IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CEDE & CO. and CINERAMA, INC., Petitioners, v. TECHNICOLOR, INC., Respondent.	C.A. No. 7129
	CONSOLIDATED
CINERAMA, INC., a New York corporation, Plaintiff, v. TECHNICOLOR, INC., a Delaware corporation, MORTON KAMERMAN, ARTHUR N. RYAN, FRED R. SULLIVAN, GUY M. BJORKMAN, GEORGE LEWIS, RICHARD M. BLANCO, JONATHAN T. ISHAM, MACANDREWS & FORBES GROUP, INCORPORATED, a Delaware corporation, MACANFOR CORPORATION, a Delaware corporation, and RONALD O. PERELMAN, Defendants.	C.A. No. 8358

COMBINED POST-TRIAL OPENING BRIEF OF PETITIONERS/PLAINTIFF IN C.A. NOS. 7129 AND 8358
VOLUME I OF III VOLUMES

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NATURE AND STAGE OF THESE CONSOLIDATED ACTIONS

A. Chancery Action No. 7129 - The Appraisal Case

Chancery Action No. 7129 is an appraisal action commenced in March 1983 by petitioners Cede & Co. ("Cede") and Cinerama, Inc. ("Cinerama"). Cede was the record owner and Cinerama was the beneficial owner of 201,200 shares of common stock of respondent Technicolor, Inc. ("Technicolor"). The appraisal proceeding arises out of the January 24, 1983 freeze-out merger between Technicolor and Macanfor Corporation ("Macanfor"), a wholly-owned subsidiary of MacAndrews & Forbes Group, Incorporated ("MAF") (hereinafter referred to as "the Merger"). In connection therewith, each shareholder of Technicolor's par value $1.00 per share common stock (excluding MAF and its subsidiaries) was offered $23 cash per share. Petitioners dissented from the Merger, seeking fair value for the Technicolor stock owned by Cinerama as of the time of the Merger. A stipulated order, entered June 27, 1983, provides that petitioners have complied with the provisions of Section 262 of the Delaware General Corporation Law and are entitled to appraisal rights for 201,200 shares of Technicolor common stock owned on the effective date of the Merger (Dkt. No. 5).

Cinerama contends it is entitled to an award of $62.75 per share, based on a $286,629,000 fair value for Technicolor as of January 24, 1983. Cinerama also seeks an award of daily compound interest at the rate of 12.07% per annum, plus costs, including the fees of expert witnesses.

Respondent contends that the fair value of the Technicolor stock as of the Merger was between $11 and $23 per share.[1] Respondent also contends that if Cinerama is entitled to an award of interest it should be simple interest at the rate of 9.137% per annum. (See Plaintiff's Exhibit 459C at Response 88)[2] Respondent opposes paying the costs of petitioners' expert witnesses.

B. CHANCERY ACTION NO. 8358 - THE FRAUD CASE

Chancery Action No. 8358 is an action for fraud, breach of fiduciary duty and unfair dealing in connection with the Merger. The action was brought in January 1986 by plaintiff Cinerama against Technicolor, seven of the nine members of the Technicolor Board of Directors at the time of the Merger (Morton

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1 Respondent proferred the testimony of two valuation experts whose opinions on value were different. Professor Robert Hamada offered the opinion that "the best estimate of the value of Technicolor shares as of January 24, 1983, if there had been no MAF bid at all" was in the range of $11 - to - $13 per share, but if one takes into account the November 4, 1982 Macanfor Offer to Purchase all of the common stock of Technicolor at $23 per share, then the "value of Technicolor shares as of January 24, 1983" was no greater than $23 per share. (Defendants' Exhibit 355, p. 3; emphasis added.) (All of Respondent's and Defendants' Trial Exhibits will hereinafter be designated "DX" followed by the exhibit number.) Professor Alfred Rappaport opined that the value of Technicolor as of January 24, 1983 was $60 million or $13.14 per share. (DX 344 at 1.1) As of the close of trial testimony, respondent had not taken a definitive position as to the fair value of Technicolor as of the date of the Merger. See Trial Transcript Volume 43 at 98-100. (Hereinafter references to the transcript of the trial will be designated "TR" preceded by the volume number and followed by the page number.)

2 All of Petitioners' and Plaintiff's Trial Exhibits will hereinafter be designated "PX" followed by the exhibit number.

Kamerman, Arthur N. Ryan, Guy M. Bjorkman, Richard M. Blanco, Fred R. Sullivan, Jonathan T. Isham and George Lewis), MAF, Macanfor and Ronald O. Perelman, Chairman of MAF. Plaintiff alleges that the Merger was void ab initio because one of the Technicolor Directors, Charles S. Simone, voted against the Merger and against amending the Technicolor charter. A unanimous vote of the Directors was necessary to waive a 95% super majority shareholder voting requirement in the Technicolor charter. Because it alleges that unanimous director approval was not achieved and since only 89.3% of the shareholders voted in favor of waiving the super majority provision and to approve the Merger (PX 62 at 13), plaintiff contends the Merger was not lawful.

In the fraud action plaintiff also charges certain defendants, as set forth in the Complaint, with multiple acts of wrongdoing in connection with the Merger including: (1) engaging in breaches of fiduciary duty and self-dealing; (2) committing acts of fraud, including the issuance of false and misleading documents to the public which failed to disclose material information and which misrepresented other material information; (3) accepting a price so grossly unfair for Technicolor as to be a badge of fraud; (4) violating the test of entire fairness; and (5) aiding and abetting the wrongs of others.

Plaintiff seeks a judgment awarding it rescissory damages and damages for losses resulting from defendants' wrongdoing in the amount of $32,867,482, plus pre-judgment daily compound interest at the rate of 11.04% per annum from October 7,

1988, until the entry of judgment, and an award of counsel fees and costs, including the fees of expert witnesses.

Defendants deny liability. They seek a judgment dismissing C.A. No. 8358 and awarding them their reasonable costs and expenses.

C. CONSOLIDATION

Pursuant to an opinion issued by the Delaware Supreme Court on July 10, 1988 (reported at 542 A.2d 1182), this Court entered an order on July 1, 1988, authorizing Cinerama to proceed to trial in both actions and consolidating the appraisal and fraud cases for discovery and trial (Dkt. No. 109).

D. TRIAL

These cases were tried to the Court during the period October 16, 1989 through February 16, 1990, for a total of 47 trial days. Twenty-one witnesses testified; eight called by petitioners/plaintiff and 13 by respondent/defendants. During the course of those proceedings close to 700 exhibits were admitted into evidence. The Court held an all-day hearing on Pre-Trial Motions on October 2, 1989, and a Pre-Trial Conference on October 13, 1989, after which a Pre-Trial Order was entered (Dkt. No. 267). The Pre-Trial Order provides that "all deposition transcripts taken in these actions," except for the transcripts of the depositions of expert witnesses, are "part of the trial record in these cases, except for such objections thereto which the Court sustains." (Pre-Trial Order VII(3) at 41)

Accordingly, the trial record in these cases includes the transcripts of the depositions of the following witnesses, whose testimony was given on the designated days:

Entity	Witness	Volumes	Period
Bank of America	Thomas E. Meyer	3	8/12-14/85
Bear Stearns & Co.	Jeffrey Bloomberg	3	11/20-12/5/85
	Paul Hallingby	1	4/22/86
	Gilbert Matthews	1	4/15/86
	Phyliss Ross Schless	1	9/22/86
	Michael Tarnapol	1	2/13/86
Chase Manhattan Bank	James T. Beale	1	2/12/86
	Mara K. Seibert	4	10/1-16/85
Cinerama	James J. Cotter	2	1/8-9/86
	Michael R. Forman	1	1/7/86
Goldman Sachs & Co.	John Golden	2	9/24-25/86
	Richard Sapp	3	3/13-4/1/86
	Joseph Sullivan	1	4/17/86
MAF	Ronald O. Perelman	5	12/9-12/13/85
	Bruce Slovin	2	4/30-6/16/86
	Carl T. Tsang	4	1/28-1/31/86
Technicolor	Guy M. Bjorkman	1	3/25/86
	Richard M. Blanco	1	10/29/85
	Jay Cipes	3	1/10/86, 8/31-9/1/89
	Raymond Gaul	3	10/31-11/5/85
	Jonathan T. Isham	1	12/3/85
	Morton Kamerman	2	11/12-13/85
	John H. Oliphant	3	11/4-6/85
	George Lewis	1	11/18/85
	Arthur N. Ryan	4	10/28-11/1/85
	Charles S. Simone	2	12/16/85, 9/2/87
	Fred R. Sullivan	2	2/3-4/86
TOTALS	27	58	8/85-9/89

At the close of plaintiff's case in the fraud action, defendants tendered motions to dismiss. After briefing, the

Court denied the same from the bench on November 28, 1989, except to the limited extent of ruling that Technicolor cannot be held liable on a respondeat superior theory for breaches of fiduciary duty which may have been committed by the Director Defendants. (25 TR 68-69)

E. NATURE OF THE BRIEF

This submission is petitioners' opening brief in the appraisal case and plaintiff's opening brief in the fraud case. The brief is divided into three volumes: Volume One sets forth the facts and Volumes Two and Three contain the arguments in the fraud and appraisal cases, respectively.

UNDISPUTED BACKGROUND FACTS[3]

A. THE PARTIES

Cinerama is a New York corporation with its principal place of business located in Los Angeles, California. As of January 24, 1983, Cinerama was the beneficial owner of 201,200 shares of the common stock of Technicolor, 4.405% of the total outstanding. These shares were registered in the name of Cede, a New York partnership which acts as a depository that effects transfers of securities deposited with it by participants. Cede had no beneficial interest in the Technicolor stock owned by Cinerama. As the record owner of the Technicolor shares beneficially owned by Cinerama, Cede appears as a nominal petitioner in the appraisal case. It is not a party to the fraud case. Cinerama is a co-petitioner and the real party-in-interest in the appraisal case and the sole plaintiff in the fraud case.

Technicolor is a Delaware corporation with its principal place of business located in North Hollywood, California. From before January 1, 1982 through January 24, 1983, there were 4,567,491 shares of Technicolor stock outstanding, which shares were publicly traded on the New York Stock Exchange. Technicolor is the only respondent in the appraisal case. It is also a defendant in the fraud action.

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3 Unless otherwise noted, all of the facts set forth in this section of the brief are taken from Part II of the Pre-Trial Order (beginning at page 6), wherein the parties specifically stipulated that the factual matters set forth therein were "admitted and require no proof."

Defendant MAF is a Delaware corporation with its principal place of business located in New York, New York. At the time of the Merger, defendant Ronald O. Perelman ("Perelman") was Chairman of the Board and Chief Executive Officer of MAF. Perelman beneficially owned 38.4% of the common stock of MAF.

Defendant Macanfor was a Delaware corporation that was a wholly-owned subsidiary of MAF. Macanfor was incorporated in Delaware on October 28, 1982, and it was created by MAF in order to effectuate a tender offer for the common stock of Technicolor and thereafter to accomplish the Merger with Technicolor. Macanfor was merged into Technicolor, the latter of which survived the Merger, on January 24, 1983.

All of the directors of Technicolor at the time of the Merger, except for Messrs. Frye and Simone, were named as defendants in the fraud action. Director William R. Frye died before the fraud action was filed. He became a Vice President and a Director of Technicolor in 1970. He resigned as Vice President in 1975, but remained a director until the time of the Merger. As of October 29, 1982, he owned 45,000 shares of Technicolor stock. In 1982-83, Director Charles S. Simone ("Simone") was President of Sheffield International Investors Ltd. He was elected a Technicolor director in 1976, and he remained a director until the time of the Merger. As of October 29, 1982, he owned 300 shares of Technicolor stock.[4]

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4 Simone was not named a defendant because he testified on deposition that he opposed the Merger and voted against the same.

- Fred R. Sullivan: A director since 1972. Mr. Sullivan was in October 1982 Chairman and Chief Executive Officer of Kidde, Inc. As of October 29, 1982, he beneficially owned 13,800 shares of Technicolor stock, was the trustee for 5,700 shares held in trust for his daughter, and custodian for 1,750 shares owned by his son.

- Jonathan T. Isham: A director since 1976. He had been Vice Chairman of Drexel Burnham Lambert, Inc. ("Drexel Burnham") after the firm of William B. Witter was merged with Drexel Burnham in 1976. By 1979 Isham had resigned his affiliations with Drexel Burnham. As of October 29, 1982, he beneficially owned 150 shares of Technicolor stock.

- George Lewis: A director since 1980. Mr. Lewis was an attorney and member of the New York Bar in private practice in New York City. As of October 29, 1982, he beneficially owned 7,500 shares of Technicolor stock; his wife owned an additional 1,200 shares.

B. TECHNICOLOR'S BUSINESS ACTIVITIES

At the time of the events giving rise to these actions, Technicolor's business activities were conducted through domestic and foreign divisions and subsidiaries within four business segments: Professional Services; Consumer Services; Government Services; and Television Program Licensing.

As of the fall of 1982, and for all Technicolor's prior business history, the Professional Services Group was Technicolor's main source of revenues and profits. In the United

States, the Professional Services Group provided professional film processing services primarily to the motion picture and television industries through laboratories in North Hollywood, California and New York, New York. In addition, the Group provided film processing services to the professional non-theatrical industry. In Europe these services were provided through a 70% owned subsidiary, Technicolor Limited (hereinafter referred to as either "Limited" or "London"), which owned a processing laboratory in London, and a wholly-owned subsidiary, Technicolor S.P.A. (hereinafter referred to as either "SPA" or "Rome"), which owned a laboratory in Rome.

The Professional Services Group also provided, through a wholly-owned subsidiary, Vidtronics, Inc. ("Vidtronics"), videotape post-production and videocassette duplicating services to the motion picture and television industries. The Vidtronics Videocassette Duplicating Division began operations at a leased plant in Newbury Park, California in July 1981. Management believed that it was one of the largest individual duplicating facilities in the world.

As of the fall of 1982, the Consumer Services Group operated five film processing laboratories which provided movie, slide, disc and photographic film processing services to other photofinishers and to consumers through independent dealers, such as camera and drug stores. This segment of the business was denominated the Consumer Photo Processing Division (hereinafter "Consumer Photo Processing" or "CPPD"). Also included in this business group was Technicolor's Standard Manufacturing Division

(hereinafter "Standard"), which manufactured (at a facility in Chicopee, Massachusetts) film splicers and associated equipment for use in film processing laboratories. The third business of this group was a one hour retail photofinishing service provided through Technicolor One Hour Photo, Inc., a wholly-owned Technicolor subsidiary (hereinafter either "One Hour Photo" or "OHP"). On June 8, 1981, Technicolor announced its intention to create OHP and to enter into the consumer one hour photoprocessing business. The company's original plans called for leasing space for approximately 1,000 stores throughout the United States in high traffic areas. (PX 290; PX 294A) The first store opened in August 1981; as of December 6, 1982, a total of 39 stores had been opened.

As of the fall of 1982, the Government Services Group, through Technicolor Government Services, Inc., a wholly-owned Technicolor subsidiary (hereinafter "Government Services"), provided photographic and non-photographic support and management services under contract to agencies of the United States Government.

As of the fall of 1982, Technicolor's Television Program Licensing business, through its Gold Key Entertainment Division (hereinafter "Gold Key"), licensed motion pictures and other programs for television exhibition through arrangements with domestic and foreign local television stations and pay television companies. At year end 1982, Gold Key had acquired and held distribution rights to approximately 600 features films, 20 television series, 30 television specials and 156 cartoon short

subjects. In the spring of 1982, Technicolor had decided to attempt to sell Gold Key. Mr. Ryan was in charge of the effort to dispose of the business.

As of the fall of 1982, Technicolor also had an Audio Visual Division (hereinafter "Audio Visual") which distributed video equipment under an agreement with Funai Electric Trading Co. Ltd. of Japan. During 1982, Technicolor decided to terminate this operation via a liquidation.

C. MAF'S BUSINESS ACTIVITIES

As of the fall of 1982 and through the time of the Merger, MAF divided its business into two main industry segments: the processing of licorice through its wholly-owned subsidiary, MacAndrews & Forbes Company, and the manufacture of chocolate and related products through its subsidiary, Wilbur Chocolate Co.

D. THE PROCEDURAL HISTORY OF THE MERGER

Prior to September 10, 1982, MAF owned no Technicolor shares. As of October 7, 1982, MAF beneficially owned 220,000 shares of Technicolor common stock, approximately 4.8% of Technicolor's issued and outstanding shares. Those shares were purchased in the open market between September 10 and October 7 of 1982. (PX 58 at 8, 9; Dkt. No. 309)

In September and October 1982, MAF's representatives contacted Chase Manhattan Bank ("Chase") and Bank of America (hereinafter sometimes "B of A") to discuss financing for a

proposed acquisition of Technicolor by MAF. Both MAF and the banks contemplated that MAF would repay any acquisition debt from the sale of Technicolor assets and from the cash flows of Technicolor and MAF.

To finance the acquisition of the Technicolor stock, between October 27-28, 1982, MAF and Macanfor obtained a commitment letter for an $85 million line of credit from a bank consortium led by Chase. The amount of the credit was eventually increased to $90 million. The credit agreement was finally executed November 24, 1982. (PX 244)

On October 28, 1982, the MAF Board of Directors met and approved an acquisition of all of the stock of Technicolor at a price of $23 per share to be accomplished via a two-step process, involving an initial tender offer and a follow-up, second step, freeze-out merger. (PX 62 at 6) The next day, October 29, 1982, at a Special Meeting of the Technicolor Board of Directors (hereinafter the "Special Board Meeting"), Technicolor's Board, purportedly by a unanimous vote, accepted the MAF offer and agreed to a plan whereby Technicolor would merge with Macanfor after an initial tender offer and the subsequent amendment of its charter to eliminate the 95% super majority merger requirement. (PX 62 at 7; PX 72)

The Special Board Meeting was held, commencing at about 10:00 a.m., at the law offices of Debevoise & Plimpton ("Debevoise") in New York City. In addition to all of the Technicolor Directors, the following individuals were present throughout the Meeting: John Oliphant (Technicolor's Secretary

and General Counsel); Wayne Powitzky (Technicolor's Chief Financial Officer); Meredith Brown and William Phillips (of the Debevoise firm, which had been retained as Technicolor's Special Counsel); John Golden, Richard Sapp and Joseph Sullivan (of Goldman, Sachs & Co., an investment banking firm retained by Mr. Kamerman on behalf of Technicolor).

Following the Special Board Meeting on October 29, 1982, there was a document execution session at the Debevoise offices, at which time an Agreement and Plan of Merger (the "Merger Agreement") was signed by Perelman on behalf of MAF and Macanfor and by Morton Kamerman ("Kamerman") on behalf of Technicolor. At the same time the parties entered into and executed a Stock Option Agreement (the "Stock Option Agreement"), which gave MAF/Macanfor the right to purchase up to 844,000 authorized but unissued shares of Technicolor common stock at a price of $23 per share. (PX 57 at GS1352-61) Also executed at the same time was a Stock Purchase Agreement among Messrs. Kamerman and Bjorkman and their wives and Macanfor (the "Stock Purchase Agreement"), whereby the former agreed to sell the latter most of the Technicolor stock owned by them. (PX 57 at GS1363-72; 59) (Not included in the Stock Purchase Agreement were 15,249 shares owned by Kamerman.) An amendment to Kamerman's employment contract with Technicolor was also executed at that time, with Guy M. Bjorkman ("Bjorkman") signing on behalf of the company.

Pursuant to the terms of the Merger Agreement, on November 4, 1982, Macanfor issued and disseminated an Offer to Purchase and commenced a tender offer for all of Technicolor's

outstanding stock at a price of $23 per share (the "Tender Offer"). On the same day, Technicolor issued and filed with the Securities and Exchange Commission ("SEC") a Schedule 14D-9 (the "14D-9"), conveying to its shareholders the recommendation of the Technicolor Directors that they tender their shares to Macanfor in response to the Tender Offer. (PX 57)

On November 30, 1982, MAF announced that Macanfor had accepted and purchased 2,426,506 shares of Technicolor common stock pursuant to the Tender Offer, which, when added to the 220,000 already owned by MAF, gave MAF beneficial ownership of 2,646,506 shares, or approximately 58% of Technicolor's outstanding common stock. As of December 3, 1982, MAF beneficially owned through Macanfor an aggregate of 3,754,181 shares or approximately 82.19% of Technicolor's outstanding common stock.

On December 27, 1982, Technicolor issued a notice of a special stockholders meeting to be held on January 24, 1983 (the "Special Stockholders Meeting") to vote upon the proposed charter amendments to eliminate the 95% super majority vote requirement and upon the actual merger between Technicolor and Macanfor. The notice was accompanied by a proxy statement (the "Proxy"). On January 24, 1983, the Merger was consummated, as a result of which Technicolor became a wholly-owned subsidiary of MAF.

Mr. Kamerman tendered 81,953 shares in the Tender Offer and sold 15,249 in connection with the Merger. (His wife tendered all of her shares into the Tender Offer. PX 59) The following directors tendered their shares in the Tender Offer:

Simone, Bjorkman, Lewis, Blanco, Isham and Frye. (Mrs. Bjorkman and Mrs. Lewis also tendered all of their shares into the Tender Offer. PX 6; PX 59; PX 61) Directors Ryan and Sullivan sold their shares in connection with the Merger.

Cinerama did not tender any of the Technicolor stock owned by it in response to the Tender Offer.

E. THE 1988 SALE OF TECHNICOLOR

On October 7, 1988, Carlton Communications plc ("Carlton PLC"), a United Kingdom company, purchased from Revlon Group Incorporated and MacAndrews & Forbes Holdings, Inc., the "Technicolor Businesses" as defined in a Stock Purchase Agreement dated September 9, 1988, as amended and restated on October 7, 1988, and in certain ancillary agreements (hereinafter collectively referred to as the "Carlton Agreement").

Carlton paid a total of $760 million to acquire the assets of the Technicolor Businesses. The purchase price was subject to an adjustment. The sellers of the Technicolor Businesses retained $7,480,000 in accounts receivable due Technicolor from New World Entertainment. That asset of the Technicolor Businesses was not transferred to Carlton.

STATEMENT OF FACTS RELATING TO THE ISSUES IN THE FRAUD CASE

We set forth in this section plaintiff's post-trial factual contentions (i.e., proposed factual findings), which Cinerama submits give rise to liability in the fraud case.[6]

A. ENTER PERELMAN - ALREADY IN CONTROL OF MAF AND IN SEARCH OF AN EMPIRE

By fall 1982 Perelman was firmly in control of MAF by reason of his stock ownership. MAF's 10-K for the year ended December 31, 1981, reported that Perelman owned 38.4% of MAF's stock by virtue of which "he may be deemed to control [MAF]." (PX 399A at 8-9, see also PX 55 at P303807; PX 402 at E06187) Moreover, Perelman and the officers and directors of MAF who were beholden to him for their appointment to the Board and to senior management positions, together controlled 54.1% of MAF's common stock. (PX 399A at 8)

1. Perelman On The Prowl For Acquisition Targets

MAF as shaped and controlled by Perelman in fall 1982, divided its businesses into two main industry segments: the processing of licorice through its wholly-owned subsidiary, MacAndrews & Forbes Company, and the manufacture of chocolate and

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6 The facts relating to the fair value of Technicolor as of January 24, 1983, which are pertinent to the appraisal case (and to the badge of fraud argument in the fraud case) are set forth hereinafter in Volume III of this brief.

related products through its subsidiary Wilbur Chocolate Company. (24 TR 14; 42 TR 506; PX 399A at 1-5; PX 55 at P303807) As of 1982 MAF had total sales of approximately $100 million. (42 TR 6)

Perelman and Mara K. Seibert of Chase (hereinafter "Seibert"), then MAF's primary banker, testified that both of these divisions were essentially flat, no growth businesses. Thus, Perelman admitted on deposition that in 1982 MAF had determined that there were no opportunities for expansion in the chocolate and licorice area, and he so advised Thomas E. Meyer of Bank of America (hereinafter "Meyer") in connection with his request for acquisition financing. (Perelman 35-6; Meyer 109; Seibert 54, 182; PX 424 at 2)[7] Perelman had more ambitious goals in mind.

Accordingly, beginning in 1980 Perelman actively sought out acquisition targets for MAF. Perelman testified that in the years 1980-1982, he looked at "tens, maybe a hundred" candidates. (42 TR 7) In late 1981, MAF requested a $25 million revolving credit from Chase to use as a blind acquisition pool. In that connection Perelman and/or other MAF representatives advised James T. Beale ("Beale") and Seibert of Chase that they were looking for companies with "strong cash flow and solid management." Robert T. Carlton, MAF's Senior Executive Vice President, (hereinafter "Carlton") was more direct; he told

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7 References to deposition testimony will be designated by the name of the witness followed by the page number.

Seibert that MAF was looking for "a bargain." (Beale 25-8, 29-31; Seibert 48-51, 52-5, 58-9; PX 231; PX 232 at 2)

In or about 1981 MAF made a tender offer for Intext, a small publishing company in Pennsylvania and for The Richardson Company ("Richardson"), a chemical company in Chicago, but they were overbid in both cases. MAF also sought unsuccessfully to acquire Amalgamated Sugar. In the spring of 1982, MAF attempted to purchase Consolidated Cigar from Gulf + Western, but no transaction was concluded. (42 TR 7-8; 24 TR 13; Perelman 9-11; Tsang 10-13; Seibert 57-8)

Moreover, as discussed below, by summer of 1982, Perelman and MAF sought to raise a $30 million war chest to go after acquisition targets, via the sale of a subordinated debenture to be issued by MAF and placed by Drexel Burnham with Executive Life Insurance Company ("Executive Life").

As of 1982 Perelman had a clearly defined acquisition strategy: to focus on mature businesses with stable cash flow and excess assets that could be disposed of to finance the acquisition. At trial Perelman articulated that strategy as follows, "[w]e were seeking ... companies that were low technology, non-fad and non-fashion ... . Stable cash flow generators." (42 TR 7) Bruce Slovin, the MAF President ("Slovin"), whose chief responsibility was to assist Perelman in seeking out acquisition candidates, concurred. As he put it, MAF tried to buy businesses that "were not subject to fads and fashions but that could give us a healthy cash flow on a stable

basis going forward." (24 TR 11; see also Perelman 14-5, 18-9, 219-20)

2. Perelman Sets His Sights On Technicolor

By no later than September 1982 Perelman had fixed his focus on Technicolor. As Perelman tells the story, he came upon Technicolor by happenstance through conversations and then review of public financial documents about the company which he discussed with Slovin. (42 TR 8; 24 TR 14-5; Perelman 53-4, 60-1; Slovin 6-7) According to Arthur N. Ryan ("Ryan"), Technicolor's President, however, it was Martin Davis ("Davis") of Gulf + Western who knew that Perelman was looking for a company in the business and "steered" him to Technicolor. (Ryan 90-1)

Perelman and Slovin admit that Technicolor fit their acquisition criteria to perfection. (42 TR 8-9; 24 TR 10) Technicolor's professional film processing division was just the type of basic, mature business that Perelman favored. As Slovin described it: "We saw a core business that we thought had long lasting earning power, which was the professional film processing business." (24 TR 10) As of fall 1982, Technicolor held the dominant position in the theatrical film processing industry, with a market share of about 40%. Moreover, Technicolor's core businesses, Professional and Government Services, had generated and would continue to generate large and steady amounts of cash flow.

In addition, Technicolor had excess assets available for disposal to help finance the acquisition debt that MAF would

incur. As of fall 1982, Technicolor's Gold Key and Audio Visual Divisions already were on the market and had attracted interest among potential purchasers. With less than 40 stores in place, One Hour Photo also was an operation that could be terminated with ease, with the sale of the existing stores generating more cash to pay down debt.

Add to the foregoing the fact that in fall 1982 the price of Technicolor stock was artificially depressed because of One Hour Photo and one has the makings of a perfect acquisition target.

B. PERELMAN DEVISES A MASTER PLAN FOR RESTRUCTURING TECHNICOLOR

1. From the Outset MAF Develops a Strategic Plan to Dispose of Certain Technicolor Assets

Perelman's philosophy in acquiring Technicolor was to strip away the non-core businesses and retain the core operations that generated strong, stable cash flows. No sooner had Perelman identified Technicolor as an acquisition candidate than he, together with Slovin, set about formulating a strategic plan to dispose of certain Technicolor assets in order to implement Perelman's philosophy and convince the banks to finance the acquisition.

The plan was in place from the start. Slovin testified that from the time of his involvement in the Technicolor project in early September 1982, they had determined to concentrate efforts on the professional film processing business and a few other businesses and to liquidate the losing and marginal

businesses. (24 TR 10-11; Slovin 14, 18) The operations that Perelman identified for disposal were Technicolor's Audio Visual, Consumer Photo Processing, One Hour Photo and Television Program Licensing (Gold Key) Divisions, including excess real estate owned by the company. Perelman determined to retain only the Professional Film (including video) and Government Services Divisions and to concentrate the efforts of the company in maximizing their profitability. (42 TR 22, 24; Perelman 171, 175)

2. In Its Presentation To The Banks, MAF Represents That It Will Dispose Of Certain Technicolor Assets And Realize $50 Million In One Year

Perelman's new business plan for restructuring Technicolor was intended to prove to his bankers that MAF could handle an acquisition as large as Technicolor. As of fall 1982 Technicolor was one-third larger in revenues than MAF and had a market capitalization 2.5 times its size. Therefore, MAF was dependent on Technicolor's cash flow and the proceeds to be generated from disposition of assets to finance the transaction. By Slovin's own account, MAF represented to the banks that the repayment schedule was based primarily on disposition of certain of Technicolor businesses. (24 TR 23)

Once Perelman defined the contours of the plan, Carlton, assisted by Carl Tsang (MAF's vice president and controller) ("Tsang") saw to it that a financing package was put together for the banks embodying the Perelman plan. On October 12, 1982, Carlton instructed Tsang to prepare a financial model for the

banks in connection with MAF's financing request for the acquisition of Technicolor. Tsang was specifically advised to break up the businesses of Technicolor into two categories, continuing and discontinued operations. (Tsang 18, 24-5, 61-2)

Under Carlton's supervision, Tsang prepared on behalf of MAF a loan proposal and acquisition plan entirely premised on disposition of Technicolor's Consumer Photo Processing, One Hour Photo, Audio Visual and Gold Key Divisions. The plan included a complete five year business plan for the company. (PX 99; Tsang 146-49)

The financing package was presented to both Chase and Bank of America by mid October, 1982. It specified that MAF would realize $50 million in net proceeds from the sale of assets by year-end 1983. The centerpiece of the financing package was a chart, "T Company Divisions to Be Disposed," which identified the four Technicolor divisions that MAF intended to divest, and the $50 million in proceeds expected to be realized. The numbers were prepared by Carlton and reviewed by Perelman prior to submission of the proposal to the banks. (42 TR 24; PX 99 at 5) At trial both Perelman and Slovin confirmed that the chart represented their best estimate as to the value they expected to be generated from sale of these assets. (24 TR 27-30; 42 TR 23-4) Moreover, Slovin added that the $50 million estimate did not necessarily include proceeds to be derived from sale of Technicolor's Costa Mesa and English properties. (24 TR 78-82)

The chart contained detailed financial information and disposition values which were derived from confidential balance

sheet information provided by Kamerman to Perelman at their October 12 meeting. (See discussion below at pp. 27-8) Kamerman conceded that such information was essential to preparation of MAF's divestiture plan. As he put it, "they must have been given the balance sheets if they have all this detail." (Kamerman 145-46; Perelman 237)

In addition, at Carlton's instruction, Tsang prepared projections which were provided to Chase by MAF on or about October 14, 1982. The projections reflect MAF's plan to sell off the four Technicolor divisions for net cash proceeds of $50 million and to concentrate on Technicolor's core (film, video and government services) businesses. The projections assume that the $50 million of net proceeds would be realized from the disposition of assets by December 31, 1983. (PX 104, 105, 115, 116, 117, 118)

Prior to October 18, 1982, Perelman specifically advised Beale and Seibert of Chase that MAF would be able to pay down $55 million in debt in one year with $50 million coming from asset sales and $5 million from operating profits. (Beale 50-2; Seibert 76, 114-15) According to Seibert, both Perelman and Kamerman represented these estimates to be conservative in nature. Thus, she recorded in an Executive Memorandum on October 18, 1982:

> Perelman and Kamerman conservatively estimate that they can realize $50,000 M (book value) from these divestitures and that the sales can be completed by 12/31/83.

(PX 233 at C00209) Apparently Seibert agreed because in that memorandum she recommended approval of MAF's request for

acquisition financing based on a debt paydown of $55 million in one year. The initial commitment letter issued by Chase on October 22, 1982 contained such an amortization schedule. (PX 234; Beale 53-4)

Likewise, at their meeting on October 20, 1982, Perelman explained to Meyer of Bank of America that the rationale behind the acquisition of Technicolor was the ability to sell off assets for $50 million and thereafter generate stable cash flow from Professional and Government Services that could more than amortize the debt. It was on that basis that Bank of America agreed to participate in the credit. (Meyer 115, 128, 130; Perelman 199-200; PX 259; PX 260 at B000969, B000971)

The commitment letter that finally issued on October 27, 1982 provided that $55 million of principal had to be repaid by December 31, 1984 and further specified that the net proceeds realized on the sale of any Technicolor asset had to be used permanently to pay down principal. (PX 236) Meyer explained that it was standard procedure in acquisition credits to allow eighteen months to two years for asset dispositions. Nonetheless, he confirmed that he understood from Perelman that the expectation was that those sales would be accomplished within one year. (Meyer 126)

The loan agreement between MAF and the banks which, as described below, was not in fact executed until November 24, 1982, specifically identifies the Audio Visual, Consumer Photo Processing, Gold Key and One Hour Photo divisions as assets which

can be sold by MAF on behalf of Technicolor. (PX 244 at B000065; 24 TR 96-7)

3. Kamerman and Sullivan Are Aware of Perelman's Restructuring Plan

Kamerman and Technicolor director Fred R. Sullivan ("Sullivan") were fully aware of the restructuring plan that MAF had in mind for Technicolor. Sullivan testified that Perelman let him know at their first meeting on September 17, 1982, that he intended to finance the acquisition of Technicolor from "money that we can generate from the sale of certain divisions of Technicolor... ." In that connection Perelman inquired of Sullivan whether Kamerman wanted to continue One Hour Photo. (22 TR 209-10)

At the October 4, 1982 meeting among Perelman, Sullivan and Kamerman, the issue again was discussed. According to Sullivan, the sense of what Perelman was saying was that he wanted to quickly get to the subject of selling Technicolor assets. Perelman specifically indicated that he wanted to get out of One Hour Photo. In response Kamerman indicated that "most of the things you have in mind are already on the market". (23 TR 71; Sullivan 152-53, 182-83)

Kamerman himself concedes that he discussed the sale of assets with Perelman at their October 12 meeting. (21 TR 120) Indeed it is clear that the main purpose of that meeting was so that Perelman could get his hands on the Technicolor financial information necessary to put together MAF's divestiture plan. Thus, several days following the October 4 meeting, Perelman

called Kamerman and asked if he could come out again with Carlton, who was in charge of financing at MAF.

Although Kamerman denies that Perelman requested financial data in that call, his professed ignorance is belied by the fact that he immediately had Powitzky prepare consolidated balance sheet breakdowns. (21 TR 41-2) Oliphant's chronology records that these breakdowns were prepared by October 11, 1982. (PX 126) The next day Kamerman turned them over to Perelman at the meeting. (21 TR 42; PX 127 at 022909) Given the fact that by Kamerman's own admission, he and Perelman discussed MAF's proposed sale of assets at the October 12 meeting, it is obvious that he understood the use to which these balance sheet breakdowns were being put.

As willing as Kamerman was to accommodate, Perelman was even more anxious to have the data so that he could proceed apace with preparation of the divestiture plan that was to form the focus of MAF's bank financing package. So as not to lose any time, Carlton telephoned Tsang that very day from California to instruct him to prepare a financial model for the banks and to start feeding him the necessary information. (Tsang 18, 24-5)

Not only did Kamerman discuss asset sales with Perelman, but, in addition, as Slovin testified on deposition, he had conversations with Kamerman prior to the Special Board Meeting concerning the divisions that MAF planned to divest. (Slovin 24)

Despite all this, Kamerman claims that Perelman never told him MAF's specific divestiture plan. While such testimony is inherently incredible, it is of no real consequence. Even

Kamerman concedes that he knew, based on the nature of financing that Perelman was seeking, that he intended to dispose of One Hour Photo and other Technicolor assets. As Kamerman put it,

> One thing I did know about One-Hour Photo was here was a guy who was scratching to get money to be able to buy Technicolor, and there wasn't any way that he was going to get a $150,000,000 to go on with One-Hour Photo.

(21 TR 163-64)

So certain was Kamerman of Perelman's plans that prior to the Special Board Meeting, he insisted that Art Tesser, head of Technicolor's One Hour Photo operation, fly down from Texas to meet him privately in his Los Angeles apartment. At that time, Kamerman advised Tesser that Technicolor might be acquired and that the buyer might discontinue One Hour Photo. (21 TR 163-65; Kamerman 259)

Moreover, at the request of MAF, the Merger Agreement contained a provision prohibiting Technicolor from accumulating more than $26.5 million in long term debt between the execution of the Agreement and the actual Merger, designed to prevent Technicolor from expanding One Hour Photo. (PX 57 at GS 1318)

It is also clear that Kamerman was aware prior to the Special Board Meeting that MAF expected to realize some $50 million from sale of assets. On deposition Kamerman admitted that he was aware of the terms of Chase's initial commitment letter, dated October 22, 1982, pursuant to which MAF had to pay down some $50 million from asset sales in the first year. (Kamerman 140-41)

In addition, Kamerman's participation in the October 12 meeting in which he provided Perelman with balance sheet data for MAF's divestiture plan, strongly supports the inference that Perelman discussed with Kamerman his expectation of realizing $50 million from such a sale. Knowing that he was going to make such a representation to the banks, Perelman well may have sought Kamerman's concurrence that the $50 million estimate was reasonable. Apparently he got it. As described above, Seibert of Chase recorded in her October 18, 1982 memorandum that Kamerman believed such estimate to be "conservative". (PX 233)

Given this course of events, Kamerman's turnabout at trial, during which he claimed that he only came to learn that Perelman expected to realize $50 million after the deal was done, (21 TR 115, 185-86), must be rejected as yet another example of his self-serving fabrication.[8]

4. Kamerman Advises The Goldman Team And Brown Of Perelman's Restructuring Plan

At the October 18 meeting, Kamerman advised the Goldman Sachs team and Meredith Brown of Debevoise ("Brown") of Perelman's plan for restructuring the company and of the fact

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8 It is undisputed that Kamerman was aware prior to the Merger that MAF estimated that sale of Technicolor assets would generate $50 million. Kamerman admits having read the Offer to Purchase of November 4, 1982 which reports, "MacAndrews expects to have realized disposition proceeds of an order of magnitude of $50,000,000." (PX 55 at P303812; 21 TR 185) He also knew that the Proxy issued by Technicolor on December 27, 1982 reported this information. (PX 61 at P301350; Kamerman 453; 21 TR 187)

that Technicolor already had efforts underway to sell some of the very assets that Perelman planned to divest. Brown testified that, "[i]t was clear from the October 18th meeting that Mr. Perelman was thinking of selling some assets." (28 TR 217) Similarly, Oliphant recalled on deposition Kamerman's advice that Perelman's approach in an acquisition would be to sell-off a portion of assets and such interest in Technicolor's assets is recorded in his notes of the October 18 meeting. (Oliphant 93; PX 127 at 022909)

At trial Richard Sapp ("Sapp") of Goldman Sachs & Co. ("Goldman Sachs") not only testified, but also recorded in his notes of the meeting, that Kamerman reported on October 18 that Perelman was interested in "asset stripping" and wanted to continue only the Professional and Government Services operations of Technicolor. (31 TR 116-17; PX 211 at GS 1225; Sapp 233-34) Sapp was led to understand that in addition to disposing of Gold Key and Audio Visual (assets which Technicolor already was planning to sell), "Perelman was not interested in the One Hour Photo business." (31 TR 117-18)

This is confirmed by the fact that the valuation memorandum Goldman Sachs put together following the October 18 meeting specifically anticipated the possibility that the acquirer would discontinue One Hour Photo. Accordingly, the memorandum included forecasted earnings for Technicolor with and without that operation. (PX 188)

Moreover, both the Goldman Sachs team and Brown understood prior to October 28, 1982 that MAF expected to realize

on the order of $50 million from asset sales. Sapp made clear that Goldman Sachs was aware that MAF had included such estimate as part of its financing package to the banks. Goldman Sachs was provided with copies of the commitment letters which contained this information. (Sapp 193) In conversations with Beale of Chase, Sapp and John Golden of Goldman Sachs ("Golden") discussed MAF's "asset divestiture plan" and were advised that Perelman had represented that MAF would raise $50 million from the sale of assets to pay down the bank credit. (Sapp 330; PX 212 at GS 1203) Brown learned this information from the commitment letters and subsequently the Tender Offer. (28 TR 213)

A number of the assets that Perelman planned to divest, including Gold Key, Audio Visual, and excess real estate, already were up for sale by Technicolor in the fall 1982. (21 TR 166) At the October 18 meeting, Kamerman reported on the potential sale values for these excess assets. In the conversation Kamerman advised that the book value of Gold Key was $25 million (21 TR 108), but that Ryan was asking more. Paula Venuto of Goldman Sachs ("Venuto") specifically recorded in her notes of the meeting that the asking price was $38 million. (PX 210 at GS 1217) Likewise, Sapp recalled and documented in his notes the fact that Kamerman had advised that they were seeking a price in the "upper $30s". (PX 211 at GS 1231; 30 TR 44-45; Sapp 246)

Kamerman further advised that Technicolor believed it could sell its Costa Mesa property for $7 million and that its English property, which was also up for sale, was expected to fetch around 5.3 million English pounds. In addition, Kamerman

reported that the company's Audio Visual division was then in the process of being liquidated. (21 TR 109-110) Each of the Goldman Sachs representatives and Brown confirmed in their testimony, as well as independently in their respective notes, that they were apprised of these estimated sale values for Technicolor's excess assets. (27 TR 173; 28 TR 214-15; 30 TR 44-45; 31 TR 117-18; Sapp 194-95; Golden 61-4; PX 211 at GS 1225; PX 215 at GS 1247-48; PX 210 at GS 1209; PX 503 at 11)

By Kamerman's own admission, the book value of Consumer Photo Processing, One Hour Photo, Gold Key and Audio Visual (the four divisions that Perelman planned to sell) totaled $54 million. (21 TR 114-15; PX 100) Thus all those present knew that Technicolor's excess assets had a book value of more than $50 million and were expected by MAF to generate at least that much when sold. Given the fact that at the time Technicolor had 4,567,000 shares outstanding, the value of the excess assets was $11 per share, meaning that Perelman was paying approximately $12 a share for the continuing operations of Technicolor.

Yet no consideration was given at the October 18 meeting, or any time thereafter, to the value of the excess assets in assessing the fairness of the price being offered by MAF. When asked whether anybody said at that meeting: "Hey, we have got 9, 10, $11 a share in excess assets. How do we take that into account in valuing Technicolor," Kamerman unequivocally responded, "Nobody said it." (21 TR 116-17) Nor, by Brown's own account, did he ever discuss that computation with the company in

the context of advice as to whether it was appropriate to accept a bid of $23 a share. (28 TR 215-17)

Moreover, as discussed below, although Goldman Sachs was aware of Perelman's restructuring plan and the fact that MAF expected to realize $50 million in proceeds, it failed to take such value into account in considering the fairness of the $23 price offered by MAF. Nor did Goldman Sachs ever give Kamerman a figure for the value of the assets that would be disposed of. (21 TR 168)

C. PERELMAN PLOTS HIS APPROACH TO TECHNICOLOR

Having identified Technicolor as his next target, Perelman needed the right entree to the company to set his plan in motion. As fate would have it, one of the senior executives at Bear Stearns & Co. ("Bear Stearns"), one of MAF's investment bankers, was a long-time friend of Sullivan, a Technicolor director.

1. The Approach To Sullivan Via Bear Stearns

Perelman's first effort to contact Technicolor was through Bear Stearns. In early September 1982, Perelman contacted Michael Tarnopol ("Tarnopol"), a Managing Director at Bear Stearns, to discuss his interest in acquiring Technicolor. (42 TR 9; Perelman 62, 112-13) Tarnopol concurred with Perelman that Technicolor was an attractive candidate and told him that he thought Technicolor stock looked cheap. After reviewing Technicolor's annual report, Tarnopol advised Perelman that he

was a personal friend of Sullivan, one of the directors of Technicolor. (Tarnopol 24-6)

As of September 1982, Tarnopol and Sullivan had had an ongoing social and business relationship for more than 20 years. Tarnopol had met Sullivan when he was at Lehman Brothers, which had served as investment banker for Kidde, Inc. ("Kidde"), the corporation that employed Sullivan as Chairman and CEO. Over the years, Bear Stearns and Tarnopol had preformed investment banking services for Kidde. (22 TR 198-99; Tarnopol 19-22; Sullivan 18-20)

Perelman requested that Tarnopol contact Sullivan to arrange a meeting to discuss the concept of MAF buying Technicolor. (42 TR 19; Perelman 62, 113)

On September 10, 1982, Tarnopol telephoned Sullivan to convey Perelman's request to meet with him in order to explore the possibility of MAF acquiring Technicolor. Sullivan testified that he received a call from Tarnopol on the specified date and that Tarnopol advised that Perelman was interested in Technicolor and was considering buying Technicolor stock. As detailed below (pp. 137-39), it is also clear that as a result of this conversation Sullivan was aware of Perelman's interest in acquiring the company. Sullivan readily agreed to meet with Perelman. (22 TR 199-200, 277; Sullivan 75-6)

After speaking with Sullivan, Tarnopol reported back to Perelman that Sullivan was receptive to the idea of meeting with him. (Tarnopol 31-2; Perelman 116-17) Thereafter, on that very same day, September 10, 1982, MAF made its first purchase of

Technicolor stock. Between September 10 and October 7, 1982, MAF purchased 220,000 shares (4.8%) of Technicolor common stock in the open market.[9] (PX 58 at GS1537)

From September 10, 1982 when Perelman first began acquiring Technicolor stock to the time he first met with Sullivan on September 17, Perelman bought approximately 30,000 shares. Once Sullivan had given him the green light after their meeting on September 17, Perelman set about buying in earnest. Between September 17 and September 23, 1982, he purchased an additional 156,500 shares.

Then Perelman abruptly stopped purchasing until after his meeting with Kamerman on October 4, 1982 (described below). The explanation for this hiatus is simple. Given the shark repellant in Technicolor's Charter, Perelman knew that this had to be a friendly deal. Once Kamerman signed on at the October 4 meeting and gave Perelman the go ahead, he promptly resumed purchasing Technicolor stock on October 6. (PX 58 at GS1537)

2. Sullivan Agrees To Facilitate The Deal

September 17, 1982 was set as the date for the meeting between Perelman and Sullivan. As it happened, Tarnopol was in Europe on the appointed day, so he asked a colleague, Paul Hallingby ("Hallingby"), a Managing Director in the mergers and

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9 By buying less than 5% of the Technicolor stock, MAF did not have to file a public 13D disclosure statement with the SEC.

acquisition department of Bear Stearns who knew Sullivan, to attend the meeting in his stead. (Tarnopol 33-35; Hallingby 7-9)

On the morning of September 17, 1982, Hallingby's office called Sullivan and asked if he could meet Perelman for lunch that day. (22 TR 208) That afternoon Sullivan, Perelman and Hallingby met for lunch at Le Cirque, a restaurant in New York City. The testimony is in accord that at that meeting Perelman confirmed to Sullivan that MAF was interested in acquiring Technicolor, and that he thought the company would be a good fit with his expansion plans. (42 TR 10; Perelman 117-18; 22 TR 208-11, 278; Hallingby 11-13; Pre-Trial Order II(E) 33-35) According to Sullivan, Perelman advised that MAF hoped to buy 4.9% of the company's stock and may have indicated purchase of a substantial number of shares in the last week. (22 TR 278)

Finally, Perelman asked Sullivan what he should do. Sullivan conceded that the best thing to do would be to talk with Kamerman. Perelman asked Sullivan to arrange for just such a meeting with Technicolor's Chairman to discuss MAF's potential acquisition. (42 TR 10; 22 TR 210-11) Realizing the rewards that he could reap by acting as Perelman's go-between, Sullivan agreed to support the transaction and to arrange a meeting between Perelman and Kamerman.

Although, by his own admission, Sullivan knew as of September 17 that Perelman was going to buy 4.9% of Technicolor's stock and was interested in buying the entire company, he sat on

this critical information. Sullivan could offer no explanation for his conduct.[10] (22 TR 278-79; Sullivan 95)

It was not until one day during the week of September 20, 1982, that Sullivan finally contacted Kamerman. In that call Sullivan advised Kamerman of Perelman's interest in acquiring the entire equity of the company and urged him to meet with Perelman. Kamerman agreed to do so. (22 TR 211-12; 19 TR 73-4; Sullivan 97-8)[11]

3. Sullivan Provides Perelman With Intelligence On Kamerman

Sullivan immediately called Perelman to advise that his charge had been fulfilled; he had convinced Kamerman to meet with him. Seeking to obtain intelligence on Kamerman and information on how best to approach him in their upcoming meeting, Perelman asked Sullivan to meet with him privately at his office. Sullivan agreed and the two met sometime between September 17 and before October 4, 1982, at which time Sullivan imparted to Perelman whatever useful information he had about Kamerman, including what kind of an executive he was, and how he operated. (42 TR 11; 22 TR 212-13; Sullivan 101-04)

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10 Of course one possible explanation for the delay was to allow Perelman time to amass additional Technicolor stock. As discussed above, between September 17 and 23, 1982, he acquired 156,500 additional shares. (PX 58 at GS1537)

11 Oliphant testified that it was his understanding, based on the fact that Sullivan had "proposed" that Kamerman meet Perelman, that Sullivan supported MAF's takeover of Technicolor. (Oliphant 72-3)

Having obtained the go-ahead from Sullivan, Perelman called Kamerman on September 29, 1982 and asked for an appointment. The two agreed to meet the following Monday, October 4, 1982, at Technicolor's offices in Century City, California. (19 TR 74; PX 124 at 022869)

D. NEGOTIATIONS ARE CONDUCTED IN SECRET

Kamerman, who had never met Perelman, asked Sullivan to attend the meeting. Sullivan flew out on Sunday night and went directly the next morning to Kamerman's office. The two conferred for a few minutes about Technicolor and what Perelman was all about. (22 TR 214-15; 19 TR 78) Perelman arrived at about 10:00 a.m. Sullivan introduced Perelman to Kamerman, but played no other role at the meeting. (42 TR 13)

1. The Price Is Fixed From The Outset

At the meeting, Perelman expressed his desire to acquire the full equity of Technicolor. The record leaves no room for doubt that the price was set from the start, with Perelman offering $20 per share and Kamerman countering with $25 per share. (Pre-Trial Order II(E) 37-39) On deposition Kamerman recalled that "he [Perelman] came to me and said he was going to offer 20, I told him 25. ..." (Kamerman 171; see also 109-110, 173) At trial Kamerman confirmed that at the October 4 meeting "he [Perelman] came out with $20" (19 TR 79) to which Kamerman responded "at 25 I would have to take the thing to a board ..." (19 TR 80) Perelman likewise testified that Kamerman advised that at a price of $25 a share he would consider taking it to the

admits that as of that time he knew the amount of financing that MAF was seeking (and therefore could have determined the price per share that Perelman could pay) -- although he denies this formed the basis for his recommendation to Kamerman. (23 TR 78-9, 81)

In a conversation with Golden and Sapp, on October 26, 1982, as recorded in notes taken by Sapp, Kamerman advised that he was "under impression that $23.50 to 24 would be indicated although Fred [Sullivan] cautioned that Perelman may not hear any numbers higher than $22.50." (PX 212 at GS 1201) Nevertheless, Kamerman was reluctant to press for the higher number.

According to Sapp, the Golden representatives had to urge Kamerman back to the negotiating table. As Sapp testified, we had to "pump up" Kamerman, "get him excited". Sapp explained, "Mr. Kamerman had never participated in -- I believe, in a transaction of this type. Therefore, we kind of gave him a little bit of encouragement to go back and keep asking for a higher price." (30 TR 160-61)

Ultimately, Perelman and Kamerman agreed between themselves to a price of $23 per share on or about October 27, 1982. On the evening of October 27, Kamerman called Sullivan to advise him of the final price that had been set. Defendants admit that at that time Sullivan agreed "to support the acquisition of Technicolor by MAF." (PX 460 Response 91; 30 TR 161; 42 TR 15; Sapp 335-36) Significantly, as discussed more fully below, Kamerman concedes that he recommended the $23 price because he thought it was the most that Perelman (then a minor

player) could afford to pay. (21 TR 225-26) Kamerman does not contend that $23 per share was the maximum price available or that he or the Board ever took steps even to determine what the maximum price should be.

2. Kamerman Keeps The MAF Offer "Tightly Bottled Up"

Kamerman's offer to Perelman on October 4, 1982 to sell Technicolor to MAF for a price in the range of $22-23 per share was made without the knowledge or consent of any of the other Technicolor directors (except Sullivan who had introduced Perelman to Kamerman), and without the counsel of any financial advisor. Indeed, Kamerman treated the negotiations as a covert operation of which he was commander. He told no one except those whose counsel he needed to effectuate his personal goals in the mission.

Kamerman advised Oliphant, Technicolor's in-house counsel, of MAF's proposal on October 5, 1982. (PX 126 at 022905; PX 124 at 022869) Prior to Perelman's approach, Kamerman had no experience whatsoever in the buying or selling of a public company (21 TR 37), and he found himself in over his head. Accordingly, as Kamerman explained, he went to Oliphant.

> But the main thing was that this was an area -- I mean, this was a public company, and mergers and SEC stuff wasn't my forte. Any business transactions like that I had had had [sic] been with private companies, and I was out of my depth.

(19 TR 102-03) Oliphant did not prove up to the task because he was a rank amateur in these matters as well. Eventually, a decision was made to call in outside counsel. But they were both

so inexperienced with the players and practices in these transactions that, at Kamerman's suggestion, Oliphant first contacted none other than MAF's counsel, an attorney at Skadden Arps. (PX 126)

Kamerman told Powitzky, Technicolor's chief financial officer, on or about October 1, 1982, because he needed someone to put together the financial information that he had promised to Perelman (and which was, in fact, provided on October 12). (PX 126, 124)

Prior to October 29, 1982, this informational triumvirate -- Kamerman, Oliphant and Powitzky -- were the only ones who knew what was going on and the only three individuals at the company whom either Goldman Sachs or Brown was allowed to talk to in the course of their assignments. (See below, pp. 66-8)

Kamerman let his long-time friend Bjorkman in on the deal on October 5 or 6, 1982. Bjorkman was the largest stockholder in the company, holding with his wife, in excess of 400,000 shares. Kamerman told Bjorkman nothing of his discussions with Perelman, but only that they had agreed on a price of $23. (Bjorkman 27, 29-31; Pre-Trial Order II(E) 41) Kamerman knew that sale of Bjorkman's stock was a pre-condition to the deal. Accordingly, he had to convince Bjorkman what a good bargain he had struck so that Bjorkman would turn over his 400,000 shares to Perelman. (Bjorkman 38)

On the same day, October 5 or 6, 1982, Kamerman clued in Lewis, his friend and tax counsel for more than twenty years.

(21 TR 26; Pre-Trial Order II(E) 41) Kamerman knew that sale of his shares (together with Bjorkman's) was necessary to make the deal fly. He needed Lewis' advice to ensure that the sale of his stock to MAF was structured in such a way as to give him a better deal than any of the other stockholders would get, including capital gains treatment for his option shares and price guarantees for the shares that he would sell to MAF via the Stock Purchase Agreement.

Kamerman told Lewis only what he had to know in order to carry out the task assigned to him. He did not advise Lewis of his meetings with Perelman, did not keep him abreast of the negotiations or seek his advice in that connection, and did not consult with him regarding the retention of an investment banker or special counsel. (29 TR 233-34; Lewis 50, 63, 68, 70-2, 69)

On October 14, 1982, Kamerman advised Isham, a member of the Executive Committee.[13] (Pre-Trial Order II(E) 42) Isham was a gentleman of leisure not engaged in any active business pursuits that would tie him to a particular locale. (27 TR 25) Accordingly, Kamerman had to be sure that he would be available on short notice when he finally decided to call a Board meeting. Isham understood that this was the only purpose for Kamerman's call. He testified:

> I believe the only thing he wanted to know was whether or not I had any plans to be away, like out of the country or some such, during the course of the next few weeks. ... Was I

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13 The other members of the Executive Committee were Kamerman, Bjorkman and Ryan. As described below, Kamerman was at war with Ryan and had no intention of telling him anything.

going to be available.

(27 TR 41)

At trial Kamerman admitted that he did not recall any discussions with Isham and that, in any event, he would not have asked for his view on how to proceed. (21 TR 37) Isham confirmed that the thrust of the call was merely to alert him to be available for a Board meeting. Kamerman did not ask him to do anything, and he played no role whatsoever in the negotiations. (27 TR 50; Isham 95-6) Indeed Isham had no further contact with any Technicolor representative between that initial call and the Special Board Meeting, other than a phone call from someone notifying him of the time and place of the Meeting. By his own admission, the only thing Isham did to prepare for the Special Board Meeting was "blanking out my calendar." (27 TR 48-50; Isham 98-9)

These were the only three directors whom Kamerman told anything; he knew he could count on them to do his bidding without asking questions. Thus, Kamerman did not discuss with Bjorkman, Lewis, Isham or even Sullivan calling a Board meeting or advising the other directors of MAF's proposal and none of them raised the need to inform their fellow directors. (23 TR 67-8; 27 TR 41; Isham 94-5; Sullivan 171-2, 249-50; Lewis 71) As Sullivan put it, "[t]hat was his [Kamerman's] call." (Sullivan 250)

Although Ryan was a director and President of Technicolor, Kamerman intentionally kept him in the dark (Ryan 95) due to the fact (more fully described below) that Ryan and

Kamerman were engaged in an acrimonious feud and were not even on speaking terms. Defendants admit that Kamerman "did not inform Mr. Ryan about his discussions with Mr. Perelman until October 29, 1982," and that "Mr. Kamerman did not include Mr. Ryan among the persons he consulted during his negotiations" because of the erosion in their relationship. (PX 460 Response 138) Kamerman specifically advised Oliphant that Ryan was not being apprised of MAF's proposal and that "he, in essence, was not having a role in the acquisition or the management's discussions as to what would be done." (Oliphant 70-1)

As for the remaining three directors, Blanco, Frye and Simone, Kamerman did not need anything from them, and so he told them nothing. Defendants admit that these directors were only advised on October 27, 1982 to attend a Special Board Meeting, but were not told the purpose of such meeting and, in fact, they did not even learn of MAF's offer until they arrived at the Special Board Meeting. (PX 460 Response 18; PX 124 at 022869; Kamerman 287-88, 198-99; Blanco 20, 24-5, 27; Simone 21-2, 44, 135-36, 139, 226; 120 TR 150)

Kamerman's only explanation for leaving his fellow directors out in the cold was that he did not need their input and wanted to keep the information confined to a small circle. (Kamerman 204-05; Oliphant 73) Given the undercover mentality that characterized his mode of operation, Kamerman would trust no one -- not even his own directors. He testified:

> I trust them [Ryan, Blanco, Frye, Simone] but I don't have to put my trust to the test all the time.

* * *

> [Y]ou try to keep the circle confined to those who have to know, in your opinion. That's the way you keep things quiet.

(21 TR 58)

Nor did Kamerman consult with the key executives of Technicolor's divisions with a view to evaluating the company for sale. The only two executives whom Kamerman even spoke to before the sale was concluded were Gaul and Tesser, the heads of Professional Film and One Hour Photo, respectively. Kamerman talked to Gaul on October 21, 1982, but had no recollection of what he said. Kamerman insisted that Tesser fly down from Texas to California on October 24, 1982 because he knew that Perelman was considering terminating One Hour Photo and had to alert Tesser that the brakes were about to be put on that operation. (PX 124 at 022869; Kamerman 288-90, 352)

At the October 18 meeting, Kamerman emphasized that he wanted the circle kept closed. He reported (as recorded in the notes of Brown, Oliphant and Venuto) that apart from himself and Sullivan the only directors who knew anything were Bjorkman, Lewis and Isham and that Blanco, Frye and Simone "don't know." Kamerman singled out his arch enemy Ryan for special exclusion reporting, "ANR does not know what's going on" and further advising that he would see to it that Ryan was told "not to talk to brokers." (PX 127 at 022907; PX 210 at GS 1208; PX 503 at 9; Kamerman 204) Both Sapp and Brown testified that they had no recollection of any discussion as to whether the other Directors should be advised of what was going on. (31 TR 126; 28 TR 195-

96) As Oliphant later characterized the situation, things were "tightly bottled up at TK." (PX 141 at 022921)

As discussed below, it was not until October 27, 1982 that Kamerman finally decided to call a Board Meeting and only that evening began notifying the directors. In an effort to offer some justification for why he waited so long to call a Board Meeting, Kamerman claimed that Brown had advised that it was not necessary to call a meeting until then. (21 TR 55) But Brown made clear that he was not consulted about communicating with other directors. (28 TR 195) Moreover, Kamerman concedes that prior to Brown's arrival on the scene in mid-October, he did not even discuss the issue of calling a Board meeting with Oliphant. (21 TR 49)

To the end, Kamerman kept information about MAF's offer a secret. Thus, even after a press release announcing a halt in trading was issued in response to rumors on October 27, 1982, Kamerman said nothing to directors Blanco, Frye and Simone about the existence of an offer from MAF. (21 TR 177-78) All he did was summon them to a Board Meeting two days hence.

3. Kamerman Alone Negotiates The Deal

Kamerman ran the MAF transaction as a one-man show. Defendants admit that in the period leading up to the October 29, 1982 Special Board Meeting, Kamerman alone negotiated with Perelman on behalf of Technicolor "concerning the terms and conditions of the agreement to sell Technicolor to MAF," and he "determined himself the substantive positions to be taken in such negotiations." (PX 460 Responses 92, 100; Pre-Trial Order II(E)

44) Likewise, prior to October 28, 1982 (the date of the MAF Board Meeting), Perelman did not seek or receive approval from any MAF officer or director for MAF to agree to acquire Technicolor. (PX 460 Response 60)

Not only did Kamerman unilaterally set the price at which Technicolor would be sold at his first meeting with Perelman on October 4, 1982 (see above pp. 39-40 and Kamerman 442-44; Perelman 240), but he alone determined all the other terms and conditions of the sale of Technicolor to MAF. He alone negotiated with Perelman, determined to turn over confidential financial information to MAF, and agreed to the structure of the deal without consulting any other directors. Indeed, other than Kamerman, the only director that Perelman even met prior to the Special Board Meeting was Sullivan, and the latter concedes that Kamerman exclusively negotiated the transaction with Perelman. (23 TR 78; Perelman 263)

By his own admission, Kamerman made the decision to retain Goldman Sachs and fixed the terms of the engagement letter and fee arrangement with that firm without seeking the advice or consent of the Board. He determined on his own to retain outside counsel after Oliphant proved inadequate to the task. Moreover, Kamerman controlled the flow of information to Goldman Sachs and Brown, prohibiting them from having access to anyone but himself, Oliphant and Powitzky. (See infra, pp. 66-8)

Kamerman decided which directors to let in on the MAF secret, which to exclude, and how much information he would dole out to each. (See supra, pp. 44-9) Although at trial Kamerman

sought to hide behind the shield of Brown's advice, as demonstrated below, it was Kamerman who decided when to call a Board meeting and when to issue a press release. (See pp. 50, 90-1) It was also Kamerman who (before the Special Board Meeting) decided not to shop the company and prohibited Goldman Sachs (against their advice) from seeking out alternative bidders.

4. Kamerman And Perelman Seal The Bargain By October 12, 1982

The basic terms of the deal were fixed almost from the start. At the initial October 4, 1982 meeting the price was set within a $22-23 a share range. By the second meeting on October 12, 1982, Kamerman and Perelman had virtually reached an agreement in principle, subject only to setting the final price and MAF securing a definitive financing commitment.

Not only was price no longer an issue by the October 12 meeting (Kamerman 160) but the structure of the deal already was in place. Asked whether there was any further discussion on the subject of the terms and conditions of the acquisition, Kamerman responded with a flat out, "no." (Id.)

To a large extent the two-step transaction was dictated by the super-majority provision in Technicolor's Charter which required that at least 95% of the common stock approve the proposed merger. That super-majority provision could be reduced to approval by two-thirds of the outstanding common stock if such reduction were unanimously approved by Technicolor's Board. (PX 1 at GS 2917; Answer ¶ 13)

Accordingly, Perelman could not proceed directly with a

merger, but first had to accumulate two-thirds of Technicolor's shares to effectuate the necessary Charter amendment. Therefore, a tender offer followed by a back-end merger was the only logical means for Perelman to accomplish the acquisition. Brown's notes prepared prior to the October 18 meeting consider various issues relating to the Tender Offer and Merger and indicate that he already was aware of the two-step structure. (PX 503 at 16, 18-19)

A lockup option designed to prevent anyone from outbidding Perelman also was an integral part of the deal worked out between Kamerman and Perelman no later than October 12. Indeed, Brown's notes record the fact that in the initial conversation on or about October 14, 1982 with Kamerman (or Oliphant) regarding the deal, he was advised that the structure contemplated included a lockup option as well as an agreement for MAF to purchase shares from the large inside shareholders. (PX 503 at 4)

Between October 12 and on or about October 19, 1982, when Perelman called Kamerman to request an introduction to Bank of America, the two had no communications of any consequence. Accordingly, it is clear that the state of the transaction as reported to the Goldman Sachs team and Brown at the October 18 meeting reflected the substantive agreement that had been reached between Kamerman and Perelman by October 12.

On October 18, Kamerman advised the Goldman Sachs representatives that a deal had been arranged with MAF subject only to financing and the rendering by Goldman Sachs of a

fairness opinion. Oliphant's notes of that meeting document the structure of the deal, including a report by Golden on the Tender Offer and back-end Merger and an explanation by Brown of how the lockup worked. (PX 127 at 022907, 022909) Sapp testified that he understood that by this point the lockup option and Stock Purchase Agreement were part of the structure of the deal. (31 TR 120)

In addition, Kamerman reported that Perelman had agreed to his enhanced employment contract. (PX 127 at 022907; 31 TR 112-13; 21 TR 81) Moreover, by Kamerman's own admission, the topic of Board seats had been taken up no later than October 7, 1982. (21 TR 39; PX 126 at 022905)

Thus, on October 18 Sapp understood there was a deal assuming only the documentation was completed, the financing achieved and Goldman rendered its opinion. (31 TR 168; Sapp 265) Oliphant's notes taken at a meeting with Kamerman later that same day reflect a like understanding that the deal was virtually in place. They state, "how close to a deal -- 'subj[ect] to loan agreement.'" (PX 127 at 022911)

The documentation for the deal already was being drafted by October 18, 1982. Sapp's notes indicate that during the October 18 meeting, Donald Drapkin, as attorney from Skadden Arps called to report on the status of the Merger Agreement and lockup. (PX 211 at GS 1226; Sapp 241)

In going to the banks to secure acquisition financing, Perelman and/or other MAF representatives represented that the acquisition was virtually a done deal. Not later than October

14, 1982, Perelman advised Beale of Chase that the parties were close to agreement and disclosed the particulars of the transaction, including price and timing. (Beale 38-9) Both Beale and Seibert understood that an agreement in principle had been reached between Kamerman and Perelman and, accordingly, recognized that their turnaround time was less than a week. (Seibert 65-7; PX 233 at C00268)

On or before October 19, 1982, Powitzky spoke to Bank of America's Meyer and advised him that Technicolor was on the verge of being acquired and that a sale to Perelman was "inevitable." (Meyer 99-100) On that same day, Meyer spoke with Beale regarding MAF'S financing request. Both believed that a deal had been worked out between Kamerman and Perelman and that they were to try and "make the deal fly" by putting the acquisition credit together. Beale told Meyer that it would be an all cash deal and that announcement would be made within three or four days. (Beale 79-80, 88; Meyer 100-102; PX 259) On or about October 20, 1982, when Perelman was out in Los Angeles to scrounge up funds from Bank of America, "he finally pestered [Kamerman] enough" so that he agreed to meet again. The two met that evening at the Polo Lounge, but by then there was really nothing further to discuss. Kamerman testified that "there was no substantive discussion." (22 TR 28)

Between October 24 and 27, 1982, loose ends were tied up and the price was definitely set at $23 per share; the financing commitment letter was issued in final form; Goldman Sachs was on board with its fairness opinion; and a determination was made to

issue a press release announcing a halt in trading. (PX 236; PX 133; PX 174; PX 460 Response 18(b)) A draft letter to shareholders, dated October 27, 1982, was prepared which announced in advance of the Special Board Meeting that "Your Board of Directors has unanimously approved the making of the offer and recommends acceptance of the offer by all stockholders." (PX 66B at 022946)

The Merger Agreement and other documents for the transaction were finalized between October 25 and 28, 1982. As discussed below, all of the documents necessary for implementation of the transaction were prepared in final form prior to the Special Board Meeting, ready for Kamerman and Perelman to sign on the dotted line. (21 TR 250)

Indeed Kamerman and Perelman (together with Sullivan and Tarnopol) sealed their bargain with a toast at a private dinner celebration held the evening of October 28, 1982. By Kamerman's admission, the deal was done by this time. He confirmed: "We didn't discuss the deal there. We had dinner and a couple of drinks, which is more than I usually have." (21 TR 249; Kamerman 146-47)

E. KAMERMAN BRINGS IN OUTSIDE COUNSEL

Kamerman hoped to keep the workings of the MAF transaction confined to the inner sanctum of himself, Oliphant and Powitzky. To the extent he needed legal advice, Kamerman hoped that he could count on Oliphant, Technicolor's in-house counsel, to insure that the implementation of the deal proceeded without a hitch. He soon realized, however, that Oliphant was

not up to the task. As he put it, "I didn't feel I was getting a strong enough answer from him." (19 TR 109)

Accordingly, following the October 12 meeting at which Kamerman had essentially reached agreement with Perelman on the terms and conditions of the deal, he determined to bring in outside counsel. Kamerman suggested that Oliphant call Steve Axinn, an attorney at Skadden Arps. After making the call, Oliphant reported back that that firm had a conflict (due to its representation of MAF). The next day, October 13, Oliphant contacted an attorney at Debevoise whom he knew, and suggested Brown to Oliphant. Kamerman telephoned Brown on October 14, 1982 and asked him to come out to California. (19 TR 109-10; PX 91) As discussed below, Kamerman did not meet with Brown until the October 18 meeting together with the Goldman Sachs representatives. (See infra, pp. 84-5) Neither Brown nor the Debevoise firm had at any time previously served as counsel for the company. Accordingly, by Brown's own admission, he was totally unfamiliar with the nature of Technicolor's business. (28 TR 81)

F. KAMERMAN GETS GOLDMAN SACHS ON BOARD

Likewise, it was only after the transaction with MAF had been agreed to in principle and the terms essentially fixed that Kamerman retained Goldman Sachs as Technicolor's investment banker to bless the deal.

On October 14, 1982, Joseph Sullivan ("J. Sullivan"), a vice president in Goldman Sachs' Los Angeles office in investment banking services responsible for selling the firm's corporate finance services, contacted Kamerman inquiring about rumblings in the street concerning Technicolor. Initially, Kamerman denied that anything was going on, but later that day he called J. Sullivan and asked him to come over. (19 TR 112; 21 TR 59-60)

That afternoon Kamerman met alone with J. Sullivan, told him that there were discussions about a possible acquisition of the company and that they needed an investment banker. Sullivan agreed to go to New York and put together a team. (19 TR 113)

1. A Team Of Goldman Sachs Novices Carries The Laboring Oar

The next day, Friday, October 15, 1982, J. Sullivan hastily rounded up a team of junior personnel from Goldman Sachs' New York office: Golden, Sapp and Venuto.

The senior person on the team was Golden, then a vice president in the mergers and acquisition department, with Goldman Sachs for about four years. (30 TR 12; 31 TR 49) Although Golden was the team leader on the project, responsible for the report's contents and for Goldman Sachs' Board presentation (31 TR 51, 55; Golden 23), he was not called by defendants to testify

at trial. (As discussed below, defendants' failure, without explanation, to call Golden, the logical witness to explain Goldman Sachs' work, permits the inference that his testimony would not have been favorable to them.)

Instead the trial testimony was left to Sapp, who was, in 1982, an associate in the M & A department, out of business school and at the firm for only about a year. (31 TR 49) During the first six months that he was at the firm, through the spring of 1982, Sapp worked under the supervision of a big brother. (31 TR 49-50) Venuto had even less experience; she was fresh out of business school, having started work in the M & A department in the fall of 1982. (31 TR 48) No partner (general or limited) at Goldman was assigned to the MAF acquisition of Technicolor. (J. Sullivan 33; Golden 9)

As an associate fresh out of training, Sapp's role was to gather information and create exhibits. (31 TR 50-1) Sapp carried the "laboring oar" in putting together material for the Technicolor report. (Sapp 24) Sapp testified on deposition that prior to the Technicolor transaction he had worked on only one completed sale of a public company: the sale of Peavey Company to ConAgra in spring 1982. (Sapp 26-7) He also testified that prior to the Technicolor assignment he had been involved in only one fairness opinion, the one issued to Peavey, and could recall no others. (Id.) At trial, Sapp claimed to recall being involved during the summer of 1982 in a second transaction, the merger of the Girard and Mellon banks, in which Goldman Sachs represented both sides and delivered fairness opinions to both

entities. (30 TR 33-5; 31 TR 53-5) Even assuming that Sapp's belated recollection should be credited, it is clear that as of fall 1982 he was a rank beginner out of his depths on the Technicolor transaction.

Sapp's trial testimony only confirmed his total lack of experience. He admitted that he had no decision making authority; it was up to Golden to supervise the junior team members and ultimately determine what went into the report. (31 TR 55) Sapp testified that he played no role in negotiating the terms of the engagement. (31 TR 59) Indeed he could not even precisely recall its terms without looking at the engagement letter. (31 TR 63-4) Nor, by his own admission, did Sapp play any role in negotiating Goldman Sachs' fee structure. (31 TR 59-60, 137) In fact, he had no idea if the fee that was negotiated was at the high or low end of the spectrum or somewhere in between. (31 TR 99) In sum, given his amateur status, Sapp was capable of functioning as little more than a number cruncher on the Technicolor project.

Although Goldman Sachs previously had not done any work for Technicolor (except perhaps a dividend study back in 1979) the Goldman Sachs team did little or nothing in preparation for the October 18, 1982 meeting. Once the Technicolor team was pulled together, they were merely told to get to California for a meeting with Kamerman at the company's Los Angeles office on Monday morning, October 18. As Sapp tells it, he was told, "get the annual report". "[T]he plane is leaving tomorrow." (Sapp 76) While at trial Sapp attempted to embellish on Goldman Sachs'

preparation, even under the spruced up version, at most the crew read a few Technicolor public filings and jotted down a list of questions before hopping on a plane for California. (30 TR 23-4)

2. Kamerman Orally Retains Goldman Sachs On October 18

On or about October 18, 1982, Kamerman orally retained Goldman Sachs and fixed the terms of the retention. He did so without consulting a single Technicolor director. Defendants admit and the directors have testified that Kamerman engaged Goldman Sachs without the advice of other Board members. (PX 460 Response 164; Sullivan 218; Isham 96; Lewis 65)

Kamerman did not even consult Sullivan, his supposed "advisor" on the deal. To the contrary, Sullivan testified that the issue of Technicolor retaining investment banking services was not addressed in his initial call to Kamerman (23 TR 66), nor was it raised prior to Kamerman making a $25 counter offer to Perelman on October 4. (23 TR 67) Sullivan simply never discussed the matter with Kamerman prior to the retention of Goldman Sachs. (23 TR 83-4, Sullivan 218) Indeed, Sullivan was not shown the engagement letter at any time before October 29, 1982 or, for that matter, at any time thereafter. (23 TR 84; Sullivan 220-21, 244) Nor was the engagement letter ever made available to the other directors. (Lewis 158; Isham 107; Ryan 279-80)

Instead, in his usual dictatorial fashion, Kamerman worked out an arrangement on his own with Golden (Golden 15-6)

for the retention of Goldman Sachs. Such unilateral action was in clear violation of Technicolor's By-Laws (Art. IV). (PX 2)

3. Goldman Sachs' Fee Is Contingent On Consummation Of The MAF Deal

The fee arrangement as set forth in Goldman Sachs' engagement letter, dated October 20, 1982 and signed by Kamerman,[14] provides for Goldman Sachs to get $625,000, 85% of which was contingent on consummation of the deal with MAF. (PX 186) Thus, Goldman Sachs received an initial payment of $100,000, with the remaining $525,000 contingent on the deal with MAF going forward. (Kamerman 192; Golden 19)

The terms of the engagement letter made it virtually impossible for Goldman Sachs to render an objective opinion: the vast bulk of Goldman Sachs' compensation would be paid only if the deal with MAF closed, and Goldman Sachs' opinion that the $23 per share price offered by MAF was "fair" was a prerequisite to the deal closing.

Despite the fact that such a fee structure created an inherent conflict of interest on Goldman Sachs' part, Kamerman gave no consideration to the propriety of that kind of arrangement. (Kamerman 192, 187) Nor was any consideration given to making the Goldman Sachs' fee contingent not upon the success of the MAF transaction, but any tender offer or merger. (Oliphant 66)

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14 Golden could not even recall who signed the engagement letter on behalf of Goldman Sachs. (Golden 17-8)

4. Goldman Sachs Is Retained Only To Opine That The $23 Price Offered By MAF Is "Fair"

The engagement letter provides (PX 186) and defendants admit that Goldman Sachs' retention was limited to an opinion that the $23 price offered by MAF was fair to the Technicolor stockholders. (PX 459 Responses 85-7) That is what Goldman Sachs understood its charge to be. At trial Sapp confirmed the accuracy of his deposition testimony that, "[w]e [Goldman] were retained to give an opinion to the board of directors of the company as to whether a particular price was fair to the shareholders" and that price would be presented by Technicolor management. (Sapp 71-2; 31 TR 62-3; see also Golden 16)

The nature of the assignment and the manner in which it was performed leave no doubt that Goldman Sachs' mandate was to give its seal of approval to the deal worked out between Kamerman and Perelman -- and not to look too long or hard in the process. As discussed below (pp. 218-19), Goldman Sachs was limited to an opinion as to the fairness of the price offered by MAF. It was not retained to do a valuation. (31 TR 90-1) Goldman Sachs was expressly prohibited from seeking out any other potential buyers for Technicolor or from assessing any alternative responses or defensive measures to the MAF offer. Moreover, the work that was performed in connection with its assignment, as limited, was carried out in such a perfunctory fashion that it could not possibly render a fairness opinion having any validity.

5. Goldman Sachs Puts Together Its Analysis In A Single Day After The October 18 Meeting

At the October 18 meeting, Kamerman presented the deal to the Goldman Sachs representatives as an accomplished fact. Notes taken by Sapp and Venuto at the meeting record the fact that Kamerman reported that Perelman expected to get a bank commitment letter by the following Wednesday (October 20) and that a Technicolor Board meeting approving the deal would be held sometime between Wednesday and Friday, October 20-22, 1982. (PX 211 at GS 1226; PX 210 at GS 1210; 21 TR 103) Oliphant, another participant at the meeting, independently recorded the same basic advice in his notes: "MK - RP said commit. ltr. by Wed; Bd mtg on Thurs/Fri." (PX 127, 022909) Accordingly, time was of the essence. Kamerman instructed the Goldman Sachs team to report back with a preliminary view on the fairness of a price in the $20-22 per share range by the following Thursday, October 21, 1982. (31 TR 69; 30 TR 69)

Armed with its marching orders, the Goldman Sachs team left Los Angeles at 10 p.m. on October 18 and took the red-eye to New York, arriving the next morning at 6 a.m. (assuming the plane was on time). (30 TR 56; 31 TR 120, 170) In the remaining hours of October 19, 1982, Sapp and Venuto put together a valuation package for Technicolor. (30 TR 71)

The valuation package (PX 188) consisted of a Standard & Poor's tear sheet on Technicolor; some Technicolor public filings; information on Technicolor's stock price history and ownership, derived from a standardized computer package; a

comparison of Technicolor with certain film and video companies; and, finally, an analysis of the company at various stock prices. As discussed more fully below, a range of $20-32 per share was used. Sapp testified that the package also originally contained a list of potential buyers for the company, but that list was missing and was never produced during discovery. (Sapp 118-19, 408; 30 TR 82)

Sapp drafted, and Golden edited and approved, a valuation memorandum to accompany the package, both of which were circulated the next day, October 20, 1982, to all Goldman merger and acquisition vice presidents and partners -- a total of eight people. (31 TR 179-80; Sapp 103-04, 127-28) The memorandum asked for the recipients' thoughts on the "fairness of a cash offer in the $20-22 range." (PX 188 at GS 1376) In addition, as discussed below, it sought recommendations for potential buyers of "Prism" (the code name chosen for Technicolor) and asked for opinions as to the value of the company as an LBO candidate. (Id.)

The memorandum instructed that responses were required by 12:00 noon on Thursday, October 21, 1982 due to the need to get back to the client. On deposition Sapp could not recall a single person who responded or what they said (Sapp 129-31), and Golden could not even recall if there were any responses at all. (Golden 134, 138) As discussed below, at trial Sapp purported to recall a conversation with Tom Mendell, a Goldman Sachs vice president, about the possibility of doing an LBO in response to the memorandum. (31 TR 51-2)

As promised, on October 21, 1982, Goldman Sachs got back to Kamerman and gave him the green light, providing a preliminary view that a price of $20-22 was "fair". (31 TR 93-4)

The valuation package slapped together by Sapp and Venuto in a matter of hours formed the basis for Goldman Sachs' final presentation made to the Technicolor Board on October 29, 1982. Apart from the addition of an LBO analysis, which was prepared on October 21, 1982 (PX 189) and in revised form included in the Board presentation, no change of any consequence was made to the contents of the original valuation package, except the range of deal prices referenced shrunk from $20-$32 to $20-$26. In essence, the material gathered by two Goldman Sachs junior associates in the space of a day (after spending the night on a flight from California) comprised the sum and substance of the work done by Goldman Sachs to support its oral opinion delivered at the Special Board Meeting that the price of $23 offered by MAF was "fair".

6. Goldman Sachs Performs No Due Diligence Before Rendering Its Oral Fairness Opinion

a. Goldman Sachs is Prohibited from Talking to Any Technicolor Operating Personnel or Visiting Facilities

From the start Kamerman tied the hands of the Goldman Sachs representatives. At the October 18 meeting, Kamerman made clear that Goldman Sachs' contacts with Technicolor were to be limited to a circle of three -- Kamerman, Oliphant and Powitzky. (31 TR 105-06; Sapp 79-80; J. Sullivan 25; PX 450 Response 26)

At the time Powitzky had been on the job for only about six months. (31 TR 107; PX 515) As Sapp put it, "they were emphatic about keeping that circle closed." (Sapp 259)

Kamerman reiterated his instructions to Goldman Sachs at trial:

> I do know that they were not supposed to go and talk to anyone before it was okayed. It was not okay for them to discuss the business with other than those I told them they could discuss it with. They had no right to do that.

(21 TR 168)

Sapp testified that the Goldman Sachs team asked to speak to Ryan. Although he was the company's chief operating officer and the individual with the contacts in the motion picture industry, Kamerman refused that request, giving as an explanation the estrangement between the two of them. (31 TR 104-05; Sapp 167-68)

Goldman Sachs did not press for information. Not only did Kamerman deny its team access to Ryan, but he directed them not to meet with any operating heads. (Kamerman 183-84) When Kamerman prohibited them from speaking to Ryan, they did not seek, in the alternative, to talk to Gaul, the head of the Company's professional film processing division. Nor did they ask to speak with Tesser, head of One Hour Photo, or to Donlon, head of the videocassette operation. Indeed, Sapp did not even know who Donlon was. Nor for that matter did Golden know who Gaul or Cipes were. (Golden 169; 31 TR 105-06)

Instead they acquiesced in Kamerman's information blockade and made no request to speak to any executives of

Technicolor other than the chosen three, or to any director (except Kamerman). (31 TR 106-07) Defendants admit that prior to October 29, 1982, Goldman Sachs representatives had no communications with any executives or other directors. (Sapp 80-1; Blanco 18; Bjorkman 33; Lewis 65; Isham 96-7; Ryan 95-6; Sullivan 216; PX 460 Response 175)

Nor were the Goldman Sachs representatives allowed to visit any of the Technicolor facilities (Sapp 78-9), despite the fact that only several days earlier Kamerman had given Perelman a personally escorted tour of these very same facilities. (22 TR 39-41; 19 TR 99-100; PX 450 Response 27; 42 TR 13) Indeed at the October 18 meeting, Kamerman told the Goldman Sachs team that Perelman had visited the North Hollywood laboratory and been provided with information. Yet the Goldman Sachs people did not even ask for a repeat performance. (31 TR 118-19)

The simple fact is that Kamerman did not care what Goldman Sachs did, or did not do, so long as it abided by his prohibitions and brought forth the required fairness opinion. Kamerman himself admitted,

> I don't know what they did to come up with their letter. They did what they did. They didn't tell me. I didn't ask them.

(21 TR 168)

b. Goldman Sachs Conducted No Independent Investigation of Technicolor or its Place Within the Film Processing and Videocassette Duplicating Industries

Given the constraints under which Goldman Sachs was operating, its only inside source for information about the nature and prospects of Technicolor's business was Kamerman himself. The extent of information gathered by Goldman Sachs was what Kamerman told its team members at the October 18 meeting. Sapp made clear that they accepted the information they were fed and conducted no independent verification of any representation made by Kamerman.

Thus, for example, Sapp stated that Kamerman left them with the impression that there was declining footage volume being processed by Technicolor. Sapp admits, however, that none of the Goldman Sachs representatives asked Kamerman for statistics on the subject of the volume of motion picture film processed at North Hollywood to ascertain if such representations was accurate. (31 TR 134) The Goldman Sachs team did not ask to see any data to confirm, or refute that representation because, as Sapp testified, "we didn't view it as a representation," but as "fact". (31 TR 136-37)

Indeed, as of fall 1982, Sapp was not even aware of the existence of "The Hope Reports" or "The Wolfman Reports" (31 TR 137-38), both of which provided data relative to the film processing industry, including the amount of theatrical footage processed by laboratories. Had Sapp or any of the Goldman Sachs people bothered to look at such reports (PX 499), it would have

been apparent that in fact Technicolor's footage processed volume had been on a steady incline from 1976 through 1981.

Similarly, although on October 18 Kamerman told the Goldman Sachs personnel that there was a trend to distribute films in mass release patterns, Goldman Sachs did no work to try to document or quantify those release patterns and their effect on Technicolor's film processing business. (31 TR 142)

So, too, while Kamerman discussed the topic of electronic imaging, indicating he did not perceive it as an imminent threat to film, Goldman Sachs did no work to investigate what was being done on that subject back in 1982. (31 TR 145)

Apart from Kamerman, the only person whom any of the Goldman team spoke to regarding Technicolor was Richard Simon, a Goldman Sachs entertainment and leisure research analyst. (Sapp 142) Sapp testified that sometime between October 19-21, 1982, he and Venuto met with Simon. (30 TR 84-5) Simon admittedly had not spoken to anyone in Technicolor management for at least the past three-four months (30 TR 92) and had not issued a research report on Technicolor since June 15, 1981. (DX 18) Nevertheless, the Goldman team took his words as gospel, and did nothing to investigate whether what he said was accurate or even made sense.

Although the Goldman Sachs team had been alerted to the issue of release patterns on October 18, they did not bother to discuss the topic in any detail with Simon. (Sapp 217; 32 TR 10) According to Sapp, Simon expressed the view that he did not believe that studios would acquire processing laboratories (i.e.,

be interested in purchasing Technicolor) because no one had acquired MovieLab. The Goldman duo took such speculation at face value. Sapp did not make any attempt to ascertain if there were any reasons why no one had been interested in MovieLab or whether that company was comparable to Technicolor, and why others had not sought to acquire that lab. (32 TR 10-12)

Likewise, Sapp made no effort to verify Simon's representations about a supposed decline in the number of prints being processed and did not even know that such data was publicly available. (31 TR 137) Had he bothered to look, he could have realized that the contrary was the case. Although some of the information passed on by Simon was at odds with what Technicolor itself was telling the public in its annual report about its businesses, Sapp was not even aware of and did not question such discrepancies. (32 TR 54-6)

Not only did Sapp do nothing to verify Simon's representations (31 TR 103), he did not consult any other research analysts concerning either Technicolor or the industry (Sapp 143) and did not review any other analysts reports on Technicolor. (31 TR 169) For example, Sapp had no recollection of ever reviewing a July 1981 Neuberger & Berman report (PX 182A), contained in Goldman's own files, in which the analyst Stephen Dixon expressed the opinion that Technicolor's basic film processing businesses were worth $40 per share on fundamentals. (31 TR 169-70)

Goldman Sachs did not seek reports from any outside organization that published data on the motion picture

industry. (31 TR 102-03; Sapp 346-47) Sapp testified that other than the Simon reports the only "report" that he read about the motion picture industry in 1982 was a copy of "Variety" that he happened to pick up at the airport on his visit to California for the October 18 meeting. (31 TR 101-02)

Given their failure to make any investigation of the film industry in which Technicolor functioned, it is not surprising that the Goldman Sachs team was ignorant of even the most basic information necessary to arrive at any kind of meaningful valuation of the company's stock. Sapp testified that he could not recall being aware at any time through the end of 1982 of the existence of data projecting release schedules or the number of films in production. He had no knowledge if Technicolor maintained such data. Nor did he ask whether Technicolor had historic or forward looking data concerning release prints by customer. (31 TR 126-27; Sapp 146)

Sapp was not aware that the number of screens was on the rise from the 1970's through 1982 (31 TR 160-61); he did not know that publications were available in 1982 that could have told him the average number of prints per film distributed by the major film companies. (31 TR 164) He made no attempt to understand what the implication was for Technicolor's business of the 20 percent increase in box office receipts achieved by fall 1982. (Sapp 338)

Golden was even less informed than Sapp about Technicolor and its place in the film processing industry. He could not recall what, if anything, he learned about the major

trends and growth outlook for Technicolor's industry, the basic nature of Technicolor's contracts with studios, or its major competitors, the nature of its international operations, the existence of real estate appraisals for land in California and London, to name but a few. (Golden 217-18, 242-43) He was unfamiliar with the most basic data relative to the film industry, including releasing patterns, screen growth and box office receipts and did nothing to inform himself. (Golden 166-67, 169-70, 224-25)

Nor did Goldman Sachs have an informed understanding of Technicolor's videocassette duplicating business. Although Kamerman was of the view that the videocassette operation offered a tremendous growth opportunity for Technicolor, as expressed in his letter to stockholders in 1981 (PX 3-A at E03871), neither Sapp nor Golden could recall being aware in 1982 of these prospects. (31 TR 159; Golden 243-45) Indeed the Goldman Sachs team did not know even the fundamentals of Technicolor's videocassette business. Sapp testified that in fall 1982 he did not know the size of the Newbury Park duplicating facility, its capacity, the amount of capital investment Technicolor had made in the business or the number of units shipped. (31 TR 150-52) Nevertheless, Goldman Sachs did not seek to contact anyone outside the circle of three at Technicolor (not even Donlon, head of the videocassette operation), and made no attempt to obtain data from outside industry sources. (31 TR 155-57)

Defendants admit that it was not customary practice for Goldman Sachs to render a fairness opinion without first visiting

any operating personnel and facilities and assessing the company's operating prospects. (PX 459 Responses 111, 112) Golden concedes that prior to 1982 he could not recall a single instance in which a fairness opinion was rendered without Goldman Sachs having had discussions with any of the operating executives of a company. (Golden 247) Yet in the case of Technicolor, Goldman Sachs saw fit to break the rules to accommodate Kamerman's game plan.

c. Goldman Sachs Relies on "Projections" Provided by Technicolor Which Were Never Intended to Forecast Future Profitability

The Goldman Sachs team was provided by Powitzky with a batch of financial documents, most of which were handwritten ledger sheets. According to Sapp, some of these sheets were turned over at the October 18 meeting and the remainder came by October 20, 1982, the date the Goldman Sachs valuation memorandum was circulated. (30 TR 53, 66-7) At trial defendants lumped together into a single exhibit (DX 149 (1-18)) all such documents which Goldman Sachs had received, representing them as a file received from Powitzky. (30 TR 57) In fact, the vast majority of these documents do not even purport to be projections, but contain historic profit plan data and information regarding the loan for One Hour Photo.[15]

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15 Thus, the following documents within DX 149 contain historic profit plan data for the fiscal years indicated: DX 149(9) (1977); DX 149(8) (1978); DX 149(7) (1979); DX 149(6) (1980); DX 149(5) (1981); DX 149(3-4, 14) (1982). DX 149(18) is nothing more than a summary of the current profit plan, i.e.
(Footnote Continued)

The very appearance of these documents, mostly handwritten spread sheets, many of which were scarcely legible in the photocopied versions Goldman Sachs received, should have triggered an alarm even in a neophyte. Yet Sapp did not ask Powitzky why a public, New York Stock Exchange company such as Technicolor, to the extent it had projections, had handwritten spread sheets that were not in any typewritten or computerized form. (31 TR 197-98)

Out of this pile of papers, only four documents (DX 149 (1, 2, 16, 17)) ever were used by Goldman Sachs in preparing its analysis. These so called "projections", which extend out over a seven year period from 1983 through 1989, were never intended as forecasts of Technicolor's business, but were part of a selling tool designed to obtain financing for One Hour Photo.

As Kamerman testified, Technicolor planned its business by using a one-year forecast (19 TR 18-9); it prepared only annual budgets. (As of October 1982, Technicolor was operating under a fiscal 1983 profit plan prepared in the spring of 1982 and covering July 1982-June 1983).

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fiscal 1983. Several of the documents relate to One Hour Photo: DX 149(10&15) contain updated figures for One Hour Photo, revised from the original 1981 plan to show the impact of slower than anticipated growth; DX 149(11) is an undated analysis of the One Hour Photo loan. Two single page documents, DX 149(12&13) contain "forecasts" made in 1980 or early 1981 at a time when Videocassette and One Hour Photo were not in existence and Audio Visual did not have a contract with Funai. Thus, they refer to a different Technicolor than the company that existed in fall 1982 and, accordingly, are without relevance. Only the remaining four documents DX 149(1, 2, 16, 17) ever were used in any way by Goldman Sachs in its analysis and, as discussed hereinafter, these were never intended as, and were not, forecasts of Technicolor's business.

In 1981 Kamerman requested that seven year forecasts be created as part of a presentation made to Bank of America to support a $90 million credit facility for the startup of One Hour Photo and in that context to demonstrate that by 1989 One Hour Photo would dominate the company. The pace of store openings did not proceed as quickly as anticipated and, accordingly, in summer 1982 Kamerman requested that updated calculations be created to demonstrate the impact of the slower store openings on the One Hour Photo financing. In accordance with Kamerman's request, in July 1982, updated seven year forecasts were prepared for the Professional Film Group and for Government Services to support the One Hour Photo credit. (DX 149(16&17)) Based upon the information thus provided, Kamerman created working notes to update the formal presentation to the banks, which documents were provided to Goldman Sachs. (DX 149(1&2); Kamerman 49; Ryan 236; Gaul 68)

None of these documents was ever intended to forecast anticipated cash flow or to value the company. As Kamerman himself testified, "[i]t was a very mechanical forecast. We ... decided that since it was not possible, in our view, to forecast what was going to happen, that we would assume that essentially things would continue as they always had been, and on average growth would be inflation." (19 TR 27) To complete the construct, they tossed in an interest rate. According to Kamerman "[w]e just decided to use 15 percent ... That didn't mean that we expected that 15 percent would be the interest rate

for seven years. ..." (19 TR 28)[16] In sum, by Kamerman's admission, the level of sophistication of these forecasts was "essentially that things wouldn't change until they changed. ..." (Id.)

Ryan confirmed that these seven year forecasts were not ordinarily used by Technicolor, but were prepared on a one-time basis in 1981 (and updated in summer 1982 using exactly the same assumptions) as part of a presentation to obtain financing for One Hour Photo. (Ryan 196-97, 299)

From their face these projections raise more questions than they answer. They are unclear and have never been fully identified. While we know that Kamerman prepared some of these documents (DX 149(1) and part of DX 149(2)) in his own hand, we do not know who prepared the rest of the pages. There is no explanation as to why a seven year time frame was chosen. The forecasts make assumptions about interest and growth rates that are belied by common sense. Yet, none of these issues were questioned by Goldman Sachs.[17]

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16 Kamerman's recollection of the interest rate arbitrarily chosen was incorrect. In fact, an 18% not a 15% interest rate was used in the projections. (DX 149(1&2)) Technicolor was, in fact, borrowing at 11% from B of A.

17 The inadequacy of these "projections" was so obvious that respondent's expert, Alcar, which performed a seven year discounted cash flow valuation in the appraisal case, refused to use the Technicolor forecasts.

At trial Sapp admitted that the Goldman Sachs team did not ask and did not know the reason why these seven year projections had been prepared. (31 TR 192-93) Sapp conceded that he did not understand the critical fact that these projections (DX 149-(1)(2)) were put together so that Kamerman could make an argument to the banks that were funding One Hour Photo. (31 TR 198-99)

Sapp was aware that most companies did not have projections going out so far. Thus the mere existence of Technicolor's seven year forecasts should have triggered inquiry. Yet neither he nor Golden asked Technicolor how it could project out to 1989 for net income. (31 TR 193-95; Sapp 173-74; Golden 230)

Although the projections were prepared at Kamerman's request and thus he was in the best position to know what their intent was, the Goldman Sachs team never discussed them with Kamerman. (31 TR 200-01) All their communications regarding the projections had to be funneled through Powitzky, who had only been at Technicolor for about six months and who had had no involvement in their preparation. (31 TR 107)

Goldman Sachs' complacent attitude was neatly summarized by Sapp: "I don't know why the forecasts were requested from the management, but ... they were there, and when we asked for them we were given them, and we worked with them." (31 TR 201)

Nor did Goldman Sachs seriously question any of the specific assumptions utilized in the projections. The projections arbitrarily used an 18 percent interest rate with

respect to One Hour Photo. Goldman just as arbitrarily lowered the interest rate to 15 percent in its analysis. In so doing Sapp did not ask what the interest rate was on the Technicolor's line of credit for funding One Hour Photo; did not ask to see the loan agreement; and did not recall knowing that the credit with Bank of America was at prime. No one at Goldman Sachs consulted with any of the firm's experts concerning future expectations as to interest rates. (31 TR 204-06)

As discussed above, in the summer of 1982, Kamerman requested the heads of Professional Film Processing and Government Services to prepare revised seven year projections in connection with updating the financing analysis for One Hour Photo. (What was generated were no growth but for inflation mathematical extrapolations, using essentially fixed percentages for growth in all categories going out over the period from 1983-1989.) (DX 149(16&17))

Gaul explained that he had Jim Wilson from Technicolor's accounting department, "extrapolate out and throw in" fixed price increases and labor expenses and then put the numbers into the computer. He made clear that he did not regard these projections as a forecast of anticipated results, but simply as an "exercise" (Gaul 65-7) done on "an arithmetic basis." (Gaul 141)

Although it is evident from the face of these documents that they merely applied constant percentages and Sapp admits he was aware of that (31 TR 217), he did not seriously challenge the projections, did not ask to compare them against updated results

Oliphant, to do the necessary to avoid making public disclosure of the MAF offer.

In keeping with his goal, Kamerman also made it clear to Brown from the start that he wanted no other alternatives considered. Notes of another initial conversation on October 13 or 14, 1982, between Brown and either Kamerman (or Oliphant), demonstrate that Brown nevertheless advocated the need to consider alternatives to the MAF offer. In these notes, he identified three such alternate approaches, including Technicolor resisting MAF and remaining independent, consideration of a leveraged buy out or pursuit of an alternate bidder, as documented in his notes: "independence," "lev. buy-out" and "best price from another."[19] (PX 503 at 3)

Moreover, Kamerman represented to Brown that the deal was so near to conclusion that a decision as to financing by the banks could be reached by that Friday, October 15, 1982. Thus, Brown's notes record that "people [are] meeting, First of Boston & Chase, today [Thursday, October 14] & tomorrow [Friday, October 15]." (PX 503 at 4)

Despite the fact that from day one Kamerman had made clear to Brown that he wanted no public disclosure of the MAF offer, Brown believed that a press release might well be

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19 Brown testified in one breath that this entire page recorded an initial conversation with Kamerman or Oliphant and in the next claimed that this entry contained notes to himself. (27 TR 156-57) Given the fact that the entire page of notes (with the exception of the "to do" notation at the bottom) refers to information and questions discussed in the course of a conversation, it is evident that Brown's initial recollection is the only reasonable one.

necessary. Accordingly, sometime in this initial period between October 14 and before October 18, 1982, he drafted a release stating, "Technicolor, Inc. today announced that it had been approached by another company with a view to a possible acquisition of Technicolor." (28 TR 177; PX 503 at 5)

In addition, on the flight out to California for the October 18 meeting, Brown prepared a written analysis of the pros and cons of issuing a press release announcing the MAF transaction. At the bottom of that analysis he wrote, "Conc[lude]: I favor announcement." (PX 503 at 12) At trial, Brown confirmed that when he went out to Technicolor he generally favored putting out a press release. Brown testified "if something of this sort is going on, it is nice to be able to put out a press release, unless there are reasons not to." (28 TR 104)

Armed with this draft press release and an agenda which he prepared on the flight, Brown set off for the October 18 meeting.

3. At The October 18 Meeting, Kamerman Prohibits Shopping The Company Or Issuing a Press Release

At the October 18, 1982 meeting, Kamerman met for the first time with Brown and the Goldman Sachs team (Golden, Sapp, Venuto and Joseph Sullivan). Oliphant and Powitzky also were

present.[20] During this meeting, the Goldman Sachs team urged Kamerman to allow it to seek out alternate buyers in order to test the market. Sapp testified on deposition that,

> We [Goldman Sachs] discussed it somewhat aggressively that they should consider widening the buyer universe, because it gives a chance to test the market.

(Sapp 286, emphasis added) At trial Sapp confirmed that Golden pressed the issue of talking to other buyers "somewhat aggressively." (31 TR 77)

In this context a number of potential purchasers were discussed. Kamerman himself was aware of the existence of other possible buyers and specifically brought up The Rank Organization

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20 Kamerman insisted at trial that prior to the October 18 group meeting, he had a separate meeting with Brown and Oliphant at which time they discussed issues relating to disclosure, shopping the company, and calling a board meeting. This is demonstrably untrue. Indeed Kamerman traps himself in his own falsehoods. On direct examination Kamerman testified that this meeting with Brown took place on October 14, 1982. (19 TR 165-67) On cross-examination when confronted with Oliphant's chronology (PX 126) which records that Kamerman only first telephoned Brown on October 14, Kamerman recanted as to the date of his initial meeting, but then fabricated a separate session with Brown and Oliphant preceding the meeting with the Goldman Sachs representatives. (21 TR 77, 82-3) This, too, is false. Oliphant, a compulsive note-taker, has no notes of any such meeting, nor does Brown. Both men recorded detailed notes of the meeting on October 18, 1982 (PX 127; PX 503, p. 9-21), but they clearly refer to the meeting with the Goldman Sachs team, not some private session. Thus, both sets of notes start with a list of all the attendees. Moreover, comparison of Brown's and Oliphant's notes to those taken by each of the Goldman Sachs representatives shows that they list the same topics in the same order (starting with consideration of Kamerman's contract amendments) and refer to one and the same meeting. Finally, the very topics that Kamerman claimed were discussed in the purported private session (including disclosure and other buyers) are recorded in Oliphant's notes of the global October 18 meeting.

("Rank"), a major British film distributor and processor, as a potential acquirer of Technicolor. (30 TR 55, 31 TR 116) Kamerman indicated that Rank was the dominant factor in the English film processing market but was not too involved in the United States and that therefore "they could be considered one of the more logical [buyers]." (Sapp 233) All those present recall discussing Rank and other potential buyers for Technicolor, a subject of sufficient importance also to have been documented in each of their respective notes. (Sapp 132-33, 233; Golden 87; Oliphant 87-8; Kamerman 209; 28 TR 201; PX 127 at 022909; PX 210 at GS 1209; PX 215 at GS 1254; PX 211 at GS 1225).[21]

Golden also made a note to find out more about Rank and EMI-Thorn (a British film company). (PX 215 at GS 1254) As he explained, part of Goldman Sachs' analysis in reaching a judgment about the fairness of a particular offer would be to consider the subject of other acquirers. Golden emphasized that even in a context where Goldman Sachs was retained exclusively to opine on the fairness of an offer received by a company, it would consider other acquirers "[i]n order to give some market judgment as to the potential list of other companies that might be interested in the acquisition." (Golden 87)

Brown also had independently considered the subject of seeking out other purchasers. On the flight out to California, Brown prepared a 13 page written agenda of topics to be covered at the October 18 meeting (28 TR 191; PX 503 at 9-21), among

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21 In 1987 Rank in fact sought to purchase Technicolor. (PX 451 Response 16)

which was consideration of various alternatives to the MAF offer. One of the options he evaluated was seeking alternate buyers, as reflected by the notes in his agenda, "T shops for highest price". Under "pro" for that option he noted that it was "best for sh[areholders];" under "con," Brown did not record anything. (PX 503 at 11)[22] Moreover, Brown believed that Technicolor should consider the alternatives available, including shopping the company (28 TR 107), and he testified that the subject of alternatives to the MAF proposal was in fact discussed at the October 18 meeting. (28 TR 199) Notwithstanding Kamerman's self-serving denial (21 TR 75-6), the only logical conclusion is that Brown also advised Kamerman that shopping the company was the most advantageous alternative for the shareholders.

The record further demonstrates that in connection with advising Kamerman on the alternative of looking for another bidder, Brown also addressed the issue of a premium. Item number one of the agenda prepared by Brown for the October 18 meeting specifically dealt with the question of what impact a premium has on the duty to sell. Brown there notes, "no duty under all circ[umstances] to sell co[mpany] to A[cquirer] at a premium, any offer for a co[mpany] will be at a premium." (PX 503 at 10) At trial Brown explained the intent of these notes:

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22 Kamerman's facile explanation that Brown had no "cons" under "T shops for highest price" because he knew them already (21 TR 75) may be dismissed out of hand. Brown himself testified that the agenda, of which these notes form a part, was prepared prior to October 18, 1982.

> I wanted to make clear that management knew that the mere fact that an offer was at a premium over the then market price did not create a duty to sell. Any offer to buy a company is going to be at some kind of premium...." (27 TR 169-70)

Given Brown's initial thoughts, as recorded in his notes, about obtaining the best price from another, his positive view of Technicolor shopping for the highest price and the strong recommendation of Goldman Sachs that the company be shopped, it is evident that at the October 18 meeting, Brown counseled Kamerman that the premium offered to Technicolor by MAF was not meaningful. This is all the more so because as Brown realized, the market price of Technicolor stock had been depressed by the announcement of the start-up of One Hour Photo (28 TR 130) and therefore did not reflect an uninfluenced price.[23]

Nevertheless, in an effort to protect himself, Kamerman fabricated his own self-serving version. Kamerman testified that Brown advised, "[i]n this case, because of the size of the premium, you don't have to shop it." (21 TR 154) On this issue, however, Brown, a neutral third party to the course of events, exposed the prevarication of his own client. Asked directly whether in fact he had so advised Kamerman, Brown responded that he had not. As Brown testified, "I don't think I said that, and

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23 Oliphant's notes record under alternatives discussed, "no legal duty because of premium." Brown testified that while the issue of a premium was discussed, he never gave such advice. (28 TR 199-200)

no more than that" and again "I don't recall using those specific words...." (28 TR 138, 140-41)

Matters finally came to a head. It became apparent that Golden, a vigorous proponent of shopping the company, and Kamerman, who would hear none of it, were locked in a clash of wills. Sapp confirmed at trial that the two had differing points of view on this issue. (31 TR 181)

Nothing Golden or any of the other Goldman Sachs representatives said, nor for that matter any advice by Brown, could sway Kamerman. As far as Kamerman was concerned, he had struck a deal with Perelman and he wanted nothing to interfere -- not even a better price for the stockholders. Accordingly, in his usual dictatorial fashion, he disregarded the counsel of his advisers and decreed that no other purchasers be contacted. According to Sapp, Kamerman "effectively expressed that he did not want to contact other purchasers." (31 TR 67-8; Sapp 285-87; Golden 17; Kamerman 196)

Brown made clear that the determination not to consider alternatives to the MAF proposal and all decisions relating to the deal were made by Kamerman -- not him. As he put it, "prior to October 29, yes, it is -- Mr. Kamerman is the primary decision-maker." (28 TR 64) Brown emphasized that he did not give Kamerman any advice concerning the impact that shopping the company would have on the business of Technicolor. Nor did he have any recollection of Goldman Sachs providing any impact on this subject. It was Kamerman alone who made the determination. (29 TR 18-20; 28 TR 67)

Not only did Kamerman prohibit seeking out alternate buyers, but he also gave orders on October 18 not to issue a press release in order to insure that no competing bidders would come forward.

As described above (pp. 83-4) in preparation for the October 18 meeting, Brown had not only drafted a press release announcing that Technicolor had been approached about an acquisition, but also he had prepared a written analysis of the pros and cons of putting out a release in which he concluded, "I favor announcement." (PX 503 at 12) It must therefore be presumed that at the meeting Brown advised Kamerman of his thinking and advocated that issuance of a press release announcing the MAF approach was appropriate and necessary. Brown admitted at trial that "the question of a press release and what a press release might look like was discussed at the October 18th meeting." (28 TR 198)

Nevertheless, in an effort to protect himself, at trial Kamerman claimed that it was Brown who made the decision not to issue a press release. (21 TR 53, 55, 153) Kamerman testified, "He [Brown] made the decision, not anyone else. He governed it. I expressed no opinion." (21 TR 105, emphasis added)

Given Kamerman's attempts from day one to avoid disclosure in the face of Brown's advice advocating issuance of an announcement, one can only react with astonished disbelief to Kamerman's words. Fortunately, however, on this issue there is no need to rely only on circumstantial evidence. Brown testified in no uncertain terms that the decision whether or not to issue a

press release was made by Kamerman. Asked directly on this subject, "but the decision making responsibility was with Mr. Kamerman and Mr. Oliphant; isn't that right?" Brown responded with an unequivocal "Yes." (28 TR 63)

Moreover, Brown made it equally clear that he did not make that determination, as demonstrated by the following exchange at trial:

> Q. Would it be correct to say that the decision as to whether or not to issue a press release was made by you?
>
> A. No; that would not be correct.
>
> Q. As to that, if Mr. Kamerman testified in this case that he had no opinion on the subject, and that you made the decision as to whether or not and when to issue a press release, that would not accord with your recollection?
>
> A. That's correct.

(28 TR 127) As Brown explained he acted simply as an "adviser", not a "decision-maker" and the advice he gave was based on the information provided to him. (28 TR 64)

4. Kamerman's Purported Confidentiality Concerns, First Expressed At Trial, Are Bogus

In an attempt at post hoc rationalization, Kamerman for the first time at trial, claimed that the reason he was opposed to shopping the company or making a public announcement of the MAF proposal was the same as his reason for not calling a Board meeting, namely, the detrimental impact he believed these would have on Technicolor's business.

According to Kamerman, these concerns, which were linked primarily to the Professional Film Processing and One Hour Photo operations, were basically twofold: first, that there would be problems with retaining and recruiting employees for the company and, second, that potential damage would be done to relations with customers if word got out that Technicolor was for sale. (29 TR 104-07)

The record demonstrates that these concerns were invented for trial. Although the five sets of notes contemporaneously prepared at the October 18 meeting by the Goldman Sachs team, Oliphant and Brown record in detail the items discussed, they are absolutely silent as to any reasons offered by Kamerman for not seeking out alternative buyers or issuing a press release.

Not a word of any such concerns was uttered by even a single witness in the thousands of pages of deposition testimony. Likewise in their responses to contention interrogatories served in August 1989 -- just two months before trial commenced -- not a word was said about any concern of damage to Technicolor's business. Thus, for example, asked why Kamerman did not call a Board meeting before October 29, 1982, defendants said nothing about confidentiality. The only explanation they offered was that the financing was not in place, the proposal had not been finalized and a desire to avoid leaks during the early stages of negotiation. (PX 460 Response 116)

To the extent that defendants raised any confidentiality concerns whatsoever in their 300 pages of interrogatory

responses, they pertain exclusively to attempts to avoid affecting the public markets. Thus, defendants' only justification for Kamerman's decision to keep the MAF proposal confined to a handful of people was "in order to keep such negotiations confidential and prevent leaks of information to the public markets." (PX 460 Responses 138, 164) Moreover, as discussed below, in their lengthy description of what was said and the topics discussed at the Special Board Meeting, defendants do not include even a mention of concerns about adverse effects to Technicolor's business. (PX 460 Responses 206)

Yet, remarkably, at trial the identical explanation emerged full blown in almost haec verba from the mouths of Kamerman and those he purportedly advised of the need for confidentiality, including, Sapp and Brown and (as discussed below) the other directors.

Under such circumstances, the sudden and belated emergence of these confidentiality concerns at trial, after total silence on deposition and in interrogatory responses, can only be explained by the fact that Kamerman and company were coached by counsel and provided with a script.

Moreover, by Kamerman's own admission, word was out by this time so that his confidentiality concerns were meaningless. Kamerman admitted that by October 14, 1982 he "suspected" that word was out on the street that something was going on at Technicolor. (21 TR 58) On that morning Joseph Sullivan of Goldman Sachs had called and asked "[i]s something going on" (21 TR 59) and as of that date Goldman Sachs was

advised of the transaction. (21 TR 61) Kamerman also drew an inference by that date that Bear Stearns knew what was going on. (21 TR 60-1) In addition, Kamerman had been told by no later than October 12 or 13 that Perelman expected to go to the banks that Thursday or Friday (October 14 or 15, 1982) (21 TR 62), thereby further widening the circle of people in the know.

Brown also acknowledged that at the time he was engaged the universe of people with knowledge of what was going on was pretty wide. In addition to a number of people at Debevoise, and a group at Technicolor, it included individuals at Goldman Sachs, Bear Stearns, Chase, First Boston and a whole group of other banks approached as part of the lending consortium. (28 TR 93-4)

Not only was this circle expanding, but in addition trading volume in Technicolor stock was abnormally high around this time. On October 11, 1982, 290,000 shares of Technicolor were traded; on October 14 and 15, 1982, respectively, 123,000 and 196,000 shares were traded. Kamerman conceded that these amounts were "extraordinary". As he succinctly put it, "[i]t sounds like press release time to me." (21 TR 60)

In any event, these purported confidentiality concerns, even if expressed by Kamerman, had no basis in reality. Thus, as for the fear that Technicolor personnel would leave, Gaul testified that by the time he was advised by Kamerman of the possibility of doing a management LBO in mid-October 1982, rumors of an impending deal already were afloat at the company. (Gaul 112) Yet Gaul did not leave, nor was there any mass exodus of Technicolor employees. Similarly, at One Hour Photo, senior

management already was in place and it would be unreasonable to assume that the clerks and cashiers who manned the individual stores would be affected by any announcement regarding the fact that Technicolor was for sale.

Nor was there any basis in fact for the professed harm to customer relations that would befall Technicolor's Professional Film and One Hour Photo businesses. There was never any doubt that MAF would continue to operate Technicolor's professional film laboratories. Thus, the studios could count on continued servicing of their needs. Moreover, Technicolor was operating pursuant to long-term contractual arrangements with its principal customers, Universal, Warner and Disney.

As for One Hour Photo, to suggest that consumers would not bring in their rolls of film to Technicolor's One Hour Photo stores because of concerns about Technicolor being acquired is on its face a joke. The only person who could affect operations of the One Hour Photo stores in any meaningful way was the landlord. To the extent such stores were in operation, they had existing long-term leases. Moreover, given Perelman's decision not to proceed with that operation, no new leases were being entered into and the Merger Agreement foreclosed further expansion. (22 TR 107)[24]

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24 Even were the Court to conclude that there were any legitimate confidentiality concerns, such finding would not excuse the failure of Kamerman (and ultimately the Board) to seek out other buyers (or to pursue any other alternative method of maximizing shareholder value). It goes without saying that there were various methods that could have been pursued to get the best price for the stockholders. Kamerman understood that public auction was not the only method to achieve such a result. Indeed, as discussed below, throughout this transaction the Goldman Sachs team stood ready to discreetly
(Footnote Continued)

Although neither Brown nor the Goldman Sachs team had any experience in the motion picture business, they accepted Kamerman's representations (to the extent, if any, they were made) at face value. (28 TR 81) Brown admitted that he did not inquire of Kamerman how any particular customer relationship would be affected by an announcement or pursuit of alternatives (28 TR 80), or how recruiting would be affected. (28 TR 83, 89) Although there had been a number of recent sales of film companies that owned processing laboratories, (e.g. Twentieth Century Fox and MGM) Brown did not ask what impact, if any, such changes in control had on the business of the Deluxe and Metrocolor laboratories. (28 TR 95-6)

Even Kamerman knew that the MAF transaction could not remain a secret forever. Eventually, a press release would have to be issued. In fact (as discussed below), a release announcing a halt in trading was issued on October 27, 1982 (PX 174), which alerted the investment community that something was going on. Therefore, at that time, the very "risks" that Kamerman claimed to be protecting against would surface. The only difference was that by waiting until the deal with MAF had been locked up to make any public announcement, Kamerman assured that the bidding process would be chilled and no alternate offers would materialize.

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contact potential buyers on a confidential basis which, as Sapp testified, they did on a regular basis, or to pursue other means of testing the market. Kamerman prohibited Goldman Sachs from pursuing any of these options.

5. Goldman Sachs Continues To Advocate Pursuit Of Alternate Buyers But Kamerman Refuses

Following the October 18 meeting, Goldman Sachs persisted in its efforts to convince Kamerman to seek out alternate buyers for the company, but all such attempts were rebuffed. Sapp confirmed at trial: "Neither Mr. Kamerman nor the board of directors of Technicolor authorized Goldman Sachs to contact any other potential buyers of Technicolor." (31 TR 82)

As discussed above, immediately upon their return to New York, Sapp and Venuto put together a valuation memorandum for circulation to partners and vice presidents in the merger and acquisition department. The first paragraph of that memorandum reports, "Prism may ask us to contact other buyers as we go forward." (PX 188) While Sapp could not recall why that sentence was included (31 TR 181), it seems likely that it was put there because Golden, who on October 18 had aggressively urged that the buyer universe be expanded, still hoped to convince Kamerman of the wisdom of such course of action.

A preliminary list of potential buyers was prepared and included in the valuation package.[25] (30 TR 82; Sapp 118-19) Although Sapp could not recall on deposition what names were on the list (Sapp 408), at trial he testified that the list included

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25 That list apparently has been destroyed. No copy was produced during discovery proceedings and none surfaced during trial. Goldman Sachs and Technicolor represent that they could not find a copy of the document in 1984 when its production was demanded, though both concede the document did exist in 1982.

Rank, several movie studios and a number of LBO investors, such as Kohlberg Kravis. (30 TR 82)

In addition, the memorandum specifically asked its recipients for suggestions as to the "best potential buyers for Prism (including retail oriented buyers) and LBO ideas." (PX 188, GS 1376) Sapp explained, "if you need to sell a company, you certainly need to know who the buyers were." (30 TR 72-3) Golden likewise testified that the subject of other acquirers would be considered in order to provide market judgment. (Golden 87)

According to Sapp, Coca-Cola was mentioned as one such potential purchaser by Richard Simon, the entertainment research analyst. Coca-Cola had recently acquired Columbia Pictures and it was believed that it could be a strategic buyer and bring the Columbia print business to Technicolor. (30 TR 98; Sapp 221; PX 216 at GS 1222)

Thereafter, during the week of October 18, 1982, when it appeared that Perelman's financing for the deal was unraveling, Golden again offered up Goldman Sachs' services in case Kamerman wanted to contact other purchasers. In this connection Sapp testified as follows:

> On a subsequent conversation with Mr. Kamerman, Golden offered up Goldman Sachs' services in case Mr. Kamerman wanted to contact other purchasers. Mr. Kamerman repeated that he did not want other purchasers contacted by Goldman Sachs.

(31 TR 172; Sapp 287)

Moreover, throughout their engagement and without reference to Perelman's financing difficulties, there were additional discussions in which the Goldman Sachs team reminded Kamerman that they were prepared to approach other potential buyers on behalf of Technicolor. Sapp prepared notes of a conversation he had with Joseph Sullivan wherein the latter opined that if Perelman could not get his financing, Kamerman might be willing to allow Goldman Sachs to find another buyer. (PX 217) As Sapp explained, "we reminded him that that was an alternative that we were prepared to explore with him . . . we were fully prepared to approach other people on his behalf." (Sapp 288) Kamerman never authorized any such action. (Sapp 126, 288; 31 TR 81-2; Golden 17; Kamerman 196)

Despite Kamerman's repeated refusals, Goldman Sachs pursued the possibility of contacting other buyers. In preparing a checklist of items for inclusion in Goldman Sachs' Board presentation, Sapp included an entry, "buyer ideas." (PX 212 at GS 1200; Sapp 408) In fact (as more fully described below), Golden's version of the report used by him at the Special Board Meeting contained a list of potential bidders for Technicolor, but that list was deleted from the version provided to the directors. (Golden 186; PX 201 at GS 0663) Defendants admit, however, that Kamerman was shown a copy of Goldman Sachs' report book in draft form (PX 460 Response 21), which contained the list of potential buyers. No one at trial claimed to have any idea what happened to the buyer list (32 TR 84), and to this day no one has ever been able to explain its mysterious disappearance.

6. MAF's Limited Financial Resources And The Status Of Its Financing Made It Clear That Other Buyers Could Offer More

a. Kamerman Knew That Technicolor Could Not Get The Best Price From MAF Because Financing For The Deal Stretched It To The Limits

Kamerman cast aside all other potential bidders without even giving them a once over in order to deal exclusively with Perelman, whom he knew was a weak bidder with limited financial resources. There was simply no way that MAF could afford to make the best offer for Technicolor.

When Perelman arrived on the Technicolor scene in September 1982, he was a minor league player with a history of strike-outs. By his own admission, Perelman then had only a string of unsuccessful acquisition attempts to his name. (42 TR 7-8) As discussed above (pp. 19-20), between 1981 and early 1982, Perelman had sought, without success, to acquire a number of companies, including Intext, Richardson, Holly Sugar and Consolidated Cigar.

Kamerman was aware of Perelman's dismal track record. At the October 18 meeting, Brown gave Kamerman and the Goldman team a status report on Perelman's prior failed takeover efforts. (PX 503 at 13; PX 127 at 022910) Two days later, William Phillips, another Debevoise attorney, transmitted to Kamerman a company analysis of MAF, further detailing its unsuccessful bids. (PX 185 at GS 0116-17)

Financing the transaction strained MAF to its limits. As of fall 1982, Technicolor was one-third larger in revenues than MAF and had a market capitalization 2.5 times its size. Since MAF brought little to the party in the way of its own credit resources, the only way that MAF could afford to purchase Technicolor was by pledging Technicolor's assets and borrowing on its credit worthiness. Thus, the transaction was leveraged to the hilt. Perelman planned to finance the deal by borrowing virtually the entire $120 million, and contributing only $2 million in equity. (PX 99) Kamerman was well aware of Perelman's financing plans. (19 TR 159)

Therefore it was evident that the relative financial weakness of Perelman necessarily would have an adverse impact on the price in a sale of Technicolor to MAF. This topic was discussed among the Goldman Sachs representatives and Kamerman. Sapp acknowledged that a company with greater resources than MAF could afford to pay more. As Sapp testified, "Kamerman was aware that there was a need for them to finance and that they [MAF] may be stretching their ability to borrow the money." (31 TR 176-77)

Goldman Sachs cautioned that MAF's financial constraints could have an impact on the price it could pay. As Sapp testified, "we did say at some point, 'Mr. Perelman is going to have to keep getting the approval of the banks. At some point he's going to be in a position where they are going to say no.'" (Id.) Indeed, Perelman had to go back to the banks even for approval of the 50 cent increase in price from $22.50 to

$23. He told Kamerman, "[t]here's going to be a lot of upset over it." (19 TR 137)

When Kamerman advised Bjorkman of the $23 price to which he had agreed, he indicated that Perelman was "stretching" at that. Asked if he would go higher, Kamerman responded, "I don't think you can push him any more. And if we did, he would probably go away. He's not that big a guy." (19 TR 137-38)

Moreover, given MAF's lack of financial resources, the Banks would not permit Perelman to engage in any kind of hostile offer or bidding contest. (PX 233 at C00268) Defendants admit that Perelman advised Kamerman of this significant constraint. (PX 460 Response 118)

Kamerman admitted that he recommended the $23 price, not because it was the maximum available price, but because he did not think he could get Perelman to go higher. (21 TR 226)

b. Even Though Perelman Fails to Deliver On the Financing Commitment Promised, Kamerman Refuses to Pursue Alternative Bidders

What Perelman lacked in financial resources, he made up for in salesmanship. Having failed at his three previous acquisition bids, he was desperate to make this deal fly. With a talent for self promotion equal to his purposes, Perelman represented to Kamerman that he had the desire and ability to wrap up the Technicolor transaction quickly -- and the financing available to make it happen.

Thus, on or about Tuesday, October 12, 1982, Perelman advised Kamerman that MAF was taking its proposal to acquire Technicolor to the banks that very week. On October 13, Kamerman briefed Oliphant, as recorded in the latter's chronology, about the fact that "MacAndrews [was] going to Banks on Thursday and Friday," October 14 or 15, 1982. (21 TR 45-6; PX 126 at 022906)

Indeed, Perelman promised to deliver financing commitments by October 20 or 21, 1982 and planned for meetings of both the MAF and Technicolor Boards by no later than Friday, October 22, 1982, so that the entire deal could be concluded at the end of that week. At the October 18 meeting, Kamerman reported that schedule to Brown and the Goldman Sachs team. (21 TR 103) Notes independently taken by Oliphant, Brown and the various Goldman Sachs representatives record the fact, as communicated by Kamerman, that Perelman had advised that the commitment letter would be forthcoming by Wednesday, October 21 and the Board meeting set for no later than that Friday, October 22. (PX 210 at GS 1210; PX 211 at GS 1226; PX 127 at 022909; PX 503 at 13) Accordingly, the Goldman Sachs team was sent hustling back to New York that very day to pull together sufficient information so that they could report back to Kamerman by that Thursday, October 21, on the "fairness" of the price offered by MAF. (See p. 64 above)

As originally planned, the funds for the transaction were to come entirely from bank financing. Notes prepared by Golden record the fact, as represented by Perelman, that Chase

would raise $65 million of the loan and First Boston the remaining $55 million. (PX 215 at GS 1253)

It soon became apparent, however, that Perelman's promises of financing commitments were shear bravado. On or about October 19, 1982, Perelman advised Kamerman that First Boston needed more time to consider MAF's financing request. Faced with the prospect of one of its two major banks backing out, Perelman asked Kamerman to approach Bank of America, Technicolor's major bank. After consulting with Goldman Sachs, Kamerman said "no." Sometime between October 18 and 21, 1982, the Goldman Sachs team was apprised by Powitzky of this conversation between Perelman and Kamerman and the state of MAF's unraveling financial commitments. Sapp's notes, contemporaneously taken, document the fact that Perelman reported, "Boston lender needs another week." (42 TR 21; PX 217 at GS 1233; 30 TR 123-25)

Unable to deliver a commitment letter as promised or even to get an introduction to Technicolor's bank, Perelman was forced to scramble to put together financing for the deal -- and everyone involved, including Kamerman, knew it. Having been turned down by Kamerman, on October 19, 1982, Perelman called Beale at Chase and entreated him to make the introduction to Bank of America; Beale agreed to do so. That day Beale telephoned Meyer at Bank of America with a request that he meet with Perelman. (Meyer 96; PX 259 at B001682)

All this was news to Meyer who up until then had not even heard of MAF's offer. (See below, p. 130) Before Meyer

could agree to meet with the potential acquirer of his client, however, he alerted Powitzky at Techicolor. (Meyer 94, 96-7) With the latter's permission, Meyer conveyed his willingness to meet and Perelman was on a plane to California the very next day, October 20, 1982, for a meeting with Meyer in an attempt to get his financing back on track by getting Bank of America to sign on. (42 TR 102-03; Meyer 107, 109-110; Perelman 199-200)

By the week of October 18, 1982, Kamerman was well aware that Perelman was having trouble getting his financing in line and so advised Goldman Sachs. Brown also was apprised of the deteriorating status of Perelman's financing, in telephone calls from Mike Schell of Skadden Arps and Oliphant, on October 20 and 21, 1982, which are recorded on his deal pad. (PX 503 at 27) Accordingly, during that week Goldman Sachs delivered an ultimatum to Perelman to get his act together. As Sapp testified, "we delivered a strong message to Mr. Perelman that, 'Look, get your financing together if you want to retain credibility in doing this transaction.'" (31 TR 171)

Despite the ultimatum, Perelman was unable to come up with the firm commitment that Kamerman had insisted upon from the start. On October 19 and 21, 1982, respectively, Chase and Bank of America orally committed to the deal. (Beale 54; PX 233; PX 260) No written commitment letter was forthcoming from Chase until October 27, 1982 (PX 236), which letter was explained by a second letter issued the next day. (PX 238) As described below, Perelman was unable to get an actual loan agreement until a month later. (PX 244)

Initially, the transaction was to be funded entirely with bank financing. In the summer of 1982, MAF had begun negotiations, through Drexel Burnham, to place with Executive Life a $30 million subordinated debenture issue to finance acquisitions such as Technicolor. Although Perelman testified that the debenture was in place by September, 1982 (42 TR 119), the documentary evidence conclusively establishes that no agreement was reached until nearly a month later.

Thus, on October 14, 1982, counsel for Executive Life conveyed to MAF drafts of the indenture and purchase agreement, advising that the new drafts were still subject to review and comment by their client. (PX 413)

Final agreement between MAF and Executive Life regarding the debenture was not reached until October 22, 1982, the date on which the documentation for the offering was executed. (PX 416, 417, 419) This is confirmed by the fact that it was only at this point that MAF's projections for the Technicolor transaction were altered to reflect the use of $30 million in subordinated debentures. Thus, MAF's presentation to the banks changed between October 18 (DX 99) and October 22, 1982 (PX 107) from seeking $115 million in bank financing to $85 million in bank financing with the balance to come from subordinated debentures. Finally, at trial Slovin confirmed that the debenture was not in place until sometime between October 18 and 22, 1982. (24 TR 32)

As the financing became unraveled and Perelman saw the deal slipping way from his reach, he became more hungry than ever

to bring it to completion so as to vindicate himself and move on to even greater conquests. Perelman made clear to Kamerman that he wanted the deal. In recounting that conversation between Perelman and Kamerman to Brown on October 20, 1982, Oliphant reported that Perelman was so anxious for the deal that he was positively "green around the gills." According to Oliphant, as recorded in Brown's notes, Perelman advised, "I really need to get the deal." (PX 503 at 27; 29 TR 7-8)

Given the course of events, it was obvious to Kamerman and everyone involved that: 1) Perelman was not coming up with the money so fast and 2) Perelman was not going to back away from what he perceived to be the deal of a lifetime. Despite the fact that it was thus evident that Technicolor was in the driver's seat and Perelman was not going anywhere, Kamerman did nothing to maximize the advantage for the shareholders. Even at this juncture, he refused to contact other bidders. Instead Kamerman simply rolled over and waited for Perelman to finally get his financing together.

Not only did Kamerman refuse to seek alternatives even in the face of delayed and unfulfilled financing promises, but he caved in on major requirements regarding the very nature of the financing commitment. From the start, Kamerman had insisted that Perelman have no financing outs. He advised Brown and the Goldman Sachs team that this was a requirement of the deal. (28 TR 161; PX 503 at 5)

This was confirmed at the October 18 meeting. During the course of a telephone call between the Technicolor group and

representatives of MAF, Brown in bold letters wrote a note coaching Kamerman to make clear, "we would much prefer to have the loan agreement in place at the time TK [Technicolor] signs the merger agreement." (PX 503 at 5; 28 TR 181)

Kamerman continued to make this a condition for the transaction. Thus, on October 20, Schell of Skadden Arps advised Brown by telephone that MAF was not likely to sign a loan agreement before the Merger Agreement. (PX 503 at 27) Nevertheless, the following day Oliphant reported in a call to Brown that Kamerman wanted "no outs." (Id.)

To the end the status of MAF's bank financing remained a concern. On October 26, 1982, the Goldman Sachs team called Tarnopol of Bear Stearns in an attempt to understand the state of the bank financing. (30 TR 156) By October 27, 1982, it became clear that MAF would be unable to get a loan agreement by the time of the Special Board Meeting and execution of the Merger Agreement, and was insistent that it be given the right to "walk" in the event it could not ultimately secure a financing agreement. Notes of a conversation among Brown, Golden, Kamerman, Oliphant and Powitzky on that day document the fact that MAF "wants cond. out due to financing not obtained." (PX 134) On October 27, 1982, a commitment letter finally issued from Chase (PX 236) -- but it was not until a month later on November 24, 1982, that a formal loan agreement was executed. (PX 244)

Still troubled by the state of the financing, on or about October 27, 1982, Golden and Sapp called Beale at Chase to

inquire whether MAF was in compliance with the covenants in the commitment letter and to ascertain the terms and conditions of the proposed loan agreement. (31 TR 100) If there were a problematic covenant or condition, MAF would be able to walk from the deal even after it had gone to the Technicolor Board. Indeed, Beale advised the Goldman Sachs representatives that Perelman had done precisely that in his attempted bid for Consolidated Cigar; Perelman pulled out of that deal although he had a firm commitment letter. (PX 212 at GS 1203; 31 TR 104)

No response to Goldman Sachs' request from Chase was forthcoming. Instead, on October 28, 1982, Carlton of MAF sent Goldman Sachs a letter simply announcing that MAF was in compliance with the financial covenants of the commitment letter. (PX 200) Attached to that letter was a handful of unidentified, unconsecutively numbered pages that purported to be certain conditions of the loan agreement. Goldman Sachs had no way of knowing, however, whether the attached pages provided by Carlton were his or Skadden Arps' view of what the loan agreement should look like. Nevertheless, as Sapp testified, Goldman Sachs made no attempt to verify the terms with Chase and never asked Chase to see the loan agreement in its complete, then-existing draft form. (31 TR 101, 104-05)

Despite his purported insistence on a definitive financing agreement, Kamerman ultimately capitulated and settled for a commitment letter, knowing that Perelman had walked from the Consolidated Cigar deal under nearly identical financing circumstances. Having refused to even consider any other

potential purchasers and having dealt exclusively with MAF, Kamerman (and the other Technicolor Director Defendants) agreed to a Tender Offer and Merger Agreement which allowed MAF to pull out of the Technicolor deal -- even after Board approval -- if it was unable to get a definitive loan agreement. Thus, Section 16(h) of the Offer to Purchase specifically provided that Macanfor would not be required to purchase shares if "MacAndrews fails to obtain the funds necessary to consummate the Offer on the terms set forth in the Commitment Letter. ..." (PX 55 at P303815)

7. No Effort Was Made By Kamerman Prior To October 29, 1982 To Pursue Any Other Alternatives To Maximize Stockholder Value

Not only did Kamerman refuse to shop the company or allow Goldman Sachs to discreetly canvas the market, but he also rejected any other alternative measures that could have maximized shareholder value. No consideration was given to just saying "no" to MAF's offer and remaining independent. No consideration was given to a liquidation of the company. Although Technicolor was familiar with and previously had employed devices such as a self tender to improve the market price of its stock, no consideration was given to responding to the MAF offer with a share buy-back program. Nor was any attention paid to generating greater return for the stockholders by selling off excess assets and increasing the quarterly dividend. (Kamerman 308-09, 460)

During the period prior to the Special Board Meeting, Kamerman did not discuss any possible alternatives with Sullivan,

his supposed advisor, or with any of his other fellow directors. (23 TR 69, 71, 78; Bjorkman 27, 29) At the October 18 meeting, Brown tossed out a few alternatives for discussion, including seeking out a white knight, but Kamerman dismissed all such suggestions out of hand. (PX 503 at 11) Kamerman refused at any time to allow Goldman Sachs even to look into any alternatives or defensive measures to resist MAF's offer. (Sapp 231; Golden 17; J. Sullivan 15)

8. Kamerman Continues To Suppress Public Disclosure Of The Transaction After The October 18 Meeting

At the same time that Kamerman countermanded any attempts to pursue other alternatives, following the October 18 meeting he continued to do everything possible to keep the lid on the deal and avoid any public announcement that could invite other bidders. Despite the concerns of his own advisers that the time for announcement had come, each time the topic of a press release was raised, Kamerman cast his veto.

Thus, for example, sometime between October 18 and 21, 1982, Kamerman called Joseph Sullivan at Goldman Sachs to advise that he had told Perelman he would not make an introduction to Bank of America. J. Sullivan then reported on his conversation with Kamerman in a call to Sapp. In the course of that call, he expressed the concern (as recorded in Sapp's notes) "May have a week to wait. Stock may slow down reducing pressure for a release." (PX 217; 30 TR 126) The logical inference is that J. Sullivan had revisited the issue of a press release in his call

with Kamerman but was unable to get him to budge and hoped that reduced stock trading might give them a temporary reprieve.

The issue of a press release came up again within the same time period. Recognizing that the parties had virtually reached agreement on price, Goldman Sachs was concerned that issuance of a press release could no longer be avoided. Accordingly, Golden instructed Sapp (as recorded in his notes), to call Brown to inquire, "can we get a number out of Perelman without triggering disclosure if his financing is not in line." (PX 217; 30 TR 129) No public announcement was forthcoming after Sapp communicated with Brown. It can only be assumed that after conferring with Kamerman, Brown relayed his message that there was to be no release.

On October 19, 1982, Bob Vidala, the specialist in Technicolor stock at the New York Stock Exchange, called Oliphant at the company at 10:50 a.m. to ask what was going on. As documented in Oliphant's notes of the conversation (PX 129), Vidala reported that Technicolor stock was trading at 16 3/8 and that volume already was at 135,000 shares. In addition, "there were very aggressive buyers out of character to fundamentals." Vidala indicated that Bear Stearns, Oppenheimer and Lehman had bought or were buying large positions in Technicolor stock. In response Oliphant, "told him that TK [Technicolor] had no comment nor anything to say regarding this trading, but that we are watching it closely." (Id.)

Although at trial Kamerman claimed to have no recollection of the call, he acknowledged that in saying nothing

Oliphant was acting as his mouthpiece. As he put it, "it must have been clear to him what he [Oliphant] was supposed to say." (21 TR 172-73)

Yet again on October 24, 1982, the issue of a press release was raised. On that day, as recorded in Oliphant's notes, there was a three way conversation among Oliphant, Brown and Golden in which there was discussion about issuance of a press release. The notes then indicate "call MK". It was understood by all that Kamerman was the decision-maker on the issue. (PX 130) Needless to say, Kamerman must have said "no" because no announcement issued.

It was only on October 27, 1982 when things reached a boiling point, that even Kamerman realized the jig was up and a release would have to be issued. On that morning it was reported that the Goldman Sachs arbitrage desk first heard specific rumors of a Technicolor transaction. The information was conveyed to Oliphant, Brown and Golden. In that call (as recorded in Oliphant's notes), it was reported that the Technicolor stock had hit 17 3/8 and that volume was very heavy, having opened at 72,000 shares. (PX 133)

Not only was the stock going wild, but in addition, on October 27, a definitive price of $23 per share had been agreed to, the Special Board Meeting was scheduled, and the directors were being notified to attend. Although, as Oliphant's notes record, Brown wanted an announcement, the decision was up to Kamerman. Accordingly the three conferred with Kamerman. Confronted with the reality of the situation, Kamerman at last

relented and authorized issuance of a release halting trading in Technicolor stock. (21 TR 177)

After securing Kamerman's approval, that afternoon Brown and Oliphant telephoned Janet Basilone at the New York Stock Exchange and for the first time in all these weeks apprised her of developments at the company. (PX 503 at 33; PX 133) They requested a halt in trading of Technicolor stock. At 1:04 p.m. on October 27, 1982, a release was issued stating that "[the company] has requested the New York Stock Exchange to halt trading in its stock pending release of news." (PX 174)

Thus, to the very end Kamerman managed to keep the fact of the MAF offer a secret. It was not until 1:40 p.m. on October 29, 1982 -- after the MAF deal had been signed, sealed, delivered and purportedly approved by the Board -- that trading was resumed and a release was finally made announcing the transaction. It reported the transaction as a fait accompli. The release stated:

> MacAndrews & Forbes Group Inc. and Technicolor Inc. said they entered into a definitive agreement providing for the acquisition of Technicolor's stock for $23 a share in cash. (Emphasis added.)

(PX 482A)

The announcement set forth the terms of the agreement in detail. Thus, it specified that MAF would commence a Tender Offer by November 4 (for which it already had financing commitments), to be followed by a cash Merger at $23 per share. The release reported that MAF already owned 4.9% of Technicolor's

outstanding shares and had been granted the right to purchase 844,000 shares from Technicolor and 523,031 shares from two directors. Finally, the release represented, "[t]he agreement has been approved by directors of MacAndrews & Forbes and Technicolor." (Id.)

Thus, in the space of a few weeks, Technicolor, a company not previously on the market and not perceived by the investment community to be available for sale, was handed over to Perelman on a silver platter. It was taken off the market before it ever had a chance to be on it. Kamerman (and the Board) took the first offer that had serendipitously surfaced even though it was clear, given MAF's financial condition, that $23 per share was not the best available offer. Kamerman managed to keep the deal under wraps from his own directors, let alone the public, until an agreement had been struck, including grant of a lockup option and no-shop clause that guaranteed MAF an absolute block (described below). Only after the Board purportedly approved the transaction and all the documents were executed was the secret finally let out of the bag. But by then it was clear to any sophisticated buyer that the transaction could not be undone. The announcement had exactly its intended effect -- it chilled any competing bidders for Technicolor from emerging and allowed MAF to walk off with its prize.

H. FROM THE OUTSET THE DEAL WAS STRUCTURED TO CHILL ANY COMPETING OFFERS

Not only did Kamerman refuse to seek out alternate buyers or to invite their participation via a press release, but

he (and the other Technicolor Director Defendants) affirmatively saw to it that no other bidders would even think of coming forward. This was accomplished by granting Perelman a lockup option and a no-shop clause prohibiting Technicolor from soliciting any other purchasers.

1. The Deal Is Structured To Give Perelman A Blocking Position

From the outset the deal was structured so as to give Perelman a block and preclude any other bidders from getting two-thirds of the stock (the amount required under Technicolor's Charter with unanimous Board approval to effectuate an amendment of the 95% super-majority). In his initial conversation with Brown on October 14, 1982, Kamerman laid out the terms of the transaction. As recorded in Brown's notes, they included a "lockup" option to buy 18% of the company's shares, the right to purchase the shares of the large inside stockholders (i.e., Bjorkman and Kamerman) and a cash merger agreement.[26] (PX 503 at 4; 27 TR 158-59) By this time Perelman already had purchased 220,000 shares in the open market, representing 4.8% of the company's shares. Kamerman so advised Brown in this conversation. (Id.)

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26 Brown admits that he made these notes, that an 18% option is commonly referred to as a lockup and that he himself referred to it as a lockup, but then disingenuously claims that it "really isn't" what it seems to be. (27 TR 158-59) The simple answer is it looked like a lockup, worked like a lockup (as demonstrated below) and it was a lockup.

It is clear that Brown understood the lockup option to be an integral part of the deal structure. On the flight out to California he prepared a written outline of issues under the securities laws and Technicolor's Charter relating to the lockup option as part of the agenda of items to be covered at the October 18 meeting. (PX 503 at 18)

Under the rules of the New York Stock Exchange, shareholder approval was required for options in excess of 18.5%. Accordingly, as Brown conceded, the amount of the company option, 844,000 shares or 18%, was calculated so that no such approval was required. (29 TR 34)

By the time of the October 18 meeting, the structure of the transaction was firmly in place. At that meeting, Kamerman advised the Goldman Sachs team that Perelman owned about 4.9% of Technicolor stock and as part of the deal would be granted a lockup stock option. Sapp testified that he was told and understood that a lockup arrangement was going to be part of the structure of the deal. (31 TR 120) Moreover, there can be no doubt that all those present recognized that the 18% company stock option was intended and functioned as a lockup. Each of their respective notes calls it just that. (PX 127 at 022909; PX 211 at GS 1225; PX 215 at GS 1241)

Indeed by October 18, 1982 the documentation recording the various components of the deal structure already was being drafted. Sapp understood and recorded in his notes at the October 18 meeting that as of that date Skadden Arps was in the process of drafting the cash merger agreement and the 18%

lockup. Things were proceeding at such a rapid clip that during the October 18 meeting there was a telephone call placed with Donald Drapkin of Skadden Arps. (29 TR 4) As Sapp explained, they got a posting on the timing of what was going on, including the status of the contracts being drafted by Skadden Arps. (Sapp 241; PX 211 at GS 1226; see also PX 127 at 022912)

On October 20, 1982 Brown, now back in New York, got a call from Mike Schell of Skadden Arps advising that the Merger Agreement and Tender Offer would be coming over the next day. (27 TR 205-06; PX 503 at 27) As detailed above, copies of the merger agreement and lockup option were delivered to Brown on October 21 and 22, 1982 (PX 193, 194), respectively, and all documentation for the deal was finalized between October 25 and 28, 1982.

The way the deal was structured, the Stock Option Agreement was in no way conditioned upon Perelman buying any shares pursuant to the Tender Offer. The Stock Purchase Agreement with Bjorkman and Kamerman compelled the latter to sell as long as MAF bought any shares pursuant to the Tender Offer. When added to the 220,000 shares Perelman already owned, representing 4.8% of the Company's outstanding shares, Perelman would have control over approximately 29% of Technicolor shares on a fully diluted basis. In addition, Perelman was assured another 2.5% of Technicolor's outstanding shares because all directors were committed to sell their shares to MAF. (PX 57 at GS1272) His total holdings would be 31.5%. Given the nature of the shark repellant in Technicolor's charter, this arrangement

guaranteed Perelman an absolute blocking position and made it impossible for any competing bidder to get a foothold.

The Offer to Purchase did not impose any minimum purchase requirements upon Perelman. By its terms, Macanfor had the right, but not the obligation, to refuse to buy shares if less than 2.1 million shares were tendered. The Offer provides in relevant part:

> This Offer is conditioned upon a minimum of 2,100,000 Shares being validly tendered and not withdrawn prior to the Expiration Date . . .
>
> * * *
>
> The foregoing conditions are for the sole benefit of the Purchaser and may be asserted by the Purchaser regardless of the circumstances giving rise to such condition or may be waived by the Purchaser in whole or in part at any time and from time to time in its sole discretion. Any determination by the Purchaser concerning the events described in this Section shall be final and binding upon all parties. (Emphasis added.)

(PX 54, Sec. 16, pp. 18-19, see also cover page and p. 1) Thus, if Perelman so chose he had the right, in his sole discretion, to waive the 2.1 million share minimum and to buy as many or as few shares as he desired.

The Merger Agreement functioned in lock step with the Offer to Purchase. Under its provisions, the obligation to effectuate the Merger ends only if MAF does not purchase any shares in the Tender Offer. Section 9.01 of that Agreement specifies (PX 61 at P30139):

> 9.01 Termination. This Agreement may be terminated at any time prior to the Effective Time, whether before or after approval by the stockholders of Company [Technicolor]:
>
> * * *
>
> (c) by either the Parent [MAF] or the Company [Technicolor] if the Offer shall terminate in accordance with its terms without any shares of the Company Common Stock having been purchased thereunder . . . [Emphasis added.]

So long as Perelman exercised his right to purchase any shares -- even one -- pursuant to the Tender Offer, the Merger Agreement would be in full force and effect and Perelman's right to exercise his right to purchase shares from Bjorkman and Kamerman under the Stock Purchase Agreement would be triggered.

The Stock Option Agreement (PX 57, Ex. 4) grants Perelman an unconditional right to purchase 18% of Technicolor's outstanding shares. It provides:

> 1. The Company [Technicolor] hereby grants The Parent [MAF] an irrevocable, unconditional option (the "Option") to purchase up to 844,000 Shares . . .

The Option could be exercised by MAF, "in whole or in part, at any time or from time to time, . . . prior to the termination of this Agreement in accordance with its terms." (Id. at GS 1353) In that connection, Section 15 provides:

> 15. This Agreement shall terminate at the Effective Time (as defined in the Merger Agreement) or upon the earlier termination of the Merger Agreement in accordance with its terms.

(Id. at GS 1360) Thus Perelman could exercise this option even before closing the Tender Offer. Assuming he did not do so at the outset, he had the right to continue to do so as long as the Merger Agreement remained operative. As shown, the Merger Agreement remained in effect as long as Perelman purchased any shares pursuant to the Tender Offer. Therefore, with or without the purchase or even one share in the Tender Offer, MAF had the absolute right to implement the lockup option.

The Stock Purchase Agreement granted MAF the right to buy the 409,406 Technicolor shares held by Bjorkman and his wife and the 113,625 shares owned by the Kamerman and his wife, together constituting about 11.5% of Technicolor common stock. Under its terms, the Bjorkmans and the Kamermans were relieved of their obligation to sell only if Perelman did not buy any shares in the Tender Offer. Section 4 of the Agreement provides in relevant part:

> 4. The Closing shall take place at the office of the Purchaser . . . on the day after the latest of . . . (iii) the termination of the Tender Offer; provided that in the event that the Purchaser . . . exercises its right pursuant to the terms of the Tender Offer not to purchase or pay for shares of Company Common Stock tendered or to terminate the Tender Offer pursuant to the terms thereof, the Purchaser shall not be obligated to purchase any Shares and no Seller will be obligated to sell his Shares hereunder. [Emphasis added.]

(PX 57, Ex. 5 at GS 1366-67)

So long as MAF exercised its right to purchase "shares" via the Tender Offer, it had the right to buy the entire block of

523,031 shares held by the Bjorkmans and the Kamermans.[27] Contrary to defendants' contention, nowhere does the Agreement impose any requirement on Perelman to purchase 2.1 million shares as a condition to his right to acquire this block of stock. Indeed, as has been demonstrated, the Tender Offer was not conditioned on any minimum purchase.

Not only did this Agreement grant Perelman the right to acquire this block of over a half million Technicolor shares, it also gave MAF the right to vote those shares prior even to paying for them. Pursuant to Section 8 of the Agreement:

> 8. Each Seller hereby irrevocably appoints, during the term of this Agreement, the Purchaser as proxy for such Seller to vote the Shares which such Seller is entitled to vote, for and in the name, place and stead of such Seller, at any annual, special or other meeting of the holders of shares of Company Common Stock . . . with respect to any amendment of the certificate of incorporation or by-laws of the Company or any merger, consolidation, sale or purchase of any assets, reorganization, recapitalization, liquidation or winding up of or by the Company.

(PX 57, Ex. 5 at 1368-69)

The net result of this scheme was to guarantee Perelman an absolute lock on Technicolor as of October 29, 1982 (the date the Agreements were signed) and shut the door on any other interested bidders. As of that date, MAF already owned 220,000 shares of Technicolor common stock. Under the Stock Option

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27 Kamerman admits that the Agreement so provides, but claims that he was "suckered" on the deal because it was his understanding that Perelman could purchase his shares only if he got 51 percent of the stock. (21 TR 263)

Agreement it acquired the right to purchase an additional 844,000 shares from Technicolor and pursuant to the Stock Purchase Agreement it had the right to purchase the 523,031 shares owned by the Bjorkmans and the Kamermans. Thus, on a pro forma basis MAF controlled 1,587,031 shares or 29.327% of the common stock of Technicolor.[28] In addition, the Directors were committed to sell their 113,389 shares[29] to MAF as part of the deal. (PX 57 at GS1272, 1277-79) That brought the number of shares controlled by MAF to 1,700,420 or 31.4% of all outstanding shares.

Given the well documented phenomenon that in any tender offer approximately 5 percent of stockholders do not respond,[30] Perelman's control of 31.4% of Technicolor stock put MAF in a position to preclude any other bidder from getting two-thirds of the stock. Recognizing this fact, at trial Brown conceded that "as a practical matter 29 percent is close to being a blocking position." (29 TR 30)[31] Brown's comments did not take into

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28 As of October 29, 1982 there were 4,567,491 shares of Technicolor common stock outstanding. Issuance of the 844,000 covered by the Stock Option Agreement increased the total outstanding to 5,411,491 shares.

29 This number includes all shares held by the Directors, (other than these sold pursuant to the Stock Purchase Agreement), including Kamerman's 15,249 option shares.

30 See, e.g., Smith & Furlow, Guide to the Takeover Law of Delaware, Appendix F. at 185.

31 Despite such admission, Brown testified that it was not his understanding that Perelman could preclude another bidder from getting two-thirds of Technicolor's shares because "the option on the insiders . . . was exercisable only if the tender offer had been consummated." (29 TR 31) As we have seen, however, the Stock Purchase Agreement did not impose any requirement on Perelman to purchase 2.1 million shares (or any minimum number of shares) as a condition of his right to acquire the 11.5%
(Footnote Continued)

> [E]ach of the parties hereto agrees to use its best efforts to take, or cause to be taken, all action, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement.

(Id. at GS 1324)

The Agreement did not contain a "fiduciary out" clause which would have allowed the Technicolor directors, in the exercise of their fiduciary obligation, to terminate the Agremeent in the event of a higher competing bid, the failure of Goldman Sachs to confirm its oral fairness opinion, or any other matter. The Merger Agreement was absolute and completely binding. Brown testified that no fiduciary out clause was ever contemplated or discussed in the course of negotiations. (29 TR 113)

Not only was the Agreement clear on its face, but Kamerman testified that it was his understanding that it gave Technicolor no outs. Indeed he conceded that the only way for Technicolor to do a deal with another bidder would be to abrogate the Agreement it had signed with MAF. (21 TR 265; See also PX 460 Response 271)

In the face of this explicit language, Brown testified that he nevertheless believed that there was room for Technicolor to become involved in an alternative to the MAF bid. But even his legalistic parsing of the language of the no-shop clause cannot change its intended result. Thus, Brown admitted that Technicolor was prohibited from undertaking another transaction or encouraging or soliciting other proposals, but he claimed that

Technicolor still was free to engage in unsolicited discussions with third parties. (29 TR 107-110) Brown was unable, however, to explain how Technicolor could make another deal given the fact that, by his own admission, the Agreement prohibited Technicolor from "approving or recommending" to its stockholders any other transaction and expressly required it to recommend the MAF transaction.

I. KAMERMAN REJECTS THE ALTERNATIVE OF A MANAGEMENT LBO IN EXCESS OF $23 PER SHARE

1. Although Bank of America Is Willing To Lend Up To $150 Million For A Management LBO, Kamerman Says "No"

The sole alternative to the MAF proposal to which Kamerman even gave passing attention was himself heading up a management LBO of Technicolor. Although Bank of America indicated its willingness to provide sufficient financing to support an LBO at a price in excess of $23 per share, Kamerman nevertheless dismissed this alternative after considering it for less than a day.

Thus, on or about the evening of October 14, 1982, Kamerman called Raymond Gaul, head of the Professional Services Group and Wayne Powitzky, Technicolor's chief financial officer, and asked to meet them right away. At a dinner meeting later that evening, Kamerman asked if they would be interested in buying out the company. Both were receptive to the idea. (Kamerman 127-31; Gaul 105) According to Kamerman, "[w]e didn't do any work on it," but just decided to get a hold of Bank of America and see whether the money is available. (19 TR 156)

The following morning, October 15,[32] a call was placed to Meyer at Bank of America asking him to come over immediately for a meeting in Kamerman's office. Meyer and his senior colleague, Michael Graves, dropped everything and went to meet with Kamerman, Gaul and Powitzky. (Gaul 105; Meyer 77)

At the meeting, Kamerman asked whether Bank of America would support and finance a management led LBO of Technicolor. Bank of America's response to the proposal was "positive" in that Meyer and Graves had confidence in Technicolor's management and were "comfortable" that Technicolor could service between $75-150 million of debt if limits were placed on capital expenditures. (Meyer 78-81) According to Kamerman, Meyer indicated that the management group would have to put in some equity, but volunteered that the Bank could even raise that. (Meyer 78-81, 84, 90-1; Gaul 106, 109; Kamerman 133)

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32 At trial Kamerman post-dated the meeting so as to create the false impression that the alternative of an LBO was seriously addressed at a point further on when he had the benefit of an investment banker and counsel. Thus, Kamerman claimed that he did not approach Bank of America until after it had committed acquisition financing to MAF. (21 TR 194) The record establishes that he is wrong. Both Meyer and Gaul, the two remaining live participants, testified that at the time the meeting took place they had not been advised of MAF's offer (and were not advised by Kamerman during the meeting). Meyer specified that the meeting took place on Friday, October 8 or 15, 1982: "Kamerman called me personally and asked for a meeting with bank representatives, probably a week to ten days before MacAndrews & Forbes' entrance." As described below, it was not until October 19, 1982, that Meyer learned by accident of MAF's offer when he received a call from Chase. (Meyer 77-8, 81, 94-7) Likewise, Gaul testified that at the time Kamerman approached him about an LBO he had no knowledge of MAF's proposal and was not advised until October 21, 1982. (Gaul 112-13; PX 124 at 022869)

Although by his own account at trial, they did no homework and did not present any documentation for this request, Kamerman testified that the bankers said on the spot they would give Kamerman and his team the money. (21 TR 190) The more plausible explanation is, as the others have testified, that Meyer and Graves asked Kamerman and his group to prepare a specific plan if they wanted the Bank to formally consider an application for financing. (Gaul 109; Meyer 80)

In either event, what is significant is that Bank of America made clear its willingness to provide financing to the tune of $150 million to support a management LBO -- a level of funding that would clearly allow for a price well in excess of the $23 per share offered by MAF. Nevertheless, no sooner did Kamerman get a positive response, than he abandoned the idea of an LBO altogether.

As Kamerman tells the story, immediately after the meeting with Bank of America, Gaul indicated that he was unwilling to lend his financial support to the LBO. Kamerman did not want to go it alone so he just let the idea drop. (19 TR 158; Kamerman 134-35)

Kamerman could have found a willing participant for an LBO in Ryan, the person by all accounts most familiar with the motion picture business. Given the war that raged between the two men, however, Kamerman testified that he intentionally excluded Ryan from the buyout. (Kamerman 129; Meyer 85)

Having determined that a management LBO did not serve his personal objectives, Kamerman had no intention of discussing

critical information. (32 TR 38) Thus, for example, the model assumed no asset sales whatsoever. (30 TR 143) Although Technicolor's capital expense budget for 1983 was under $2 million (excluding One Hour Photo and Gold Key), it assumed $5 million in capital expenditures as a starting point. The model used arbitrary sales figures not based on any projections from the company and grew them at ten percent. (32 TR 22-3) The figures plugged into the model by Sapp were not even consistent with the numbers used a day before in the valuation memorandum. Sapp could not explain how more than $4 million in the scenario for Technicolor without One Hour Photo for 1983 had disappeared when compared to the numbers in the valuation memorandum. (32 TR 35)

Nevertheless, the Goldman Sachs team concluded that such an LBO was feasible. (30 TR 143) On October 22, 1982 Goldman Sachs called Kamerman to advise him of the results of their analysis and to urge consideration of a management LBO. The Goldman Sachs group specifically asked Kamerman whether management would be interested in pursuing a leveraged buyout. (30 TR 144; Sapp 388-89; PX 212 at GS 1198)

It was only after Goldman Sachs initiated the subject that Kamerman finally disclosed to Technicolor's own investment banker the meeting he had had with Bank of America a week prior regarding an LBO. Sapp testified and his notes of this conversation confirm that Kamerman reported, "B of A would structure and lend to management for LBO." (PX 212 at GS 1198;

30 TR 145) But, as Kamerman testified, "I told them I wasn't doing it." (21 TR 206-07)

Despite the cool reception that their LBO proposal met with Kamerman, the record establishes that the Goldman Sachs group continued to believe that an LBO could be structured at a price higher than the $23 per share being offered by MAF. Thus, the Goldman Sachs team discussed amongst themselves the feasibility of doing an LBO at various prices. They realized that an LBO could be done at a price in excess of $23 a share. Sapp testified that the Goldman Sachs team concluded that with management involved a transaction could be structured at $25 a share. (Sapp 389-90, 407; 30 TR 189-90)

The record demonstrates that the Goldman team discussed their conclusion with Brown. Notes on Brown's deal pad taken sometime between October 21 and 25, 1982, reflecting updated advice on the status of the transaction, record the fact that "LBO would be for 25." (PX 503 at 28) Brown did not offer an explanation of these notes at trial. However, given the coincidence of their timing and Goldman Sachs' conclusion that a management LBO could be structured at $25 a share, the logical inference is that these notes document Goldman Sachs' advice to Brown that they were prepared to put together an LBO at $25, but Kamerman was not interested.

Under the direction of Golden, who had aggressively but unsuccessfully lobbied Kamerman to seek out alternative buyers, the Goldman Sachs team was instructed to run additional LBO analyses at prices as high as $28 a share. Defendants admit that

Goldman Sachs performed LBO analyses at prices of $25, $27 and $28 per share. (PX 460 Response 214) Sapp or Venuto ran models at $25 and $27 per share on October 28, 1982, just a day before the Special Board Meeting. (The LBO model at $28 per share apparently was destroyed so its date cannot be ascertained.) (PX 201 at GS 0729-41; PX 190; 30 TR 173, 175-76)

Although Sapp claimed at trial not to recall running a $28 per share case (30 TR 154), his professed memory lapse is belied by defendants' sworn interrogatory answers and by the fact that on deposition he specifically testified that a $28 run had been prepared. (Sapp 403) In addition, Sapp prepared a listing of the first cut of the table of contents for Goldman's Board presentation which indicated inclusion of LBO's at $28 and $25. (PX 212 at GS 1200; Sapp 401, 403) A decision was made to remove the $28 LBO model from the book, as reflected by Sapp's notation "for file only." No one at trial could offer an explanation for deletion of this model.

Indeed Goldman Sachs considered prices as high as $32 a share. In its valuation memorandum of October 20, 1982, the Goldman Sachs team included a valuation chart analyzing prices of Technicolor stock ranging from $20 to $32 a share. (PX 188 at GS 1419) According to Sapp, the range was selected and agreed upon by the Technicolor team following discussion amongst themselves. (30 TR 79-80; Sapp 119-21)

Like Goldman Sachs' initial Prism $22.50 run, these other LBO analyses also were mere constructs which could be altered by changing the assumptions and which contained no

meaningful information regarding the true value of the company. Thus, for example, even though Goldman Sachs knew that MAF expected to realize $50 million in after tax proceeds from the sale of assets, these runs assume only $30 million. (PX 190 at GS0429; PX 201 at GS0734) Although Goldman Sachs' prior LBO run had only $53 million in debt paid off in nine years, Prism 27 assumed $130 million paid off in eight years, an alteration which Sapp admitted could significantly affect interest coverage ratios. (32 TR 46)

Although at trial Sapp claimed not to recall whether Goldman Sachs advised Technicolor of all its LBO analyses in excess of $23 a share (32 TR 60-61), there can be no doubt that it did so. On deposition Sapp expressly testified, "[t]hey [Technicolor representatives] were aware we had run different price level cases." (Sapp 404) Yet Sapp could not recall if anyone at Technicolor even asked to see the analyses. (Sapp 404-05)

Moreover, defendants admit that Kamerman saw the Board book in draft form a day or two before the Board Meeting. (PX 460 Response 21) That version of their report included the Prism $25 analysis.

The simple fact is that once Kamerman had decided he did not want to participate in an LBO, he turned a deaf ear on anything Goldman Sachs had to say on that score. As he put it at trial,

> I saw whatever they showed me. If it was in the board package, or they showed it to me before, then I saw it. If not, I didn't see it. I don't know.

(21 TR 209; see also 208, 210)

The one thing Kamerman made clear to Goldman Sachs was that he wanted no part of an LBO, and he directed it to remove any LBO analysis that included his participation. (21 TR 211)

Goldman Sachs knew that participation of management in an LBO would enhance its feasibility, but it never approached Ryan regarding his interest in doing an LBO at $23 or more per share. (32 TR 61) Instead it abided by Kamerman's proscriptions against contact with anyone outside the circle of three.

Apart from whatever was shown to Kamerman, as discussed below, at the Special Board Meeting, Goldman Sachs did not show or discuss with the directors any of its LBO analyses at prices above $23 per share[33] or the chart that it had prepared showing prices up to $32 per share. Nor was there any mention at the Special Meeting either by Kamerman or by any of the Goldman Sachs representatives of the discussions with Bank of America concerning a management LBO or consideration given to the feasibility of prices in excess of $23 per share in connection with such a transaction.

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33 Golden actually had an LBO analysis at $25 per share with him at the Special Board Meeting on October 29 in his version of Goldman Sachs' written Board presentation, but that document was kept secret from the Directors. (See below, p. 217 and 32 TR 60; PX 201)

J. THE TECHNICOLOR DIRECTOR DEFENDANTS WERE DISABLED BY CONFLICTS OF INTEREST

With an agreement struck between Kamerman and Perelman, and Goldman Sachs on board to bless the deal (in exchange for a hefty fee), Kamerman anticipated clear sailing at the Special Board Meeting. Indeed, the Technicolor Director Defendants were ready to oblige. A majority had powerful self-interests in seeing the deal consummated and were motivated to vote for the transaction to promote those interests. These conflicts of interest were never disclosed before or during the Special Board Meeting. Yet not one of the interested directors abstained from voting on the Merger and Charter amendments.

1. Fred R. Sullivan

a. Sullivan Votes For The MAF Transaction To Profit From His Insider Trading In Technicolor Stock.

From the outset, Sullivan saw the MAF transaction as a vehicle for his personal enrichment. As discussed above, on Friday, September 10, 1982, Tarnopol telephoned Sullivan, at Perelman's request, to convey Perelman's interest in acquiring Technicolor. The record is clear that as of September 10, 1982, Sullivan was fully aware of Perelman's plan to acquire the company. On deposition Perelman indicated that he requested Tarnopol to contact Sullivan to arrange a meeting to discuss the concept of buying Technicolor. (Perelman 113) Tarnopol was aware at the time that Perelman had sought without success to acquire other companies for MAF. (Tarnopol 27) Following his

conversation with Sullivan, Tarnopol reported back to Perelman, indicating that his message had been conveyed.

Although Sullivan admits that he conversed with Tarnopol by telephone on September 10 and that the two discussed Perelman's interest in Technicolor, he claims that he was not led to understand that Perelman was interested in acquiring Technicolor. (22 TR 277; Sullivan 75-6) Given the conflicting testimony of Messrs. Perelman and Tarnopol, and Sullivan's obvious self-interest in concealing the fact that he possessed inside information upon which he acted, his version of the conversation should not be given credence.

Indeed, the substance of the September 10, 1982 conversation between Tarnopol and Sullivan was recorded in the minutes of the Special Board Meeting as follows (PX 72 at 000925-26, emphasis added):

> The Chairman began by describing the history of the Corporation's discussions with MacAndrews, which had begun in late September when Mr. Fred R. Sullivan had reported to him a call from a representative of Bear, Stearns & Co., . . . informing Mr. Sullivan that a Bear Stearns client was interested in meeting with the Corporation to explore the possibility of acquiring the Corporation.[34]

In addition, at the time Tarnopol called Sullivan it was public knowledge that Perelman was seeking to acquire companies, such as Technicolor, having mature businesses and stable cash

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34 Though Sullivan belatedly (after commencement of an SEC investigation) protested this statement in the minutes, he did not even then question the fact that that is what Kamerman said on October 29, 1982. See infra pp. 142-43.

flow. On trial Perelman testified that in the summer of 1982, MAF had an acquisition plan in place; it sought companies that were low technology, non-fad or fashion. (42 TR 6-7) MAF previously had made unsuccessful attempts at Intext, Richardson and Consolidated Cigar. (42 TR 7)

These and others of MAF's acquisition bids were regularly reported in The New York Times and The Wall Street Journal (PX 182B), publications which presumably Sullivan routinely followed. Accordingly, even apart from what Tarnopol expressly advised Sullivan in their September 10 conversation, it was inconceivable that Sullivan, a sophisticated businessman and investor, did not understand as of that date that Perelman/MAF was interested in the potential acquisition of Technicolor.[35]

Subsequent events confirm that Sullivan had a powerful motive to prevaricate. Sullivan did not disclose his September 10 conversation with Tarnopol or the fact that he had agreed to meet Perelman to any of his fellow Technicolor directors. (Sullivan 80-81) Instead, armed with the confidential information that he had acquired in his conversation with Tarnopol, he set out to make a killing in Technicolor stock.

No sooner did Sullivan arrive back at his office on Monday, September 13, 1982, than he instructed one of his secretaries to place an order for 10,000 shares of Technicolor

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35 Furthermore, Brown testified that he received a call (recorded in his notes, PX 503 at 37) sometime after October 29 and before November 19, 1982 regarding the SEC investigation, in which he was advised that Tarnopol had told Sullivan on September 10, 1982 that Bear Stearns had a client "interested in looking at Technicolor." (28 TR 55-6)

stock with a limit of $9.50/share. (22 TR 200-01, 280-81) As a result of his instructions, an order for 1,000 shares was entered and executed on September 13, 1982; 500 shares at $9.50/share and 500 shares at $9.375/share, for a total purchase price of $9,437.50. (22 TR 203; PX 151) (Apparently only the unavailability of a larger block of stock prevented Sullivan from executing his entire 10,000 share order.)

Sullivan then set upon a course designed to cover up the fact that he had traded on inside information. He did not disclose the fact of his stock purchase to Messrs. Perelman or Hallingby at their initial meeting on September 17, 1982. (22 TR 282; Sullivan 94) Although Sullivan advised Kamerman after September 20, 1982, of Perelman's interest in acquiring Technicolor, he said nothing about his purchase of 1,000 shares. (Sullivan 113) Nor did Sullivan disclose his purchase of Technicolor stock to any of his fellow directors at any time prior to or at the Special Board Meeting. (22 TR 282; Sullivan 113; PX 460 Response 98)

Perelman soon became Sullivan's partner in deception, willing to dissemble where it served his interests. Perelman wanted Kamerman to labor under the impression that he already was a substantial Technicolor stockholder when he contacted Sullivan. Clearly, it was not in his interest for Kamerman to know that he only bought stock on September 10, 1982, after he got the green light from Sullivan. Were Kamerman apprised of the true state of affairs, he would not have been able to confide in Sullivan and thereby Sullivan's usefulness as a mole in the