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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MACANDREWS & FORBES HOLDINGS, INC., a Delaware corporation, Plaintiff, v. REVLON, INC., a Delaware corporation, MICHEL C. BERGERAC, SIMON ALDERWERELD, SANDER P. ALEXANDER, JAY I. BENNETT, IRVING J. BOTTNER, JACOB BURNS, LEWIS L. GLUCKSMAN, JOHN LOUDON, AILEEN MEHLE, SAMUAL L. SIMMONS, IAN R. WILSON, PAUL P. WOOLARD, EZRA K. ZILKHA, FORSTMANN LITTLE & CO., a New York limited partnership, and FORSTMANN LITTLE & CO. SUBORDINATED DEBT AND EQUITY MANAGEMENT BUYOUT PARTNERSHIP-II, a New York limited partnership, Defendants.	Civil Action No. 8126

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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October 17, 1985

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NATURE AND STAGE OF THE PROCEEDINGS

This action was filed by plaintiff on August 22, 1985. The initial defendants were Revlon, Inc. and its directors. The Forstmann Little defendants were added in plaintiff's Amended and Supplemental Complaint, filed on October 8, after Forstmann Little had made a merger offer superior to that of plaintiff's offering entity, Pantry Pride, Inc.

On October 10, the Court denied the Revlon defendants' motion to dismiss or stay this action in favor of the prior-filed Delaware federal court action between the parties.

Plaintiff filed a Second Amended Complaint on October 14. The new claims challenge the Forstmann Little merger proposal announced the previous day which includes a definitely-financed $57.25 per share merger as well as an exchange offer for the notes issued in Revlon's August exchange offer which would provide substantial additional value to the Revlon stockholder/noteholders. Pantry Pride's current and highest bid is $56.25 per share and includes no additional value to the stockholder/noteholders.

On October 15, the Court granted plaintiff's motion for a temporary restraining order and restrained Revlon from placing into escrow or otherwise transferring to Forstmann Little any monies or the assets in accordance with the merger and asset option agreements reached between Forstmann Little and Revlon. The Court has set October 18 as the date for hearing plaintiff's application for a preliminary injunction.

Plaintiff has filed two briefs on the motion. The first (by Young, Conaway, Stargatt & Taylor, "PBI") addresses the propriety of the asset option agreed to with Forstmann Little in order to obtain the $57.25 offer and the propriety of the continued Revlon Note Purchase Rights (which the Revlon Board has committed to redeeming in favor of any cash offer that matches or betters the $57.25 offer). The second (by Skadden, Arps, Slate, Meagher & Flom, "PBII") argues for the "ab initio" invalidity of the Rights Plan and certain covenants in the notes and preferred stock issued in connection with Revlon's August exchange offer.

This is the Revlon defendants' answering brief in opposition to plaintiff's motion.

AN OVERVIEW

This is not an entrenchment case. This is not a case in which directors of a target company are called upon to defend conduct that preserves the independence of the target and guarantees their continued tenure. This is not a case that pits a target against a raider, with the stockholders' receipt of a premium offer for their shares riding in the balance.

This case is the opposite of entrenchment. The directors of the target here have determined to sell the company and have taken perfectly appropriate steps to seek to assure that the stockholders will receive the highest and most attractive offer that is available in the marketplace. No member of the Revlon Board, which is predominantly composed of independent outside directors to begin with, has any financial interest in the transaction that they have determined is in the best interests of Revlon and its stockholders -- the Forstmann Little proposal.

All of Pantry Pride's protestations should not be permitted to obscure that it tried to buy Revlon on the cheap, at a grossly inadequate price, then lowered that bid, and has now seen its various bids eclipsed by the superior Forstmann Little proposal. The takeover bargaining that has occurred in this case has redounded to the substantial benefit of the stockholders by increasing the value of the various takeover proposals from Pantry Pride's original $47.25 per share offer, or a total of some $1.95 billion (including fees and disbursements), to the current Forstmann Little proposal of $57.25 per share, or $2.35 billion -- an increase of approximately $400 million.

As the record in this case establishes, that benefit was a result of the Revlon board's actions -- including the Revlon Note Purchase Rights Plan which plaintiff only now attacks. And it was only possible by reason of the Vision Care Group/National Health Laboratories asset option that Forstmann Little insisted upon in return for its willingness to make its current offer which is $400 million above the price at which the bidding was begun by Pantry Pride. That option was fully justified, indeed compelled, by the Board's goal of securing the most attractive offer available. Without the option, there would be no $57.25 per share transaction. Pantry Pride would then be free to buy Revlon for <u>less</u> -- indeed, for less than even its current $56.25 tender offer (that it is free to terminate at any time even if it were to prevail on its present application to this Court).

The record in this case is one of successful bargaining by a target to produce a transaction that is the best available for its stockholders. The Revlon directors have determined after careful consultation with their legal and financial advisors and with no conflicting financial interests, that the Forstmann Little transaction is the most attractive transaction. That business judgment determination is the product of due care and promises substantial benefits to the stockholders that could very well be lost for all time if plaintiff's application were granted.

Plaintiff contends that the option somehow improperly stops the bidding for Revlon. This suggestion misconstrues the issue here. This is not a case of a lock-up option granted before a meaningful bidding process gets under way; the option now challenged is the culmination of two months in which Revlon has been notoriously "in play." By approving the option, Revlon's directors did not stop the bidding in any meaningful sense. Rather, they simply made an informed decision, in the best exercise of business judgment, to choose among the competing proposals available to them -- proposals which, but for their prompt action, would in all probability have vanished altogether, to the lasting detriment of Revlon and its stockholders.

On these facts, Pantry Pride is unable to mount any colorable legal challenge in its current retreat from the marketplace, where it has been topped, to the courthouse where it seeks "relief" to enable it to buy Revlon for <u>less</u> than Forstmann Little has committed to pay. Instead, Pantry Pride's entire attack is based on mischaracterization of the record. This is not a case about "management proposals" or competing bids one of which favors management and is favored by management in return. No director of Rev'on -- inside or outside -- has any financial interest to favor Forstmann Little over Pantry Pride. The Forstmann Little transaction is not "inferior" to Pantry Pride's $56.25 tender offer: the determination of the Revlon directors, who have no personal interests at stake, that the Forstmann Little transaction is more attractive is unassailable and cannot in any event be second-guessed by plaintiff or this Court. There is no "scorched earth" here; there is only a losing bidder.

Plaintiff also bases much of its attacks not on the facts as they now exist, but on illusions. Pantry Pride atttacks the Rights Plan and claims that the Rights are being used to "disadvantage" it and "to stop <u>any</u> 'unfriendly' acquisition efforts" (<u>e.g.</u>, PBII 1). But the Revlon Board has committed to redeem the Rights in favor of <u>any</u> transaction -- whether proposed by Pantry Pride or anyone else -- that matches or betters the Forstmann $57.25 per share merger. The Rights currently are no impediment to Pantry Pride. And Pantry Pride now attacks covenants in the notes and preferred stock issued in the Revlon August exchange offer. But that attack is essentially moot as well since the Revlon Board has committed to waive these covenants on the same terms for any other bidder -- including Pantry Pride -- as it has for the Forstmann Little offer. The covenants are thus likewise no disadvantage or impediment to Pantry Pride. Plaintiff's "ab initio" challenges are all irrelevant to the case as it stands today and have been disproven by the benefits that the Board's action has bestowed on the stockholders.

Moreover, plaintiff's entire attack here -- with respect to the asset option, the Rights Plan and the covenants -- is based on an untenable legal proposition. It is plaintiff's thesis that the powers and responsibilities of a target company's directors evaporate in a takeover situation, and the directors must be relegated to the side lines, if the raider is proceeding with an any-and-all cash offer -- regardless of the adequacy or inadequacy of the price offered, the availability of superior proposals through Board negotiation, the status of the raider's financing, or any other considerations.

Plaintiff's thesis is inconsistent with the Delaware Supreme Court's decision in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985), and the well-developed body of law that recognizes the duties and responsibilities of directors faced with takeovers, including cash any-and-all offers, to protect and maximize stockholder values. Plaintiff's thesis is inconsistent with the whole point of Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985), which stands squarely for the proposition that directors may be held liable if they permit the company to be sold for less than a fair price (there in a merger not involving any partial or two-tier offer concerns whatever). The directors' responsibilities to protect and maximize stockholder values are not diminished in the face of an any-and-all offer.

The proposition that plaintiff urges -- that a board has no role to play and must step aside when faced with an any-and-all offer -- is ridiculous. That is not, and should not be, the law of Delaware. It is not only the specter of greenmail and the enhanced coercion of partial, two-tier offers that give rise to a duty to evaluate and act with respect to an offer. As the Supreme Court pointed out in Unocal, other concerns properly -- indeed necessarily -- considered by directors in evaluating a takeover include "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation and the quality of securities being offered in the exchange." Unocal, 493 A.2d at 955-56.

Thus, a Board of Directors has a duty to evaluate and oppose inadequate offers, including any-and-all offers. E.g., id.; Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.) (applying Delaware law), cert. denied, 454 U.S. 1092 (1981); GM Sub Corp. v. Liggett Group, Inc., Del. Ch., C.A. No. 6155, Brown, C. (April 25, 1980); Northwest Industries, Inc. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969). As the record herein establishes, an any-and-all offer can indeed be coercive. And as plaintiff itself acknowledges, the directors' duty extends to pursuing the best transaction if the company is to be sold -- not capitulating to any any-and-all offer.

Plaintiff's thesis, if implemented, would have required the Revlon directors to sit back and watch Pantry Pride buy Revlon for a total of under $1.95 billion pursuant to its initial $47.50 per share any-and-all cash offer. The Revlon directors did not abandon their fiduciary duty and obligation, recognized in Unocal, to protect the corporate enterprise and the stockholders from a takeover bid it believed to be inadequate and that it determined, as was its obligation, not to be in the best interests of the company and its stockholders. See Unocal, 493 A.2d at 954-55. The result is that the stockholders now have a proposal under which they will receive $400 million more in total consideration for their shares than was offered by Pantry Pride.

STATEMENT OF FACTS*

A. The Parties

Plaintiff MacAndrews & Forbes is a Delaware corporation which beneficially owns approximately 36.3% of the out-

* In addition to the deposition transcripts and exhibits referred to herein, defendants rely upon the affidavits of Simon H. Rifkind, Felix G. Rohatyn, William R. Loomis, Jr. and Lawrence A. Hamermesh, and the exhibits thereto, in opposition to plaintiff's motion, as well as the evidence being submitted by Forstmann Lit-'e & Co. in opposition to the motion.

standing voting shares of Pantry Pride, and its designees constitute a majority of Pantry Pride's board of directors. Pl. App., Ex. D at 10. As publicly acknowledged by Pantry Pride, MacAndrews & Forbes "is in a position to exert substantial control over the Company." Slovin Dep. Ex. 10 at 3. The sole stockholder of MacAndrews & Forbes is Ronald O. Perelman, who is chairman of the board and chief executive officer of both Pantry Pride and MacAndrews & Forbes. Id.

Pantry Pride, which was discharged from Chapter XI proceedings in 1981, is currently engaged in consumer merchandise, retail drug and health and beauty aid stores and retail supermarket operations. Slovin Dep. Ex. 10 at F-11; Pl. App., Ex. D at 10. In contrast to Revlon, Pantry Pride had only about $407 million in assets as of May 4, 1985, and a net worth of only about $145 million. Pl. App., Ex. D at 11 Pantry Pride's earnings in the fiscal year ended July 28, 1984 were only about $9.9 million on sales of approximately $770 million. Id. Pantry Pride itself has acknowledged the precariousness of its financial situation, admitting that "[t]here can be no assurance that earnings from the future operations of the Company . . . will be suffic ent to meet its debt service obligations and the dividend requirements on the Company's preferred stock," and that "the Company's ability to meet its debt service and preferred dividend obligations will depend upon its ability to identify and acquire control of suitable acquisition businesses." Slovin Dep. Ex. 10 at 9.

Revlon is a Delaware corporation engaged in the health care and beauty products businesses. Pl. App., Ex. D at 9. The individual defendants are directors of Revlon. The directors of Revlon are overwhelmingly independent directors who are distinguished in the fields of business, law and finance, among others. Revlon's independent directors are as follows:*

> Simon Aldewereld -- Former Consultant and General Partner of Lazard Freres & Co. (investment bankers). Prior thereto, he was Vice President-Finance, The World Bank.
>
> Jacob Burns -- Attorney-at-Law. Mr. Burns is also an Honorary Trustee of George Washington University and Director of Benjamin Cardozo School of Law.
>
> Lewis L. Glucksman -- Executive Vice President of Fireman's Fund Insurance Companies, a subsidiary of American Express Company, since November 1984. Mr. Glucksman was formerly the Chairman of the Board and Chief Executive Officer of Lehman Brothers Kuhn Loeb Incorporated (investment bankers). Mr. Glucksman is a Commissioner and the Chairman of the Finance Committee of the Port Authority of New York and New Jersey.
>
> John Loudon -- Managing Director, Overseas Operations, and a member of the Management and Executive Committees of N.M. Rothschild & Sons Limited (investment bankers). Mr. Loudon is a Member of the Board of Heineken N.V., The Netherlands.
>
> Aileen Mehle -- Syndicated Columnist.

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* Plaintiff's suggestion that Revlon's independent directors are seeking to preserve their business relationships with Revlon is ludicrous. The independent directors are all substantial, successful individuals with interests and careers that transcend whatever minor business ties a few of them may have had with the company.

Simon H. Rifkind -- Partner of Paul, Weiss, Rifkind, Wharton & Garrison (Attorneys-at-Law). Former United States District Judge, holder of American Medal of Freedom. Judge Rifkind is also a Director of Sterling National Bank and Sterling Bancorp.

Ian R. Wilson -- Investment consultant. Mr. Wilson is the former President, Chief Executive Officer and Director of Castle & Cooke, Inc. Prior to that, Mr. Wilson was Executive Vice President of The Coca-Cola Company, Atlanta, Georgia (food processing and distribution). Mr. Wilson is also the Chairman of the Board of Directors of Beverage Canners Inc. and a Director of Crown Zellerbach Corportion.

Ezra K. Zilkha -- President and Director of Zilkha & Sons, Inc. (investments) and Zilkha Corporation (financial consulting). Mr. Zilkha is also a Director of CIGNA Corporation, Handy & Harman, The Newhall Land & Farming Company and Chicago Milwaukee Corporation.

-- Hamermesh Aff., Ex. A.

B. Events Prior to August 19, 1985

The chronology of pertinent events commences prior to August 19, 1985, the date upon which the Revlon directors adopted the Rights Plan and Pantry Pride announced its first tender offer. Revlon had for some time been the subject of takeover rumors. In June 1985, Ronald Perelman, Chairman of Pantry Pride, met with Michel Bergerac, Chairman of Revlon, and stated that he, Perelman, was desirous of effectuating a friendly business combination of Pantry Pride and Revlon. Bergerac Sept. 9. Tr. 182, 184. Perelman was about to seek to raise $700 million in a "public offering" of so-called "junk bonds" of Pantry Pride, which funds would be used principally for acquisitions. Perelman intimated to Bergerac that a Pantry

Pride/Revlon business combination would greatly enhance Bergerac's personal lifestyle. Bergerac Sept. 9 Tr. 183. Perelman stated that he had in mind a price for Revlon of around $40 to $43 -- a price far below the traditional estimates of Revlon's value by Lazard Freres & Co., Revlon's investment banker, which had served in that capacity for many years. Bergerac Sept. 9 Tr. 186, 189-90.* Bergerac had no interest in pursuing such a proposal. Bergerac Sept. 9 Tr. 186; Rifkind Aff., Ex. A at 7.

On July 23, 1985, at a directors' meeting, Revlon's general counsel Samuel Simmons, Esq. made a presentation to the directors concerning the use of "Rights Plans" to ensure that shareholders would not be subjected to unfair takeover bids such as two-tier offers, and conditional offers made at inadequate prices by thinly-financed bidders. The directors took no action at that time with respect to adoption of a Rights Plan. Bergerac Sept. 9 Tr. 214-217.

In August 1985, following massive trading in Revlon shares on the New York Stock Exchange, and rumors of a tender offer by Pantry Pride, Perelman requested an urgent meeting

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* As plaintiff notes, Revlon explored a leveraged buyout at $45 and $50 in 1984. PBI 12. What plaintiff omits is the fact that such a proposal was dropped as being too low in price. Bergerac Sept. 9 Tr. 161.

with Bergerac. At an August 14 meeting, Mr. Perelman stated that Pantry Pride's board had authorized an offer to acquire Revlon on a negotiated basis at $42 or $43 per share and in a hostile tender offer at $45 per share. Bergerac stated that the price levels were ridiculous. Bergerac Sept. 9 Tr. 249. Bergerac added, however, that if Perelman really wanted to have friendly negotiations -- as he had claimed -- Revlon would negotiate pursuant to a customary standstill agreement to be entered into between the companies. Bergerac Sept. 9 Tr. 247. Perelman refused.

Bergerac and Perelman again met on August 16. Perelman reiterated his intention to acquire Revlon and used the occasion principally to attempt to extract non-public financial information concerning Revlon from Bergerac. Bergerac Sept. 9 Tr. 242.* At the time, takeover rumors concerning Revlon were rampant; there was massive trading in Revlon's shares -- indeed, an unprecedented 4 million shares

* Plaintiff insists that there was an agreement that the status quo would be preserved pending a scheduled meeting between Bergerac and Perelman on August 19. PBI 10. Revlon denies that it violated any such agreement. Indeed, Perelman continued to threaten Revlon with a hostile tender offer and made clear that he would not withdraw the threat even if Revlon undertook to negotiate with him for the purchase of two divisions that Perelman wanted. Rifkind Aff. ¶ 14. Perelman also indicated that he was unwilling to pay a fair price for those divisions and had in mind a formula which would yield a $300-400 million price for Revlon's Beauty Products Division (which Adler & Shaykin has now agreed to buy for some $900 million). Rifkind Aff. ¶ 15.

of Revlon stock traded during that week; substantial misinformation concerning an upcoming Pantry Pride tender offer was being spread throughout the investment community. Rifkind Aff. ¶ 14; Rohatyn Aff. ¶ 2.

C. <u>The August 19 directors' meeting</u>

On August 19, a special meeting of Revlon's board was held. Bergerac referred the board members to the market rumors and press reports during the prior week concerning Pantry Pride and Revlon, and the fact that approximately 4 million Revlon shares had traded in the past week. He stated that Pantry Pride's chairman, Ronald Perelman, had advised him that Pantry Pride was prepared to make a hostile tender offer at $45 per share. Bergerac further stated that, in his opinion and in management's opinion, after consulting with Revlon's advisors, the actions by Pantry Pride since June of this year, coupled with the press reports and rumors and with the related volume in Revlon stock, have created a situation in which Revlon shareholders could be pressured into selling their shares at prices that do not reflect what Revlon is really worth. Rifkind Aff., Ex. A at 1-2; Rohatyn Aff. ¶ 4.

Bergerac then called upon Felix Rohatyn of Lazard to make a presentation concerning Pantry Pride and Revlon.

Rohatyn gave the directors some background information concerning Pantry Pride and the anticipated bid. Rohatyn stated that he understood Pantry Pride would resort again to junk bond financing, as it did a month earlier, to raise additional money to acquire Revlon. Rohatyn stated that Revlon had learned that Morgan Stanley & Co. had been retained by Pantry Pride to solicit purchasers for Revlon's various businesses and that the proceeds of the sales of Revlon assets would be used to pay down the acquisition debt. Rohaytn stated that Pantry Pride's goal was obviously to buy Revlon as cheaply as possible, sell the various pieces of Revlon's business to pay back the financing and retain the profit, or the remaining pieces, for itself. Rifkind Aff., Ex. A at 2.

Rohatyn noted that the prices that had been mentioned in terms of a possible Pantry Pride offer were all in the low- to mid-$40 range. He stated that Lazard had prepared an analysis of Revlon and its values in order to advise the Board in reviewing any possible proposals by Pantry Pride. Rohatyn then introduced his partner, William Loomis, to present the Lazard analysis. Id. at 3.

Among other things, Loomis stated that Lazard analyzed Revlon from all financial perspectives, including income statement, balance sheet, financial ratios, comparable transactions and market prices.*

The Lazard analysis showed that a price level of $45 would be grossly inadequate for Revlon viewing the business as a whole. He also noted that, viewing Revlon's businesses separately, a $45 sales price became even more inadequate because greater value could be created by selling the businesses separately. He noted, however, that this analysis did not imply that this was the best time to sell Revlon or any of its component businesses. Id. at 4-5.

Loomis stated although there was no offer on the table, it was clearly Lazard's opinion that any price even close to $45 per share would be grossly inadequate from a financial point of view. He stated that, in Lazard Freres' analysis, if the various Revlon businesses could be sold separately, and proper time were allowed for such a sale, values of between $60 and $70 per share could be achieved. He also stated that somewhat less could be achieved upon a

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* Loomis stated that Lazard had a long-term relationship with Revlon and had been working with Revlon for a long time on programs to maximize shareholder values. Consequently, Lazard was very familiar with Revlon's businesses, financial plans and operations. Loomis noted that Lazard had just reviewed and updated its work with respect to Revlon and that his presentation reflected the latest management estimates. Id. at 4-5.

sale of Revlon as a whole.* Id. at 6-7.

Martin Lipton, special counsel for the Company, next reviewed the situation in detail for the directors. Lipton indicated that it must be assumed for purposes of planning that, if left alone, Drexel Burnham could raise the financing necessary for the Pantry Pride bid. Lipton also stated that the marketplace had already witnessed an effort to "move" Revlon shares into the hands of arbitrageurs and that moving stock into arbitrage hands applied pressure to accept a premium that does not necessarily result in the maximization of shareholder value. Id. at 12-13.

Lipton stated that management, together with Lazard and Revlon's legal advisors, had developed a two-part program to recommend to the Board of Directors that was designed to protect and maximize shareholder values. The first part would be to provide the shareholders with immediate benefit of a share repurchase program for up to 5 million shares. The second aspect of the management recommendation was the adoption of a Note Purchase Rights Plan (the "Rights Plan") designed to give the Board the chance to protect shareholders against a low-priced transaction for any and all shares or

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* The investment banking firm of Donaldson, Lufkin & Jenrette Securities Corp. -- which has represented Pantry Pride in this matter and which employs Pantry Pride's director Richard Kroon -- had previously published investment reports indicating Revlon liquidation values of $60 and $65 per share. Kroon Dep. Ex. 1, 3.

against a two-tier transaction and preserve the values of Revlon for its stockholders.

Lipton explained that the Rights Plan involves distribution of one Note Purchase Right for each outstanding share of common stock as a dividend on the common stock. Until such time as a person or group acquired beneficial ownership of 20% of the outstanding shares, the Rights would trade along with the shares but that after such a 20% acquisition, the rights certificates would be issued to all shareholders except for the 20% stockholder and that holders of rights certificates would be entitled to purchase $65 principal amount of Revlon's 12% one-year notes, unless the 20% acquiror announced and promptly consummated an all cash acquisition at $65 a share or more. Rifkind Aff., Ex. A at 14.*

Lipton described the function of the Rights Plan. He stated, among other things, that in the event of an all cash offer for the Company at $65 per share, the Rights would do nothing. The Rights could be effective to deter an inade-

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* Lipton reviewed with the members of the Board a memorandum that was presented to each director which contained a summary of the Plan and of the 12% one-year notes issuable upon exercise of the Rights. Drafts of the legal documentation necessary to implement the Plan, which had been prepared by Wachtell Lipton and reviewed by Revlon's inside counsel, by its regular outside counsel and by the Delaware law firm of Morris, Nichols, Arsht & Tunnell, were present before each director. Rifkind Aff., Ex. A at 14-15.

quate offer at $45 per share and could protect against a low-priced second-step. The Rights were thus designed to provide incentives to potential acquirors to pay a full price or to negotiate with the Board, which would have the bargaining power to negotiate a full price and which could redeem the rights for a nominal amount in favor of a desirable transaction. Rifkind Aff., Ex. A at 15.

Lipton stated that the Rights would not make Revlon takeover proof. See id. at 16. In response to a question from one director, Lipton said that the $65 exercise price was being recommended after consultation with Lazard and that it represented management's opinion of a reasonable asking price for Revlon's shares, but that it was not an indication that the company was for sale either at that price, at only that price, or at any other price. Lipton then answered questions and discussed the fact that the Rights Plan would give the directors additional time to develop alternative transactions. Rifkind Aff., Ex. A at 16-20.

Rohatyn then commented that although he personally was not enamored with the Note Purchase Rights, they should be viewed as necessary to protect against the evil of a takeover bid at a grossly inadequate price. Responding to a question, Rohatyn commented that if the Rights were to become exercisable for notes, the result could be a liquidation of the company, but that Revlon could assess the alternatives prior to the 20% acquisition and determine what course would be in the best interest of shareholders. He stated that the $65 price was not intended to be the only sales price that would be acceptable to Revlon but just a reasonable asking price and that it should not imply that the Company could not receive fairness opinions at other prices. Id. at 20-21.

Simon H. Rifkind spoke next. He stated that he had, as the Board was aware, a relationship with MacAndrews & Forbes and Perelman that had lasted for quite some time. Rifkind stated that he had been on the MacAndrews & Forbes board until that very morning when he resigned on learning that Pantry Pride was prepared to make a hostile takeover bid against Revlon. He also recounted his long association with Revlon. Rifkind stated that he was aware and the Board members should be aware that the Note Purchase Rights Plan would be characterized as a "poison pill". He said that as a general proposition he was not, and he did not believe anybody was, in favor of such poison pill devices. However, he stated that in his view the alternative -- the dismantling of Revlon at an inadequate price so that Pantry Pride could make a "quick buck" -- was a far worse alternative. He stated that in his opinion Revlon had a bright future in which significant value could be created for its shareholders. He also stated that Revlon could continue to benefit its employees, customers, suppliers and the other constituencies which it serves. Accordingly, Rifkind stated that the Note Purchase Rights Plan, even if it were a "poison pill", was a necessary medicine in light of the situation, and he strongly recommended its adoption by the Board of Directors.* Rifkind Aff., Ex. A at 22. Indeed, Rifkind argued for the Rights Plan. Id. ¶ 20.

On the basis of the presentations and discussions reflected more fully in the draft minutes, the Revlon board reached a unanimous consensus that Pantry Pride's price levels were far too low. It also was clear that Pantry Pride did not have the financial resources to finance an acquisition of Revlon on any long term basis, but would instead have to sell off Revlon operations to retire debt incurred to make the acquisition. Thus, the board concluded that Pantry Pride's intention was simply to buy Revlon for a cheap price, dispose of its less profitable operations, retain certain more attractive operations, and realize a substantial profit -- all at

* Rifkind believed that given Pantry Pride's thin financing shareholders would feel coerced to tender into the offer to avoid being left with holdings in a financially unsound company. Rifkind Aff. ¶ 20. See also Rohatyn Aff. (¶¶ 8-9) in which Rohatyn sets forth the reasons why Pantry Pride's offer, albeit any-and-all, is highly coercive to shareholders in light of the thin financing for the offer and the "junk bond" financing being employed.

the expense of Revlon's public shareholders, who would be pressured to tender at a price substantially below the value of their holdings. Accordingly, the Board determined to adopt the steps that had been recommended by management and the Board's advisors. Rifkind Aff., Ex. A at 22-23.

D. Pantry Pride's Offer

Immediately following the announcement by Revlon of the steps taken on the August 19 board meeting, Pantry Pride announced its first offer at $47.50 per share of Revlon common stock and $26.67 per share of Revlon preferred. Pantry Pride did not have the funds to complete the offer. In fact, the offer was expressly conditioned upon Pantry Pride raising sufficient funds to complete the offer, including $900,000,000 in a public offering of "junk" securities -- an offering which was yet to be commenced. The offer was also expressly conditioned on the Rights being rescinded or redeemed or Pantry Pride being "satisfied that such rights are null and void." Pl. App., Ex. D at 1, 12-13.

Pantry Pride's Offer to Purchase stated that Pantry Pride intended to "seek to sell substantially all of the assets of [Revlon] other than the Beauty Group" and that it believed it might "be able to realize $1,675 million to $1,900 million from the sale of substantially all the assets of the

Company other than the Beauty Group."* Pl. App., Ex. D at 19. Pantry Pride's total offering price for Revlon, including "related fees and expenses," was $1,950 million. Pl. App., Ex. D. at 12. Accordingly, Pantry Pride was essentially offering for all of Revlon what it believed it could obtain for the assets of Revlon other than the Beauty Group. Pantry Pride's plan was thus, concededly, to buy Revlon "on the cheap" and to resell Revlon assets at an immediate profit to Pantry Pride.

Pantry Pride's offer also stated that if Pantry Pride was unable to effectuate a merger of Revlon and Pantry Pride prior to nine months from the date shares are first purchased, "there can be no assurance that the Purchaser [Pantry Pride's subsidiary] will be able to purchase and pay for the remaining [Revlon] Shares." Id. at 2 (emphasis added).

E. The August 26 Board Meeting

On August 26, 1985, the Revlon board met to consider the Pantry Pride offer. At the meeting, Lazard gave its formal investment banking opinion that the price of $47.50 being offered by Pantry Pride was grossly inadequate

* Pantry Pride's Offer to Purchase also indicated that it might seek to obtain additional funds from the Revlon Employees' Retirement Plan. Pl. App., Ex. D at 19.

from a financial point of view. Rifkind Aff., Ex. B at 1. Bergerac indicated that Revlon management agreed with Lazard's assessment. Id. at 1-3.

Management recommended an exchange offer by Revlon to purchase up to 10 million shares of its common stock by exchanging for each share securities that would have a face value of $57.50 per share. The securities consisted of $47.50 principal amount of Senior Subordinated Notes due in 1995 which would have a coupon rate of 11.75% and 1/10th of a share of a Cumulative Convertible Preferred Stock with an annual dividend rate of $9.00 per share. Id. at 4-5.

The securities that were being offered in the exchange offer contained certain provisions that could deter or make more difficult an unsolicited takeover attempt, including the Pantry Pride takeover attempt. Provisions of the notes would preclude incurrence of additional indebtedness, most asset sales and most restricted payments, such as dividends, unless these transactions were approved by the Independent Directors. Id. at 5-6.* Among the purposes of these

* Lazard opined at the meeting: (a) that the Pantry Pride offer was grossly inadequate from a financial point of view; (b) that the securities to be offered by Revlon in the exchange offer, if trading then on a fully distributed basis, would each trade at face value; (c) that the exchange offer was fair to Revlon's shareholders from a financial point of

(footnote continued)

provisions is to protect the value and security of the note against unduly leveraged and precariously financed takeovers requiring fire sale asset dispositions or incurrence of new debt. Loomis Aff. ¶ 2; Rifkind Aff. ¶ 26.

At the conclusion of the meeting, the Board also unanimously resolved not to redeem the Rights because they had been adopted to protect the shareholders against the very type of inadequate offer that Pantry Pride had made. The Board finally determined (again, unanimously) to commence the exchange offer. Rifkind Aff. ¶ 27, Ex. B at 13-14. (A fuller description of the August 26 meeting is contained in Rifkind Aff. ¶¶ 21-27 and Ex. B.)

F. The Revlon Exchange Offer

The exchange offer was commenced on August 29, 1985. The exchange offer was substantially oversubscribed by Revlon's common shareholders. Revlon exchanged notes and preferred stock pursuant to the offer for 10,000,000 shares of Revlon common stock. Hamermesh Aff., Ex. C.

(footnote continued)

view; (d) that after the offer Revlon would continue to be a viable enterprise and have the financial flexibility and resources necessary to operate its business; and (e) that the exchange offer was a more attractive financial opportunity for the shareholders of Revlon than the Pantry Pride offer because the exchange offer provided the shareholders the opportunity to realize premium values for a substantial portion of their shares and to retain a continuing equity interest in Revlon. Id. at 8-10.

G. <u>The Pantry Pride $42 Offer</u>

Immediately following an announcement by Revlon that it was accepting shares for purchase under the exchange offer, Pantry Pride terminated its offer and commenced a new tender offer for Revlon shares. The new offer was at $42 per share (as opposed to $47.50) and was still subject to a financing condition. Pl. App., Ex. I.

Of note, the $42 offer was <u>not</u> conditional on the redemption or invalidity of the Rights and was <u>not</u> conditional on the restrictive covenants in the Senior Subordinated Notes being waived by Revlon's independent directors. It was conditional upon receiving 90% of Revlon's common stock in the offer, thereby minimizing the number of shares as to which Revlon would be required to pay $65 under the Rights Plan. Pl. App., Ex. I at 1. With respect to the restrictive covenants in the notes, and the terms of the Preferred Stock, Pantry Pride stated that it did "not believe that such covenants and terms will prevent or delay consummation of the Offer." <u>Id</u>. at 2.

Thus, Pantry Pride -- by it own admission -- was able to proceed with a $42 per share offer for Revlon stock <u>notwithstanding</u> the issuance of the Rights and <u>notwithstanding</u> the covenants in the notes and the terms of the preferred.

H. Revlon's September 24 Board Meeting

Revlon's directors discussed the $42 offer at their regularly scheduled board meeting of September 24. Loomis described Pantry Pride's new offer and noted that Pantry Pride had simply adjusted its original $47.50 price to take account of Revlon's purchase of 10 million shares and to reflect the premium that would likely be required to acquire the preferred stock issued in the Revlon exchange offer, so that essentially the offer price was unchanged. In Lazard's opinion, the second Pantry Pride offer remained grossly inadequate from a financial point of view. Rifkind Aff., Ex. C at 4-7.*

Following substantial discussion among the directors and their advisors, the Revlon Board resolved that the $42

* Loomis also noted that a review of Pantry Pride's financing made it clear that, unlike many tender offers, no provision had been made to refinance Revlon's debt to banks or securityholders, so that Pantry Pride's offer put substantial pressure on shareholders to tender in order not to be faced with acceleration of this debt and possible insolvency. He noted, in connection with these same concerns, that as in the first offer, Pantry Pride had stated that if it were unable to complete a second-step merger within approximately nine months or less, there could be no assurance that it would be able to pay for any shares not tendered in the first step. But unlike the first offer, he advised, Pantry Pride no longer stated that the same cash price would be offered in any second-step merger, so that the new offer should be viewed as more coercive and inadequate than the first. Id.

offer be rejected and that the Rights not be redeemed nor the covenants in the notes or the terms of the preferred stock be waived. Rifkind Aff., Ex. C at 11-13.

I. <u>Contacts with Adler & Shaykin and Forstmann Little, Pantry Pride's Proposal and Revlon's October 1 Board Meeting</u>

Prior to the September 24 board meeting, a meeting was held between representatives of Adler & Shaykin and Lazard. Bergerac Sept. 9 Tr. 92. Adler & Shaykin had previously expressed an interest in Revlon's cosmetics business. Lazard also contacted Forstmann Little & Co. about the possibility of a transaction involving Revlon. Loomis Aff. ¶ 3. Negotiations with Adler & Shaykin, as well as with Forstmann Little, commenced. Loomis Aff. ¶¶ 4-14.

Pantry Pride apparently discovered that Revlon was considering alternative transactions. Thereupon, on September 27, Pantry Pride -- whose tender offer was at $42 per share -- sent a letter to Revlon stating that if Revlon's directors would waive the covenants in the notes issued in the exchange offer and would redeem the Rights, Pantry pride would consider entering into an agreement for a $50 per share cash merger with Revlon. Then, on October 1, 1985, Perelman again wrote to Bergerac, this time indicating that Pantry Pride would pay $53 per share conditional on, among other things, acceptance of the proposal at the directors' meeting of Revlon to be held that evening. Pl. App., Ex. B at 1-2.

At that October 1 directors' meeting, the directors were informed of Pantry Pride's proposals. Rifkind Aff., Ex. D at 1-2. Bergerac informed the directors that in addition to these events involving Pantry Pride, discussions were being undertaken regarding a leveraged buyout offer for Revlon (i.e., the negotiations with Forstmann Little). He also told the directors that the price which all stockholders would receive in cash pursuant to the terms of the proposed leveraged buyout would be higher than $53 per share and that, while the issue had not been resolved, it was contemplated that management might participate in the leveraged buyout. Id. at 2.

Loomis stated Lazard's view that more than $53 per share could be realized in an alternative transaction or liquidation. Rifkind Aff., Ex. D at 3. In connection with Pantry Pride's request that the note covenants be waived, counsel Arthur Liman made clear that in connection with any decision to waive the covenants in the notes, the independent directors had to decide, in their best business judgment, whether there would be adequate coverage for the debt securities. Id. at 5.

Waiver of the covenants would result in a decline in value of the Notes.

Bergerac indicated that a press release would be issued the next morning, if the board approved it. He noted that the release asked Pantry Pride to hold its proposal open in order to give to the board the opportunity to consider it along with other proposals. Rifkind Aff., Ex. D at 6-7. The Board agreed. Id.

J. Further Negotiations with Forstmann and Adler & Shaykin

Negotiations with Forstmann Little and with Adler & Shaykin intensified. Among other things, Forstmann Little stated that it would agree to a merger transaction, but wanted the following consideration for making the deal:

(1) an option to acquire certain businesses of Revlon, notably its Vision Care business and its National Health Laboratories at a discount price should another bidder acquire a substantial number of Revlon shares;

(2) a "no shop" clause, pursuant to which Revlon would agree not to seek higher bids;

(3) an agreement by the Revlon directors to redeem the Rights and waive the covenants in the exchange offer

notes only for Forstmann Little and not for other bidders;

(4) a break-up fee of $25 million if Revlon were to breach the merger agreement.

Loomis Aff. ¶ 5.

Revlon negotiated with Forstmann. It was able to persuade Forstmann to pay $56 per share of Revlon in a transaction without a "lock-up" option, without a "no shop" clause and without an agreement by the Revlon directors to redeem the Rights only for Forstmann. If aproved by the Revlon directors, Revlon would agree to the $25 million breakup fee and that it could redeem the Rights for other bidders offering $56 or more, but only after 10 days following the execution of the merger agreement. Loomis Aff. ¶ 6..

Revlon also would agree, if the board approved, to sell the Beauty Group to Adler & Shaykin for $905,000,000. Rifkind Aff. ¶ 36. (Of note, the plaintiff in this action has never attacked the economic merits of the fully priced Adler & Shaykin transaction.)

K. <u>The October 3 Revlon Directors' Meeting</u>

The Revlon directors met on October 3 to consider proposed transactions with Adler & Shaykin and Forstmann Little. Rifkind Aff., Ex. E.

Bergerac summarized the proposal of Forstmann Little stating that under that proposal each shareholder would receive $56 a share in cash for all his shares. The proposed transaction did not have any so-called "lock-ups" and did not prevent the Board from considering an alternative more favorable offer for Revlon. He emphasized that the proposal was not subject to financing although it was subject to consummation of the transaction with Adler & Shaykin, which he would describe. Bergerac noted that he and certain other members of the senior management would acquire approximately 25% of the equity of the company to be organized by Forstmann Little. He noted that the terms and conditions of management's participation were not yet determined. Rifkind Aff., Ex. E at 3.

Bergerac stated that there was also a proposal by Adler & Shaykin to acquire the beauty products operations for approximately $900 million. Bergerac noted that this proposal also was not subject to financing. He also noted that this proposal was independent of the Forstmann Little transaction. Id.

It was noted that Forstmann Little would be entitled to a breakup fee of $25,000,000 in the transaction. Bergerac further stated that the pension plan and certain other employment practices of Revlon would be continued. He said that the operating people in Revlon's divisions would likely retain their jobs following the consummation of the proposed transaction, as the divisions would contin ue as operating entities, but that the central corporate group of Revlon was likely to be adversely affected. _Id_. at 4.

Theodore Forstmann of Forstmann Little, and his associate and counsel, entered the meeting. Forstmann summarized the terms of his proposal. He stated that he was proposing a cash merger pursuant to which all stockholders would receive $56 in cash per share. He indicated that, pursuant to the terms of the merger, the surviving entity would assume all of Revlon's outstanding debt, including the $475,000,000 aggregate principal amount of the company's exchange offer notes. Forstmann stated that the aggregate value of the transaction would be valued at approximately $3 billion, including the assumption and refinancing of certain debt. Forstmann noted that his company would commit $445,000,000 in cash to the new entity and would use the proceeds of the sale of the cosmetics business, which he noted were expected to be approximately $900,000,000, as part of the financing. In addition, the remainder of the financing, $1.2 billion, was covered by bank commitment letters.* Rifkind Aff. ¶ 34, Ex. E at 6.

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* Forstmann informed the Board that Forstmann Little had reached an understanding to sell the Norcliff Thayer and

(footnote continued)

In response to questions, Forstmann stated that the proposal was not subject to a financing condition and that it was only subject to certain customary merger conditions, such as the shareholder approval required under Delaware law. He emphasized that there was no financing condition. Rifkind Aff., Ex. E. at 6-7.

Following a question and answer session with Forstmann, he was excused and Mr. Shaykin of Adler & Shaykin entered the meeting. He stated that Adler & Shaykin had arranged the financing and had received commitment letters from financial sources for the full price of $905 million for the Beauty Products division. He noted that the consideration would be in the form of a $875 million cash payment and the assumption of foreign debt that was on the books of the division in the amount of approximately $30 million, subject to certain adjustments. He described the details of his financing commitment. He stated that Adler & Shaykin expected to offer certain members of the cosmetic division's domestic and international management an opportunity to participate with Adler

(footnote continued)

Reheis divisions to American Home Products for approximately $355 million, that such sale would be consummated immediately after the closing of the proposed merger, and that such sale was conditioned on the consummation of the merger he was proposing. Rifkind Aff., Ex. E at 6.

& Shaykin in the transaction and that as a result Adler & Shaykin was expected to contribute slightly less than $35 million.* Rifkind Aff., Ex. E at 9-10.

Andrew Brownstein of Wachtell, Lipton was then asked to summarize the details of the proposed transactions. Brownstein described the negotiations of the transaction, the Merger Agreement, and among other things, noted that the Merger Agreement did not have a provision prohibiting the Board of Directors from "shopping" the company. Id. at 12-14.

Brownstein noted that the Rights would be redeemed conditioned upon consummation of the merger. He also informed the Board that the Merger Agreement provided that the Rights could be redeemed to enable the Board to facilitate another deal pursuant to which all stockholders would receive $56 in cash or more per share for all their shares (although this later provision would not be in effect for ten days). Thus, he noted, the Board would still be able to redeem the Rights

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* Shaykin stated that he had negotiated with Forstmann Little and Revlon regarding Adler & Shaykin's role in the transaction and that throughout the negotiations, Revlon attorneys and Revlon representatives had been present and that they had been satisfied with the terms of the asset sale contract. He emphasized that his proposal was not subject to financing and that it was not subject to a shareholder vote. Finally, he noted that the proposal would be formalized in a contract with Revlon directly, and was not contingent on, although it would also help to finance, the Forstmann Little proposal. Rifkind Aff., Ex. E at 10.

in order to facilitate an offer that was more favorable to Revlon's stockholders than the Forstmann Little proposal. Rifkind Aff., Ex. E at 15.

With respect to the covenants in the exchange offer notes and preferred stock, Brownstein noted that it was a condition to the closing that certain covenants be waived with respect to debt to be assumed in the merger. He stressed, however, that although Forstmann Little had received binding commitment letters, they did not yet have definitive financing agreements. Both Brownstein and Lipton stressed that action with respect to the waiver of the covenants in the notes or preferred stock would be undertaken only when the Board had the definitive financing agreements before it.* _Id_. at 17-19.

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* Lipton also informed the directors of a conversation between himself and Joseph Flom, counsel for Perelman and Pantry Pride. Flom had informed Lipton that Perelman was very desirous of acquiring Revlon or its cosmetics business and that Perelman was not going to go away. Flom said that Perelman really was interested in acquiring Revlon's cosmetics business and that if Revlon would sell the cosmetics business to Perelman at Perelman's price, Perelman would drop his tender offer. Flom would not say what Perelman's price was, other than that it was somewhat higher than what he had previously offered. Lipton noted for the Board that the previous price range that it had been believed Perelman was considering was between $400 and $500 million, substantially less than the $900 million being offered for the division by Adler & Shaykin. Rifkind Aff. ¶ 37, Ex. E at 23-25.

Liman, later in the meeting, stated that he had spoken with Perelman who had stated that he thought that a price over $500 million for the beauty products division was imprudent and that Liman believed that Perelman was not near $905,000,000 for that division. Rifkind Aff. ¶ 37, Ex. E at 31-32.

Indeed, Lipton made clear that the waiver of the covenants as well as a "leveraged buy out capital structure" would adversely affect the market price of the notes.

Rohatyn summarized for the directors the options the Board had. He noted that there was the $56 per share bid from Forstmann Little and the sale of the cosmetics business to Adler & Shaykin at $905 million. The only other bids that were on the table at that time were the $42 a share Pantry Pride tender offer and its offer for a merger at $50 or $53 a share. He noted that the proposed merger was the only proposal on the table that could compete with the Pantry Pride bid and that Forstmann Little's proposal was the only bid higher than Pantry Pride's to date. Rifkind Aff., Ex. E at 26.

Loomis of Lazard was then asked to give Lazard's formal opinion to the Board. He stated that Lazard had studied both overall transactions and was familiar with their terms, and that Lazard had taken into account its knowledge of the historical and forecasted financial results and market conditions of Revlon as well as certain other factors. With regard to the sale of the cosmetics business, Lazard was of the opinion that the $905 million price (subject to certain adjustments) was a fair price for the business. With regard to the merger, Lazard was of the opinion that a $56 merger price was fair from a financial point of view. Loomis reviewed the work Lazard had done to enable it to express its opinion. Rifkind Aff., Ex. E at 28-29.

The management members who would be equity participants in the leveraged buyout left the room and discussion continued in their absence. After considerable discussion, as outlined in the draft minutes, a roll call vote of the independent directors was taken. Each director was polled and each director approved the cash merger agreement with Forstmann Little and the asset sale with Adler & Shaykin. A new vote was taken when all of the remaining directors returned. Again, all of the directors unanimously approved both transactions. Rifkind Aff., Ex. E at 34.

L. <u>Pantry Pride raises by a quarter</u>

On October 7, 1985, following announcement of the Forstmann Little and Adler & Shaykin agreements, Pantry Pride issued a press release announcing that it was "amending" its $42 tender offer for Revlon shares to increase the price to $56.25 per share in cash. Pantry Pride stated that its offer was now:

-- conditioned upon the Rights being redeemed or Pantry Pride being satisfied that the rights are null and void;

-- conditioned upon the covenants in the notes and the preferred stock being waived; and

-- conditioned upon three Pantry Pride directors being named to the Revlon board of directors as "independent directors."

Hamermesh Aff., Ex. D. Pantry Pride also announced that the offer was "no longer conditioned upon any minimum number of shares being tendered and is not subject to a financing condition." Id. Notwithstanding the removal of the financing condition, Pantry Pride made clear that it had not yet obtained full financing for the transaction. Hamermesh Aff., Ex. D at 3.

Pantry Pride took the position that it was free to purchase shares under the "revised" offer immediately and that shareholders' "withdrawal" rights had expired even before Pantry Pride disseminated its new offering material on October 9, 1985. Id.

M. Events Leading to the Revised Merger Agreement

On October 9, 1985, Perelman wrote to Bergerac with respect to Pantry Pride's "request" that covenants in the Notes and Preferred Stock be waived. The letter (Hamermesh Aff., Ex. E) stated that Pantry Pride's acquisition subsidiary will have "at the time of acquisition not less than $500 million in capital which is in excess of the capital the amount provided in the Forstmann Little-Management merger proposal."* The letter ends as follows:

> Should you or your financial advisors wish any additional information concerning our capital structure, we shall be available to meet with you and to make such submission as required by your Board.

In response, on October 9, 1985, Lazard wrote to Perelman and noted the following points:

> (1) You [Pantry Pride] have not disclosed commitments for the full amount of the financing of your proposed acquisition of Revlon.
>
> (2) You have not disclosed your intentions with respect to refinancing Revlon's outstanding debt, including the 11.75% Senior Subordinated Notes.
>
> (3) You have not disclosed your intentions with respect to Revlon's $9.00 Cumulative Convertible Exchangeable Preferred Stock.
>
> (4) Although you have indicated that your acquisition company will have in excess of $500 million in capital, we understand that your acquisition company/Revlon will, in effect, fund the debt service obligations on indebtedness incurred by Pantry Pride in connection with your proposal.
>
> In order that we may advise the Board, we request further information from you on the foregoing points. In particular, we would appreciate receiving projections as to how the

* As set forth in the Rohatyn affidavit (¶ 13) the $500 million capitalization number was meaningless since Pantry Pride and Nicole would have the responsibility of servicing the debt incurred in making the acquisition.

debt incurred and assumed by you in connection with the acquisition would be serviced and copies of any financing commitments or agreements you have obtained or entered into. We have already received similar information from Forstmann Little & Co.

-- Pl. App., Ex. R.

The Lazard letter requested a response by noon October 11. Id.

On October 11, Howard Gittis of Pantry Pride responded. The requested projections were not included. Gittis stated that $350 million of the required $700 million junk bond financing had been obtained and that Drexel was confident of obtaining the rest. With respect to the Senior Subordinated Notes, Pantry Pride stated only that it intended to make interest and principal payments when due. No plan to ensure the value of the Notes was presented. Pl. App., Ex. S; Rohatyn Aff. ¶ 13.

With respect to Pantry Pride's October 11 responsive letter, the testimony of Lewis Glucksman, former chief executive of Lehman Brothers, an independent Revlon director who has been represented by his own counsel in connection with the matter, is noteworthy. With respect to the first part of the letter, setting forth Pantry Pride's existing financing commitments and Drexel Burnham's confidence that it could obtain the remaining $350 million of additional financing, he testified:

> I thought that this was an exceptionally fuzzy, inconclusive, alarming statement. And I did not agree with the conclusion that Drexel Burnham's capabilities in this area would satisfy me that the financing was in place.
>
> -- Glucksman Tr. 66.

He further testified, quite accurately in light of the highly conditional nature of Pantry Pride's financing:

> Q. Was that what concerned you, that the last $350 million was not in place, and, therefore, the other financing was up in the air?
>
> A. All of it concerned me. Without the last piece there was nothing there.
>
> -- Glucksman Tr. 66-67.

With respect to Pantry Pride's response to Lazard's inquiry as to Pantry Pride's intentions concerning the Exchange Offer notes, Glucksman testified:

> Q. The second item in the Lazard letter deals with ascertaining Pantry Pride's intentions with respect to the financing of Revlon's outstanding debt, including the 11.75 percent senior subordinated notes.
>
> Did Pantry Pride's answer on that subject satisfy you?
>
> A. It disturbed me. It did not satisfy me at all. I felt that it was not an answer that in any way approached a resolution of the problem.

Q. What problem?

A. Of trying to create a circumstance in which we restored the notes to something approaching par value.

And I think that that paragraph which is enumerated paragraph 2 speaks for itself with respect to my answer.

-- Glucksman Tr. 71-72.

During the week of October 7, Forstmann Little made a proposal to increase the cash consideration for Revlon common stock from $56 per share to $57.25 per share. This new proposal -- as well as Pantry Pride's response to Revlon's October 9 letter and other events of that week -- were presented to the Revlon directos at a directors' meeting held on Saturday, October 12.

N. The October 12 Revlon Board Meeting

At the October 12, 1985 special meeting of Revlon's directors, after introducing those present,* Bergerac briefly summarized the new Forstmann Little proposal, noting that Forstmann Little would increase the price it was offering to pay for each share of the company's common stock and would provide accommodations for the holders of the 11.75% Notes. Rifkind Aff., Ex. F at 2. Forstmann Little had explicitly

* Four of the independent directors -- Gluckaman, Wilson, Loudon and Zilkha -- were accompanied by their own attorneys (Cleary, Cottlieb, Steen & Hamilton). Rifkind Aff., Ex. F at 2.

conditioned its willingness to make such changes on its receiving an option to acquire certain of Revlon's assets under circumstances that would be described and on certain other factors. Id.

Bergerac noted that, in order to facilitate the proposed transactions, to prevent any appearance of any conflict of interest, and to prevent any possible divergence of interest on the Board of Directors, he, along with the other members of management, had withdrawn from participation in the equity interest of the surviving corporation. Id. at 2-3. Thus, Revlon's management would not be participating with Forstmann Little in the equity of the surviving corporation and there was no conflict of interest.* Id. at 3; Gluckman Tr. 116-17.

Loomis of Lazard summarized the developments of the preceding few days. He noted Pantry Pride's increased offer price and stated that Pantry Pride's offer was conditioned on the Board's waiving certain covenants in the Revlon's 11.75% Notes and $9 Preferred Stock. Rifkind Aff., Ex. F at 3-4. Loomis then described the correspondence between Revlon and Pantry Pride during the ensuing days.

* Earlier that week, Perelman had suggested that Bergerac could work for Pantry Pride and that "all existing severance agreements would be honored and paid." Bergerac Oct. 16 Tr. 122-23.

Loomis stated that Ted Forstmann had indicated that he wanted to better the Pantry Pride offer, but he said that he believed that whatever Forstmann, Little would do, Pantry Pride would increase its offer $0.25 per share over Forstmann Little's proposal. Id. at 7. Indeed, on Wednesday night, October 9, there had been a meeting between Forstmann Little and Pantry Pride, at which representatives of the Revlon were present, where possible alternatives between Forstmann Little and Pantry Pride had been discussed. Principally, a possible split-up of the business of Revlon had been considered. On Thursday, October 10, Ted Forstmann indicated to representatives of Lazard and Wachtell, Lipton that Perelman had said to Forstmann that whatever Forstmann Little did would be countered by a $0.25 per share raise. Id. at 8. Forstmann stated that he felt that it was futile to raise his offer only to be countered by a nominally higher Pantry Pride offer -- higher by a fraction that was not material in light of the size of the transaction -- that was not fully financed. Id. at 7.

Loomis stated that on Thursday, October 10, Forstmann Little stated that it wanted to make a new proposal to Revlon, but that it was concerned that, whatever it did, its offer would be marginally "raised" by Pantry Pride's. Id. Forstmann had indicated that as a result of this, it would require a so-called "lock-up" before they would be willing to make a proposal. Rifkind Aff., Ex. F at 7. Loomis stated that at a meeting with the representatives of Forstmann Little, both Wachtell Lipton and Lazard had stated that any proposal from Forstmann Little would need to address the following: (1) concerns regarding the consequences of any proposed transaction for the notes and preferred stock and (2) concerns that any proposal should be Forstmann Little's best possible price for the shares. Id.

Loomis stated that on Friday, October 11, the same day that the above-described letter from Pantry Pride had been received, Forstmann Little presented to representatives of Lazard Freres and Wachtell Lipton what Forstmann Little described as a non-negotiable proposal.

Forstmann's proposal was the following: it would increase the price per share to $57.25 per share, but it would require a "lock-up" at $525 million on the Vision Care and National Health Laboratories divisions of the Company. Id. at 9. Forstmann Little mentioned that the $525 million price was within the range of values that Goldman Sachs had given to Forstmann Little in Goldman Sachs' work for Forstmann Little. Id.

Forstmann stated further that as soon as practicable following the merger, it would undertake to commence an exchange offer in which new notes would be exchanged for the existing exchange offer Notes. The new notes would have terms that were designed to have them trade at par. Essentially, these terms would be an increase in the interest rate on the notes, which would reflect the new leverage of Revlon. Id.

Revlon's Board was properly concerned that noteholders be treated fairly, in large part because the stockholders are also Revlon shareholders. As Glucksman testified:

> And when this paragraph [of the amended merger agreement concerning treatment of noteholders] was reviewed at the meeting, when this change was suggested, I felt as a director that it had a material effect upon improving to the Revlon shareholders, present and past, the value of their investment in the company. Although those shareholders had surrendered shares, but they were still investors in the company through the receipt of notes. And this was a very major step that was taken at the time of this meeting, because price has risen in the marketplace from around 86 or 87, maybe 88, I don't even know, because there were more notes for sale than the market would absorb. I think on Friday afternoon the market responded to 92. The market in effect was anticipating that the notes were a major potential impediment to any transaction. So the market was saying that something would be done to improve that valuation for the benefit of the shareholders or the investors in the company.
>
> -- Glucksman Tr. 31-32 (emphasis added).

* * *

> A. I suspected, and it would be impossible for me to prove at this meeting, that most of the notes, most of the notes, a very substantial majority, were owned at the time of this change by people who were owners of Revlon shares.
>
> -- Glucksman Tr. 34.

* * *

> Q. To the extent that the stock was -- the notes were not in the hands of Revlon stockholders but in the hands of creditors, note holders who were not Revlon stockholders, what, if any, duty did you believe you owed to those creditors?
>
> A. I never concentrated, in my analysis, on that body of notes that were not owned by what you refer to as creditors who were not Revlon shareholders. I was of the opinion, and still am of the opinion, that most of the notes related to Revlon shareholders.
>
> -- Glucksman Tr. 35.

Representatives of Forstmann Little had stated that they did not want the Board to waive the covenants for anyone but Forstmann Little and that they wanted the Board to leave the Rights in place for anyone but Forstmann Little. Further, they said that the Revlon Board meeting had to be convened on the next day, October 12, 1985. Revlon had not agreed but proposed that the Rights would be redeemed upon consummation of an offer by <u>any</u> bidder for all cash at \$57.25 or more; the covenants in the notes would be waived for any bidder in connection with a proposal in which two major investment bankers were satisfied that the notes would trade approximately at par. Rifkind Aff. Ex. F at 10-11.

Bergerac then spoke, noting that at this time there was a very serious difficulty in running the company.

The amount of uncertainty that had resulted from the activities of the last two months had created great human problems -- Revlon was losing people and recruiting was impossible. He stated that the employees of the company were coming to be concerned about their futures and not about the business of Revlon. He stated that another rung of difficulty was the problems with the employees in the Beauty Group, who were wondering what the consequences of the sale of the Beauty Group to Adler & Shaykin would be. Rifkind Aff., Ex. F. at 12.

Terms of the proposed contracts were described for the Board. Changes in the Merger Agreement included that: (1) the amended agreement recited that no member of the Board of Directors or management of Revlon would obtain or participate in an equity interest in connection with the financing of the merger; (2) the amended agreement provided for an increase in price and that 11.75% notes of Revlon would be exchanged for new notes on the terms that Mr. Loomis had described; (3) instead of the absence of a "no-shop" provision in the Merger Agreement (which he had told the members of the Board was unusual at the preceding meeting) now, as a result of the recent events, Forstmann Little had required a no-shop provision.* Rifkind Aff., Ex. F at 13.

* It was noted that this inclusion of a no-shop provision was the usual provision in agreements of this kind and he went on to summarize its terms. Id. at 13.

The proposed option agreement was described. Forstmann Little would be granted the option to acquire Revlon's Vision Care Group and National Health Laboratories, for $525 million. It was explained that the option could be exercised when any person or group acquired 40% of the outstanding voting power of the company. Id. at 17-19. A director asked why the trigger point was 40% for the option, saying that it seemed somewhat high. Lipton stated that Revlon had wanted the trigger to be a high number. He noted that Forstmann Little had originally requested a naked option, namely, one that would be exercisable immediately, before anyone acquired any shares of the company. Revlon had initially requested that the option be exercisable at 51% of the outstanding shares, but that the company had negotiated with Forstmann Little to the 40% figure that was the current deal. Brownstein noted that 20% to 33% were usual for these situations. Id. at 21.

Lazard stated that, given an assumed 12% per year cost of borrowing money, a $56.25 offer in which the consideration was available now might be perceived by arbitrageurs as marginally higher than a $57.25 offer in which payment might not occur for 60 days or more. Lazard informed the Revlon board of these calculations because -- although aware that it was the intention of Forstmann Little to pay the cash consideration with respect to its proposed merger in 35 days -- such a timetable could not be guaranteed. Id. at 21-22; Rohatyn Aff. ¶ 16.

Loomis stated that it was the opinion of Lazard that the consideration of $57.25 in cash per common share to be received in the merger by Revlon's common shareholders was fair to such common shareholders from a financial point of view. He noted that his opinion was based on comparisons with other companies and on his discussions throughout the negotiation process. Loomis noted that Lazard was also of the view that, although because of market conditions it is not possible to predict the prices at which securities will trade, the new notes to be issued in the exchange offer would trade approximately at par on a fully distributed basis and that the existing notes should reflect this. Loomis stated that, regarding the proposed lock-up, $525 million was, in Lazard's view, a favorable price from the perspective of Forstmann Little. He noted that the estimate of Lazard Freres was that they could achieve a price as high as $600 to $700 million from the sale of the two divisions together. Mr. Loomis stated that he understood that $525 million was within the range of values placed on the two divisions by Goldman Sachs, Forstmann Little's investment banker. Rifkind Aff., Ex. F at 22.

A director inquired of Loomis whether he had an opinion as to which of the available alternatives was the best transaction for Revlon and its stockholders. Loomis said that Lazard would recommend the Forstmann Little transaction. Id. at 24. A second director inquired regarding the lock-up. Loomis stated that the valuation showed that the price was favorable to Forstmann Little, but that it was one aspect of the overall transaction. The transaction had to be evaluated with all aspects together from the point of view of what was best for the shareholders. One transaction alone may not be ideal, but when the three proposals were looked at together, as they must be, and all factors were evaluated, including the lockup, Lazard's recommendation was the Forstmann Little transaction. Id. at 24-25.

A statement from Liman of Paul Weiss to the Board was then read. In his statement, Liman told the Board that he favored the Forstmann Little transaction because it was his belief that it was proper for the board to consider the process, and that the events of the past two months were destroying Revlon and the people in it. He stated that he believed that it was also proper to consider the shareholders and the noteholders, and that this deal dealt well with both the noteholders and the shareholders. He said that he thought that it was important to bring the process to an end in a way that was favorable to both the shareholders and the noteholders. He noted that Pantry Pride had been given time in order to present its proposals for the noteholders, and that even in light of substantial publicity regarding the noteholders, Pantry Pride had not presented a meaningful proposal. Liman further stated that it was his belief that, based upon the events of the past few days, Forstmann Little would walk away and no longer compete with Pantry Pride for Revlon if their proposals were not accepted at the meeting. He felt that the company could not afford to lose Forstmann Little, and if Forstmann Little were no longer bidding for the company, Revlon would not be able to bargain a better deal for the shareholders or the noteholders. Id. at 26.

Lipton repeated for the directors conversation he had had that past week with representatives of other potential bidders and with Donald Drapkin, an attorney for Pantry Pride. He told the Board that he informed Drapkin that Revlon's 11.75% Notes were a major concern of the company, and that they must be addressed in any proposal. Drapkin stated that Pantry Pride offered to give a contingent guarantee on the notes. Lipton responded that he believed that would have no effect on the market price of the 11.75% Notes due to Pantry Pride's financial circumstances. Drapkin had then stated that Pantry Pride might be prepared to increase the price of the notes by

1% to 1.5%. Lipton stated that he thought that interest rate increase would fall short of what the directors would expect. Id. at 29-30.

Lipton stated that Revlon had tried to obtain more time from Forstmann Little, but that Forstmann had stated that if the transactions were not approved at the present Board meeting, he would no longer compete with Pantry Pride for Revlon. Lipton told the directors that it was reasonable to believe that there were limits on Forstmann's money and his patience and that he did not believe that this was merely a negotiating posture of Forstmann but an absolute deadline. Id. at 32.

Rohatyn stated that it was an absolute unacceptable risk for Revlon to face Pantry Pride alone without Forstmann Little and that he did not believe that without Forstmann Little there would be a $56 a share bid from Pantry Pride and that Pantry Pride might very likely lower its bid. Rohatyn commented regarding the proposal of Forstmann Little. He stated that he believed that Revlon needed a proposal that would deal with both the shareholders and the noteholders.

The representatives of Forstmann Little were invited in to the meeting. Forstmann thanked the directors for coming together for a Saturday meeting and said that they felt very strongly that it was necessary for the meeting to be convened today as a result of all that had been going on. Forstmann provided information about his company. Rifkind Aff., Ex. F at 34-35.

Forstmann noted that he had been invited by Lazard to make a legitimate offer for Revlon. There had been very hard work over a short period of time in order to get this complex transaction accomplished. Forstmann stated that he felt that the previous offer that he had made was very attractive. He said now that there were three improvements that he was offering over the previous deal. First, the price would be increased to $57.25 per share, which represented an increase of over $35 million dollars. Second, the proposal to exchange the notes in an exchange offer was a significant improvement. He noted that this would result in an increased cost of $15 million per year for him, which was substantial. Third, he stated that he would be willing to cash in the preferred stock at its stated value. Id. at 36-37.

In response to a question, Forstmann noted that his transaction was fully financed and did not have a financing condition. Id. at 40; Gluckman Tr. 24.

Forstmann advised the directors that in return for the significant improvements he would not accept anything less than an option on the Revlon's Vision Care and National Health Laboratories divisions for $525 million. Forstmann stated that Goldman Sachs had said that this price was within the range of those divisions' value and that he had received a written opinion from Delaware counsel that his option would not require a shareholder vote. He repeated that it was a quid pro quo for the deal and that he would accept nothing less. Rifkind Aff., Ex. F at 37-38.

As director Rifkind has testified in his affidavit (¶ 49):

> Mr. Forstman stated his "bottom line" very clearly. He had to have a lock-up option on Revlon's Vision Care and National Health Laboratories Divisions in order to avoid being used as stalking horse by Mr. Perelman with his "$0.25 more" threat. He also had to have a Board decision that night. Otherwise, Forstmann Little would withdraw its offer and leave Pantry Pride as the sole bidder -- with the inevitable consequences. I firmly believed that Mr. Forstmann was being sincere and candid in these statements.

See also Gluckaman Tr. 154.

After Forstmann left the meeting, outside director Wilson emphasized that he was an operating person and that he believed that the uncertainty and disruption caused by the present state of affairs was destructive and detrimental to the company's business and operations. He said that the Board needed to resolve matters for the benefit of Revlon's business. Rifkind Aff., Ex. F at 40.

Further discussion ensued. Bergerac submitted the proposed transactions to a vote. He stated that the matter had been laid in front of them, debated and examined. The motion was seconded and unanimously carried. Id. at 41.

O. The Directors' Business Judgment

There can be absolutely no good faith contention by Pantry Pride or anyone else that the directors of Revlon acted in bad faith or did not exercise reasonable business judgment during the many events of the last two months and, in particular, in connection with the October 12 meeting.

The Court is respectfully referred to the affidavit of Felix Rohatyn who makes clear that the Forstmann proposal was, simply, the best proposal available and would be lost if the directors failed to agree to the option and to other requests of Forstmann. Rohatyn's affidavit demonstrates that, among other numerous reasons for approving the deal, the directors were correct in considering, among other things, (1) the substantial risk that Pantry Pride would lower its offer if Forstmann's proposal was rejected; (2) the greater likelihood that a deal with Forstmann would be consummated; and (3) the fact that Revlon's noteholders (the stockholders who tendered into the August exchange offer) would be treated far more fairly by Forstmann than Pantry Pride had ever proposed to do. Rohatyn Aff. ¶¶ 10-16.

Mr. Gluckaman's testimony is also telling on this point. See Gluckman Tr. 145-75. He made very clear that he had not made up his mind on the proposed deal when he entered the October 12 meeting and, indeed, had numerous questions to resolve. Gluckman Tr. 151. His reasons for voting to approve the transaction, among numerous other, were as follows:

> One is I evaluated the Forstmann Little offer in terms of price to the shareholders. I gave consideration to the time value of money, which we have described in an earlier part of my deposition. And that 57.25 figure satisfied me vis-a-vis the other offer that we had under consideration or had been in consideration.
>
> I was particularly -- I thought it particularly important to factor into that what I in my own notes call the fill or kill statement by Teddy Forstmann. It was absolutely clear to me that he was either going to do a deal or walk away from the deal and he was not going to keep it open.
>
> -- Gluckman Tr. 154.
>
> Secondly, in my notes I have financing the transaction. Forstmann was questioned, and I stated before that I have absolutely no reservations based upon his reputation, the ways he has done business in the past. And the response was that the way he financed it was conclusive.
>
> The letter from Pantry Pride is a very unsatisfactory, and I use that word carefully, answer to the Lazard letter and does not indicate a commitment. That is the second paragraph enumerated as number one in the October 11 letter.
>
> So I had a deal that could be financed against something that might be financed but in which Mr. Cittis, the vice chairman, talked of probabilities and not certainties.
>
> -- Gluckaman Tr. 154-55.

Mr. Gluckman also testified as to other reasons for his decisions, among other things, as follows:

> I was concerned with what would happen if Mr. Forstmann withdrew. I had no idea whether Pantry Pride would then cut its offer to a lower price, amend its offer, withdraw its offer, and create chaos for awhile. But I did know that we had no one who was in negotiation or conversation with us who seemed to offer -- who was offering a price for the whole company or were some combination of offers that achieved the $57.25 price.
>
> In addition we had Mr. Bergerac, when he started the meeting, said something which I have been through in my own professional experience, he said the management was in chaos. I was concerned if the offer was withdrawn, we might find we had divisions in which everyone was worrying about what was best for themselves, and would substantially reduce the value of these properties.
>
> That was a real issue. I have talked in my deposition about concern about an obligation to note holders, not because of fear of litigation but what I looked on as the equity of the situation. Those note holders received a piece of paper which in good faith we hoped would trade for par. These were trading at a value that I thought was closer to 86. And the solution offered by Mr. Forstmann, which was a costly one in the transaction, to bring them up to par value, would advantage note holders most of whom, but I have no statistical number, had been shareholders or were shareholders.
>
> -- Glucksman Tr. 155-56.

The Court is also respectfully referred to the affidavit of Simon Rifkind. Rifkind testified that the Forstmann deal is worth $100 million more than Pantry Pride's offer. Rifkind Aff. ¶ 5. His affidavit, in its entirety, reveals the difficult, arduous task that the Revlon Board has faced over the past few months. The Rifkind affidavit graphically demonstrates the nature of that task and the dedicated fashion in which the board discharged its duties.

As director Rifkind concludes:

> Perhaps some other processes, unknown and untested, could have achieved a higher price for the shareholders, although if they did not work the shareholders might have been stuck with Pantry Pride's substantially lower offer. That, however, is in the realm of speculation and hypothesis, which directors operating in the real world cannot indulge in. I can say with absolute conviction that the processes we followed not only were in the best tradition of corporate governance, but also created a competitive environment that yielded for the shareholders a significant premium over the price they were being pressured by Pantry Pride to take before we succeeded in inducing Forstmann Little to bid. If the agreement with Forstmann Little were enjoined, and Pantry Pride left as the sole bidder -- the prospect we faced in reaching our decision -- the consequences for our shareholders and noteholders could be disastrous.
>
> -- Rifkind Aff. ¶ 52.

ARGUMENT

I. THE REVLON BOARD'S ACTIONS WITH RESPECT TO THE ASSET OPTION ARE FULLY JUSTIFIED AND PROTECTED BY THE BUSINESS JUDGMENT RULE.

A. The business judgment rule.

The business judgment rule requires courts to defer to the business decisions of disinterested directors acting in good faith, on an informed basis, and for a rational purpose. Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946, 954 (1985); Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). See also Panter v. Marshall Field & Co., 646 F.2d 271, 293-95 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Johnson v. Trueblood, 629 F.2d 287, 292 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981).

The business judgment rule reflects judicial recognition that the analysis of all business matters -- including takeover-related matters -- calls for the exercise of business judgment within the directors' competence and authority and beyond that of the judiciary. Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 702 (2d Cir. 1980); Johnson v. Trueblood, 629 F.2d at 292-93. Delaware courts have consistently applied the business judgment rule in the context of contests for corporate control. E.g., Unocal, 493 A.2d at 954; Pogostin v. Rice, Del. Supr., 480 A.2d 619, 627 (1984).

The business judgment rule operates as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d at 812; see also Unocal, 493 A.2d at 954. Moreover, where, as here, a majority of directors are independent or outside directors receiving no benefit other than usual directors' fees and have no financial or other interest whatsoever in the conduct being challenged, the presumption of good faith is heightened. Unocal, 493 A.2d at 955; Moran v. Household International Inc., Del. Ch., 490 A.2d 1059, 1075 (1985), appeal pending, Del. Supr., No. 37, 1985 (filed Jan. 31, 1985).

When a board addresses a pending takeover bid, it has an obligation to determine whether the offer is in the best interests of the corporation and its stockholders. The Delaware Supreme Court has recognized that a board of directors must consider "the nature of the takeover bid and its effect on the corporate enterprise". Unocal, 493 A.2d at 955. Even if a challenged action is intended to affect corporate control or defendant directors will retain their positions if a defensive action is successful, the business judgment rule is not rendered inapplicable. Unocal, 493 A.2d at

954-55; Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 702-03 (2d Cir. 1980). To rebut the presumption of the business judgment rule, a plaintiff must "tender evidence from which a factfinder might conclude that the [directors'] sole or primary motive was to retain control". Johnson v. Trueblood, 629 F.2d at 293. No such control motivation is possible on the facts here.

Under the presumption of the business judgment rule, the directors' rational business judgments are entitled to deference. As the Delaware Supreme Court made plain in Unocal, business decisions made in the boardroom are not to be reversed in the courtroom. That teaching is particularly applicable here where there is no danger (much less any evidence) of the directors acting primarily for self-interested motives:

> In Pogostin v. Rice, Del.Supr., 480 A.2d 619 (1984), we held that the business judgment rule, including the standards by which director conduct is judged, is applicable in the context of a takeover. Id. at 627. The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984) (citations omitted). A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be "attributed to any rational business purpose." Sinclair Oil

Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971).

> When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders. In that respect a board's duty is no different from any other responsibility it shoulders, and its decisions should be no less entitled to the respect they otherwise would be accorded in the realm of business judgment. See also Johnson v. Trueblood, 629 F.2d 287, 292-293 (3d Cir. 1980).
>
> -- Unocal, 493 A.2d at 954 (emphasis added).

The proposition that plaintiff urges -- that a board has no role to play and must step aside when faced with an all cash, any-and-all offer -- is ridiculous. That is not, and should not be, the law of Delaware. It is not only the specter of greenmail and the enhanced coercion of partial, two-tier offers that give rise to a duty to evaluate and take action with respect to an offer. As the Supreme Court pointed out in Unocal, other concerns properly considered by directors in fulfilling their takeover responsibilities in the target's boardroom include "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange".

Id. at 955-56. Thus, a board of directors has a duty to evaluate and oppose inadequate offers, including any-and-all offers. E.g., id., (indeed, the Unocal Court found a statutory basis for this: 8 Del. C. § 141(a)); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.) (applying Delaware law), cert. denied, 454 U.S. 1092 (1981); Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984); GM Sub Corp. v. Liggett Group, Inc., Del Ch., No. 6155, Brown, V.C. (Apr. 25, 1980); Northwest Industries, Inc. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969).

Moreover, it is not the fact, as plaintiff would contend, that any-and-all offers are noncoercive. Any-and-all offers, even in cash, can indeed produce coercive effects on stockholders, as the record herein establishes in particular as to Pantry Pride's junk-bond-financed $56.25 tender offer. See Rohatyn Aff. ¶¶ 8-9. Indeed, the courts have recognized that all tenders involve coercion on stockholders. See Radol v. Thomas, 534 F. Supp. 1302, 1312 (S.D. Ohio 1982).

Taking plaintiff at its word (PBI 41), once a company's directors decide that the company will be sold, they must accept the best offer. That is exactly what the Revlon Board did here. No entrenchment motive has been -- or can be -- shown. Accordingly, this Court should uphold the business decisions of the Revlon Board, made in good faith and after careful investigation and consultation with legal and financial advisers.

B. The "lock-up option" is entirely proper.

The "lock-up option" granted by Revlon to Forstmann Little is perfectly valid and plaintiff has not shown and cannot show that the granting of the option was outside of the Revlon Board's valid exercise of business judgment.

As the record establishes beyond dispute, the option was absolutely essential to obtaining the Forstmann $57.25 merger proposal, with its additional, substantial benefits -- benefits which include more certain financing and an exchange offer that will provide some $60 million of value to the noteholders who are overwhelmingly the very same Revlon stockholders. Without the option, there would be no $57.25 offer. Without the option, Revlon could be acquired in an inferior transaction -- including a transaction at less than Pantry Pride's $56.25 tender offer that Pantry Pride could lower (as it has lowered bids in the past). Without the option, there might be no Pantry Pride offer at all for the stockholders to fall back on -- since under the terms of its offer Pantry Pride could walk away for a host of reasons.*

* Cf. Gilbert v. El Paso Co., Del. Ch., 490 A.2d 1050 (1984).

In short, without the option, Revlon and its stockholders would be worse off. In the business judgment of the Revlon directors -- who have no personal self-interest or control-retention motive -- the Forstmann Little proposal made possible only by the option, is superior economically and in all other pertinent respects to Pantry Pride's $56.25 tender offer. There is no basis to second guess that judgment.

The authorities on point -- both under Delaware law and the law of other jurisdictions -- demonstrate convincingly that the issuance of the "lock-up option" was entirely proper.

Last year, in Thompson v. Enstar Corp., Del. Ch., C.A. No. 7641, Hartnett, V.C. (June 20, 1984, revised August 16, 1984), this Court upheld a "lock-up agreement" that gave Unimar voting control over Enstar's alleged "crown jewel", Enstar Indonesia. Not only was it argued that this "lock-up agreement" made Enstar unattractive to other potential bidders, Unimar paid nothing to Enstar for the voting arrangement, other than Unimar's agreement to acquire Enstar at an agreed-upon price. Moreover, voting control over Enstar Indonesia was of critical importance to a large shareholder of Enstar who was likely to win an upcoming election for control over Enstar's board.

In rejecting allegations of corporate waste and breach of fiduciary duty, this Court observed that while "lock-up" arrangements may, depending upon the circumstances, discourage competing bidders, nevertheless, "[t]he test of whether a lock-up provision should be upheld is whether management acted reasonably." Slip op. at 12. The Court then concluded that the Enstar lock-up was permissible, emphasizing that the Unimar offer was expressly contingent on the lock-up being granted. _Id._ In these circumstances, the directors' business judgment could not be assailed:

> While reasonable men may differ as to whether the offer was the best which might ever materialize, the plaintiffs have not met their burden of showing that it was unreasonable for the directors to conclude that, in their judgment, the offer of Unimar was the best which could be obtained under the circumstances and that it was possible it might be soon withdrawn, thus leaving the shareholders of Enstar to face the prospect of liquidation for a much lesser price and at some time in the distant future. The adoption of the lock-up provisions was a necessary prerequisite to Unimar making its tender offer and therefore it is possible that it was reasonable for the directors to accede to Unimar's demand under the unusual circumstances present.
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> -- Slip op. at 13.*

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* Plaintiff's assertion that the _Enstar_ Court declined to enjoin the lock-up agreement only because, at the time the lock-up was given, "[t]here was no competing bid as such" is incorrect. The _Enstar_ Court made this statement while distinguishing two cases cited by the _Enstar_ plaintiffs. The _Enstar_

(footnote continued)

This precise reasoning is dispositive. Forstmann Little's proposal was contingent on the granting of the option, and the directors reasonably believed that there was no other way to secure equivalent gains for the stockholders of Revlon. Plaintiff's attempt to rely on Enstar is misplaced; in fact, the portions of the Enstar opinion cited by plaintiff (PBI 55) further bolster Revlon's position. The Revlon Board -- like the Enstar Board -- was faced with an offer that was explicitly conditioned on virtual immediate acceptance and on the granting of a lock-up option.

The Revlon Board determined that, as a practical matter, it had before it only two choices: (i) Forstmann Little's proposal -- including the lock-up -- which would be lost if not accepted at the October 12 Board meeting, and (ii) the inferior $56.25 Pantry Pride tender offer, which was not likely to be improved, involved substantial risks of non-consummation even if continued to be held out by Pantry Pride, and could be terminated or reduced at any time. The Revlon

(footnote continued)

Court noted that those two cases stand for the "correct legal proposition that a fiduciary faced with competing bids for an asset must accept the higher bid." Id. at 8. To the extent that the facts at bar are different from those in Enstar due to the existence of a competing bid for Revlon (albeit a conditional one that could disappear at any time), the two cases cited in Enstar support Revlon's position -- the Revlon Board "accepted the higher bid."

Board properly exercised its business judgment and granted Forstmann Little the lock-up option in order to ensure a better economic transaction for its stockholders; plaintiff's conclusory assertion that the lock-up is "'calculated primarily to exclude' Pantry Pride" (PBI 58) is rhetoric without basis.

Plaintiff asserts -- repeatedly but incorrectly -- that their $56.25 offer is in fact superior to Forstmann Little's proposal. In making such an argument, it is clear that plaintiff is not using as the "standard of comparison . . . the absolute one of dollars in hand for the same identical thing". Robinson v. Pittsburgh Oil Refining Corp., Del. Ch., 126 A. 46, 49 (1924) (relied upon by plaintiff). Accepting plaintiff's premise, the Revlon Board was entitled to, and did, determine in its informed business judgment that Forstmann Little's offer was superior. That determination was fully supported, indeed compelled, by the higher per share price, the definiteness of the financing and the tremendous added value that will flow to the stockholder/noteholders via the exchange offer. The Board's undisputably rational determination is entitled to deference under the business judgment rule.

It is of no moment that Pantry Pride and its advisors may have formed a different judgment. Neither plaintiff (nor even this Court) may "substitute its judgment for that of the board." Unocal, 493 A.2d at 954. As Robinson itself notes, when the choice involves "something more than the simple process of deciding between the flat offer of two sums of money", the Board is entitled to the protection of the business judgment rule. Robinson, 126 A. at 49; see also Simkins Industries, Inc. v. Fibreboard Corp., Del. Ch., C.A. No. 5369, Marvel, C. (July 28, 1977).

The conclusion of this Court in Robinson is equally applicable here: "it is impossible to escape the conclusion that the real contest in this action is by an unsuccessful bidder against his more fortunate rival." Robinson, 126 A. at 50.

Furthermore, under Delaware law, even outright sales of assets designed to maximize stockholder values in the midst of corporate control battles have been upheld. This Court approved a sale of a "crown jewel" asset in GM Sub Corp. v. Liggett Group, Del. Ch., C.A. No. 6155, Brown, C. (Apr. 25, 1980), a case plaintiff does not even cite. There, Liggett sold its Austin Nichols subsidiary in the face of a hostile tender offer by GM Sub. The Court found that "it seems realistic to assume that it was contemplated by Liggett that the practical effect of the sale of its sought-after asset might be to cause GM Sub to lose interest in its tender offer." Slip op. at 3. Nevertheless, noting that "not every action taken by a board of directors to thwart a tender offer is to be condemned", the Court refused to enjoin the sale of Austin Nichols. Id.

The Court concluded that GM Sub had failed to meet its burden of showing that "the motivation of Liggett in entering into the agreement [to sell Austin Nichols] was to perpetuate the present control of Liggett as opposed to being action taken so as to assure that the best price available is received for Austin Nichols." Slip op. at 5. The Revlon board, to use the words of the GM Sub Court, was seeking to assure the "best price available" for Revlon as a whole.* And here there can be no question of any intent to perpetuate control by the Revlon directors who have acted to put themselves out of control in favor of the transaction they have judged to be the best available.

In Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill.), aff'd, Dkt. Nos. 82-1305, 82-1307 (7th Cir. March 5, 1982) (applying Delaware law), the court upheld Whittaker's

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* Decisions concerning the disposition of corporate assets are committed to the business judgment of the board of directors. E.g., Simkins Industries, Inc. v. Fibreboard Corp., Del. Ch., C.A. No. 5369, Marvel, C. (July 28, 1977), slip op. at 2; Mitchell v. Highland-Western Glass Co., Del. Ch., 167 A. 831 (1933).

sale of its "crown jewel" subsidiary, Sherwood Medical, to a third party, American Home, in the face of a hostile tender offer. The transaction was to be implemented by means of a tender offer by American Home to Brunswick shareholders for the total purchase price of Sherwood, followed by a swap of Sherwood for the Brunswick stock acquired by American Home in its tender offer. The Brunswick board approved the "crown jewel" sale and the American Home offer *despite* the fact that the Brunswick board was advised by its investment bankers that the sale would have a significant adverse affect on the price of Brunswick stock and despite the fact that Brunswick's investment bankers failed to render an opinion recommending the sale of Sherwood. 535 F. Supp. at 941. The court refused to enjoin the sale and reached conclusions of law as follows:

> When confronted with a threatened change in control, a board of directors of a target company may engage in a corporate transaction with a third party that the board determines in its business judgment to be in the best interests of shareholders. . . . In so doing, *the board of directors may enter into various arrangements with the third party to promote consummation of the transaction even though to do so might cause the hostile tender offeror to withdraw*. . . .
>
> *The sale of an asset which has the result of making a company less attractive to a tender offeror can be a proper exercise of a board of directors' business judgment*.
>
> -- 535 F. Supp. at 951 (emphasis added; citations omitted).

The instant case is, if anything, a far _more_ compelling one than _Whittaker_. Unlike the outright _sale_ in Whittaker, Revlon has granted only a conditional _option_ to purchase certain of its assets. And, the disinterested Revlon directors agreed to grant the asset option only because Forstmann Little insisted upon it in arm's-length negotiations as part of a transaction involving the extremely advantageous sale of the _whole company_ -- thus, no entrenchment or control interest of the directors can seriously be raised.

Authority from other jurisdictions is equally strong in support of Revlon's position. For example, in _Buffalo Forge Co._ v. _Ogden Corp._, 555 F. Supp. 892 (W.D.N.Y.), _aff'd_, 717 F.2d 757 (2d Cir.) (applying New York law), cert. denied, 464 U.S. 1018 (1983), the court upheld, among other things, a "lock-up option" granted by Buffalo Forge as an inducement to a white knight to enter into a merger agreement.

The _Buffalo Forge_ decision grew out of a hostile tender offer by Ampco-Pittsburgh for any and all shares of Buffalo Forge stock at $25 per share. Believing that the raider would not increase its bid in the absence of competition, Buffalo Forge -- like Revlon here -- decided not to attempt any negotiations with Ampco. 555 F. Supp. at 898. Instead, in an effort to secure a better deal for Buffalo

Forge's shareholders, the company entered into negotiations with Ogden, a potential white knight. Ogden ultimately entered into a merger agreement with Buffalo Forge pursuant to which Buffalo Forge's shareholders would receive the equivalent of $32.75 per share. As an essential precondition to this merger proposal, Ogden insisted: (i) that Buffalo Forge sell Ogden 425,000 shares of its treasury stock for $32.75 per share to be paid in the form of a promissory note, and (ii) that Buffalo Forge grant Ogden an option to purchase an additional 143,000 treasury shares on similar terms. 555 F. Supp. at 901. Without the sale of stock and the "lock-up option", Ogden refused to agree to a merger. Id. at 900-01.

The bidding for Buffalo Forge continued even after the stock sale and the granting of the "lock-up option", and Ampco ultimately gained control of Buffalo Forge by paying $37.50 per share (thus demonstrating that a "lock-up" cannot really "lock" anything up). Ampco then sought to have both the sale of treasury stock and the granting of the "lock-up option" invalidated on the grounds that the Buffalo Forge directors had purportedly breached their fiduciary duties.

Like plaintiff, Ampco asserted that the grant of the option and the sale of treasury stock were intended to "stifle" bidding for Buffalo Forge and were detrimental to

Ampco's own rights as an acquiror. Both the District Court and the Second Circuit (largely adopting the findings of the District Court) held that the directors' actions were completely proper under the business judgment rule. In Buffalo Forge, as in the instant case:

(a) the option was an "essential feature" of the proposal (555 F. Supp. at 900);

(b) the directors acted upon the advice of legal counsel experienced in takeover matters and qualified investment bankers (555 F. Supp. at 904; 717 F.2d at 759);

(c) the directors did not negotiate out of self-interest (555 F. Supp. at 904); and

(d) the option was negotiated in arm's-length negotiations (555 F. Supp. at 904).

As noted above, Ampco expressly raised the contention that the Buffalo Forge directors should have negotiated directly with Ampco rather than agree to the option. 555 F. Supp. at 896. The Court nevertheless found that the directors acted properly in relying upon professional advisors to determine negotiating strategy. Id. at 904.

In affirming the District Court's refusal to grant relief to Ampco, the Second Circuit emphasized that it would be improper to second-guess business decisions of the board that resulted in gains for the Buffalo Forge shareholders. 717 F.2d at 759. The Second Circuit expressly cited the District Court's findings that: (a) the directors were not motivated by self-interest; (b) the directors were not guilty of fraud or bad faith; (c) the directors properly relied upon advice from their advisors; and (d) the negotiations were at arm's length. 717 F.2d at 759. All of these factors are applicable here and support Revlon's position.*

Moreover, in Mobil Corp. v. Marathon Oil Co., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,375 (S.D. Ohio), rev'd on other grounds, 669 F.2d 366 (6th Cir. 1981), although the district court found that self interest on the part of the directors of a target corporation (Marathon) prevented application of the business judgment rule, the court upheld as "fair and reasonable" an agreement whereby a favored suitor (United States Steel) was granted options to purchase stock and an extremely valuable corporate asset. The court

* Buffalo Forge is one of the leading cases on point and has been followed in other jurisdictions. See, e.g., In re Castle & Cooke Derivative Shareholder Litigation, No. C-85-0063, slip op. at 11 (N.D. Cal. June 28, 1985) (board's decision to grant asset option to merger partner "was a classic exercise of business judgment") (citing Buffalo Forge).

stressed that the grant of the options was a valid concession necessary to obtain a desirable acquisition offer:

> [D]efendants had a reasonable corporate purpose in granting the options. That purpose was to obtain the best possible deal for Marathon shareholders in the face of an inevitable takeover. The granting of the options must be viewed in the context of the entire negotiated transaction between Marathon and United States Steel. The directors clearly established that <u>the option agreements were requested by United States Steel as a part of the transaction; their acceptance by the directors was a necessary step in furtherance of what the directors perceived to be the shareholders' best interests</u>. The record is replete with evidence that the directors thoroughly reviewed the alternatives open to them, diligently investigated the relevant facts, and relied upon the advice of competent professional advisors before accepting the agreements. In sum, the Court concludes from the evidence before it that the defendant directors have borne their burden of showing fairness, corporate purpose, and good faith.
>
> -- ¶ 98,375 at 92,285 (emphasis added).

Courts have made it crystal clear in other cases that the directors of a target company may, in the exercise of their business judgment, grant concessions to a third party in order to obtain better terms for its shareholders than those offered by a raider. This principle applies even where the board's action also makes the target less attractive to the raider. This body of law makes clear that the decision of Revlon's disinterested directors to grant the "lock-up option" to Forstmann Little in order to secure a better deal is beyond challenge.

Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980) (applying New York law) is squarely on point. In Crouse-Hinds, Belden and Crouse-Hinds had entered into a merger agreement. Subsequently, InterNorth commenced a tender offer for 54% of Crouse-Hinds. In response to the InterNorth offer, the Crouse-Hinds board modified the original merger agreement in order to protect the Crouse-Hinds/Belden merger. Pursuant to that modification, the original merger was divided into two parts, the first part of which was an exchange offer in which Crouse-Hinds would issue new shares to Belden security holders for 49 percent of Belden's outstanding stock at the exchange ratio contemplated in the original merger agreement.

The stated purpose of the exchange offer was "to facilitate consummation of the Merger in light of the [InterNorth] Offer and to discourage [InterNorth] from proceeding with the [InterNorth] Offer". 634 F.2d at 696 (emphasis added), quoting the Crouse-Hinds prospectus. The exchange offer document made clear that, among other things, the issuance of new Crouse-Hinds shares in the exchange offer would make it far more expensive for InterNorth to acquire Crouse-Hinds.

InterNorth claimed that the Crouse-Hinds exchange offer was designed merely to perpetuate Crouse-Hinds' management's control of the company by defeating the InterNorth tender offer. The Second Circuit, reversing the grant of a preliminary injunction by the District Court, rejected InterNorth's assertion, finding that the exchange offer served a valid business purpose -- i.e., it secured gains for shareholders through a beneficial merger. 634 F.2d at 703.

Crouse-Hinds stands squarely for the principle that the board of a target company may take actions intended to thwart a hostile tender offer, and that such actions are reasonable when they are intended to achieve other benefits for the target's shareholders. In short, when the target's board has such a reasonable basis -- i.e., a desire to secure other benefits -- to oppose the tender offer, "the offeror cannot, on the theory that the target's management opposes the offer for some other, unstated, improper purpose, obtain an injunction against the opposition without presenting strong evidence to support its theory". 634 F.2d at 704.

Plaintiff has utterly failed to make any such showing. Rather, the evidence points unequivocally to the opposite conclusion -- that Revlon's independent directors decided to approve the "lock-up option" only after careful consideration, after consulting their expert advisors, and with the knowledge that Revlon's stockholders would have the opportunity to benefit from Forstmann Little's superior proposal <u>only</u> if the option were approved.*

The Second Circuit's decision in <u>Treadway Cos.</u> v. <u>Care Corp.</u>, 638 F.2d 357 (2d Cir. 1980) (applying New Jersey law and reversing district court's grant of injunction), is to the same effect. In <u>Treadway</u>, the Second Circuit held that the business judgment rule protected the Treadway board's decision authorizing the sale of a block of Treadway stock to a white knight merger partner. The court held that it was reasonable for the Treadway board to take steps to oppose a hostile offer in order to enhance the likelihood that a more beneficial, friendly merger would succeed. 638 F.2d at 381, 383. The Second Circuit again emphasized that allegations of an improper retention-of-control motive are simply untenable where the target company's board is merely seeking to facilitate a beneficial merger with a white knight:

> The critical fact, <u>in our view, is that the Treadway board was simply not acting to maintain its own control over the corporation</u>. Rather, in approving the stock sale, they were moving Treadway toward a business combination with Fair Lanes. Fair Lanes had made the stock sale a precondition to further merger talks. . . . [T]he <u>consummation of the</u>

* In some respects, <u>Crouse-Hinds</u> was a far stronger case for the plaintiffs therein, since the Crouse-Hinds directors acted knowing that they would remain directors of a Crouse-Hinds/Belden entity. 624 F.2d at 702.

<u>proposed business combination could not be expected to perpetuate control by these directors</u>.

-- 638 F.2d at 383 (emphasis added).

In the face of this overwhelming authority, the remaining cases relied on by plaintiff are wholly inapplicable. Thus, plaintiff maintains that the facts in <u>Data Probe, Inc.</u> v. <u>CRC Information Systems</u>, N.Y.L.J., Dec. 28, 1984, at 7, col. 2 (Sup. Ct. N.Y. Co.) are "similar" to the facts at bar, nothing could be further from the truth.

<u>Data Probe</u> presented a classic case of interested directors engaging in self-dealing.* In connection with a merger agreement, Datatab granted acquiror CRC Information Systems ("CRC") an option to purchase authorized but unissued stock amounting to 200% of Datatab's then outstanding shares. Thus, even if its tender offer for Datatab failed, CRC would still be able to gain control by exercising its option. In <u>dictum</u>, the court concluded that Datatab's issuance of the option was not protected by the business judgment rule.**

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* The Datatab directors' bad faith is evidenced by a director's remark during negotiations that "I don't care about shareholders; we have to take care of ourselves. . . ." <u>Data Probe Acquisition Corp.</u> v. <u>Datatab, Inc.</u>, 568 F. Supp. 1538, 1542 (S.D.N.Y.), <u>rev'd</u>, 722 F.2d 1 (2d Cir. 1983), <u>cert. denied</u>, 104 S. Ct. 1326 (1984).

** The state trial court's entire analysis of the option at issue in <u>Data Probe</u> was <u>dictum</u>, because the court held that the question of the option's validity was moot. N.Y.L.J. at 7, col. 3.

Under Datatab's agreement with CRC, three inside directors of Datatab, all of whom were on month-to-month contracts as officers of Datatab, would receive three-year employment contracts with CRC in the event of a merger. Noting these employment agreements and CRC's agreement to indemnify the Datatab directors in their pocket, the court observed that the directors "had established an extremely cozy relationship with CRC." N.Y.L.J. at 7, col. 3. Because "the employment contracts and the indemnification warranties given by CRC confirm the existence of personal interests by the directors", the burden of proof under the business judgment rule shifted. Id.

Data Probe has no relevance here, where none of the directors has any financial stake in the Forstmann transaction. Absent a showing of director interest, the burden of proof cannot shift under the business judgment rule, and the New York Supreme Court's dictum is wholly inapplicable.

Plaintiff's attempt to draw a parallel between the instant case and Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985), is completely baseless. In Van Gorkom, it was found that the directors of Trans Union had breached their duty of care in approving a leveraged buyout by Jay Pritzker's Marmon Group. Without any advisors, the board approved the merger proposal in a meeting that took place without prior notice that a merger was to be considered, and in the absence of any hostile acquisition attempt or any other circumstances requiring "emergency" action. 488 A.2d at 874. In reaching its decision, the board relied primarily on a 20-minute presentation by Van Gorkom, the chief executive officer of Trans Union, who had negotiated the merger with Pritzker without informing the board or other members of management. Id.

Applying a standard of gross negligence (id. at 873), the court held that "considering all of the surrounding circumstances", the directors had a duty to make reasonable inquiry before reaching their decision. Id. at 875. The directors had voted on the merger proposal without knowing, among other things:

-- that Van Gorkom, who was approaching retirement age, had originated the merger proposal and had himself suggested to Pritzker the $55 per share price on which they subsequently agreed (id. at 866, 874, 877 & n.19);

-- "that Van Gorkom had deliberately chosen to ignore the advice and opinion" of senior members of Trans Union management, who believed that the