. 729:15-73 1:7 (Clarke) (discussing the success of Compaq's UNIX business); Tr. 507:2-4 (Wayman) ("Not only did we have no revenue loss during this period of time,. we clearly outperformed our competitors."); Tr. 269:21-270-17 (Fiorina) (noting that this was "a maximum time of uncertainty and a maximum moment of opportunity for [HP's] competitors").

> uncertainty. I knew, as well, we had revenue synergies, revenue upsides, that were real, that were achievable, that were not part of the financial model we had delivered to the street at all.[27]

Accordingly, at a Goldman Sachs Technology Conference on February 4, Fiorina stated that HP had "now entered the third and final phase of our integration planning. We are at the point where detailed business plans are being drawn up for the new company. We are over-achieving on both our cost-reduction and revenue targets."[28]

The January 30 VCU was the first of several VCUs to include "bottom-up" numbers generated by the business units instead of focusing solely on the "top-down" numbers from management as previous VCUs had done.[29] At this point in

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[27] Tr. 290:2-10 (Fiorina); see *also* DTX 40 (minutes of an HP board meeting on January 17-18, 2002) at 15 ("Carly Fiorina reminded the Board of revenue loss assumptions that were built into merger models and analyses and emphasized that thus far the assumptions appear to be conservative. She also discussed with the Board that customers appear not to be shying away from doing business with either company."). These statements were corroborated by Wayman in a subsequent presentation and were validated when it was later revealed that HP and Compaq both performed better than expected and better than most of their competitors in the last quarter of 2001. In a presentation to security analysts on February 27, Wayman discussed the companies' revenue loss experience, noting that contrary to expectations neither HP nor Compaq had experienced any significant merger-related revenue losses since announcement of the merger. HP's and Compaq's revenue for the quarter totaled 98% and 97%, respectively, of analyst consensus estimates that existed as of the date the merger was announced, versus a peer average of 86%. DTX 276 (HP Rule 425 filing dated February 27, 2002); Tr. at 504:20-507:15 (Wayman).

[28] DTX 268 (Fiorina's comments at the Goldman Sachs Technology Conference on February 4, 2002).

[29] The value capture team and management establish top-down or "stretch" targets. Tr. 714:18-715:9 (Clarke). The business units develop plans to meet those targets and provide them to the value capture team. The value capture team works with the business groups to assist them in implementing the top-down targets. Tr. 715:10-717:2 (Clarke) (describing this process); see *also* DTX 179 (VCU dated January 30, 2002) at HPE 8248-50. Clarke made this point at trial when he testified:

the process, the goal from HP management's perspective was to identify the relevant gaps between top-down and bottom-up numbers so that those gaps could be closed. To that end, the January 30 VCU identified specific actions, on a group-by-group basis, that could be used to bridge the gaps between those two sets of numbers.[30] The January 30 VCU also discussed the "interlock" process-a process that remains to be completed-in which business groups and functional groups (such as procurement) coordinate their estimates of cost synergies in order to make the business unit reports more accurate.[31]

The next several VCUs—dated February 14, February 28, and March 14—all reflected growing gaps between the top-down and bottom-up numbers. Each VCU was worse than the previous one, and by March 14 the bottom-up numbers were significantly below the numbers implied in the S-4.[32] The Hewlett Parties contend that this is because the underlying facts about the progress of the

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> Financial planning is also important but a different part of the process. It is a process that every company goes through on a regular basis. We build financial plans. We look at them. We revise them. Very frequently you need to keep working on them to get to the right level of what can be. I think one of the geatest jobs of senior management is to determine how high to set the bar. If you set it too low, people underachieve. If you set it too high, they give up because they don't know how to get there. So the challenge is to make them be better than they think they can be but make it reachable.

Tr. 816:9-19.

[30] DTX 179 (VCU dated January 30, 2002) at HPE 8239-42.

[31] Clarke Dep. at 177:20-178:7; DTX 179 (VCU dated January 30, 2002) at HPE 8239-42.

[32] In the March 14 VCU, the values contained in the bottom-up plans yield an EPS of $ 1.23, or roughly 25% below the EPS implied in the S-4. PTX 162 (VCU dated March 14, 2002) at HPE 11241.

integration effort did not support the positive statements about the merger being made by HP management. HP responds, to the contrary, that lower numbers from the bottom-up roll-ups are to be expected, for three main reasons. First, the bottom-up plans are generated with imperfect information because the business units do not have complete access to all of the clean room information generated by the 23 integration teams.[33] Second, the bottom-up plans are generated by people who are contemplating the newly combined business units for the first time and are essentially unfamiliar with half of their new businesses.[34] Third, because the business units are accountable for the numbers they report, the numbers will naturally be conservative.[35]

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[33] See, e.g., Tr. 121:23-122:2 (Fiorina) ("They were not presenting in full, for example, the full amount of procurement synergies that the clean team knew was available but the business units didn't have full visibility to."); Tr. 716:15-717:2 (Clarke) ("There are certain parts of the clean room in this process that come in at different points. So, I have visibility and the value capture team has visibility to key opportunities that the business groups don't have yet, for multiple reasons."); Tr. 462:23-463:13 (Wayman) (indicating that as of March 14, the VCUs did not reflect full integrations of functions).

[34] See, e.g., Tr. 273:23-274:6 (Fiorina) (noting that the business units "were not focused on the revenue upsides. They weren't focused on the total cost synergies. They were focused on learning their business. And it would take some time for them to learn their business and understand how to execute."); Tr. 344:3-345:3 (Fiorina) ("The business units in February and March were, for the first time, being asked to roll up plans for how to hit targets. Not surprisingly, the first and second passes, they didn't know how to hit those targets."); Tr. 716:24-717:2, 722:10-18 (Clarke) (noting that the business units were leanly staffed at the time the VCUs were created and that many important managers were not named until March).

[35] Clarke Wayman, and Fiorina all testified about the business units producing conservative numbers 'because they were commiting to targets for which they would be held accountable. Fiorina described this aspect of the process as follows:

> What happens in February that is different is all of a sudden, but as planned, when we entered Phase III, you bring new people into the planning process, people who haven't been spending months in the clean room, people who in many cases have literally just been named. We don't, for example-we didn't name the CFOs of

(which appear to be substantial) were "still not factored in" and that "[i]n some cases it looks like we are assuming way too much share loss."[43]

The February 28 and March 14 VCUs appear to be similarly limited. Management was aware of additional cost and revenue synergies that the business teams were not including, partially for the reasons described above and partially by design? The EC, in its March 14 meeting, reiterated the stance it had taken one month earlier, rejecting several of the pessimistic assumptions behind the bottom-up plans. Management identified specific problems with the group reports; for example, every group assumed that it would lose market share, an assumption not shared by management, and the group plans still did not include cost synergies from two key functional integration teams, information technology and facilities.[45]

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[43] DTX 39 (EC minutes dated February 14, 2002) at HPE 335 1. As Fiorina testified, "there were clearly upsides to cost synergies of which we have talked. There were not 2 to 2-and-a-half [billion dollars]. It was 3.4 to 3.9 [billion dollars]. There were clearly revenue synergies that aren't even in here. And as well, there were assumptions being made at this time by business units which were unrealistic and overly pessimistic about gross margins, about market share, about a whole host of things. Which is typical for this point in the planning process." Tr. 294:3-11 (Fiorina).

[44] As Wayman testified in his deposition: "I'm sitting here as CFO evaluating this planning process, knowing full well that I have things in my pocket; and specifically no revenue in here for printer pull-through, specifically a $2 1/2 billion cost synergy plan. And I can show you a [McKinsey] document in July where it was $4 billion. We went with the 2 1/2. Upside revenue synergies. I can show you a document in July, range of X to $X billion. Those are in my pocket today." Wayman Dep. at 172:6-15; see *also* id. at 175:3-11 ("I have high confidence, as a very experienced CFO, that the ultimate cost synergy goals that are the basis of people's meeting their performance plan will be above $2 1/2 billion and that the revenue numbers, which do not yet have any revenue synergies up there, will include some revenue synergies. We *don't have people working on that yet because we don 't want them to use that to meet the plan yet."* (emphasis added)).

[45] PTX 162 (VCU dated March 14, 2002) at HPE 11239.

Moreover, management also believed that the current negative state of the economy was affecting the bottom-up numbers.[46]

Top HP management was receiving negative financial information at this time from other sources as well. First, on March 10, 2002, Ken Wach, who had been "named on a future basis when the company is combined to be the chief financial person for the enterprise systems group,"[47] sent Wayman and others an e-mail indicating that the report he attached to the e-mail was "a frightening reality check on the clean room and value capture revenue work."[48] Then, two days later, Clarke sent virtually identical e-mails to Wayman and Capellas, attaching "the latest roll-up from the value capture" and indicating that "[i]t is ugly-both companies are deteriorating."[49] The Hewlett Parties again contend that these e-mails, like the February and March VCUs, show that the integration process was not going as well as HP management was stating publicly. HP again responds, as

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[46] DTX 62 (Steering Committee minutes dated March 14, 2002) at HPE 3100 ("Bob pointed out that the prevailing view of economists is that [the second half of 2002] will be much stronger than [the first half], and that Business Leaders are generally too conservative in predicting recoveries (since the[y] usually didn't predict the down turn either and are gun shy."); see ***also*** Tr. 300:3-15 (Fiorina) ("[W]hat was bugging people that day and what you see in the minutes here, is people's sense of the overall economy. February was a soft month for both companies. It was a soft month for the technology industry in general. One of the things-one of the human dynamics about planning processes is people's view of the future tends to be colored by their current sense of the economy. And people's current sense of the economy was that the economy was soft. And so this was all about what are we really assuming about the water level, the level of economic activity by the time we get to 2003.").

[47] Tr. 423:13-15 (Wayman).

[48] PTX 197 (e-mail from Wach to Wayman and others dated March 10, 2002).

[49] PTX 156 (e-mail from Clarke to Capellas dated March 12, 2002); PTX 155 (e-mail from Clarke to Wayman and others dated March 12, 2002).

management, and that the combined company would not meet the revenue projections implied in the S-4. The plaintiffs also question the accuracy of Fiorina's statements at the Goldman Sachs Technology Conference on February 4, 2002. Ultimately, the plaintiffs' allegations boil down to two arguments: that HP management overstated the progress that was being made on the integration process, and that HP management was overly optimistic about the substantive results that the integration process would create. In connection with the second of these claims, the plaintiffs contend that HP should have made corrective disclosures about its financial projections after receiving the VCUs and the March e-mails.

I find both of these contentions to be without merit. The public statements made by HP management about the progress of the integration process, specifically Fiorina's February 4 statements, were supported by the facts when they were made and were neither false nor misleading. HP had entered Phase III of its integration planning by February 4, and detailed business plans were being created. Information available to management also indicated that the company was overachieving on both its cost-reduction and its revenue targets. Specifically, the January 30 VCU identified $3.728 billion in cost synergies, or more than $1 billion over HP's external target of $2.5 billion in synergies,[84] and expected revenue

[84] DTX 179 (VCU dated January 30, 2002) at HPE 8248.

losses following the announcement of the merger had not materialized." Moreover, HP management continued to be aware of revenue synergies and other cost upsides that were not included in the external projections.@'

The evidence before me also supports ISS's conclusion that "management has done everything it can to maximize the chance that integration will be a success."[87] As indicated by the McKinsey report presented to HP's board on July 30 and by the naming of the integration team heads on the same day as the first public announcement of the merger, HP management focused on integration even before the merger was announced. HP's board believed from the beginning that successful integration of the two companies would be critical to the success of the merger. HP acted accordingly by planning its integration efforts carefully and thoroughly. It selected hundreds of its "best" and "brightest" managers for the integration teams.[88] It also involved key senior executives in the process through the Integration Steering Committee, which was actively involved through, among other things, weekly meetings about integration.[89] Nothing in the record indicates that HP lied to or deliberately misled ISS or the HP shareholders about its integration efforts.

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[85] *See supra* notes 26-27 and accompanying text.
[86] Tr. 290:2-10 (Fiorina); Wayman Dep. at 172:6-15.
[87] DTX 49 (ISS recommendation) at HPE 0596.
[88] Tr. 338:19-339:2 (Fiorina).
[89] Tr. 245:24-246: 13 (Fiorina) (describing the role of the Steering Committee).

The crux of the Hewlett Parties' second argument is that HP learned in February and March that the top-line revenue projections implied in the S-4 and used illustratively in the December 19 425 Filing were unattainable. This argument proceeds from two faulty premises: first, that the revenue numbers generated in the value capture process and contained in the VCUs represent realistic projections of expected future results; and second, that the estimated revenue, profit, and EPS numbers found in the S-4 and the December 19 425 Filing represented firm commitments by HP management. I am persuaded by HP's arguments that several factors limit the accuracy of the VCUs. Consequently, I find that it is reasonable for HP to believe that it will achieve better results than those contained in the VCUs. Additionally, I am unable to conclude that HP committed to the financial numbers implied in the S-4. The projections in the S-4 were clearly labeled as forward-looking estimates, and the December 19 425 Filing clearly indicates that those projections were made on September 4. More importantly, however, the numbers relied upon by the plaintiffs are purely illustrative and indeed are only one set of several presented by HP. The important numbers discussed repeatedly by HP management are the merger-related numbers of $2.5 billion in cost synergies and not more than 4.9% revenue loss. No evidence in the record before me contradicts the reasoned views of HP management about the limitations of the VCUs or suggests that HP will be unable to meet its merger-related targets. To the extent that the plaintiffs need to prove a subjective element for this claim to succeed, they fail completely to do so.

Failing to prove that HP affirmatively and knowingly misrepresented facts about integration, the plaintiffs fall back on the argument that HP should have disclosed the negative information contained in the VCUs and the early March e-mails because that information would have been material to shareholders. It is well-settled that omitted facts are material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[90] I cannot agree with the plaintiffs that the VCUs and the e-mails from Wach and Clarke were material. Whilethis information clearly would be material if presented in final reports or projections, that is simply not the case here. There is no reason for management to disclose preliminary reports that are generated early in a planning process, based on imperfect information, and limited both by the unfamiliarity of the people creating the report with the business and by the desire of those people to commit to conservative numbers that are definitely attainable. There is also no reason to require HP to disclose Wach's e-mail to shareholders, because it suffers from the same flaws and limitations as the VCUs

[90] *Rosenblatt* v. *Getty Oil Co., 493* A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc., 426* U.S. 438,449 (1976)).

(and indeed was later rolled up into the March 14 VCU). Significantly, like the VCUs and like Wach's e-mail, Clarke's e-mails also address value capture roll-ups. The numbers included in Clarke's March 12 e-mails and their attachments are identical to those found in the March 14 VCU.[91] As a result, those numbers reflect the same gaps and are bounded by the same limitations as the VCUs. Moreover, Clarke testified credibly, as the head of the integration process, that he was frustrated with the value capture numbers because the business units were unwilling to address cost and revenue synergies that he knew existed. Accordingly, I find Clarke's e-mails to be immaterial as well.

The plaintiffs have been unable to prove that HP misrepresented or omitted material facts about integration in the proxy contest. Instead, the evidence demonstrates that HP's statements concerning the merger were true, complete, and made in good faith. During the trial, members of HP's senior management testified credibly, in accordance with the evidence and without exception, that throughout the proxy contest they believed that the cost synergy and revenue loss targets were realistic and, in fact, would be exceeded. Finally, there is no legal requirement that companies disclose all documents generated in a budgeting process. I therefore find in favor of HP on the disclosure claim.

[91] ***Compare*** PTX 156 (e-mail from Clarke to Capellas dated March 12, 2002) at CPQ 010357 ***with*** PTX 162 (VCU dated March 14, 2002) at HPE 11241.

IV. THE VOTE-BUYING CLAIM[92]

The Hewlett Parties' vote-buying claim centers on the March 19, 2002, telephone conference at which members of Deutsche Bank's PWG entertained competing presentations on the merits of the proposed merger from Walter Hewlett and HP management. The plaintiffs contend that during the telephone conference, Deutsche Bank was coerced by threats, either implied or explicit, from HP management that Deutsche Bank's future business relationship with HP would suffer if the shares of HP held by Deutsche Bank were voted against the merger. Accordingly, they ask this Court to set aside the resulting vote of a portion of the HP shares held by Deutsche Bank in favor of the merger.

As stated in the opinion denying HP's motion to dismiss, the Hewlett Parties bear the following burden with respect to the vote-buying claim:

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[92] I note initially, although the matter is disputed, that it appears at this point that the number of votes switched by Deutsche Bank likely will not be enough to change the ultimate outcome in this case. Hewlett's vote-buying claim, therefore, may be of greater academic than practical interest. At the special meeting on March 19, HP's shareholders approved the transaction by a preliminary margin of 45,240,287 votes. The defendants, relying on discovery documents, an April 27 letter from Deutsche Bank's counsel, and voting results provided by IVS Associates, Inc., contend that the participants in the March 19 conference call voted 17,015,988 HP shares in favor of the merger on March 19. Even assuming that all of these shares initially were voted against the merger (a matter that is also in dispute), HP's margin of victory would still be more than 11 million votes, probably enough to withstand the remaining "snake pit" challenges. The plaintiffs, however, also relying on record evidence, contend that the number of shares voted by Deutsche Bank (as a whole, apparently, and not just by the participants in the March 19 call) may be as high as 24 million. If this number is in fact correct, and if all of these shares were initially voted against the merger and then later voted in favor of the merger as a result of improper influence by HP management, then the resulting swing48 million votes-would appear to be outcome-determinative.

process DBAM would follow in voting shares on the merger. Both Griswold and Thornton testified, without exception, that they had erroneously advised HP that shares held by DBAM as index, or passive, shares would be voted according to the ISS recommendation. Feeling “stupid,” “shocked,” and “embarrassed” about having misstated the facts regarding the voting process,[97] both Griswold and Thornton believed that it was only appropriate to create an opportunity, albeit at the last minute and with no assurance as to its outcome, for the proxy contestants (and particularly their client) to present their positions on the merits of the merger to the PWG. This was the good news that Griswold and Thornton could offer HP in conjunction with the bad news that the vote was against the merger. From these circumstances, the plaintiffs contend that the only reasonable inference is that Griswold and Thornton, responding to HP’s threat to withhold future business, coerced and pressured the PWG to switch its vote.

The circumstances surrounding the March 19 conference call give rise to reasonably conflicting inferences, not all of which are benevolent. It is troubling, for example, that the March 19 telephone conference was initiated at the urging of individuals from the CIB group of Deutsche Bank and that those individuals also attended the telephone conference. This fact raises clear questions about the integrity of the internal ethical wall that purportedly separates Deutsche Bank’s

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[97] **Griswold Dep. at 66:21-67:8; Thornton Dep. at 90:14-91:4.**

asset management division from its commercial division. Nevertheless, no evidence credibly demonstrates that Griswold and Thornton arranged the conference call in response to a threat from HP management to withhold future business.

Ultimately, the recording of the March 19 conference call, as well as the testimonies of Fiorina, Wayman, and the individuals at Deutsche Bank participating in the call, fail to support the plaintiffs' vote-buying contention. This testimony, which I find credible, disproves the assertion that HP management improperly coerced or influenced the PWG in the ultimate deliberations about the vote. The recording reveals that the presentation made by Fiorina and Wayman on behalf of HP, the questions posed by Deutsche Bank, and the responses by Fiorina and Wayman all concerned the merits of the proposed merger and not the effect of Deutsche Bank's vote on its future business relationship with HP.[98]

Following HP management's presentation on the merits, the PWG debated about the merger without reference to how its decision would affect business between HP and Deutsche Bank. The PWG focused instead on the harm the

[98] DTX 3 14 (recording of March 19 conference call). The call was recorded in Germany by Klaus Kaldermorgen (a representative Deutsche Bank's European Proxy Committee) and produced for the first time during trial. The fact that the call was being recorded apparently without the knowledge of either the Hewlett Parties, the HP representatives, or Deutsche Bank's American participants reinforces my conclusion about the innocuous nature of the call. This lack of knowledge makes it less likely that discussions during the call were merely scripted as a smoke screen for an improper voting agreement.

companies and their shareholders would suffer if the merger was not approved, as well as other substantive issues relating to the merits of the merger, such as the revenue synergy from printer pull-through. After this substantive discussion, the PWG voted 4-1, by secret ballot, in favor of the merger.

The committee then spoke to Klaus Kaldermorgen, Deutsche Bank's European Proxy Committee representative, about how he would vote the shares he controlled. Again, the discussion concerned the substantive merits of the merger and no mention was made of any threat to Deutsche Bank from a business relationship standpoint. All of this evidence indicates that the ultimate decision of the PWG to vote the shares of HP it controlled in favor of the merger was made with regard to what the PWG believed to be in the best interests of the beneficial owners of those shares. On its face, none of the evidence suggests an effort was made to coerce or manipulate the PWG's vote.

The final circumstance offered by the plaintiffs to prove that the PWG's vote was the result of improper influence from HP management is Fiorina's closing remarks during the conference call. Fiorina ended her presentation by stating:

> Gentlemen, we appreciate your time. I need to go try and get ready for a shareowner meeting. We very, very much appreciate your willingness to listen to us this morning. This is obviously of great importance to us as a company. *It is of great importance to our ongoing relationship.* We very much would like to have your support

> here. We think this is a crucially important decision for this company.[99]

This is the only statement from HP management that plaintiffs point to as evidence that Deutsche Bank was coerced during the March 19, 2002, telephone conference. That statement does not, in my opinion, demonstrate that Fiorina was attempting to coerce Deutsche Bank. Fiorina testified that the statement was the typical way she ended similar calls after making HP's standard presentation to investors. For thirty minutes prior to that closing statement, Fiorina and Wayman presented management's case for the merger and responded to concerns specifically raised by members of the PWG. The plaintiffs can point to nothing in those exchanges that indicates a threat from management that future business would be withheld by HP from Deutsche Bank and there is no indication that the PWG believed its discretion had been limited because of such a threat. Instead, the record establishes that all of the questions posed by the proxy committee-some of which were prompted by concerns raised just minutes before by Walter Hewlett's presentation in opposition to the merger—went to the merits of the transaction. Accordingly, I must find in favor of HP on the vote-buying claim.

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[99] **DTX 3 16** (transcript **of March 19,202** telephone conference) (emphasis **added).**