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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Verition Partners Master Fund Ltd. and Verition Multi-Strategy Master Fund Ltd., Petitioners, v. Aruba Networks, Inc., Respondent.	REDACTED - AMENDED PUBLIC VERSION FILED JUNE 15, 2016 C.A. No. 11448-VCL

BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR A PROTECTIVE ORDER

[redacted]

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TABLE OF CONTENTS

[redacted]

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

[redacted]

[redacted]

PRELIMINARY STATEMENT

Respondent Aruba Networks, Inc. ("Aruba" or the "Company") moves for a protective order limiting the deposition of Margaret ("Meg") Whitman to an arbitrary three hours by arguing that Petitioners (somehow improperly) seek to "recast" what Aruba asserts was an "arm's-length transaction" as "an interested transaction meriting closer scrutiny by the Court." Respondent's Brief in Support of Its Motion for Protective Order ("Res. Br.") at 2. Absent Respondent's aspersions, Respondent is correct. While Aruba asserts that Petitioners are "factually wrong" (*id.*), its argument demonstrates the need for discovery and provides no basis to impose the arbitrary time limit requested in the motion.

Petitioners asked Aruba to provide dates for the deposition of five witnesses, including Ms. Whitman, for over five weeks. Aruba declined to provide a proposed date for any witness. Only when Petitioners sent a formal notice of deposition with its own dates did Aruba finally provide proposed dates for all of the requested witnesses. But in doing so, Aruba announced for the first time that Ms. Whitman would be made available on June 30 for only 3 hours. Petitioners

[redacted]

accepted the offered dates for *all* of the witnesses, but declined to accept Aruba's arbitrary limitation on Ms. Whitman's deposition.[1]

Aruba's motion for a protective order should be denied because Aruba cannot satisfy its "substantial burden" to demonstrate "extraordinary circumstances" that would justify deviating from the liberal discovery allowed in this Court. Its brief is replete with factual representations that demonstrate why discovery is appropriate, not why it should be restricted.

FACTUAL BACKGROUND

A. ARUBA STONEWALLED PETITIONERS' EFFORTS TO SCHEDULE DEPOSITIONS AND NEVER SUGGESTED ANY NEED TO LIMIT MS. WHITMAN'S DEPOSITION

Aruba's argument that it "diligent[ly]" worked to schedule depositions is belied by the facts. On March 28, 2016, counsel for Petitioners requested that Aruba provide proposed dates for depositions of five identified witnesses: (i) Ms. Whitman; (ii) a 30(b)(6) designee for Hewlett-Packard; (iii) Aruba CEO Dominic Orr; (iv) Aruba lead director Dan Warmenhoven; and (v) Aruba CFO

[1] Petitioners are willing to depose Ms. Whitman on June 30 without the arbitrary time limit. In fact, Petitioners offered to start as early as 7:00 a.m. or as late as 1:00 p.m. if it would be more convenient for Ms. Whitman, as long as there was no arbitrary time limit.

[redacted]

Michael Galvin.[2] Receiving no response, on April 7, Petitioners' counsel again requested dates for the identified witnesses.[3] Aruba's counsel responded: "Thank you. We will get back to you."[4] Eleven days later, on April 18, Petitioners' counsel asked: "Have you made any progress on getting us deposition dates? Please let us know where this stands."[5] Aruba's counsel responded that she had a "follow up call" that she hoped would "provide some clarity on schedules", but again failed to provide any dates.[6] Petitioners' counsel responded that "we would like to start taking deposition[s] no later than mid to late May and finish them in June, so pretty much any time in June will work."[7] Petitioners received no response.

On April 20, Petitioners' counsel noticed a deposition of a 30(b)(6) witness for Aruba, explaining that Petitioners were not seeking to expand the number of witnesses if Messrs. Orr, Warmenhoven or Galvin could testify on the designated

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[2] Email from C. Mackintosh to L. McNally, 3/28/16, 4:35 p.m., a true and correct copy of which is attached to the accompanying Transmittal Affidavit of Michael J. Barry (the "Barry Aff.") as Ex. 1.

[3] Email from C. Mackintosh to L. McNally, 4/7/16 2:25 p.m. (Barry Aff. Ex 2).

[4] Email from L. McNally to C. Mackintosh, 4/7/16, 5:37 p.m. (Barry Aff. Ex. 3).

[5] Email from C. Mackintosh to L. McNally, 4/18/16, 11:30 a.m. (Barry Aff. Ex 4).

[6] Email from L. McNally to C. Mackintosh, 4/18/16, 1:24 p.m. (Barry Aff. Ex 5).

[7] Email from C. Mackintosh to L. McNally, 4/18/16, 1:27 p.m. (Barry Aff. Ex 6).

[redacted]

topics, and once again requesting dates for the depositions.[8] And once again, Aruba's counsel remained silent.

On the morning of April 27, Petitioners' counsel notified Aruba's counsel that a date had been scheduled for the deposition of Hewlett-Packard's financial advisor, Barclays, and again requested dates for the designated witnesses:

> On the same topic, we really do need deposition dates for the HP and Aruba witnesses we have asked for. We understand that these things take time, but it has been about a month since we provided the names of the witnesses we would like to depose and we have yet to secure a single date.
>
> Please let us know when can expect to receive dates.[9]

Aruba's counsel failed to provide any deposition dates in response to this inquiry.

On April 28, having received no proposed dates for any identified witness over the prior month, Petitioners' counsel made the following demand:

> With a fast-approaching fact discovery deadline, we simply cannot wait any longer. Accordingly, if you do not provide deposition dates for each of the witnesses whose deposition we have requested (Dominic Orr, Mike Galvin, Daniel Warmenhoven, Meg Whitman, HP 30(b)(6) and Aruba 30(b)(6)) by the close of business today, we will unilaterally notice these depositions for dates that are convenient to petitioners and we will expect the deponents to appear, absent court order relieving them of this obligation.[10]

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[8] Email from C. Mackintosh to L. McNally, 4/20/16, 2:57 p.m. (Barry Aff. Ex 7).

[9] Email from C. Mackintosh to L. McNally, 4/27/16, 10:00 a.m. (Barry Aff. Ex 8).

[10] Email from C. Mackintosh to L. McNally, K. Pohlmann, 4/28/16, 9:47 a.m. (Barry Aff. Ex 9).

[redacted]

Within minutes, Aruba's counsel responded that "[w]e plan to call you tomorrow."[11] Petitioners' counsel immediately asked for clarification on whether they would be providing dates for the proposed depositions,[12] and Aruba's counsel did not respond to this request either. Accordingly, on April 29, Petitioners' counsel filed a formal notice of deposition.[13]

Notably, throughout this entire time, ***not once*** did Aruba's counsel suggest that Petitioners' request for Ms. Whitman's deposition was at all improper, or that it should be limited in any way.

Finally, on May 2 and 3, 2016, Aruba's counsel provided available dates for depositions of each of the designated witnesses, but ***for the first time*** announced that Ms. Whitman's deposition would be limited to three hours.[14] Petitioners accepted the alternative dates offered for each of the designated witnesses, except for Ms. Whitman due to the arbitrary three hour limitation tied to the offered June

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[11] Email from K. Pohlmann to C. Mackintosh, 4/28/16, 9:54 a.m. (Barry Aff. Ex. 10).

[12] Email from C. Mackintosh to L. McNally, K. Pohlmann, 4/28/16, 9:57 a.m. (Barry Aff. Ex 11).

[13] Petitioners' Notice of Depositions, April 29, 2016 (Trans. No. 58931185); Petitioners' Notice of Depositions, May 5, 2016 (Trans. No. 58962724); Petitioners' Amended Notice of Depositions, May 5, 2016 (Trans. No. 58962583). (Barry Aff. Exs. 41-43).

[14] Email from L. McNally to C. Mackintosh et al., 5/2/2016, 11:32 a.m. (Barry Aff. Ex. 44); email from L. McNally to S. Grant et al., 5/3/2016, 5:58 p.m. (Barry Aff. Ex 45).

[redacted]

30 deposition date. Instead, Petitioners offered to adjourn Ms. Whitman's deposition for the date noticed and take the deposition on the offered June 30 date *if* Aruba dropped its arbitrary three hour time limit.[15] Aruba refused.

B. SIGNIFICANT FACTUAL ISSUES EXIST SURROUNDING MS. WHITMAN'S INVOLVEMENT IN, AND INFLUENCE OVER, THE SALES PROCESS.

Aruba's entire motion is premised on its factual assertion that Ms. Whitman was disengaged from the sales process and whatever involvement she did have did not impact the deal price. But these are the very issues that *warrant* discovery and provide no basis to impose an arbitrary time limit.

1. Ms. Whitman Was Directly Involved In The Sales Process.

Respondent makes the unsubstantiated factual assertion that Ms. Whitman had only a tangential involvement with the acquisition process. But the documents produced demonstrate that Ms. Whitman was involved in "Project Aspen" from its inception.[16] The Aruba Board of Directors specifically requested that Ms. Whitman explain the proposed transaction before engaging in due diligence.[17] Ms.

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[15] Email from S. Grant to M. Kelly et al., May 4, 2016, 4:24 p.m. (Barry Aff. Ex 46).

[16] *See* ArubaAA0236872 (email dated 7/23/14 from M. Whitman to A. Neri: "Have we engaged with Aruba yet?") (Barry Aff. Ex 12).

[17] ArubaAA0100331-32 ("It is clear that before they engage into due diligence they want some better understanding about us executing this and what sort of deal we

[redacted]

Whitman also was instrumental in convincing the Hewlett-Packard Board to pursue the deal, *including on issues of valuation.*[18] In fact, Aruba's replacement banker Evercore, which was brought on at the behest of Ms. Whitman (discussed below), explained Ms. Whitman's involvement as follows:

> … I also talked for quite a while late today with Dan Warmenhoven, the lead director…he said the acquirer is calling our CEO in the mid morning tomorrow…he also said he had a significant discussion with Meg right before the acquirer board meeting and his read as a former CEO himself was **that it was very clear Meg had taken ownership of this deal from the division that proposed it and she really wants to do it**… and he would be very surprised if the board turns Meg down…he and I both know her well and she usually gets her way on strategic moves…so we will see…keep your fingers crossed as I certainly am, the the [sic] acquirer will say tomorrow they want to move ahead…

EVERCORE00002148 (emphasis supplied) (Barry Aff. Ex 15).

Indeed, Ms. Whitman represented that the Aruba acquisition was her "idea", and that she and Mr. Neri were the primary advocates for the transaction. On October 14, 2015, Mr. Neri shared with Ms. Whitman that the HP-acquired Aruba had landed a significant defense contract. Ms. Whitman responded:

> Whose idea was Aruba? Who were the only advocates for Aruba?

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are willing to pursue, in addition to hear from Meg our overall strategy.") (Barry Aff. Ex 13).

[18] *See* ArubaAA0100331 (Barry Aff. Ex 13); ArubaAA0486662-722 (Barry Aff. Ex 14).

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[redacted]

Oh … You and me!!!

ArubaAA0350436 (Barry Aff. Ex 16). Aruba's representation, therefore, that Ms. Whitman had very little to do with the sales process (Res. Br. at 3) appears to be contradicted by the record and, at the very least, merits discovery.

2. Ms. Whitman Had Undue Influence Over The Removal And Replacement Of Aruba's Financial Advisor.

Respondent argues that "Aruba and HP believe that Petitioners intend to question Ms. Whitman about Aruba's selection of bankers and the reasons that HP preferred not to negotiate with Qatalyst. Based on comments from Petitioners' counsel, it appears that Petitioners intend to argue that HP's acquisition of Aruba was not an arm's-length transaction because HP controlled Aruba's banker." Res. Br. at 21. In large part, Aruba is right. But Aruba's suggestion that Petitioners' effort to investigate this issue is based on some "fabricate[d]" argument is simply false.

Aruba retained Qatalyst as its financial advisor for purposes of considering a proposed sale to Hewlett-Packard on September 5, 2014.[19] Ms. Whitman has a longstanding animosity towards Qatalyst founder Frank Quattrone. During her 1998 to 2008 tenure as eBay's CEO, Mr. Quattrone is rumored to have created

[19] Proxy at 39 (Barry Aff. Ex. 40).

[redacted]

"difficult circumstances" for Ms. Whitman on a number of deals.[20] Ms. Whitman's troubles with Mr. Quattrone apparently continued when she joined Hewlett-Packard. Qatalyst represented Autonomy Corp. Plc in its 2011 sale to Hewlett-Packard.[21] Ms. Whitman was on Hewlett-Packard's Board at the time of the acquisition and became HP's CEO while the deal was in progress. In November 2012, Hewlett-Packard announced that it had discovered a massive accounting fraud at Autonomy for which it took an $8.8 billion charge,[22] writing off more than three-quarters of the $11 billion HP paid for the company.[23] The ensuing fallout led to widespread litigation, as HP found itself defending against a shareholder suit and suing Autonomy executives in the United Kingdom.[24] Given his central role in the Autonomy debacle as well as his history dating back to Ms.

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[20] *See, e.g.*, Maureen Farrell, *Behind Frank Quattrone's Comeback in New Tech Era,* THE WALL STREET JOURNAL, December 20, 2015. (Barry Aff. Ex. 49).

[21] Autonomy was represented by Slaughter & May and Morgan Lewis – counsel for Aruba here – in connection with the acquisition.

[22] *See, e.g.*, Poornima Gupta and Nicole Leske, *HP alleges Autonomy wrongdoing, takes $8.8 billion charge,* REUTERS, November 20, 2012 (Barry Aff. Ex. 51); Quentin Hardy, *New Lawsuits Emerge in HP's Long-Running Autonomy Dispute,* THE NEW YORK TIMES, March 31, 2015. (Barry Aff. Ex. 50).

[23] *See, e.g.*, Poornima Gupta, Nadia Damouni, and Paul Sandle, *How a desperate HP suspended disbelief for Autonomy deal,* REUTERS, November 30, 2012. (Barry Aff. Ex. 52).

[24] Quentin Hardy, *New Lawsuits Emerge in HP's Long-Running Autonomy Dispute,* THE NEW YORK TIMES, March 31, 2015. (Barry Aff. Ex. 50).

[redacted]

Whitman's tenure at eBay, Frank Quattrone and his firm were *personae non gratae* with Ms. Whitman. It is no surprise, therefore, that when Ms. Whitman found out that Aruba had retained Qatalyst as its financial advisor, she promptly had them replaced.

At a dinner meeting on January 21, 2015, Ms. Whitman was informed that Aruba had selected Qatalyst as its investment banker for purposes of negotiating the deal. Ms. Whitman immediately rejected Qatalyst and blamed them for the Autonomy debacle. According to an email that Mr. Orr sent to Mr. Warmenhoven, "Meg spoke with conviction and emotion over dinner that they were guilty. Qatalyst will argue the reverse, but it does not matter." ArubaAA0055774 (Barry Aff., Ex. 17). Rather than push back and maintain a true third-party relationship, the Aruba team immediately caved and began to strategize how to keep their contract with Qatalyst but find a banker to represent Aruba who would be acceptable to Ms. Whitman. ArubaAA0055775 (Barry Aff. Ex 18).[25]

Even assuming it was within reason for Aruba's team to credit Ms. Whitman's criticism of Qatalyst, the Aruba board compromised the independence

[25] Mr. Warmenhoven wrote to Mr. Orr: "Got it. I have a strategy. HP uses all firms, especially now before the break up. But Stu is in a new firm and not conflicted, and Meg knows and (I think) trusts him. I sent a note to Meg asking for a 10 min call. I will suggest Stu. Are you OK with that?" ArubaAA0055775 (Barry Aff. Ex 18).

[redacted]

of any "third-party" negotiations by making the crucial decision to seek Ms. Whitman's *approval* of a replacement banker before negotiations. Mr. Warmenhoven explained this to the Aruba Board:

> … I have scheduled a call with Meg at 6:00 PM this evening to get her view of the status of the discussions and to discuss our representation. I intend to inform her that we signed up with Q many months ago. We are clearly bound by the contract with Q and will have to pay the 1% fee if the transaction is concluded. But if Dom is correct then we may need to bring in a second advisor. **I intend to float Stu Francis' name past Meg. Stu has left Barclay's and is now at Evercore. He is new, and Evercore is new in the tech sector, so they may be willing to do a deal at ¼% just to get a deal done that they can brag about publicly**.
>
> …

ARUN004372 (Barry Aff. Ex. 19). Mr. Warmenhoven thereafter did get Ms. Whitman's "approval" to hire Mr. Francis at Evercore. ARUN004373 (Barry Aff. Ex. 20).[26] But the decision to relegate Qatalyst to the "back room" while obtaining Ms. Whitman's blessing of Mr. Francis of Evercore raises serious concerns regarding the independence of the advice provided to the Aruba board thereafter and the integrity of the negotiations themselves.

[26] ARUN004373 ("I spoke with Meg for 10 min just now. Quatalyst [sic], Frank & George are not welcome in the negotiations. The issue is bigger than Autonomy and goes back to Ebay & Yahoo. Meg described George as 'evil.' She would be happy with either Stu or me as negotiator with Quatalyst [sic] in the back room.") (Barry Aff. Ex. 20).

[redacted]

First, as discussed below, as the replacement banker hired by Aruba at Ms. Whitman's behest, and who agreed to a much reduced fee in order to establish a position in the tech industry, Mr. Francis understood that Hewlett-Packard (and not Aruba) was a source of significant future business. Moreover, Mr. Francis's prior relationship with Barclays – *Hewlett-Packard's banker on the deal* – raises questions regarding potential conflicts that may have been exploited by Hewlett-Packard in the negotiations. *Infra*, Sec. 3.

Second, Qatalyst's relegation to a second-string player, still ostensibly responsible for providing advice to Aruba but without being able to take credit for the "lead role," sent Frank Quattrone into a tizzy. In a series of communications with Mr. Warmenhoven, Mr. Quattrone implored him to intercede for Qatalyst and help him "clear the air" with Ms. Whitman and Hewlett-Packard.[27] When Mr. Warmenhoven's efforts were unsuccessful,[28] Mr. Quattrone made repeated efforts

[27] On Sunday, January 25, Mr. Warmenhoven asked Ms. Whitman if she would be willing to speak with Frank Quattrone regarding her views towards him and Qatalyst, and followed up with an email touting his personal relationship with Mr. Quattrone: "I am confident that if you two could 'clear the air' that Frank and Quatalyst could be constructive participants in getting this deal done. … *If that is not possible, then please let me know and we will find another alternative.*" QP00010422 (emphasis supplied) (Barry Aff. Ex. 21). After being forwarded a copy, Mr. Quattrone quipped: "I suggested that he follow up and make it personal. Unfortunate that he gave her the escape clause at the end." *Id.*

[28] On Monday, January 26, Mr. Warmenhoven sent the following email to Ms. Whitman:

[redacted]

to reach out directly to Ms. Whitman, practically begging for an audience so that he may return to her good graces.[29]

> Hi Meg,
>
> I felt compelled to send you a follow-up message so you understand my intentions. We (Aruba) need to understand if your objection is directed at Quatalyst [sic] or George Boutros.
>
> That is why I suggested you met [sic] with Frank Quattrone.
>
> If you are not willing to meet with Frank, then I take that as a blanket objection to Quatalyst [sic].
>
> If you are willing to meet with Frank Quattrone, then
>
> a) If you make peace with Frank and feel you are willing to have Quatalyst [sic] in the negotiations, then we will find a new representative from Quatalyst [sic] other than George Boutros, or
>
> b) After you meet with Frank you decide that you are not willing to negotiate with Quatalyst [sic], in which case we will find a new representative.
>
> We are OK either way, albeit we have a contract with Quatalyst [sic], and we need to resolve the fee split issue. So we need to know where you are regarding Quatalyst [sic] as a firm (I know where you are regarding George).
>
> Thanks.
>
> Dan.

ArubaAA0120740 (Barry Aff. Ex.23).

[29] *See* QP00010424 ("Hi Meg, I was very surprised and disappointed to learn from Dan Warmenhoven today that you recently expressed very strong negative feelings about our firm, some of our people (including me) and our current representation of Aruba. I would greatly appreciate the opportunity to speak or meet with you at your earliest convenience to understand from you directly what your concerns are and give me the opportunity to address them.") (Barry Aff. Ex. 24);

[redacted]

On January 28, Ms. Whitman agreed to give Mr. Quattrone his requested audience, responding "Yes. Will call you tomorrow." ArubaAA0431391 (Barry Aff. Ex. 22). Petitioners obviously would need Ms. Whitman's deposition to investigate what transpired on that call.

According to the Proxy, on January 31, 2015, Hewlett-Packard provided a non-binding letter of intent proposing to acquire Aruba for $23.25 per share in cash. Aruba formally engaged Evercore "as an additional financial advisor" on February 1, 2015. Thereafter, Evercore acted as the "face" of Aruba in discussions with Hewlett-Packard, while Qatalyst supposedly provided ongoing advice to Aruba's Board in the "back room."

On February 27, 2015, when finalizing the deal, Ms. Whitman found out that Qatalyst's name would appear on the closing documents and "freaked out."[30] Frank Quattrone was also made aware of Ms. Whitman's "freak out," but was told that Ms. Whitman viewed the transaction as a "path towards 'rehabilitation' of our

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ArubaAA0432537 ("Just resending my message from Sunday below. I would be very grateful for the opportunity to meet or speak with you at your earliest convenience. Could you please let me know how best to connect? My numbers are below.") (Barry Aff. Ex. 25).

[30] ArubaAA0437615 (email from D. Orr to D. Warmenhoven: ""…I had dinner with Antonio last evening. The first thing he dwelled on was that 'Meg freaked out when she for the first time , saw the Qatalyst name on the docs as she thought we had switched them out with stu'") (Barry Aff. Ex. 27).

[redacted]

relationship" provided Qatalyst agree to not to publicize its role in the deal. Mr. Quattrone explained to his partners:

> Following the board meeting to approve the deal tonight, our client's lead director called me to pass along a message from the CEO of the buyer. Evidently, she was surprised to learn that we were still advising behind the scenes on this deal, and 'went on a rampage.' She mentioned that she gets 3 emails a week from us about the companies we sell, and that if she sees one on this deal she will 'light up'. **She asked him to pass along the message to us that there is now a path towards 'rehabilitation' of our relationship** but that it would be much harder and problematic for her if we did a lot of press and blast emails on this one. …

QP00011412-13. (Barry Aff. Ex. 26). Qatalyst agreed, provided that Ms. Whitman agreed that Qatalyst would have a "clean slate" going forward.[31]

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[31] At 5:53 a.m. on March 2, Mr. Quattrone sent the following email to Ms. Whitman:

> Hi Meg.
>
> I spoke with Dan Warmenhoven tonight, and he passed along your request that we not publicize with the media or through blast emails our role advising our client in its proposed acquisition by HP, and the potential adverse implications to the healing of the relationship between HP and Qatalyst if we do otherwise. While I was disappointed to hear this, we do want to have a good relationship with you, and we are willing to explore alternatives to our normal course of business in marketing this deal, if I can have your assurance that by doing so we will have a 'clean slate' with you and HP immediately going forward. Just to be clear, this would require a commitment by you and your team that you will not: 1) disparage our firm or any of our partners; 2) attempt to persuade any of our clients or prospective clients not to use our services; and 3) tell our clients or prospective clients that you won't acquire them (or that it would make things more difficult for you to acquire them) if we are their advisors, among other

[redacted]

On July 9, 2015, Frank Quattrone sent Ms. Whitman an email asking for a meeting "to discuss the path forward."[32] Thereafter, in September 2015, when THE WALL STREET JOURNAL was preparing an article profiling Qatalyst and Frank Quattrone,[33] including its role in the Aruba deal, Frank Quattrone reached out to

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> things. In other words, we would enjoy a constructive and supportive relationship with you going forward.
>
> In return, we would be willing to make a commitment: 1) not to discuss our role on this transaction with members of the media or post it on social media; and, 2) one of the following: a) to tone down our blast email by not mentioning anything about the premium or multiple paid and not send it to any employee or board member of HP (our first preference - the email would simply state that Qatalyst served as financial advisor to our client and attach your press release); b) to delay the 'toned down' blast email until the proxy statement is filed, in which our role will become publicly known (our second choice); or c) not to send out a blast email at all on the transaction (a distant third choice). I will point out that any of these and especially the last two will cause short term significant harm to our business, since Evercore will be aggressively marketing their role in the transaction as well as the circumstances that caused them to be added after the fact. Again, in an appeal to your fairness, we have already been embarrassed and our business damaged by what has already occurred, and I would respectfully request that we not be asked to incur significant further damage to our business when it is simply a matter of time before the public will know what our role was.

ArubaAA0431381-82 (Barry Aff. Ex. 47).

[32] ArubaAA0350501 (Barry Aff. Ex. 28).

[33] Maureen Farrell, *Behind Frank Quattrone's Comeback in New Tech Era,* THE NEW YORK TIMES, March 31, 2015. (Barry Aff. Ex. 49).

[redacted]

Ms. Whitman to vet proposed responses to the reporter's questions.[34] Notably, Mr. Quattrone's draft response to one question represented that "Qatalyst's relationship with HP is in good standing. We had a meeting with Meg Whitman and Tim Stonesifer last month to discuss ways in which we might collaborate in the future."[35] Hewlett-Packard requested that Mr. Quattrone remove any disclosure about Ms. Whitman's meeting with him, but Ms. Whitman ultimately was "okay" with the representation of the nature of the relationship between Qatalyst and Hewlett-Packard.[36]

There is nothing "fabricated", therefore, regarding Petitioners' effort to investigate the circumstances surrounding Qatalyst's removal as Aruba's primary investment banker, and whether Frank Quattrone's desire to "rehabilitate" his relationship with Ms. Whitman compromised the price Aruba stockholders received.

3. Ms. Whitman "Okayed" Aruba's Replacement Banker And Hired That Person's Former Colleagues To Negotiate Against Him

From 2008 to May 2014, Stuart Francis was the chairman of the global technology group at Barclays. Thereafter, he became the Senior Managing

[34] ArubaAA0432268-70 (Barry Aff. Ex. 29).

[35] ArubaAA0432269 (Barry Aff. Ex. 29).

[36] ArubaAA0431374-79 (Barry Aff. Ex. 30).

[redacted]

Director of the Technology Group of Evercore Partners Inc.[37] This is notable for at least two reasons.

First, at the time of its sale to Hewlett-Packard, Aruba had a highly unusual capital structure – it had no debt. However, beginning in 2013 and throughout 2014, the Board of Directors of Aruba had prepared to issue a $300 million bond offering, and worked extensively with *Barclays* to prepare that offering.[38] In fact, the bond offering was part of the operational plans of the Company and was only tabled because of the sale to Hewlett-Packard. Because Barclays had worked extensively with Aruba in preparation of the bond offering, Barclays necessarily had detailed knowledge of Aruba's capital structure and potentially nonpublic information regarding Aruba's operational plans. In fact, when the Aruba Board suddenly put the brakes on the bond issuance, Barclays speculated that Aruba was considering a merger and expressed concern that Aruba might give the investment banker business to the recently departed Mr. Francis.[39] Thus, when Aruba was

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[37] Dealbook, *Barclays Tech Banker to Join Evercore*, THE NEW YORK TIMES DEALBOOK, May 6, 2014. (Barry Aff. Ex. 53).

[38] *See* ArubaAA0117208 (discussion about the bond offering between Barclays and Aruba) (Barry Aff. Ex. 31); ArubaAA0001980 (minutes of an August 8, 2013 meeting of the Capital Structure Subcommittee of the Board of Directors of Aruba Networks, Inc., resolving to recommend that the Board approve a $300m financing plan) (Barry Aff. Ex. 32).

[39] ArubaAA00116120 (Barry Aff. Ex. 33).

[redacted]

informed that Hewlett-Packard had retained Barclays as its financial advisor, Mr. Orr was "caught … off-guard."[40] Significant questions exist, therefore, regarding the nature of Hewlett-Packard's retention of Barclays, and whether the fact of Mr. Francis's former position at Barclays played any role in Ms. Whitman's decision to "approve" his role to negotiate on behalf of Aruba against his former colleagues.

Second, in his new position, Mr. Francis was charged with leading Evercore's foray into the technology sector. Aruba used this fact to convince Evercore to accept a lower fee in order to publicize its role in a landmark deal.[41] But Mr. Francis's desire to drum up business also compromised his interaction with Ms. Whitman. In a series of emails from February 2015, Mr. Francis reported on his "negotiating dinner at Meg's house", touting how productive it was for purposes of building future business *with Hewlett-Packard*, concluding:

> … I think we made a pretty good impact from an advisory perspective, and she and I have known each other a long time socially through Princeton events and when our kids were at Menlo school… please pardon the "pat on the back" nature of this comment, but **after the meeting one of the people on our side said we had done a "masterful" job of taking meg through the issues as if we were her**

[40] BARC-ARU_00044302 ("Joakim called this afternoon. Antonio spoke to Dominic this morning (positive call). Joakim delivered the term sheet and had a follow-up discussion with Dominic … Joakim told Dominic that Barclays was advising. Seems this caught Dominic off-guard (Joakim said not in a bad way). Dominic mentioned his relationshiop with Kirk [Kalduc] (positively, it seems)") (Barry Aff. Ex. 34).

[41] ARUN004372 (Barry Aff. Ex. 19).

[redacted]

[redacted]

Ms. Whitman's testimony is thus relevant in evaluating the loyalties of Aruba's replacement banker Evercore.

4. Significant Questions Exist Regarding Ms. Whitman's Involvement In The Decision To Offer Orr The Job Of Running The Networking Division Of HP Post-Closing

As evidenced in the hearing transcript where this Court rejected the proposed settlement of the prior class action, the Court is well aware of at least one significant flaw in the sales process. Specifically, in September 2014, Hewlett-Packard told Messrs. Orr and Melkote (co-founder and Chief Technology Officer of Aruba) that HP wanted them to operate the combined wireless division of Hewlett-Packard following any acquisition of Aruba. But that is only part of the story. In fact, in November 2014, Hewlett-Packard specifically elicited Mr. Orr's agreement to run Hewlett-Packard's "whole networking business" post-closing.[43] And at the time of that conversation, Hewlett-Packard was subject to a confidentiality agreement, dated October 2, 2014, [redacted]

[42] [redacted]

[43] ARUN001210 ("Team. I met with Joakim over drinks for 75 minutes. He wanted to meet me for three things: (1) let me know clearly that, post combination, they expect me to run the whole networking business. He wants to look me in the eye and see that I have no objection. I told him I have no objection. …") (Barry Aff. Ex. 36).

[redacted]

[redacted][44]

Ms. Whitman was directly involved in discussions regarding the proposed transaction in November 2014,[45] and had direct communications post-signing regarding the compensation of Messrs. Orr and Melkote.[46] Significant questions exist, therefore, regarding Ms. Whitman's knowledge of the initial employment offer to Mr. Orr as well as the timing and circumstances surrounding discussions relating to his compensation.

ARGUMENT

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Del. Ch. Ct. R. 26(b). Under these standards, "[t]he scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching . . . Consequently, absent injustice or privilege, the Rule instructs the Court to grant discovery liberally." *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).

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[44] ARUN004018 (Barry Aff. Ex. 37); [redacted].

[45] On November 7, in response to an inquiry "How did the ASPEN review go with Meg yesterday?", Mr. Neri responded: "It was interesting. Meg continues to be supporting, not Cathie/Todd based on the risk profile. But we will proceed with the presentation to the FIC. Joakim will work with you and don (and Matt) to finish the presentation." ArubaAA0104125 (Barry Aff. Ex. 48).

[46] ARUN001210 (Barry Aff. Ex. 36).

[redacted]

Given the broad scope of permissible discovery, a protective order may be issued only for "good cause shown" to protect the party from "annoyance, embarrassment, oppression, or undue burden or expense." Del. Ch. Ct. R. 26(c).[47] "The protection of a party from, *inter alia*, annoyance must be construed to apply only to the ***extraordinary conditions*** that exceed the degree of annoyance that is present and inherent in any litigation." *Taglialatela v. Galvin*, 2012 WL 6681871, at *1 (Del. Ch. Dec. 7, 2012) (emphasis added). Respondent falls far short of meeting the "substantial burden" it faces in seeking to limit the deposition of the Chief Executive Officer of the acquiring party in an appraisal action to three hours. *Id.*

As the foregoing reflects, Ms. Whitman has knowledge regarding (1) the background and negotiation of the Transaction; (2) the circumstances surrounding the removal of Qatalyst as Aruba's investment banker, and the selection and appointment of Evercore as its replacement; (3) the selection of Barclays as Hewlett-Packard's investment banker and the "approval" of Mr. Francis at

[47] That Ms. Whitman is not a party to the litigation is of no moment, because it is well-settled that the "reasonably calculated to lead to the discovery of admissible evidence" standard of Rule 26(b) applies equally to discovery sought from non-parties. *See, e.g.*, *Lane v. Cancer Treatment Ctrs. of Am., Inc.*, 1994 WL 263558, at *1 (Del. Ch. May 25, 1994) (applying "reasonably calculated" standard to document requests forming part of motion for commission to third-party); *East v. Tansey*, 1993 WL 330063, at *1 (Del. Ch. Aug. 24, 1993) (applying "reasonably calculated" standard to subpoena *duces tecum* issued to third-party).

[redacted]

Evercore to negotiate against his former colleagues; and (4) the circumstances surrounding Hewlett-Packard's offer to Mr. Orr that he run Hewlett-Packard's networking operations post-closing.

In its brief, Aruba argues that Ms. Whitman had very little to do with the sales process, and that Petitioners essentially are making up an issue with the investment bankers in an effort to explain why the deal price is not reflective of fair value. Res. Br. at 2. As detailed above, Respondents are factually incorrect. But the very existence of this factual dispute demonstrates the need for and appropriateness of discovery. Ch. Ct. R. 26(b)(1); *Levy v. Stern*, 1996 WL 742818, at *2 (Del. Dec. 20, 1996) ("This Court has long recognized that the purpose of discovery is to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial."); *The News-Journal Co. v. Billingsley*, 1979 WL 178482 (Del. Ch. May 15, 1979) ("The purpose of discovery is to disclose the factual basis which the party will rely on at trial.").[48] Against this backdrop,

[48] *See also In re Nat'l Western Life Ins. Deferred Annuities Litig.*, 2011 WL 1304587 (S.D. Cal. April 6, 2011). In *National Western*, the court ordered the full-day depositions of a chairman/CEO and president/COO to move forward over their claims of a lack of knowledge and involvement, because the "entire purpose of a deposition is to determine what the deponent does and does not have knowledge about." *Id.* at *3. The court further noted that even if plaintiff's counsel's theory about the executives' role and involvement "is ultimately proven wrong at deposition, … his clients are entitled the opportunity to test that theory at deposition; that is the entire purpose of discovery." *Id.* at *4.

Respondent's assertion that subjecting Ms. Whitman to a full day deposition would cause sufficient "annoyance, embarrassment, oppression, or undue burden or expense" to warrant a protective order rings hollow.

Respondent's whine that someone as "busy and important" as Ms. Whitman should not be called upon to provide discovery in "a straightforward appraisal action" (Res. Br. at 2) should be rejected. The allegedly "straightforward" nature of an appraisal proceeding does not impact the scope of permissible discovery, as this Court recognized in *In re Appraisal of Dole Food Company, Inc*., 114 A.3d 541, 548 (Del. Ch. Dec. 9, 2014) ("Even in a statutory appraisal proceeding, 'the rules of discovery should [] be construed liberally.'") (quotation omitted). As this Court is well aware, "busy and important" executives often are called upon to sit for full-day depositions, even in "straightforward appraisal action[s]." In fact, in May 2015, Ms. Whitman's equally busy and important contemporary, Michael Dell, sat for a two day deposition in the "straightforward appraisal action" *In re Appraisal of Dell Inc.*, C.A. No. 9322-VCL. Neither Ms. Whitman's stature nor the allegedly "straightforward" nature of an appraisal action constitute the "good cause" necessary for this Court to enter a protective order.

Respondent's assertion that Petitioners are "unwilling to accommodate Ms. Whitman's schedule" is also false. Res. Br. at 3. To the contrary, when Petitioners

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initially provided the names of the Aruba/HP witnesses they wished to depose, they offered a six week window spanning "mid to late May" to "any time in June" for the depositions. *See* Res. Br. Ex. 4. Even after Respondent failed to provide a single deposition date for more than a month after being given the names of the witnesses Petitioners wished to depose (thus forcing Petitioners unilaterally to notice depositions to get Respondent to provide the promised dates), Petitioners remained willing to accommodate Ms. Whitman's schedule, offering, *inter alia*, to take her deposition on a weekend or to begin the deposition on her preferred June 30 date at 7 a.m. to allow a full day's testimony to conclude by mid-afternoon. Against this backdrop, Respondent's claim that Petitioners have been "unwilling to accommodate Ms. Whitman's schedule" is absurd.

Respondent's argument that "Petitioners do not intend to depose Ms. Whitman about the fair value of Aruba as a stand-alone company" (Res. Br. at 20) is also wrong. Petitioners' requested discovery from Ms. Whitman goes to the integrity of the deal process, and thus relates squarely to Respondent's primary defense that the supposed "third party" nature of the deal process itself should support a finding that the deal price is reflective of fair value.

As the facts above demonstrate, Ms. Whitman does, in fact, have superior knowledge of discoverable facts. She objected to Qatalyst and "approved"

[redacted]

Evercore. She presented the structure and strategy of the deal to the Aruba board. She had direct communications regarding Mr. Orr's compensation and was involved in the transaction when Hewlett-Packard corrupted the process by discussing employment agreements with Mr. Orr when forbidden from doing so under a confidentiality agreement. And she had repeated non-public discussions with Aruba's banker Frank Quattrone who was desperate to use the Aruba transaction to "clean the slate" with Ms. Whitman and Hewlett-Packard in the hope of finding "ways in which [they] might collaborate in the future."

In seeking the protective order, Respondent has presented no valid arguments demonstrating why an arbitrary three hour limit is necessary or appropriate. Respondent concedes that a deposition is appropriate, and makes factual arguments that simply confirm that discovery is necessary. In deposing Ms. Whitman, Petitioners will make every effort to both accommodate her schedule and to proceed efficiently. If the deposition takes three, five, or the full seven hours, that should be a product of responsible questioning. But if there is a valid need for discovery – and Respondent concedes there is – the deposition should not abruptly end after three hours for no reason but Respondent's baseless insistence that it should.

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CONCLUSION

Respondent's motion for a protective order should be denied.

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CERTIFICATE OF SERVICE

I, Christopher A. Selzer, hereby certify that on June 15, 2016, I caused a copy of the foregoing Redacted – Amended Public Version of Brief in Opposition to Respondent's Motion for a Protective Order to be served via LexisNexis File and Serve on the following:

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