price was inadequate (id. at 867, 877 n. 19); and

-- "that Van Gorkom had arrived at the $55 figure based on calculations designed solely to determine the feasibility of a leveraged buy-out" secured by Trans Union's projected revenues, and had not determined the intrinsic value of the company (id. at 877).

In short, the board in Van Gorkom was kept completely in the dark about the transaction that it approved and failed -- to the point of gross negligence -- to make reasonable efforts to enlighten itself. The contrast with the instant case is self-evident.

Plaintiff also asserts that the Revlon Board violated some duty by failing to negotiate with Pantry Pride. In fact, there is no such "duty" to negotiate: any purported "duty to negotiate" upon which plaintiff would rely is utterly without foundation in the law. This lack of legal basis is evident from cases upholding a board's power to enter into exclusive merger agreements, pursuant to which the board promises not to pursue any competing offers -- even if they are superior. See, e.g., Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 741 F.2d 1555, 1563 (9th Cir. 1984) ("[T]o permit a board of directors to decide that a proposed merger transaction is in the best interests of its shareholders at a given point in time, and to agree to refrain from entering into competing contracts until the shareholders consider the proposal, does not conflict in any way with the board's fiduciary obligation".) (emphasis added); Mobil Corp. v. Marathon Oil Co., [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,375, at 92,269 & n.18 (S.D. Ohio), rev'd on other grounds, 669 F.2d 366 (6th Cir. 1981); Belden Corp. v. InterNorth, Inc., 413 N.E.2d 98, 102 (Ill. App. 1980) (upholding enforceability of merger agreement pursuant to which management promised to support merger to the exclusion of any competing offers).

In particular, courts have recognized that a commitment not to negotiate with others is sometimes a necessary quid pro quo in order to get a better deal for stockholders. See, e.g., Jewel Cos., supra, 741 F.2d at 1563 ("[A]n exclusive merger agreement may be necessary to secure the best offer for the shareholders of a firm."). Given the unequivocal authority that a board may commit itself irrevocably to a given merger and thereby exclude all possible competitors, any claim of a "duty to negotiate" is frivolous.

Plaintiff similarly asserts that the Revlon Board breached its duty to pursue the best price available, arguing that Thomas v. Kempner, Del. Ch., C.A. No. 4138, Marvel, V.C. (March 22, 1983), supports the proposition that directors make a "fundamental error of business judgment" by dealing only with one bidder when it was apparent that a second bidder is willing to top the offer in cash. Not only is the factual predicate for that argument nonexistent, it makes no sense. Thomas supports Revlon's position -- the Forstmann Little $57.25 offer coupled with the exchange offer tops the $56.25 offered by Pantry Pride.*

Plaintiff's reliance on DMG, Inc. v. Aegis Corp., Del. Ch., C.A. No. 7619, Brown, C. (June 29, 1984), is equally misplaced. The holding in that case must be restricted to its unique factual setting and, in large part, is based on factors having nothing to do with claims of breach of fiduciary duty and the business judgment rule. DMG, a white knight, sought to enjoin acts intended to undercut the value of an option to buy stock in a subsidiary of target company Aegis afer a raider, Minstar, had gained control of

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* See also Simkins Industries, Inc. v. Fibreboard Corp., Del. Ch., C.A. No. 5369, Marvel, C. (July 29, 1977), slip op. at 7 (Thomas v. Kempner "is a unique case which was decided on a record which indicated that corporate directors failed to give any consideration to a higher cash bid for corporate assets").

Aegis by outbidding DMC. Noting that he "had great difficulty in attempting to resolve the matter" (slip op. at 5), the Chancellor rejected DMC's "novel" attempt to use the business judgment rule <u>offensively</u> as a basis <u>for</u> an injunction. Slip op. at 9. The court held that the business judgment rule can be invoked only <u>defensively</u> and might well be available to the Aegis directors if they were sued for granting the option. Id. DMG is of no help to plaintiff.

* * *

In sum, Revlon's Board acted entirely appropriately in granting the "lock-up option" to Forstmann Little in order to secure the best available deal.

II. STOCKHOLDER APPROVAL OF THE ASSET SALE AND OPTION AGREEMENTS IS NOT REQUIRED <u>UNDER DGCL § 271.</u>

Section 122(4) of the Delaware General Corporation Law empowers every Delaware corporation to "sell, convey, lease, exchange, transfer or otherwise dispose of . . . all or any part of its property and assets . . . ." Section 141(a) of the statute provides that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

Under the authority granted by Section 141(a), the directors of a Delaware corporation are empowered and, indeed, charged to dispose of corporate assets when, in their judgment, to do so is in the best interests of the corporation. Denckla v. Independence Foundation, Del. Ch., 181 A.2d 78, 85 (1962), aff'd, Del. Supr., 193 A.2d 538 (1963).

The only statutory restriction upon the board of directors' authority to dispose of corporate assets is found in Section 271, which requires stockholder approval of the sale, lease or exchange of "all or substantially all" of the corporation's assets.

The forerunner of present Section 271 was enacted in 1916, but without the phrase "or substantially all". The words "or substantially all" were added in the 1967 general revision of the Delaware General Corporation Law, and were understood to codify the widely accepted understanding that the phrase "all of its property and assets", which had theretofore been the statutory standard, embraced a transaction which left a transferor corporation retaining only cash or other current assets. See Folk, Delaware Corporation Law: Study of Statute With Recommended Revision 399-400; Siegal, When Corporations Divide: A Statutory and Financial Analysis, 79 Harv. L. Rev. 534 (1966).

The understanding of Section 271 was refined in Gimbel v. Signal Cos., Del. Ch., 316 A.2d 599 (1974), aff'd, Del. Supr., 316 A.2d 619 (1974), and more recently by Katz v. Bregman, Del. Ch., 431 A.2d 1274 (1981), request for interlocutory appeal denied, Del. Supr., C.A. No. 123 (May 1, 1981); Desmedt v. Gardner, Del. Ch., C.A. No. 6430 (June 26, 1981); and Bacine v. Scharffenberger, Del. Ch., C.A. No. 7862, 1984 (Dec. 11, 1984).

Gimbel, which was heard on a motion for a preliminary injunction, involved a sale of assets representing 26% of the total assets of Signal Companies, Inc. ("Signal"), 41% of Signal's total net worth, and 15% of Signal's revenues and pre-tax earnings. Finding that under a straight "quantitative" test stockholder approval was not required, the Chancellor spoke to the type of transaction subject to Section 271, saying:

> It is important to note in the first instance that the statute does not speak of a requirement of shareholder approval simply because an independent, important branch of a corporate business is being sold. . . . The statute requires shareholder approval upon the sale of "all or substantially all" of [the] corporation's assets. That is the sole test to be applied. While it is true that the test does not lend itself to a strict mathematical standard to be applied in every case, the

> qualitative factor can be defined to some degree notwithstanding the limited Delaware authority. But <u>the definition must begin with and ultimately necessarily relate to our statutory language</u>.
>
> -- 316 A.2d at 606 (emphasis added).

Addressing further the need for stockholder approval, the Chancellor stated that a "qualitative" test must also be applied:

> While it is true that a transaction in the ordinary course of business does not require shareholder approval, the converse is not true. Every transaction out of [the] normal routine does not necessarily require shareholder approval. The unusual nature of the transaction must strike at the heart of the corporate existence and purpose.
>
> * * *
>
> It is in this sense that the "unusual transaction" judgment is to be made and the statute's applicability determined. If the sale is of assets quantitatively vital to the operation of the corporation and is out of the ordinary and substantially affects the existence and purpose of the corporation, then it is beyond the power of the Board of Directors.
>
> -- <u>Id</u>. at 606.

Under either a "quantitative" or a "qualitative" test, it is clear that Revlon has not sold or agreed to sell "all or substantially all" of its assets within the meaning of Section 271 (even assuming exercise of the Vision Care/NHL asset option).

As the Loomis Affidavit states (at ¶ 16), on a quantitative basis, the Beauty Care Group's assets represented 36.3% of Revlon's total assets at December 31, 1984. Vision Care's and NHL's assets represented 5.9% and 2.8%, respectively, of Revlon's total assets at December 31, 1984. It is readily apparent that, viewed separately, neither transaction represents a sale of substantially all of Revlon's assets on a quantitative basis.

And it is clear that the transactions must be viewed separately for purposes of Section 271. At the time the sale of the Beauty Care Group was approved (October 3), the Revlon Board had not formed any plan or intention to sell any other assets. The option agreement with Forstmann was approved at a later time and involves a different purchaser and different circumstances. There is no reason in law or logic to treat the two independent transactions as one.

The decision in Bacine v. Scharffenberger, supra, supports the view that the transactions must be viewed independently. In that case, City Investing agreed to sell three of its assets for $1.2 billion. One month after the

Board approved the sale, the Board approved a plan of liquidation. The plaintiff claimed that the asset sale should be viewed as being part of the plan of liquidation and was, therefore, subject to a stockholder vote. The Court rejected the argument.

Even if one views the two transactions as one -- which would not be proper -- the potential sales of the three divisions do not require Revlon stockholder approval. At year-end 1984, the three divisions together represented only 45% of Revlon's total assets. And they have not accounted for more than one-half of Revlon's assets in any of the last five years. Loomis Aff. ¶ 16. Plaintiff's repeated statements that Revlon would be selling 59% of its assets (PBI 62) are totally misleading. Plaintiff's 59% figure is an estimate of the percentage of Revlon's <u>operating</u> assets being sold, i.e., total assets less corporate assets. Every case cited by plaintiff relies on <u>total</u> assets in assessing the applicability of Section 271. When corporate assets are included, as they properly should be, it is apparent that significantly less than one-half of Revlon's assets are involved in the challenged transactions.

<u>Desmedt</u> v. <u>Gardner</u>, <u>supra</u>, fully supports Revlon's position here. In that case, the plaintiff claimed that the

proposed sale at issue involved 60.7% of the corporate defendant's assets and 42% of its estimated net income for the most recent three-month period. See Plaintiff's Memorandum for a Temporary Restraining Order, Desmedt, supra. In lifting a temporary restraining order, the Chancellor held that Section 271 was not applicable as the asset sale at issue did not "present a case of the proposed sale of substantially all of [the defendant's] corporate assets . . . ." Desmedt, slip op. at 1. With only 45% of Revlon's total assets involved here, the same result must be reached.

The proposed and potential asset sales, likewise, do not run afoul of the "qualitative" test set forth in Gimbel. In that case, the Court focused on Signal's corporate existence and purpose as of the time of the sale of assets, observing that Signal had developed into a conglomerate corporation engaged in several distinct lines of business. Similarly, in Bacine the Court was not persuaded that the qualitative test would be met in connection with the sale of three important subsidiaries of a conglomerate. See also Moore, The Sale of All or Substantially All Corporate Assets Under Section 271 of the Delaware Code, 1 Del. J. Corp. L. at 56, 60 (1976) (arguing that the sale of independent branches of the business of a conglomerate is not within the ambit of Section 271).

Like the corporations involved in <u>Gimbel</u> and <u>Bacine</u>, Revlon is not a corporation engaged in a single line of business. Even if Beauty Care, Vision Care and NHL are sold, Revlon will continue to be engaged in substantial businesses with assets of over $1.27 billion, sales of over $935 million and operating profit of over $111 million in 1984. Loomis Aff. ¶ 15. Pantry Pride's argument that the sale of the Beauty Products Group for which Revlon is identified by the public and which was Revlon's original business proves nothing. The Beauty Care Group now constitutes only one of Revlon's several major business segments; the present-day Revlon is much more than a beauty products company. <u>See Gimbel</u> v. <u>Signal Cos.</u>, Del. Ch., 316 A.2d 599, 607-08 (1974) (sale of oil and gas operation did not require shareholder approval even though company's "original purpose was oil and gas").

Pantry Pride's principal reliance is placed on <u>Katz</u> v. <u>Bregman</u>, supra. That case is clearly distinguishable. In <u>Katz</u>, the plaintiff was challenging a transaction in which Plant Industries proposed to sell its Canadian operations which represented 51% of Plant's total assets and, thereafter, embark in a line of business representing a "radical departure from plaintiff's historically successful line of business". After elimination of intracompany charges and taxes, it was apparent that the Canadian operations were Plant's only profitable businesses and that Plant's remaining operations were all unprofitable. Indeed, two months later in Desmedt v. Gardner, supra, Chancellor Marvel (who decided Katz) made it clear that the basis for his decision in Katz was the fact that the remaining operations were losing money.

No such facts are presented here. The Revlon divisions that will remain if all three sales are effected earned over $111 million in 1984. Loomis Aff. ¶ 15. Unlike Katz, Revlon will still own substantial earning assets if all three divisions are sold. And Revlon is not going to embark on any "radical departures" from its traditional businesses.

In sum, as the Supreme Court stated in Gimbel, the definition of substantially all "must begin with and ultimately necessarily relate to [the] statutory language". 316 A.2d at 605. The sale of less than one-half of a corporation's assets cannot be labelled "substantially all" without doing violence to that language. Plaintiff's argument is without merit.*

* It may be noted that Delaware counsel to Revlon and Forstmann Little each separately opined in writing on October 12 that the sales of the Beauty Group and the proposed Vision Care/NHL option would not constitute a sale of substantially all the assets even if viewed as a single, integrated sale.

III. THE REVLON BOARD'S ACTIONS WITH RESPECT TO THE RIGHTS PLAN ARE FULLY JUSTIFIED AND PROTECTED BY THE BUSINESS JUDGMENT RULE.

A. The beneficial function of the Revlon Rights Plan.

Plaintiff's attack on the Revlon Rights Plan is misguided and misfocussed, concerning itself with arguments and facts that have been mooted by the Revlon Board's recent actions. As discussed above, at its October 12 meeting, the Revlon Board effectively altered the terms of the Rights Plan to provide that the Rights would be redeemed immediately prior to the consummation of <u>any</u> transaction -- including a transaction initiated by Pantry Pride -- in which all Revlon stockholders received $57.25 or more per share in cash for all their shares. In addition, the Revlon management participants in the initial Forstmann leveraged buyout have dropped out of the deal. Thus, there is no possible argument of self-dealing or interest on the part of Revlon's management or Board and no possible claim that the treatment of Pantry Pride -- or any other potential bidder -- under the Rights Plan is in any way discriminatory or disadvantageous.

Plaintiff's brief is thus permeated with mischaracterization. It is argued that the Revlon Board is acting "to preserve for management the benefits of the leveraged buyout" (PBI 30), when there are no management benefits in the leveraged buyout. It is argued that the Rights are being used to favor a leveraged buyout "favoring management" (PBI 44) when management is not "favored" at all. It is argued that the Rights are being kept in place by the directors "for the improper purpose of . . . favoring their own proposal" (PBI 43) and for "[t]he only reason [is] to advantage management's proposal" (PBI 47), when there is no "management's proposal" and no "directors' proposal." It is argued that the Rights are being used "to advantage management" (PBI 47), when management has not been advantaged in any respect. Rather, the stockholders have been advantaged, as it was the Rights Plan that has protected the stockholders here by ensuring that only any-and-all cash offers would be made and by encouraging the ensuing very substantial increases in the value being provided to the stockholders.

The Rights Plan has thus functioned to serve a perfectly legitimate corporate purpose -- to insure that Revlon stockholders receive a minimum of $57.25 in cash for all their shares regardless of who the purchaser is (as well as the other substantial benefits). Plaintiff's argument that this is not a valid use for the Plan is baseless.

As discussed previously, the Board of Directors of a target company is entitled to -- indeed, it is obligated to -- consider not only the structure of a takeover bid but the adequacy of the price offered. Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946, 955-56 (1985). See also Panter v. Marshall Field & Co., 646 F.2d 271, 288 (7th Cir.), cert. denied, 454 U.S. 1092 (1981). There is nothing in Delaware law that requires a Board of Directors to sit by idly and allow an economically inferior tender offer to be consummated when a superior merger proposal is available as an alternative. Indeed, plaintiff itself argues (see PBI 41-43) that Revlon's Board is obligated to pursue the best possible price for Revlon stockholders. That is precisely what Revlon's directors have done, and that is precisely what the Rights Plan has facilitated.

There can be no argument in this case that the Revlon Board has misused its authority with respect to the Rights Plan. The Revlon Board, faced with the conditional Pantry Pride tender offer and the definite Forstmann proposal of greater value determined in its good faith business judgment that the Forstmann offer was superior and in the best interests of Revlon and its stockholders. Any bidder willing to meet or beat the Forstmann proposal will find its offer unencumbered by the Rights Plan. Revlon's Board has, in effect, used the Rights Plan to establish a "floor" for the bidding for the company. At the time of the initial Forstmann offer, the floor was $56. It has now been raised to $57.25. And, of critical import, Forstmann was demanding that Revlon redeem the Rights only for Forstmann. The Revlon Board is amply justified in adjusting the Rights Plan as it did as a negotiated compromise to leave all bidders on an equal footing.

In this respect, the Rights Plan operates similarly to a "lock-up option" which gives one bidder an inducement to raise its bid. However here, the effect is less than a lock-up since _any_ party making an offer above the threshold price will be unaffected by the Plan. As lock-ups are unquestionably legal under Delaware law (_see_ Argument I, _supra_), the Revlon Board's use of the Rights Plan in this manner must too, _a fortiori_, be found proper.

B. _Schnell_ and _Lerman_ _are inapposite here_.

Plaintiff's remaining arguments with respect to the Rights Plan are equally bereft of merit. First, plaintiff claims that the Rights Plan constitutes a manipulation of the corporate machinery, working an inequitable result in violation of Schnell v. Chris-Craft Industries, Inc., Del. Ch., 285 A.2d 430 (1971) and Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980). See PBI 35-40. Nothing could be further from the truth. The Revlon Board has stated that the Rights will be redeemed upon the consummation of any all-cash transaction at or above $57.25 a share. There is manifestly nothing inequitable in this decision. Indeed, Revlon's Board rebuffed Forstmann's request that the Rights Plan be redeemed for other bidders only if they bid more than $57.25. Pantry Pride is on precisely equal footing with Forstmann in this regard. The Rights are not having "'the effect of removing [Pantry Pride's Offer] from the contest altogether'" (PBI 40). Pantry Pride has been topped, plain and simple, and it is certainly not a fiduciary breach for a Board of Directors to seek a higher price for the stockholders in preference to a lower one.

Moreover, Schnell and Lerman are plainly distinguishable. In Schnell, the Court found that management's last-minute change of the regularly scheduled annual meeting date had been made "for the purpose of perpetuating [management] in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders . . . to undertake a proxy contest . . . ." 285 A.2d at 439. Management's actions were invalidated only after the Court found on the evidence presented that management's actions were undertaken for an improper and self-interested purpose. Furthermore, management's actions had made it virtually impossible for the plaintiffs to wage a successful proxy fight. As shown above, that is not remotely the record in the case at bar.

The decision in Lerman v. Diagnostic Data, Inc., is likewise inapposite. There, management rendered it literally impossible for dissidents to mount a challenge by first creating a rule that non-management nominations for board positions be filed 70 days prior to any meeting of stockholders and then giving only 63 days' notice of the meeting. Management's purpose was obviously to avoid a proxy contest and its actions entirely disabled the stockholder from engaging in such a contest to elect his own nominees. No such situation is presented here. The Rights Plan has not so disabled or disadvantaged Pantry Pride. Plaintiff has not shown, and cannot show, that Revlon's predominantly independent Board of Directors is in any way seeking to perpetuate itself in control.

C. Revlon's directors have sought
<u>the best economic alternative.</u>

Plaintiff argues that once the decision was made to seek a purchaser for the company, its directors were obliged to seek the best price available. See PBI 41-43. That is precisely what the Revlon directors have done. Plaintiff's argument on this score boils down to the claim that in its judgment, Revlon's directors erred and that the Pantry Pride offer is economically superior to the Forstmann offer. The judgment of Pantry Pride and its advisor on this, however, is not conclusive or even pertinent. It is besides the point.

Revlon's directors in the exercise of their independent, informed business judgment determined that the Forstmann proposal is economically superior to Pantry Pride's and in the best interests of Revlon and its stockholders. This determination was fully informed. It was untainted by any conceivable personal financial interest.

Under the business judgment rule, the directors' decision in this regard is beyond question absent a showing of fraud or self-dealing (see Argument I.A, supra) -- a showing that plaintiff has not made and cannot make. "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)." Unocal, 493 A.2d at 954.

D. The Revlon directors have acted with a proper purpose consistent with their duty of loyalty.

Plaintiff's final argument is that the Rights Plan should be enjoined because Revlon's Board has impermissibly used it to entrench itself and to advance management's interests over those of Revlon's stockholders. PB 43-51. The facts belie this claim. Revlon management no longer has any role in the Forstmann leveraged buyout. And far from entrenching itself, the Board has instead acted to put itself out of office. Pantry Pride's further assertion that six of Revlon's fourteen directors are interested in the Forstmann offer because they have "golden parachutes" is grasping at straws -- whether Forstmann succeeds or Pantry Pride succeeds, those executives will be entitled to the same payments; there is nothing in the Forstmann proposal about any of the "parachutes".* In sum, plaintiff's allegations in this regard are groundless.

* Notably, plaintiff seeks no relief with respect to the so-called "golden parachutes".

Rather than acting improperly, the record shows that Revlon's Board has acted single-mindedly to protect and promote the interests of Revlon and its stockholders. Plaintiff's own litany of supposed "horrors" (PBI 45-47) reveals that this is so: Pantry Pride made its first offer to acquire Revlon common stock for $47.50 on August 23. As a result of the steps taken by Revlon's Board, Revlon stockholders are now being offered $57.25 for their common stock (and significantly more valuable notes in exchange for the existing debentures).

In total, the Forstmann merger proposal represents an increase of approximately $400 million in the total consideration to Revlon shareholders over Pantry Pride's initial offer. This single fact speaks far more loudly than plaintiff's misplaced diatribe.*

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* Plaintiff also asserts that payment of Forstmann Little's cancellation fee (in the event the deal with Forstmann Little falls through) should be enjoined on the grounds that it is an attempt to shut Pantry Pride out of the bidding and, as such, is a waste of corporate assets. PBI, Point III. This argument is without merit. First, the fee was a prerequisite for Forstmann Little to make its offer. The Revlon Board validly exercised its business judgment and determined that the Forstmann Little proposal -- including the fee -- was in the stockholder's best interests and thus accepted it. Just as the Board acted properly in connection with the asset option, so they acted properly here. Second, the cancellation fee in no way "shuts Pantry Pride out of the bidding." Third, no imminent irreparable injury to plaintiff exists here, as payment of the cancellation fee is not imminent. Finally, plaintiff has an adequate remedy at law if payment of the fee is ultimately held to be improper and plaintiff is damaged.

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IV. THE RIGHTS SHOULD NOT BE INVALIDATED "AB INITIO".

Plaintiff devotes almost an entire second brief (the one by Skadden Arps, "PBII") to the contention that the Revlon Note Purchase Rights should be invalidated "ab initio." Whatever is meant by that, it is clear that this line of attack is even further removed from the present reality of this case than plaintiff's other attacks. And it is certainly as meritless.

A. Plaintiff's "ab initio" argument ignores the present reality of this case.

Plaintiff's second brief begins with the premise that this is a case about:

> the abuse by Revlon's board of poison pill defenses to stop any "unfriendly" acquisition efforts, including those completely lacking in any element of unfairness, coercion, or divisiveness.
>
> -- PBII 1.

This supposed deterrence of "any hostile acquisition," it is asserted,

> results from the artificially high price of $65 per share put in the Rights by the Revlon board. That the $65 price is a sham valuation, meant only to drive away bidders, is crystal clear on the record in this case.
>
> -- PBII 6-7.

All of this is obviously written in a brief taken "off the shelf" for a motion plaintiff never made. It ignores reality. The Rights were not intended to and certainly in fact did not "stop any 'unfriendly' acquisition efforts" -- the Rights were followed by a host of unfriendly acquisition efforts by Pantry Pride itself. The Rights have provided very substantial benefits to the stockholders: their issuance led to Pantry Pride's series of any-and-all offers and an increase of $400 million in value to Revlon stockholders.

Similarly, the $65 initial price is now totally irrelevant. The Revlon Board has committed to redeeming the Rights in favor of any cash offer at $57.25 per share or better -- by Pantry Pride or anyone else. There is no point in arguing now about where $65 is "artificially high" or a "sham." The Rights are not an impediment to any transaction at $57.25 or better, and that is certainly not an "artificially high" price (indeed, it is the price Forstmann Little is offering to pay).

In short, the Rights Plan has worked. It has led to a tremendous increase in value to the stockholders since Pantry Pride's first bid. Plaintiff's brief ignores what we are privileged to know has in fact occurred in this situation.

Plaintiff's "ab initio" brief is an invitation to a useless exercise in amnesia.

B. The Rights are not void because not <u>reasonably related to any threat posed</u>.

Plaintiff's "not reasonably related" argument (PBII, Point I) partakes of the same anachronistic quality. It urges that the Rights should be "voided" because the Rights are "overbroad", "impose their prohibitive economic penalty on <u>all</u> acquirors and all acquisition proposals, irrespective of their nature and terms", and will "prevent [Revlon's] stockholders from receiving an offer for their shares." PBII 14, 17 (plaintiff's emphasis).

This rhetoric is inapposite in the here and now. The Rights have not and will not impose on "<u>all</u> acquirors and all acquisition proposals." The Rights have not and will not prevent the stockholders from receiving an offer. Again, the Rights will be redeemed in favor of <u>any</u> offer by <u>any</u> acquiror of $57.25 per share or better in cash. The Rights have prohibited and prevented nothing. To the contrary, the Rights have encouraged the takeover bargaining that has led to a large increase in value to the stockholders.

Plaintiff's argument is also meritless on other grounds. Pantry Pride is simply wrong in arguing that <u>Unocal</u>

established some rule that defensive steps are only appropriate in the face of the enhanced coercion of two-tier offers or the specter of greenmail. As demonstrated in Argument I.A, supra, the Board's right and responsibility to protect the stockholders in the takeover context does not evaporate whenever someone makes an any-and-all offer. The directors remain entitled and obligated to assess the adequacy of the price (and other pertinent factors), and if the company is to be sold, to take steps designed to maximize the price -- a proposition that one would have thought Smith v. Van Gorkom (which involved a merger with no partial or two-tier concerns) to have finally settled.

As Unocal and numerous other cases clearly show, the directors' duties include assessing the "inadequacy of the price offered" -- the very first of the takeover potential "threats" that are proper subjects of director analysis as listed in Unocal, 493 A.2d at 955. And defensive measures have been judged under the business judgment rule in the context of any-and-all cash offers in a host of cases in Delaware and applying Delaware law. See Argument I.A, supra.

An any-and-all offer is no excuse for directors to retreat to the sidelines, nor is it a license for the raider to demand that they do so. In the takeover context, "a board of directors is not a passive instrumentality." Unocal, 493

A.2d at 954. It does not become one because an any-and-all tender offer is made.. See also Unocal, 493 A.2d at 955 n.10:

> It has been suggested that a board's response to a takeover threat should be a passive one. Easterbrook & Fischel, [Takeover Bids, Defensive Tactics, and Shareholders' Welfare,] 36 Bus. Law. at 1750. However, that clearly is not the law of Delaware, and as the proponents of this rule of passivity readily concede, it has not been adopted either by courts or state legislatures. Easterbrook & Fischel, [The Proper Role of a Target's Management In Responding to a Tender Offer], 94 Harv. L. Rev. at 1194.

Plaintiff's argument is also inconsistent with the established principle that the business judgment rule applies to both prospective and reactive defensive measures. EAC Industries, Inc. v. Frantz Manufacturing Co., Del. Ch., C.A. No. 8003, Walsh, V.C. (June 28, 1985), slip op. at 21; Moran v. Household International, Inc., Del. Ch., 490 A.2d 1059, 1075-76 (1985).* And it virtually ignores this Court's opinion in Household which upheld a similar Rights Plan against the same specific challenge that it deters "all hostile takeover attempts", id. at 1071, and did so notwithstanding that the Rights Plan at issue there also embraced

* It can no longer be disputed that "directors who have the responsibility for the governance of the corporation are entitled to formulate a takeover policy, whether it be to meet a specific threat or a general prospective one, even though that policy may not please all its shareholders." Household, 490 A.2d at 1079; see also Unocal, 493 A.2d at 953-55, 955 n.10, 955-56.

all potential acquisitions of the company's stock, not simply two-tier offers with a greenmail threat.

Indeed, to the extent the Revlon Rights differ from the Household Rights, the Revlon Rights are, if anything, somewhat more limited in purpose and effect. In Household, this Court found that the "flip over" provision in the Household Rights resulted in "immediate and devastating" dilution to the acquiror upon any second-step, regardless of price; in light of such provision, the Court found that the Household Rights virtually eliminated hostile two-tier offers. See Household, supra, 490 A.2d at 1066, 1077. The Revlon Rights, in contrast, do not impede an offer (two-tier or otherwise) but only seek to assure that the value of the second-step is not less than the $65 value determined by the Revlon Board. In short, the Revlon Rights were designed only to protect the value received in the second-step transaction, while the Household Rights (as long as they remain in place) may prevent any second-step at any price thereby forcing an acquiror who wishes to acquire the entire company to do so in one step or have the Household Rights redeemed, either by winning control through a proxy fight or by negotiating with the Household Board.

As discussed in the Statement of Facts, supra, at the time the Rights Plan was adopted, it was designed to give the Revlon Board a chance to protect stockholders against a low-priced transaction for any-and-all shares or against a two-tier transaction. The Rights were adopted in a period of massive confusion in the marketplace with a grossly inadequate (and underfinanced) offer on the horizon. The Rights were designed to provide incentives to potential acquirors to pay a full price, to deal fairly in their proposals, and to negotiate with the Revlon Board, which would have the bargaining power to protect and maximize the values of Revlon for its stockholders. The Rights achieved this purpose.

Further, plaintiff's argument is also misguided in its emphasis on the $65 price initially set by the Revlon Board. Even as an "ab initio" matter, the argument ignores that the Board retained the power to redeem the Rights if doing so would be for the best interests of the stockholders. See Household, 490 A.2d at 1083. It also ignores the record which establishes that $65 was an appropriate price at that time and certainly not without economic justification. Cf. Household, 490 A.2d at 1077:

> [T]he ten year life of the Plan required the Board to make a long range prediction of the conversion price. In view of Moran's estimate that Household had a present "break-up" value of $52 per share, the Board's selection of $100 is not without economic justification.

And in any event plaintiff's argument is entirely irrelevant given the Board's commitment to redeem the Rights in favor of <u>any</u> offer of $57.25 per share or better.

Finally, plaintiff's attempt to mount an "ab initio" "reasonable relation" argument on this belated, emergency application is an improper attempt to force a decision on matters that should be decided only upon a full evidential showing. "The application of the business judgment rule to the Rights Plan is a central issue which can only be considered upon an evidential showing. . . ." <u>Household</u>, 490 A.2d at 1072.

* * *

Plaintiff's "ab initio" brief also raises a number of statutory arguments relating to the Rights which were essentially not in this case until that brief was filed. These afterthoughts are all without merit.

The terms of the Revlon Note Purchase Rights are contained in the Rights Agreement. The issuance and dividend of the Note Purchase Rights by Revlon to its common stockholders was within the power and authority of the Board of Directors under §§ 141(a), 160(a), 122(13), 170 and 173 of the DGCL. The Note Purchase Rights are obligations of the corporation to purchase its common stock and to issue debt in exchange therefor, as authorized by §§ 141(a), 160(a) and 122(13), which obligations were distributed as a dividend, as authorized by §§ 170 and 173. Plaintiff's belated arguments that the Note Purchase Rights are something else that is not authorized by the DGCL are unprecedented -- plaintiff cites no pertinent authority -- and without merit.

C. The Rights are authorized by the Delaware General Corporation Law.

As the Delaware Supreme Court made clear in Unocal, in dealing with takeover-related issues, "[t]he board has a large reservoir of authority upon which to draw." 493 A.2d at 953. That reservoir of power, as Unocal also makes clear, includes "the inherent powers conferred by 8 Del. C. § 141(a), respecting management of the corportion's 'business and affairs,'" id.,* and further,

> the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source. See e.g., Panter v. Marshall Field & Co., 646 F.2d 271, 297 (7th Cir. 1981); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 704 (2d Cir. 1980); Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977); Cheff v. Mathes, 199 A.2d at 556; Martin v. American Potash & Chemical Corp., 92 A.2d at 302; Kaplan v. Goldsamt, 380 A.2d at 568-69; Kors v. Carey, 158 A.2d at 141; Northwest Industries, Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 712 (M.D. Ill. 1969).
>
> -- Unocal, 493 A.2d at 954.

* In quoting DGCL § 141(a), the Supreme Court added its emphasis to the words "and affairs".

The Supreme Court in Unocal further confirmed the broad authority of a Delaware corporation under DGCL § 160(a) to "purchase", "acquire", "exchange" and "otherwise deal in and with" its own common shares. 493 A.2d at 953; see also Cheff v. Mathes, Del. Supr., 199 A.2d 548, 554 (1964); Lowenschuss v. Option Clearing Corp., Del. Ch., C.A. No. 7972, Brown, C. (March 27, 1985), slip op. at 8-12; Alcott v. Hyman, Del. Ch., 184 A.2d 90, 94 (1962), aff'd, Del. Supr., 208 A.2d 501, 508 (1965); Kors v. Carey, Del. Ch., 158 A.2d 136, 140 (1960); Lawson v. Household Finance Corp., Del. Ch., 147 A. 312, 316 (1929), aff'd, Del. Supr., 152 A. 723 (1930); Bankers Securities Corp. v. Kresge Department Stores, Inc., 54 F. Supp. 378 (D. Del. 1944).

The power to acquire or agree to acquire shares under § 160(a) is not limited to any particular percentage of the outstanding common stock, nor is it limited by whether the exercise of the power is invoked to deal selectively with the stockholders, or whether its exercise would work a fundamental change in the capital structure of the corporation. See Unocal, supra, 493 A.2d at 953-54; Lowenschuss, supra, slip op. at 12. Absent capital impairment or director misconduct, such as fraud or an improper primary purpose to maintain control, the right of a Board of Directors to obligate the corporation to repurchase its own stock is absolute.

Further, it cannot be doubted that § 160(a) confers power on the Board of Directors to exchange debt securities for common stock, and to obligate the corporation to do the same. Section 160(a)(1) provides that "[n]othing in this subsection shall invalidate or otherwise affect a note, debenture or other obligation of a corporation given by it as consideration for its acquisition by purchase, redemption or exchange of its shares. . . ." See Unocal, supra; Lowenschuss, supra. Indeed, the very creation of the Note Purchase Rights may be viewed as authorized under § 160(a) since the Rights simply constitute an obligation of Revlon to exchange notes for stock as authorized by Unocal, supra, under certain conditions (subject to the Board's ability to redeem the Rights). Indeed, the Rights, upon exercise, would be equivalent in effect to the selective self-tender offer sustained in Unocal.

Creation of the Note Purchase Rights was also authorized under DGCL § 122(13). The Rights arose, and exist, by virtue of the Rights Agreement entered into by Revlon with the Rights Agent. The power to make contracts, such as this, is express in § 122(13), which was added to the DGCL in the 1967 general revision that was intended to enhance the powers and flexibility afforded directors of Delaware corporations. Folk, The Delaware General Corporation Law 38 (1972) (Section

122(13) was without counterpart in prior Delaware law). Moreover, § 122(13) authorizes the issuance of "notes" and "other obligations." Section 122(13), like § 160(a), provides ample power to the Board of Directors to enter into binding commitments, such as created under the Rights Agreement, to issue obligations such as the Rights and the Senior Notes for which the Rights may be exchanged.

Authority to distribute the Note Purchase Rights to the Revlon stockholders as a dividend is clearly within the power of the Board of Directors under DGCL §§ 170 and 173. Section 173 provides that dividends may be paid "in property" which certainly includes the Rights. See, e.g., Kraft Foods Co. v. Commissioner of Internal Revenue, 232 F.2d 118, 122 (2d Cir. 1956) (dividend of newly-created debentures valid under Delaware law); cf. Venner v. Southern Pacific Co., 279 F. 832, 834 (2d Cir.) (property dividend of rights to acquire stock in another company), cert. denied, 258 U.S. 628 (1922); Miller v. Steinbach, 268 F. Supp. 255, 272-73 (S.D.N.Y. 1967) (property dividend of stock warrants). Plaintiff does not even attempt to dispute that the Rights, once validly created, may be distributed to the stockholders as a dividend pursuant to § 173.*

* In passing, in a footnote, plaintiff urges that the Rights dividend violated DGCL § 213 because, in the future, Revlon shares may be issued along with Rights, thus somehow extend-

(footnote continued)

Plaintiff's claim that the Note Purchase Rights are statutorily invalid is bottomed on the assertions _first_ that the Rights are "rights of the common stock" (PBII 18) and, _secondarily_, that they further are "redemption rights" (PBII 23). Based on these assertions, plaintiff argues that the Rights are illegal under DGCL §§ 151(a) and 151(b), respectively.

Wholly apart from the other infirmities in plaintiff's argument, as demonstrated _infra_, it bears emphasis as an initial matter that plaintiff's entire attack is fundamentally misguided. Plaintiff's statutory arguments all seek to attach a characterization to the Note Purchase Rights which manifestly does not fit. This effort to have the Court reach out to label the Rights as statutorily invalid is inconsistent with the overall policy of the DGCL to enhance the power and flexibility afforded to the directors of Delaware companies to meet ever changing threats to the corporate enterprise such as those engendered by the recent wave of raids on

(footnote continued)

ing the dividend to multipled record dates. PBII 21n. This argument misses the mark. If Rights are to be delivered along with shares of common stock in future issuances, such delivery will occur as part of the issuance of stock, not as a dividend. The only stockholders to receive the Rights through a dividend are the holders of record as of August 30, 1985, the dividend record date. There is no multiplicity of record dates for the Rights dividend, and Section 213 has not been violated.

companies whose stockmarket value is temporarily depressed in relation to underlying asset values.*

Plaintiff's entire approach is thus irreconcilably at odds with the Delaware Supreme Court's reaffirmation in Unocal that the policy of Delaware is to read the corporate statute flexibly as an enabling statute, particularly insofar as concerns director power to protect the corporate enterprise from unfair and inadequate takeover threats. Plaintiff's strained effort to read the DGCL restrictively is further irreconcilable with the Supreme Court's admonition that: "Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited." Unocal, 493 A.2d at 957. Plaintiff's approach is equally at odds with the Supreme Court's recognition that where the Board is acting in the area of its "large reservoir of power" (including specifically the § 141(a) and § 160(a) powers) in the takeover context, the Board also derives ample power "from

* The DGCL is express on the point that director powers granted by the statute or the certificate of incorporation include not only the powers specified but also "any powers incidental thereto" where "necessary or convenient" to a proper corporate purpose. DGCL § 121. Section 121 was broadened in the 1967 revision of the DGCL. Its predecessor authorized only the exercise of power "expressly given" and prohibited exercises of powers not expressly given (or necessary to powers expressly given). See Folk, The Delaware General Corporation Law 33 (1972).

its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source." Unocal, 493 A.2d at 954. And plaintiff's entire approach also suffers from the infirmity that it would engender undesirable uncertainty and unpredictability as to the scope of a corporation's power to purchase and deal in its own stock. See Lowenschuss, slip op. at 12.

Beyond all this, plaintiff's hyper-technical § 151 attacks are entirely without merit.

D. The Rights are not illegal under DGCL § 151(a).

1. The Rights are not "rights of the common stock."

Plaintiff's first statutory contention is that the Note Purchase Rights are illegal under DGCL § 151(a) because they are "rights of the common stock" conferred without charter amendment. This contention is based upon a fundamentally mistaken factual premise which plaintiff hardly bothers to even argue. Plaintiff simply ignores the fact that the Note Purchase Rights are a separate security from Revlon common -- separately registered with the SEC, separately listed by the NYSE and with separately identifiable financial and trading characteristics.* Plaintiff's argument is also without any basis in law.

a. The Rights are securities separate from Revlon common stock.

The terms of the Rights are inconsistent with plaintiff's conclusory characterization of them as "rights of the stock." The characteristics of the Rights that are inconsistent with plaintiff's characterization include the following:

-- Here, as in Household, once the Note Purchase Rights are triggered, separate rights certificates will be issued and the Note Purchase Rights will be freely tradeable separate and apart from Revlon common stock. Rights Plan § 3(a). At that time, separate trading markets will emerge for Rights and for Revlon common stock, and persons will own Rights without owning common shares, and vice versa.**

* For additional background relevant to the Revlon Rights, the Court is respectfully referred to the affidavits of Simon Orme and Robert B. Allardice submitted in opposition to the pending partial summary judgment related to the Phillips Note Purchase Rights Plan in Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7899.

** The fact that, as in Household, the Rights are evidenced by common stock certificates (with a summary of the Rights attached thereto) before they are triggered hardly demonstrates that they are not separate securities from the common. It has long been the law in Delaware that stock cer-

(footnote continued)

-- No Note Purchase Rights will be issued in respect of any shares of common stock issued by Revlon after the Rights have been triggered. It is difficult to maintain that the Note Purchase Rights are a right or characteristic of the common stock when shares of the common stock may be issued without Rights. Rights Plan, p. 1.

-- Under the Rights Agreement, exercise consideration other than shares of Revlon common stock will be used in a variety of circumstances:

(i) If after the Rights become exercisable, Revlon declares a dividend on its common stock of debt or other securities (other

(footnote continued)

tificates are only evidence of shareholding and do not themselves constitute the shares. Mau v. Montana Pacific Oil Co., Del. Ch., 141 A. 828, 831 (1928); Baker v. Bankers' Mortgage Co., Del. Ch., 135 A. 486, 488 (1926). Indeed, DGCL § 158, which provides that "[t]he shares of a corporation shall be represented by certificates," expressly permits a board of directors to provide by resolution that "some or all of any or all classes or series of its stock shall be uncertificated shares." Since securities of Delaware corporations need not even be evidenced by certificates, there is no conceivable legal significance to the fact that the Note Purchase Rights, while inchoate, are evidenced by Phillips common stock certificates rather than separate certificates.

In any event, once the Rights are triggered, separate Note Purchase Rights Certificates will be issued. See Rights Plan § 3(a).

than common stock), cash (other than the regular cash dividend), or assets, the consideration payable upon exercise of the Rights includes the securities or non-cash assets that constituted the dividend. Rights Plan § 10(c)(ii). In such circumstance, then, the exercise consideration would include securities and/or non-cash assets in addition to Revlon common stock.

(ii) In the event that Revlon is a party to a merger and is the surviving company, the consideration upon exercise of the Rights is adjusted to include whatever kinds of securities and property were received for common shares in the merger. Rights Plan § 12(a). In such circumstance, the exercise consideration could include any manner of property or securities other than Revlon common shares (such as preferred stock or debt securities).

(iii) In the event that Revlon is a party to a merger and is not the surviving company, the consideration upon exercise of the Rights (which unlike the common stock survive the merger) is adjusted to equal the securities and other property which the Revlon common stockholders received in the merger. Rights Plan § 12(b). In such circumstance, the exercise consideration could include not only property but securities (be they common shares, preferred shares or debt securities) of a company other than Revlon. And the fact that the Rights will continue to exist when Revlon common stock ceases to exist renders untenable any suggestion that the Rights are a "characteristic" or "right of" the common stock.

(iv) If Revlon stockholders are squeezed out of their equity investment in a cash-out merger for less than the Rights price, the Rights alone -- with no other exercise consideration whatsoever -- may be exercised in exchange for Senior Notes (reduced in amount by the cash merger price). See Rights Plan § 12(c).

-- Once the Rights are triggered, they become freely tradeable. From that point on, an owner of both common stock and Rights will have the option to sell either his Rights or his common stock or both: he will not be required to own Revlon common stock in order to own Rights, and vice versa. Since Rights and shares of common stock will each be tradeable separately, Revlon common stockholders will not necessarily hold an equal number of Rights and common shares. Plaintiff's assertion that "the exercise of each Right depends on ownership of a corresponding common share" (PBII 18n) is false.*

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* Like the Household Rights, the Revlon Rights are not separately transferable or exercisable until the occurrence of a triggering event. See Household, 490 A.2d at 1073: "[T]here is presently no separate class of rights holders. The rights are affixed to the common shares and in the absence of a triggering event, are not separately tradeable or exercisable." That is so because here, as in Household, it is critical to the success of the plan that the Rights and shares of Revlon common stock not trade separately until the Rights are triggered. Were the Rights to trade separately before they were triggered, a raider could defeat the purpose of the plan by buying up the Rights separately prior to, rather than at the same time as, it acquired 30% of the shares of Revlon common stock. The raider would thus effectively nullify the protections of the Rights against a second-step squeeze-out merger at less than $62 per share, as adjusted.

Moreover, the fact that the Rights will trade with shares of common prior to their becoming exercisable hardly demonstrates that the two securities are one. It is not uncommon in today's securities markets for "paired" or "stapled" securities to be issued. Corporate notes and debentures are not infrequently issued with "attached" warrants as part of a unit; the debt instrument initially evidences the right to receive warrants, which are not separately transferable until

(footnote continued)

-- Moreover, the Rights are not identified to particular shares of common stock. To exercise any Rights he does own, a Rightsholder will not be required to surrender to Revlon the precise shares as to which his Rights were issued or any particular common shares. Rather, a Rightsholder who does not own shares of Revlon common stock (or any other property or securities then constituting the exercise consideration) but who wishes to avail himself of the opportunity to purchase Senior Notes would be entitled to purchase shares of common stock plus any other required consideration for this purpose. Similarly, a common stockholder (or holder of any other required consideration) who wishes to purchase Senior Notes would be entitled to buy Rights and exercise them. It is anomalous to say that the right to purchase

(footnote continued)

months later when separate warrant certificates are issued. Similarly, it is not unusual for companies to issue shares of common stock with warrants attached; the warrants trade with the common until subsequently detaching and trading separately. See the Allardice Affidavit submitted in Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7899. And, in some instances, the common shares of two related companies trade as a single paired unit. See, e.g., Wincorp Realty Investments, Inc. v. Goodtab Inc., Del. Ch., C.A. No. 7314, Brown, C. (Oct. 13, 1983). In none of these instances are the "paired" securities viewed as a single security, even though they are traded as such for a period of time.

notes is an inherent characteristic of or a "right of" a particular security when that security alone (here, Revlon common stock) cannot be utilized to purchase notes.

b. There is no legal support for the proposition that the Rights are "rights of the common stock."

Plaintiff cites no authority that would support its proposition that the Rights are "rights of the stock." The two cases that are cited clearly do not support any such proposition.

Thus, in Starring v. American Hair & Felt Co., Del. Ch., 191 A. 887, aff'd, Del. Supr., 2 A.2d 249 (1937), a stockholder brought suit to enjoin the defendant corporation from redeeming shares of its common stock. The corporate charter contained a provision expressly making the company's common stock "subject to call and redemption . . . at the option of the corporation." Since Section 27 of the 1927 version of the DGCL limited the power to redeem to "preferred or special shares," the question presented was whether the common stock at issue was "special" within the meaning of the statute. The Court held that it was not, since examination of the defendant's charter did not reveal that the common stock enjoyed "anything in the nature of a preference or a relative, participating, optional or other special right." See 191 A. at 890-91.

Contrary to plaintiff's assertion (PBII 18), the Starring Court was not called upon to decide, and did not decide, whether a "right to exchange existing stock for a specified consideration . . . is a right of the stock" which must be set forth in the corporate charter. The Court held only that any preference or special right that would entitle the corporation to redeem the shares under former Section 27 had to be set forth in the charter. Starring does not even purport to address whether, and under what circumstances, a corporation may contract to repurchase its shares through some means other than redemption. Nor does Starring provide any support to plaintiff's effort to mischaracterize the Note Purchase Rights as "rights of the common stock."

Plaintiff's reliance on Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Manufacturing Co., Del. Supr., 24 A.2d 315 (1942), is also misplaced. The plaintiff stockholder there brought suit to enjoin the adoption of an amendment to a corporate charter increasing the number of authorized Class A shares. Plaintiff claimed that under Section 26 of the 1927 version of the DCCL, common stockholders were entitled to a separate class vote on the amendment because their "special rights" were being altered so as to affect their shares adversely. In rejecting plaintiff's claim, the Supreme Court adopted Starring's definition of "special" shares. In so doing, the Court did not even discuss whether -- much less hold that -- a "right to exchange existing stock for a specified consideration . . . is a right of the stock" which must be set forth in the corporate charter.

2. There is no distinction under DGCL § 151(a) between the Revlon Rights and the Household Rights.

Plaintiff does not even purport to distinguish this Court's decision in Household with respect to DGCL § 151(a). Indeed, there is no principled distinction between the Household Rights plan and the Revlon Rights plan for purposes of DGCL § 151(a). The Household Rights, like the Revlon Rights, were distributed as a dividend to common stockholders and conferred certain privileges to Rightsholders without any amendment to the Household certificate of incorporation. Moreover, the Household Rights, like the Revlon Rights issued here, were attached to, and tradeable only with, shares of Household common until a triggering event occurred. See Household, 490 A.2d at 1066.

Plaintiff does seek to distinguish Household on the ground that the exchange consideration for the Revlon Note Purchase Rights is Revlon common stock. See PBII 18n. As has already been shown, however, it is simply not the case that the exercise consideration for the Note Purchase Rights will invariably be shares of Revlon common stock. Moreover, the purported distinction simply will not wash. The alleged invalidity of the Rights is the grant of "poison pill rights" to common stockholders without amendment of the charter. There is no principled basis for asserting that a charter amendment is required if the consideration for exercise of the "poison pill rights" is shares of common stock, but that no charter amendment is required if the consideration takes some other form. And the distinction in no sense supports the contention that the Revlon Note Purchase Rights are "rights of the common stock."

3. <u>The Rights are not void under DGCL § 151(a).</u>

Plaintiff contends that DGCL § 151(a) prohibits a corporation from conferring any "rights" upon the shares of its stock except as provided in its certificate of incorporation or, where the certificate expressly permits, in a Board resolution "providing for the issue of such stock." As has already been shown, plaintiff's position rests upon a fundamental mischaracterization of the Rights. The Rights Agreement creates entitlements that inhere in the Note Purchase Rights themselves, not in shares of common stock. The Note

Purchase Rights are securities separate and distinct from Revlon common stock; a holder of common stock alone has no right to require Revlon to acquire his shares.

Telvest, Inc. v. Olson, Del. Ch., C.A. No. 5798, Brown, V.C. (March 8, 1979), does not support plaintiff's § 151(a) argument in any respect. Telvest does not stand for the proposition that a board may not "alter the rights of outstanding common stock for the supposed good of the shareholders without permitting the shareholders to be heard" (PBII 21). Whatever its precedential weight,* Telvest at most stands for the proposition that a board cannot create a new class of preferred stock that is indistinguishable from the existing common stock except for a special feature designed to alter voting rights to the disadvantage of an existing substantial stockholder. Unlike the securities involved in Telvest, the Note Purchase Rights have no voting

* The precedential value of Telvest is questionable. Chancellor Brown himself later stated that, while he believed "that that decision was a proper one on its facts," it "[is] an unreported decision on an emergency injunction application" that was, by necessity, prepared "hastily." National Education Corp. v. Bell & Howell Co., Del. Ch., C.A. No. 7278, Brown, C. (Aug. 25, 1983), slip op. at 5, 9. Moreover, as noted in Household, one of the principal alternative bases for the decision -- namely, Chancellor Brown's conclusion that a board could not amend the certificate of incorporation by board resolution pursuant to a "blank check" stock power -- was promptly overruled by the Legislature in a clarifying amendment to DGCL § 151(g). 490 A.2d at 1077.

power and thus do not affect the voting rights of any Revlon stockholder. Telvest is simply inapposite. See Household, 490 A.2d at 1077; National Education Corp. v. Bell & Howell Co., Del. Ch., C.A. No. 7278, Brown, C. (Aug. 25, 1983), slip op. at 10.

E. The Rights are not illegal under DGCL § 151(b).

As demonstrated in Argument D immediately supra, there is no merit to plaintiff's primary contention that the Rights are "rights of the common stock." Necessarily, then, there can be no merit in the secondary contention that the Rights are not only "rights of the common stock" but also "redemption rights" of the common stock invalid under DGCL § 151(b).

Plaintiff's § 151(b) argument suffers from numerous other infirmities as well. It is fundamentally flawed: it ignores the difference between redemption rights, which inhere in shares, and commitments to repurchase shares arising from other sources. Plaintiff ignores the many characteristics of the Rights which make it absolutely clear that the Rights do not inhere in the common stock and do not make the common stock "subject to redemption" within the meaning of § 151(b).

1. The Rights do not make the common stock "subject to redemption."

It is fundamental that the power of Delaware corporations under DGL § 160 to deal in their own stock is separate and distinguishable from the power under § 151(b) to issue redeemable stock. See, e.g., Dalton v. American Investment Co., Del. Ch., 490 A.2d 574, 586-87 (1985); SEC v. Sterling Precision Corp., 393 F.2d 214, 217 (2d Cir. 1968) (Friendly, J.). See also Martin v. American Potash & Chemical Corp., Del. Supr., 92 A.2d 295, 301-302 (1952) (distinguishing power to repurchase from power to redeem shares under former § 28 (now § 244) and holding Starring inapplicable to purchases as opposed to redemptions).

DGCL § 160(a), in pertinent part, provides:

> Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares.

Section 160(a) confers "broad authority upon a corporation to deal in its own stock." Unocal, 493 A.2d at 953. Section 160(a) authorizes boards of directors to obligate corporations to purchase their shares subject to the restriction that such obligations not impair capital (see, e.g., DGCL § 160(a)(1); Pasotti v. United States Guardian Corp., Del. Ch., 156 A.

255, 257 (1931); In re International Radiator Co., Del. Ch., 92 A. 255 (1914)), whether by the self-tender offer endorsed by the Delaware Supreme Court in Unocal or by other means.

It is clear from both the structure of the DGCL as well as the numerous cases in which the Delaware courts have sanctioned binding commitments to purchase a substantial portion of the outstanding common shares, e.g., Unocal, supra (offer to purchase 49 per cent of common stock); Lowenschuss, supra, that Delaware law requires a distinction between redemption rights set forth in the corporate charter and which are inherent in the shares themselves, and binding obligations to purchase shares arising from other sources. Clearly, the common understanding is that shares are "subject to redemption" only when the relevant right inheres in the shares and devolves upon the owner of the shares merely by virtue of his ownership:

> In some cases shares are issued with an option to the purchaser to resell to the corporation at a later date or with an option to the corporation to repurchase under certain conditions or with an agreement that, if certain events occur, the subscriber will resell and the corporation will repurchase. . . . If the agreement or option for the repurchase of the shares is set forth in the certificate of incorporation so that it becomes an inherent characteristic of the shares, the shares are commonly referred to as 'redeemable' or 'callable' shares.
>
> -- Cary, Corporations 1590 (4th ed. 1969).

See also Dodd, *Purchase and Redemption by a Corporation of its Own Shares: The Substantive Law*, 89 U. Pa. L. Rev. 697, 719 (1941) ("The term 'redeemable shares' as used in this article will be confined to shares which are made redeemable by provisions in the articles of incorporation"); Jones, *Redeemable Corporate Securities*, 5 So. Cal. L. Rev. 83, 84-86 (1931) ("'Redemption', as the word is used herein, is restricted to the repurchase or repayment by a corporation of its outstanding obligations in accordance with the provisions and terms in the securities themselves").

As one author has explained:

> Strictly, a right to *redeem* springs from a provision in the articles of association, by-laws or share certificate existing at the time the shares were created and obtaining with respect to all the shares of a given class.
>
> -- Note, *Redemption of Preferred Shares*, 83 U. Pa. L. Rev. 888, 889 (1935).

Thus, rights that do not inhere in the shares and do not devolve merely by virtue of share ownership, but arise from an independent source such as the Note Purchase Rights, cannot be "redemption rights" of the shares, as that term is used in corporation law. *See* Dalton v. *American Investment Co.*, *supra*, 490 A.2d at 586-87; *SEC* v. *Sterling Precision Corp.*, *supra*, 393 F.2d at 217, 219 (debentures and preferred stock which are redeemable by their terms are not "purchased" by the corporation but are "discharged" and this distinction between purchase and redemption is recognized by Delaware corporation law).

Here the same facts which show that the Note Purchase Rights are not "rights of the common stock" but rather independent securities conclusively demonstrate that the conditional right to put shares to Revlon which plaintiff attempts to label a "redemption right" does not inhere in Revlon common stock, but arises from an independent source, the Note Purchase Rights. Thus, it is simply false (contrary to plaintiff's assertion, see PBII 23n) that the Rights are "not exercisable apart from the common shares (i.e., the right to compel the purchase is always dependent upon ownership of common stock." In the event of any merger involving Revlon, the exercise consideration may well not be the common stock of Revlon but may include property or securities of a company other than Revlon or may be nothing more than the Right itself. See Rights Plan § 12(a)-(c).

Moreover, after the Rights become exercisable, the Rights and the Revlon common stock will not trade together. Rather, the Rights will trade separately from the Revlon common stock, so that Rightsholders need not be stockholders, and stockholders need not be Rightsholders. To some extent, in fact, there must be separate markets for the Revlon common stock and the Rights, once the latter become exercisable and separately transferable, since it is inevitable that there will be, at the least, 30% fewer Note Purchase Rights than common shares outstanding at that point.

These facts completely undermine plaintiff's position. They establish that:

-- the Rights can survive the demise of the Revlon common stock (it is illogical to claim that the Rights are redemption rights of the common stock when the Rights will continue to exist when the common stock does not exist);

-- the Rights can survive the demise of Revlon as a company and give Rightsholders rights to securities of another (non-Revlon) company;

-- the Rights can, under certain conditions, be exercised for consideration other than Revlon stock including securities of a company other than Revlon, and in the event of a cash-out merger, Senior Notes can be purchased by the exercise of the Note Purchase Rights alone;

-- the Rights, once exercisable, will trade separately from the Revlon common stock and be held by persons who do not own Revlon common stock, and Revlon common stock will be held by persons who do not hold Rights; and

-- possession of a common share does not bring a Right with it once the Rights became exercisable and separately transferable and the holder of a Revlon common share will then have to separately obtain and pay for a Right (or Rights) to exchange such share for a Revlon Senior Note.

Plaintiff ignores these characteristics of the Rights because there is no way plaintiff can explain them consistently with its simplistic view that the Rights are redemption rights of the common stock. Plaintiff cannot explain how "stock redemption rights" could survive the common stock and even Revlon itself. Plaintiff cannot explain how "stock redemption rights" could be exercised for consideration other than the stock. Plaintiff cannot explain how "stock redemption rights" could trade separately from the stock, or how one could own the stock and yet not own the "stock redemption rights."*

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* To be contrasted is the redemption feature of the Note Purchase Rights themselves. That redemption right is part of the Right itself, is in no sense ever separate from the Right and is not dependent upon any other instrument or source. That is what a redemption feature or right looks like.

Nor can plaintiff suggest that the Rights give rise to any of the problems traditionally associated with redeemable common stock and thus provide any reason to classify the Rights as redemption rights of the common stock. Redeemable common stock is disfavored because stock redeemable at the option of directors gives directors the ability to remove shareholders deemed "troublesome," thus undermining corporate democracy, see Starring v. American Hair & Felt Co., Del. Ch., 191 A. 887, 890, aff'd, Del. Supr., 2 A.2d 249 (1937); Comment, Unqualified Redemption of Common Stock: A Question of Public Policy, 50 Northwestern L. Rev. 558, 563 (1955), and because redeemable common stock raises the spectre of a company with no equity. See Starring, 191 A. at 892; Glens Falls Insurance Co. v. National Board of Fire Underwriters Building Corp., 63 Misc. 2d 989, 992, 314 N.Y.S.2d 80, 83-84 (N.Y. Sup. 1970).

The Rights do not give the Revlon Board any power to eliminate stockholders. The Rights are exercisable only at the option of Rightsholders, not the Revlon Board, and then only after the Rights become exercisable. Moreover, the Rights cannot result in a "zero-equity" Revlon. Because the Rights of any "Acquiring Person" become null and void upon the triggering event of a 30% or more acquisition, the Rights can be exercised with respect to, at most, 70% of the Revlon common stock. Thus, the Rights do not give rise at all to any of the problems traditionally associated with redeemable common stock.

2. Plaintiff's arguments are all without merit.

Plaintiff seems to argue that stock is subject to redemption whenever there is "an option to compel the company to purchase the common stock at a stated price upon the occurrence of a specified event" (PBII 22). No such definition of "redemption right" can be accepted consistently with the Delaware courts' broad interpretation of the power of corporations to purchase and otherwise deal in their own shares under DGCL § 160(a). All binding commitments of corporations to purchase their shares -- including the Unocal self-tender offer specifically endorsed by the Delaware Supreme Court as well as the issuer exchange offer sanctioned by this Court in Lowenschuss -- would clearly be "redemption rights" of common stock, in plaintiff's view, because they all confer rights upon the stockholders to compel the corporation to purchase shares at a stated price upon a stated event. Plaintiff's interpretation of the DGCL would render these commitments -- long sanctioned by the Delaware courts under § 160(a) -- illegal under DGCL § 151(b).

Not surprisingly, this expansive definition of "redemption right" is not supported by any authority. In fact, in Dalton v. American Investment Co., Del. Ch., 490 A.2d 574, Brown, C, (1985), this Court carefully distinguished between redemption of stock pursuant to terms in the share contract and repurchase of shares pursuant to § 160 in holding that an issuer's repurchase of preferred shares, not by lot and at negotiated prices, would not violate its duty to redeem shares by lot and at a price stated in the terms of the preferred. Id. at 586-87. Dalton recognizes the distinction between redemptions and repurchases -- the very distinction plaintiff's entire argument necessarily ignores.

Similarly, this Court's opinion in Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7899, Walsh, V.C. (Feb. 12, 1985), is instructive in its summary rejection of the related "redemption" argument pressed by the plaintiff there. Plaintiff there argued that Mesa's agreement in the December 23, 1984 Phillips/Mesa agreement either to have its Phillips common stock exchanged for debt securities in the recapitalization (if approved by the stockholders) or to sell its shares to Phillips (if the recapitalization were not approved) constituted a "redemption" of Mesa's common shares rendering such shares ineligible to vote under DGCL § 160(d). Rejecting this "redemption" theory -- which, like the theory here advanced, confuses "purchases" and "redemptions" and is based on a definition of "redemption" that is inconsistent with long-established usage -- this Court held:

It is clear, however, that Mesa's shares have not been "called for redemption" within the meaning of Section 160(d) and are still exercisable for voting purposes even though subject to a "put" requirement.

-- Edelman, slip op. at 13.

Here, too, the Revlon common stock has not been made redeemable even though it is subject to a conditional repurchase option provided in the Note Purchase Rights.

F. The Rights are authorized under the DGCL.

As previously set forth (Argument III.C), creation and issuance of the Note Purchase Rights by Revlon was authorized by DGCL §§ 141(a), 122(13), 160(a), 170 and 173. In the face of that clear statutory authority, there is no merit to plaintiff's argument that the Rights are not authorized under the DGCL because they are rights to acquire debt instruments or notes.

Plaintiff does not dispute, as it cannot, that after Unocal and Lowenschuss there is no longer any room to question a corporation's power under DGCL § 160(a) to exchange debt securities for shares of its common stock. Yet plaintiff contends that a corporation may not take the lesser step of providing for the possibility of a future exchange of debt for stock. Plaintiff's argument is nonsensical. The power of the corporation to obligate itself under specified conditions to a future exchange of debt securities for shares of its common stock may be found in various provisions of the DGCL including:

-- DGCL § 122(13), which authorizes the corporation not only to "issue notes," as plaintiff concedes (POB 47), but also to "[m]ake contracts," "incur liabilities" and to "issue . . . obligations";

-- DGCL § 160(a), which broadly authorizes the corporation to "purchase or redeem its shares," and to contract to repurchase its shares under specified conditions, as made clear in Unocal and Lowenschuss;

-- DGCL §§ 170 and 173 which authorize the payment of dividends in "property";

-- DGCL § 141(a), which was recognized in Unocal as an independent source of Board power for actions taken in response to takeover activity perceived to be harmful to the company and its stockholders.

Plaintiff's quick tour of various sections of the DGCL (PBII 25-26) shows at most that rights to acquire notes are not specifically mentioned in the statute. Exactly the same argument was made concerning the selective self-tender offer in Unocal, and clearly rejected by the Delaware Supreme Court, which stated: "Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited." Unocal, 493 A.2d at 957. Rights to acquire notes are clearly authorized under the general powers of corporations to purchase and deal in their own shares, create and issue notes, make contracts and incur obligations.

Equally meritless is plaintiff's expressio unius est exclusio alterius argument (PBII 25-26) that DGCL § 157 "authorizes rights to purchase stock, not rights to purchase notes." Application of this doctrine of "literalism" and "plain meaning"* to DGCL § 157 yields only the unsurprising result that rights to acquire notes are not authorized by § 157. Since § 157 itself refers only to rights or options to purchase stock, § 157 itself authorizes only rights or options to purchase stock. That conclusion is of no help to plaintiff whatsoever.

Any argument from the inclusion within the DGCL of a specific section authorizing stock options to a legislative intent to prohibit any other types of options not involving the purchase of new stock is clearly fallacious. The DGCL's

* See 2A Sutherland, Statutory Construction §§ 47.23-47.25 (1984).

grant of authority to issue stock options in § 157 cannot be taken to limit a corporation's ability to issue other kinds of options under other grants of authority in the DGCL. Nothing in the expressio unius doctrine dictates that specific mention of one thing in one section of a statute should be taken to exclude another thing from coverage under another part of the statute.

Plaintiff's argument also ignores that § 157 is one of the many provisions of the DGCL designed to deal specifically with special problems that arise from the issuance of stock. The Legislature manifestly did not intend § 157 to codify all the kinds of option contracts into which a Delaware corporation can enter. The predecessor of § 157 was passed in 1927 to make clear that Delaware corporations could issue rights and options on their own stock, then a relatively new practice untested in the courts. See Arsht, A History of Delaware Corporation Law, 1 Del. J. Corp. Law 1, 11 (1976); Berle, Investors and the Revised Delaware Corporation Act, 29 Colum. L. Rev. 563, 570 and n.8 (1929). Indeed, that section was one of a number added to the Delaware General Corporation Law in 1927 and 1929, largely at the behest of the investment community, to make clear that then current methods of financing were allowed. Id. at 563-64. Subsequent amendments have merely clarified the extent and limits of the power to issue stock rights and options, especially to employees. See Folk, The Delaware General Corporation Law 127-44 (1972).*

In light of this history, the argument that because § 157 deals only with rights and options to acquire capital stock (i.e., only with its intended subject) an intent to exclude other types of rights and options from the scope of the DGCL's other authorization provisions should be implied, is especially specious. In Alcott v. Hyman, Del. Ch., 184 A.2d 90 (1962), aff'd, Del. Supr., 208 A.2d 501 (1965), the defendant corporation (Associated) sold virtually all of its assets to another corporation (United) in exchange for shares of Associated stock. Plaintiff claimed that, under the expressio unius doctrine, former DGCL § 271's authorization of the sale of substantially all assets in return for the "stock . . . of, any other corporation or corporations" had to be read to preclude a corporation's sale of assets in exchange for its own stock. Since the legislative history revealed that the General Assembly had intended to clarify, and not restrict, corporate power, the Court declined to apply the doctrine. Id. at 94.

* "Section 157 was intended to protect the directors' business judgment in consideration inuring to the corporation in exchange for creating and issuing stock options." Michelson v. Duncan, Del. Supr., 407 A.2d 211, 224 (1979).

Acceptance of plaintiff's expressio unius argument would entail the obviously absurd result that options to buy or sell assets, or the many other commonplace forms of option contracts that are not mentioned in DGCL § 157, would be unauthorized under the DGCL. Plaintiff's argument has nothing to commend it.

Indeed, because the Rights are authorized under DGCL §§ 141(a), 160(a), 122(13), 170 and 173, plaintiff's arguments against the Rights are further deficient under the doctrine of independent legal significance. Under this fundamental doctrine of Delaware corporate law, the grants of authority in the DGCL are to be interpreted independently of each other, and a grant of or limitation on authority under one section of the DGCL is not to be taken as limiting what can be done under another section of the statute to achieve the same result. Delaware courts have repeatedly invoked this doctrine in rejecting challenges to action validly taken pursuant to one section of the DGCL on the ground that it "really" or "de facto" was taken, or accomplished a result that could have been achieved, under another section, with which there was no compliance. See, e.g., Rothschild International Corp. v. Liggett Group Inc., Del. Supr., 474 A.2d 133, 136 (1984); Orzeck v. Englehart, Del. Supr., 195 A.2d 375, 377 (1963); Moran v. Household International, Inc., Del. Ch., 490 A.2d 1059, 1077 (1985).

Here Pantry Pride's charges amount to nothing more than the theory that by issuing the Rights Revlon has "de facto" added a redemption right to its common stock in violation of § 151(b)'s prohibition of "redeemable" common stock and § 151(a)'s requirement that "rights of the stock" appear in the charter. Since the Rights are a separate, validly issued security, the doctrine of independent legal significance conclusively refutes this "de facto right of the stock"/"de facto redeemable stock" theory.

This Court's decision in Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 8003, Walsh, V.C. (June 28, 1985), is also instructive in this regard. The plaintiff there made the nearly identical argument that the recapitalization there at issue constituted a statutorily forbidden "redemption of common stock." Slip op. at 19. This Court rejected that contention, finding that "the Phillips' exchange is in technical complaince with Delaware statutory law" and concluding that "[u]nder the doctrine of independent legal significance this approach appears sustainable." Id., citing Orzeck v. Englehard, supra.

The same result should follow here. Revlon's authority to distribute the Note Purchase Rights is clear under several provisions of the DGCL. The fact that "the exchange under the [Note Purchase Rights] plan will result in each [Rightsholder] receiving a [debt] instrument upon the surrender of a pure equity instrument" (see Edelman, slip op. at 19), does not preclude the application of the doctrine of independent legal significance to validate the Rights.

Moreover, plaintiff's reliance on Gaskill v. Gladys Belle Oil Co., Del. Ch., 146 A. 337 (1929), is misplaced. In Gaskill the stockholders attempted to add certain liquidation preferences to one class of stock by unanimous stockholder amendment of the by-laws. The Court ruled that the purported preferences were void because the DGCL required that they appear in the charter. Id. at 341. It is significant to note that the corporation in Gaskill did not even claim to have a statutory basis for conferring liquidation rights by by-law. Gaskill, then, stands only for the proposition that liquidation rights of capital stock must appear in the corporate charter and may not be altered by by-law. Gaskill does not hold that a corporation may not use any of its other statutory powers to issue securities exchangeable, with shares of capital stock, for the company's notes. Gaskill has no relevance here.

V. PLAINTIFF'S ATTACK ON THE EXCHANGE OFFER COVENANTS IS WITHOUT MERIT.

Plaintiff's argument concerning the covenants in the notes and preferred stock of the August Revlon exchange offer is of a piece with Plaintiff's arguments concerning the Rights. It is behind the times.

Plaintiff begins its argument with the assertion that the covenants were intended by the Revlon directors

> [t]o ensure absolutely their continuing control of Revlon's destiny.
>
> -- PBII 27.

Plaintiff goes on to urge that the covenants

> will have the effect of drastically crippling Revlon as a viable economic entity not only in the event of an unwanted takeover but also in the event the sitting board of Revlon loses its control over Revlon at any time in the future for any reason.
>
> -- PBII 27.

These assertions are inapposite in view of the current posture of this case. Plaintiff's attack on the covenants is meritless and provides no basis for any relief.

__First__, for all intents and purposes, the covenants are not in the case any more -- Revlon has, in effect, waived the covenants for any offer equal or superior to the $57.25 Forstmann Little offer. Thus, Pantry Pride is in no way disadvantaged in the marketplace.

__Second__, in any event, the record establishes that the covenants were necessary to assure the value of the securities in the exchange offer. Indeed, when it was believed in the market that the covenants would be waived, as a result of a leveraged buyout transaction, the market value of the securities declined -- reflecting the covenants' significance in terms of protecting values.

<u>Third</u>, plaintiff's attack is barred by laches. The covenants were a part of Revlon's exchange offer announced on August 26, commenced three days later and long ago consummated. As such, plaintiff has known of them for over six weeks. During those six weeks, four offers have been made for Revlon including three price increases. The covenants are ancient history as far as this matter is concerned. To sit back and then suddenly come into this Court on an emergency basis seeking extraordinary relief on this point is a rather severe imposition. Besides the burden to the Court and defendants in having to deal with the now irrelevant issue, the securities have been trading in the market. Because of plaintiff's unreasonable delay in seeking injunctive relief, its arguments should not be heard.

Under the doctrine of laches, "a delay in asserting alleged rights that works a disadvantage to another after notice of the invasion of such rights is usually grounds for the denial of equitable relief if it appears that the delay was unreasonable under the circumstances." <u>Updyke Associates</u>

v. Wellington Management Co., Del. Ch., C.A. No. 6298, Brown, V.C. (February 3, 1982), slip op. at 2, citing Borax v. H.M. Byllesby & Co., Del. Ch., 12 A.2d 178 (1940); Federal United Corporation v. Havender, Del. Supr., 11 A.2d 331 (1940); Elster v. American Airlines, Inc., Del. Ch., 128 A.2d 801 (1957); Bay Newfoundland Co. v. Wilson & Co., Del. Ch., 4 A.2d 668 (1939). Each of the key components of the doctrine of laches is present here. Wechsler v. Abramowitz, Del. Ch., C.A. No. 6861, Hartnett, V.C. (August 30, 1984), slip op. at 3.

The fact that plaintiffs here waited only six weeks to sue is not a bar to a laches defense. As the Delaware Supreme Court has stated, "[t]he precise time that may elapse between the act complained of as wrongful and the bringing of suit . . . does not, in itself, determine the question of laches." Federal United Corp. v. Havender, supra, 11 A.2d at 343. Rather, the significance of delay depends on its reasonableness and effects under the circumstances. Under settled precedent, plaintiff's belated claim must therefore be denied.*

* E.g., Shanik v. White Sewing Machine Corp., Del. Supr., 19 A.2d 831 (1941); Bay Newfoundland Co. v. Wilson & Co., Del. Ch., 28 A.2d 157 (1942), aff'd, 37 A.2d 59 (1954); Union Financial Corporation of America v. United Investors' Securities Corp., Del. Ch., 156 A. 220 (1931); Finch v. Warrior Cement Corp., Del. Ch., 141 A. 54 (1928). See also McConnell v. Lucht, 320 F. Supp. 1162, 1166 (S.D.N.Y. 1970) (laches "alone justifies denial of [plaintiffs' preliminary injunction] motion").

In sum, plaintiff's attack on the covenants is much ado about something no longer involved in the case. Financially unwilling to compete in the marketplace, plaintiff has -- at this late hour -- retreated to the courthouse.

VI. THE NOTE AND PREFERRED STOCK COVENANTS DO NOT VIOLATE DGCL § 141.

Plaintiff contends that since the independent directors are authorized to waive the covenants in the securities issued in the Revlon exchange offer, the Board has delegated the waiver decision to the independent directors in violation of DGCL § 141(a). PBII 32-35. This contention simply misstates the issue and is without merit.

Surely a board of directors can approve the issuance of debt securities that contain covenants limiting or precluding altogether major corporate actions such as payment of dividends, incurrence of new debt, or sales of assets. All such covenants are not void simply because they create corporate obligations that limit future boards of directors in the ability to effect such transactions. Indeed, plaintiff's argument is downright disingenuous in light of the subordinated note offering proposed by Pantry Pride -- itself a Delaware corporation -- last month. In that offering, the Pantry Pride notes would be subject to indentures that, like

Revlon's 11.75% Note Indenture, would in a variety of circumstances flatly prohibit dividends, stock repurchases or incurrences of new debt by Pantry Pride or its subsidiaries. Slovin Dep. Ex. 26 at 44-52. Such provisions unquestionably limit the authority of future Pantry Pride directors. In short, it is entirely customary and proper for the directors to retain no authority whatsoever to waive debt covenants, and plaintiff can scarcely be heard to contend otherwise.

Here, the Revlon Board approved covenants in the 11.75% Note Indenture that also do not give the Board as a whole any power to waive them. Thus, the Revlon Board never had any waiver authority to "delegate" to the independent directors. The ability of the independent directors to waive the note covenants flows not from any authority initially retained and then delegated by the Board, but from authorization carved out from the protections otherwise afforded to the 11.75% Noteholders under the Note Indenture.

Thus, plaintiff's "delegation" argument is a red herring. The Revlon Board retained no authority to waive the covenants, and has not "delegated" any authority at all. That the independent directors are authorized to waive the covenants therefore raises no issue at all under Section 141(a).

VII. PLAINTIFF HAS NOT SATISFIED THE ESSENTIAL PREREQUISITES FOR THE EXTRAORDINARY RELIEF OF A PRELIMINARY INJUNCTION.

A preliminary injunction is extraordinary relief that may not be granted unless the plaintiff demonstrates (i) that plaintiff has a probability of ultimate success on the merits at a final hearing, (ii) that the failure to issue an injunction will result in immediate and irreparable injury, and (iii) that the balance of hardships weighs in the plaintiff's favor. Van deWalle v. Unimation, Inc., Del. Ch., C.A. No. 7046, Hartnett, V.C. (Feb. 14, 1983) slip op. at 1-2; Weinberger v. United Financial Corp., Del. Ch., 405 A.2d 134, 137 (1979); Sandler v. Schenley Industries, Del. Ch., 79 A.2d 606, 610 (1951); Allied Chemical & Dye Corp. v. Steel & Tube Co., Del. Ch., 122 A. 142 (1923).

The heavy burden of establishing these prerequisites rests squarely on the plaintiff, even in cases in which defendants bear the ultimate burden at trial. Cascella v. GDV, Inc., Del. Ch., C.A. No. 5899, Brown, V.C. (June 21, 1979). That burden cannot be satisfied merely by showing that there exists a dispute and that plaintiff or others might be injured; rather, plaintiff must clearly establish each of the required elements and injunctive relief "will never be granted unless earned." Lenahan v. National Computer

Analysts Corp., Del. Ch., 310 A.2d 661, 664 (1973); see Gimbel v. Signal Cos., Inc., Del. Ch., 316 A.2d 599, 603, aff'd, Del. Supr., 316 A.2d 619 (1974).

Finally, injunctive relief will not issue unless plaintiffs can establish the above prerequisites based on facts that are not in dispute. Gropper v. North Central Texas Oil Co., Del. Ch., 114 A.2d 231, 237 (1955). As this Court stated in Belle Isle Corp. v. MacBean, Del. Ch., 49 A.2d 5, 7 (1946):

> Many of the grounds asserted in support of and in opposition to the legality of the issuance of the 75,000 shares are premised upon facts which are seriously in dispute and which cannot properly be determined at this stage of the proceeding.

Cf. La Chemise Lacoste v. General Mills, Inc., 53 F.R.D. 596, 605 (D. Del. 1971), aff'd, 487 F.2d 312 (3rd Cir. 1973). Here, plaintiff's contentions have been flatly contradicted under oath by defendants' witnesses and affiants.

As set forth above, plaintiff cannot satisfy its burden of proving a probability that it would succeed on the merits of its claims. Similarly, plaintiff cannot show imminent irreparable harm or that the balance of hardships tips in its favor.

A. Plaintiff cannot demonstrate imminent irreparable injury.

The fundamental prerequisite for the entry of preliminary injunctive relief is a demonstration of imminent irreparable injury. Sandler v. Schenley Industries, supra, 79 A.2d at 610; Allied Chemical & Dye Corp. v. Steel Tube Co., supra. Thus, "[a]n injunction, being the 'strong arm of equity' should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the Court of its urgent necessity." State v. Delaware State Educational Ass'n, Del. Ch., 326 A.2d 868, 872 (1974), quoting 1 High on Injunctions § 22 (1905).

Even where substantial injury can be shown, that alone will not suffice; an "injunction will never issue merely because there is a threat of very great injury." Bayard v. Martin, Del. Supr., 101 A.2d 329, 334 (1953). Rather, preliminary injunctive relief "should not be granted unless truly irreparable injury would be suffered by the party seeking such relief". Thomas C. Marshall, Inc. v. Holiday Inn, Inc., Del. Ch., 174 A.2d 27, 28 (1961) (emphasis added). When the plaintiff "can point to no immediate threat of irreparable and immediate injury", the injunction must be denied. Levin v. Metro-Goldwyn-Mayer, Inc., Del. Ch., 221 A.2d 499, 505 (1966).

1. The asset option.

Pantry Pride is without standing, as a bidder, to claim injury from the asset "lock-up" option. The option does not prevent Pantry Pride from consummating its tender offer and acquiring Revlon's stock. Pantry Pride simply has no "right" to the assets of Revlon as they existed at the time the tender offer was commenced. GM Sub Corp. v. Liggett Group, Inc., Del. Ch., C.A. No. 6155 (April 25, 1980).

Plaintiff's complaint about the exercise price of the option, clearly establishes no irreparable injury. Any loss Pantry Pride might suffer by reason of the alleged disparity of the price is fully compensable by an award of money damages. Nor can plaintiff establish irreparable injury by asserting in its brief that the option is chilling "any bidding" (PBI 75). Pantry Pride itself has not expressed any intention to top the Forstmann Little agreement, and therefore cannot be heard to complain of the speculative possibility that some better transaction is now being "chilled." Such speculation is not irreparable injury. See FMC Corp. v. R.P. Scherer Corp., 545 F. Supp. 318, 322-23 (D. Del. 1982):

> Intervenors [i.e., stockholders of the company] allege that they will be harmed in the long run because the supermajority provisions will act to depress the market value of their stock and will also discourage other potential tender offerors from seeking to acquire Scherer by offering premiums to the stockholders. The quick answer to

> this contention is as explained above, viz., if the intervenors are correct, a final merits determination would eradicate this aspect of their alleged irreparable injury. The intervenors attempted to counter that answer by asserting at oral argument that they would suffer irreparable injury because some potential offerors might be deterred during the months intervening before a final merits determination. However, there is no record support for the proposition that such offers might be forthcoming during that time but for the adoption of the supermajority provisions. Vague, speculative conjecture as to the existence and terms to be offered by an unknown, potential tender offeror pending a final merits determination does not constitute immediate irreparable harm sufficient to support the grant of a preliminary injunction in this case.
>
> -- Emphasis added.

2. The Rights.

Plaintiff certainly has not established the "clear case, free from doubt" that it acknowledges it must establish before the Court may entertain its request for the mandatory relief of directing the Revlon Board to redeem the Rights entirely (PBI 71).

Nor has plaintiff established any irreparable injury flowing from the Rights. The Rights do not impede Pantry Pride's bidding for Revlon since they will be redeemed in favor of any cash offer at and better than the Forstmann $57.25 transaction. Pantry Pride cannot claim any "right" to buy Revlon for less. The only "harm" it is suffering is not being able to pay less than $57.25, and what is "harm" to it is quite obviously a <u>benefit</u> to the stockholders. In any event, the economic harm to Pantry Pride of having to raise its bid in light of the Rights if it is to succeed in acquiring Revlon is not the type of immediate, severe, irreparable injury warranting the extraordinary relief of a preliminary injunction. Indeed, it is a "harm" that is manifestly redressable with money.

3. <u>The note and preferred stock covenants</u>.

The same analysis is equally applicable to the claims regarding the note and preferred stock covenants. Revlon's Board has announced that it will waive the covenants in favor of any other bids on an equal footing with the Forstmann Little proposal. Accordingly, Pantry Pride can complain at most only of economic injury that will not support the issuance of a preliminary injunction.*

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* In this connection, plaintiff cites <u>San Francisco Real Estate Investors</u> v. <u>Real Estate Investment Trust of America</u>, 701 F.2d 1000 (1st Cir. 1983) ("<u>SFREI</u>"), and <u>Kennecott Corp.</u> v. <u>Smith</u>, 637 F.2d 181 (3d Cir. 1980). These cases are inapposite. <u>SFREI</u> involved a tender offeror's attack on its target's recently adopted bylaw which absolutely barred accumulation by any one person of more than 9.8% of the target's shares. If such an accumulation occurred the shares would lose both voting rights and dividends and would become immediately subject to redemption at the board's demand. The bylaw clearly blocked any tender offer. In this context, the Court of Appeals found irreparable injury.

Plaintiff cites <u>Kennecott</u> for the proposition that delay in consummating a tender offer constitutes irreparable harm. Plaintiff's argument fails for two reasons. First, Pantry

(footnote continued)

In essence, plaintiff seeks from this Court an advisory opinion so that it may proceed with somewhat reduced risk, and make tactical decisions about how to proceed in its quest to acquire Revlon for less. It is not entitled to any such relief. See FMC Corp. v. R.P. Scherer Corp., 545 F. Supp. 318, 323 (D. Del. 1982). When a movant "can point to no immediate threat of irreparable and immediate injury", the court must deny the issuance of a preliminary injunction. Levin v. Metro-Goldwyn-Mayer, Inc., 221 A.2d at 505.

B. The balance of hardships weighs decidedly in favor of defendants.

Since plaintiff has failed to demonstrate either irreparable injury or a reasonable likelihood of success on

(footnote continued)

Pride cannot explain how the Rights and covenants prevent consummation of its offer. Pantry Pride could raise its offer to $57.25 and buy shares without triggering either the Rights or the preferred stock covenants, and if Pantry Pride obtains the opinion of Lazard Freres or two other investment banking firms that its proposed transaction will not damage the value of Revlon's Notes, the notes covenants will be waived as well. Second, Kennecott did not hold that delay in itself constitutes irreparable harm. Kennecott involved a challenge to a New Jersey statute which delayed consummation of a tender offer beyond the time limits set by the Williams Act. In light of the denial of a clear legal right and the Williams Act's purpose of maintaining a balance between management of a target and an offeror, the court found delay beyond that mandated by federal law constituted irreparable harm. This holding has no application here.

the merits, the balance of hardships requires that plaintiff's application for preliminary injunctive relief be denied. Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, supra, 122 A. at 158.

Any injunction would gravely injure Revlon's stockholders. They would of course be deprived of the benefits of Forstmann Little's $57.25 offer and the beneficial exchange offer to the stockholders/noteholders. Moreover, in light of the numerous conditions and uncertainties attending Pantry Pride's offer, the stockholders might lose even that offer (particularly given that Pantry Pride is free to alter its bid or terminate it altogether, under the conditions in its offer, at any time*). This harm certainly outweighs any minimal speculative injury to Pantry Pride's interests.

In addition, this Court has consistently recognized that enjoining a party from exercising a legal right is a significant factor in balancing the relative harm to litigants:

> Nor can it ever be said that no harm is done if a person be restrained from exercising a right vouchsafed to him by the law, even though the exercise of the right may be held in abeyance for a while without entailing pecuniary loss. The mere inhibition against the enjoyment of a lawful right, though unattended by

* See Gilbert v. El Paso Co., Del. Ch., C.A. Nos. 7075 and 7079, Walsh, V.C. (Nov. 27, 1984).

> other circumstances, is I conceive in itself a harm to the individual restrained.
>
> -- Allied Chemical, id. at 158.

This principle is particularly significant where, as here, an injunction would deprive the Revlon stockholders of the right timely to receive a merger proposal that the Revlon Board believes to be superior and in the best interests of the Company and its stockholders.

As the Court stated in Van deWalle v. Unimation, Inc., Del. Ch., C.A. No. 7046, Hartnett, V.C. (Feb. 14, 1983) slip op. at 4:

> I must balance the equities between the competing interests. If I grant plaintiff's prayer for injunctive relief and enjoin the voting at tomorrow's meeting, I will, in effect, deny to the minority stockholders an opportunity, if they so desire, to immediately receive $21 for their shares. It is not unlikely that many will decide to do so. Considering all the facts and circumstances present here, to deny this opportunity to the minority would be a disservice to them.

Not only would the sweeping injunctive relief sought by plaintiff result in the harms outlined above as well as confusion and anxiety to the stockholders of Revlon, factors noted by the courts in Dunn v. Decca Records, Inc., 120 F. Supp. 1 (S.D.N.Y. 1954) and Levin v. Metro-Goldwyn-Mayer, Inc., supra, 221 A.2d at 505; but far worse, Revlon stockholders who are not fully informed about this litigation might well draw the erroneous inference that a preliminary injunction represents a favorable adjudication of plaintiff's claims. Thus, in Sherman v. Posner, 266 F. Supp. 871, 874 (S.D.N.Y. 1966), the Court stated:

> [If] the preliminary injunction were granted at this time irreparable injury would accrue to the defendants. Beyond a peradventure, the issuance of the injunction would come to the attention of the stockholders of the two corporations involved. And no matter how clearly it was indicated otherwise, the issuance of the injunction undoubtedly would be viewed by some as a favorable adjudication of the claims of the plaintiff. This would be tantamount to a determination of wrongdoing on the part of the DWG management. Just how this result could be remedied in the event it was found at a full hearing that the claims of the plaintiff were unfounded is not readily perceptable to this court.

See also Elgin National Industries, Inc. v. Chemetron Corp., 299 F. Supp. 367, 374 (D. Del. 1969); Kauder v. United Board & Carton Corp., 199 F. Supp. 420, 424 (S.D.N.Y. 1961).

Plaintiff has utterly failed to show any entitlement to extrordinary injunctive relief.

CONCLUSION

Plaintiff's motion for a preliminary injunction should be denied in all respects.

Respectfully submitted,

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