IN THE SUPREME COURT OF THE STATE OF DELAWARE

REVLON, INC., a Delaware corporation, MICHAEL C. BERGERAC, SIMON ALDEWERELD, SANDER P. ALEXANDER, JAY I. BENNETT, IRVING J. BOTTNER, JACOB BURNS, LEWIS L. GLUCKSMAN, JOHN LOUDON, AILEEN MEHLE, SAMUEL L. SIMMONS, IAN R. WILSON, PAUL P. WOOLARD, EZRA K. ZILKHA, FORSTMANN LITTLE & CO. SUBORDINATED DEBT AND EQUITY MANAGEMENT BUYOUT PARTNERSHIP-II, a New York limited partnership,	)	No. 353 & 354 1985
Defendants Below, Appellants	)	
v.	)	
MACANDREWS & FORBES HOLDINGS, INC., a Delaware corporation,	)	
Plaintiff Below, Appellee	)	

Delaware Supreme Court
Superior Courtroom No. 1,
Public Building
Wilmington, Delaware

Thursday, October 31, 1985
2:30 p.m.

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ORAL ARGUMENT

BEFORE:

Hon. John J. McNeilly,
Associate Justice

Hon. Andrew G. T. Moore, II,
Associate Justice

Hon. Bernard Balick,
Judge, Superior Court

APPEARANCES:

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Forstmann Little & Co. Subordinated
Debt And Equity Management Buyout
Partnership-II Appellants

MR. SILVERMAN: Thank you, sir.

MR. SPARKS: If it please the Court, I would like to introduce to the court sitting to my left or where I was sitting Mr. Herbert Wachtell who is a member of the New York bar and a partner in the firm of Wachtell Lipton Rosen & Katz. However, since I will make the argument, I will not formally move Mr. Wachtell's admission.

At the request of the clerk and for the benefit of the court, and with the court's permission, Mr. Silverman and I have discussed how we would like to divide our time. I would propose to make an opening argument of twenty minutes in length and reserve five minutes for rebuttal. I am advised that Mr. Silverman would like to take seventeen minutes for his opening and three minutes for rebuttal.

And with the court's permission, I will begin the argument unless there are any other preliminary matters the court wishes to take up.

JUSTICE McNEILLY: Anything else before we start argument, gentlemen?

MR. SPARKS: Your Honors, as this court made -- I'm sorry.

JUSTICE McNEILLY: Just a minute, Mr. Sparks. Mr. Shapiro, how do you -- ?

MR. SHAPIRO: Your Honor, perhaps it would be appropriate at this time for us to indicate how we're going to divide our time as well.

JUSTICE McNEILLY: Please do.

MR. SHAPIRO: I will open and speak for approximately 25 to 30 minutes and Mr. Stargatt will take our remaining time to deal with a set of discrete issues. He will have 15 to 20 minutes.

MR. SPARKS: Your Honors, as this court made clear in the Pogostin case and later in the Unocal case, actions taken by a board of directors in the face of attempts to take over a corporation are protected by the business judgment rule from second-guessing by the courts of this state unless the action taken is motivated by personal interest, is taken on an uninformed or grossly negligent basis, or is so unreasonable that viewed objectively no director could rationally have approved the action taken. This is concededly not an entrenchment case that we are dealing with here, and the court below so found.

In that context this court is therefore

called upon to examine the applicability of the business judgment rule to a board's decision to enter into a lock-up arrangement to obtain for the stockholders what that board judged to be a higher bid for the stock of those stockholders than was presently outstanding at the time the board made its decision, in this case, October 12.

Now, in his decision below Justice Walsh found that a lock-up agreement is not per se illegal and he found that its use as a bargaining tool to encourage the participation of a prospective bidder or to stimulate the bidding process will not be second-guessed under the business judgment rule.

However, on the limited record and under the tremendous time pressures imposed by plaintiffs in this litigation, Justice Walsh went on to find that the business judgment rule did not apply to the particular facts of this case. He did so based upon the conclusion which is found at page 25 of his opinion that Revlon's board was motivated in agreeing to accept the Forstmann Little $57.25 merger proposal not by an interest in doing what was best for stockholders but rather to protect themselves from a threat of personal liability to

noteholders.

JUSTICE MOORE: Well, I thought that he indicated that it stemmed initially from the October 3 meeting when the leveraged buyout was proposed which included a 25 percent interest on the part of management, which did indicate some interest initially.

MR. SPARKS: That interest initially was first at the insistence of the buyer as is typical in this --

JUSTICE MOORE: I understand that. But that nonetheless was an interest, was it not?

MR. SPARKS: And by the time --

JUSTICE MOORE: It was an interest, was it not?

MR. SPARKS: I think they had an interest, an interest in the sense that certain members, not a majority of the board but certain members of the board were going to end up being employed and be investors as a result of that initial October 3 transaction. By the time we got to October 12, that was out of the picture.

JUSTICE MOORE: That had been removed. So that question of interest was no longer in the

case.

MR. SPARKS: That is correct, your Honor.

JUSTICE MOORE: But at that point there had been a meeting with Forstmann Little on October 11. Is that right?

MR. SPARKS: Well, there were tripartite meetings throughout the course of that week, some with Forstmann Little, some with Forstmann Little and Pantry Pride, but there were meetings.

JUSTICE MOORE: But there was a meeting, a very particular meeting on the 11th, was there not?

MR. SPARKS: There was a meeting at which a proposal was made by Forstmann Little --

JUSTICE MOORE: What time of day was that proposal made?

MR. SPARKS: It is my understanding that proposal was made late in the afternoon. And the way I place that is, we know it was made after we had appeared before Judge Walsh on Friday of that date. We at that point thought there was going to be a meeting but not until Tuesday and not to

consider the Forstmann Little proposal but simply to act on the proposed, then proposed $56.25 Pantry Pride offer. So it is placed in time after that.

JUSTICE MOORE: Now, at that point Pantry Pride had already indicated that it would top any bid of Forstmann Little. Isn't that correct?

MR. SPARKS: Yes. The board of Revlon understood -- and Pantry Pride had made no secret of it; they had told both Forstmann Little and Revlon's representatives that their strategy was to not make any bid unless there was another bid made by Forstmann Little, in which case their strategy was to then up that bid by a nominal amount.

JUSTICE MOORE: Why didn't Revlon contact Pantry Pride sometime after the Forstmann Little proposal of October 11 which included the $57.25 price, the lock-up, the no-shop provisions, and before the October 12 board meeting to see if it would top the bid?

MR. SPARKS: Your Honor, the answer to that is really quite simple. The offer that had been made by Forstmann Little on the afternoon of October 11 was an offer coupled with a no-shop clause. In other words --

JUSTICE MOORE: Well, you didn't have a clause at that point. You had no contract.

MR. SPARKS: That's right. There was no contract. There was no contract. But there was an offer --

JUSTICE MOORE: You had no contract except for the October 3 merger agreement which already obligated Forstmann Little to the proposal that had been approved then. Why did you not, since you were in a bidding situation, contact Pantry Pride and say that "Forstmann Little has made a proposal which we are going to look at at the board meeting tomorrow. Now, what are you going to do about it?"

MR. SPARKS: I think the best answer to that is in the record and it is in the record in the testimony of Judge Rifkind at appendix pages 1566 and 1567. He said that it was his judgment, and ostensibly shared by the rest of the board members, that if Revlon had gone backs to Pantry Pride before acting on the Forstmann Little proposal and had said that "We have $57.25 from Forstmann Little. Can you do better?" that Mr. Forstmann would have gone home.

And that's the language. That's the language of --

JUSTICE MOORE: How could Judge Forstmann have gone home? He could not walk away. He was already bound by the October 3 agreement.

MR. SPARKS: He couldn't walk away from -- You can always question whether he could walk away from it apart from the legal matter. But let's assume he couldn't walk away from the October 3 agreement as a legal matter; that he was bound by that agreement. That was an agreement for $56. There was a Pantry Pride offer out there for $56.25 and the question was: what do we do to get a $57.25 offer, some offer that's higher.

So if he walks away, if he goes home and never really puts his $57.25 proposal on the table, never signs that merger agreement at $57.25, then there you are. You are left at the $56.25 Pantry Pride bid. And with nobody else in the picture. Because that would have been viewed by Forstmann Little as an act of bad faith. They have made a proposal with a no-shop clause in it and if the first thing you do before you even sit down to formalize that with the board is call up the other

side and say "We've got this $57.25 proposal," I mean, that, your Honor, is bad faith. And it would be so viewed by Forstmann and certainly was viewed by, among others, Judge Rifkind as being something that would cause Forstmann to say "I'm not going to actually follow through to make my $57.25 bid."

JUSTICE MOORE: What was it to the stockholders? It may be bad faith to Mr. Forstmann but --

MR. SPARKS: No, no.

JUSTICE MOORE: Excuse me. What was it to the stockholders who were supposedly being protected?

MR. SPARKS: Because this board believed that Mr. Forstmann, if we did that, would walk away.

JUSTICE MOORE: Had the board met?

MR. SPARKS: Had the board met on October 11 on this question?

JUSTICE MOORE: And determined not to call Pantry Pride?

MR. SPARKS: The board could have always called Pantry Pride on the 12th. It had not met on the 11th. The offer was made late on the

afternoon of the 11th and the board met on the 12th to consider it. The board always had the option, if it chose to do so, of calling Pantry Pride. But if it had done so, it was its belief that Forstmann would walk away. Mr. Forstmann, as Judge Rifkind said, would have gone home. And the board would have faced the prospect of having Revlon left naked with Pantry Pride's lower offer. That's all that would have been there.

The lower Forstmann Little offer was meaningless at that point. It was $56 and there was a higher $56.25 offer sitting out there. The $56 offer isn't going to protect you against a $56.25 offer. The question that the board faced was, we've got an offer at $57.25 that has been demanded by the other side that it be a non-shopped offer. Now, they either had the choice of taking that offer with its lock-ups or they had the choice of rejecting it, in which case they're left with a $56.25 Pantry Pride offer. And they made the choice under those circumstances to take the higher offer, to take the $57.25 offer.

JUSTICE MOORE: Was it really higher in practical economic effect?

MR. SPARKS: Your Honor, we're getting into now a question of second-guessing the business judgment of this board. But I think once again the record on that question is affirmatively yes. And I will direct the court, if I may, to that record.

First, your Honor, the record clearly shows that at the October 12 meeting Revlon's board after receiving the advice of Lazard, its investment banker, concluded that the Forstmann Little $57.25 offer was superior to the $56.25 offer even after discounting for the period of time anticipated to be necessary to consummate the Forstmann Little merger.

The record shows that the board considered the state of financing of both offers. Pantry Pride indeed had conceded -- and we're focusing on October 12, because that's when the decision of the board was made and that's when it has to be judged by. Pantry Pride at that point in time had conceded after two months of outstanding tender offers that its financing was still not in place. At that point in time it was $350 million short.

JUSTICE MOORE: Was Forstmann's?

MR. SPARKS: Forstmann's financing, the

board understood, was in place.

JUSTICE MOORE: Was it in fact?

MR. SPARKS: I think in the financial jargon, the answer is yes. Now, Mr. Silverman can address this in more detail. But let me tell you what was perceived by this board. Two sets of financing --

JUSTICE MOORE: Before you go into that, in regard to the Forstmann Little funding, Forstmann told the board at the October 12 meeting that funds were available for the entire transaction. Isn't that correct?

MR. SPARKS: That is correct, your Honor. And the board believed that.

JUSTICE MOORE: However, your client's 14D-9 of 18 October indicated that up to $400 million is still subject to Merchants, Hanover and Bankers Trust using their, quote, best efforts, unquote, to set up a syndicate to provide the balance. So it wasn't a hundred percent committed, was it?

MR. SPARKS: Your Honor, that's what I was getting ready to try to explain.

In a businessman's viewpoint, this

financing was committed. And let me --

JUSTICE MOORE: Excuse me just a moment. The argument is, Pantry Pride's financing under the same reasoning was similarly available.

MR. SPARKS: Absolutely not.

JUSTICE MOORE: Well, Mr. Perelman's affidavit indicates that Mr. Flom and Mr. -- someone from Paul Weiss -- had met and described the fact that it was, quote, money good, unquote.

MR. SPARKS: Your Honor, the facts are that the tender offer that was put out on October 9 by Pantry Pride disclosed that they did not have $350 million of the $700 million third-tier financing, the most risky financing, its equity. It's the bottom-tier financing they were missing, $350 million of that 700 million. They put in an affidavit on October 18 that says "Now we have it." They didn't have it on October 12. And the record here is crystal clear on that point.

Now, the board knew based on the disclosures that Pantry Pride had made that it did not have that $350 million most risky portion. What it knew with respect to the other side of that transaction is that Forstmann Little had its equity,

which is the most risky portion. It had its middle tier and it had a commitment of lead banks, one to put up 800 million themselves and to also get the additional 400 million. Now, that financing --

JUSTICE MOORE: Excuse me. It did not have a commitment, did it, for the final 400 million?

MR. SPARKS: No, it didn't. It had a best-efforts undertaking of the lead banks that they would fill out that commitment. Now, that is the least risky band of the financing. That is the senior debt. It is not the subordinated debt; it is not the equity. And this board, based on its experience and its business judgment, believed that they had that financing, that that financing was in fact going to fall into place. And that's what they were told also by Forstmann Little. And they believed it.

And they had good reason to believe it, given the nature of how these deals are structured. And they made a judgment. They made a judgment based on their knowledge of the time-discounted cost of money which was explained to them by Lazard, based on the risk of the two offers ultimately going

forward, based on the prospective timing of the two offers -- because, don't forget, there's no assumption here that Pantry Pride is going to go forward immediately with its offer. It doesn't have its financing. It is admitted in these papers that are filed before this court that on October 12 it didn't have its financing. They had some idea that Forstmann Little would be able to get done in 35 or 45 days. They had all that before them, and they made a judgment as to which was the better offer.

JUSTICE MOORE: And to what extent did the notes and restoring the floor under the notes come into play in this decision?

MR. SPARKS: It appears that in the basic decision about which offer was better, in other words, whether the $57.25 versus the $56.25 was better, that the objective determination was made that regardless of the note issue, the $57.25 was better than the $56.25. And indeed the testimony, I suppose the best testimony there, is -- again, it is not in an affidavit; it is in a deposition on cross-examination -- is that of Mr. Glucksman. Mr. Glucksman is the former head of Lehman Brothers, obviously about as sophisticated a

person as you can get on your board in this context. And he testified that taking into account -- and this is at A1473-B -- that taking into account the time cost of money and the risks of consummation, he believed the $57.25 offer was far superior to the $56.25.

JUSTICE MOORE: There is contrary evidence, isn't there?

MR. SPARKS: There is an affidavit by the other side.

JUSTICE MOORE: Well, that's where you are in this proceeding. This was not a trial.

MR. SPARKS: Well, that's right. And we're also right smack dab in the area of business judgment in what we're talking about right now: conflicting affidavits of experts and judgments of people as to how long it's going to take the deal to close, how firm financing is, the discounted cost of money, how quickly people can get things done. Smack dab in the middle of the area of business judgment.

JUSTICE MOORE: One of the things that Justice Walsh's decision turned on was the notes and the saving of the notes. Now, what legal duty did

Revlon owe the noteholders beyond the terms of the indenture?

MR. SPARKS: Your Honor, I think that legal duty surprisingly enough is found in -- well, it's found in two places. The first place that it's found is in an earlier decision by Justice Walsh himself and that's Gilbert v. El Paso. What that case holds -- Since I was in that case and did the research which resulted in this holding, I can tell you that it's backed up by a number of other cases some of which are cited by that case, including the Onderdonk case or something like that that comes out of New York or someplace else. -- is that where you have a contracting party and that contracting party in the contract has discretion as to how to apply a contract term -- In this case we happen to be talking about the discretion of the independent directors of Revlon as to whether or not to waive the protections for these notes. And Judge Walsh found at page 26 of his opinion that the purpose of these covenants was to protect the notes.

Where you have that discretion there is an implied covenant of good faith that in exercising that, you will do so in good faith vis-a-vis the

other side to that contract. And that, your Honor, is a legal obligation. And that is something that these directors had to face. When they decided to waive those covenants and they were coming up to the question of waiving those covenants, they had to do so in good faith. A contractual agreement.

Beyond that, your Honor there was another obligation. And I will confess that I'm not sure whether it is a right or an obligation but it is clearly a right. And that is that the board under this court's Unocal decision and I think under all states that have considered the modern business judgment rule, had a right in looking at all this to look at all the constituencies here. And one of those constituencies that they had to consider in fashioning this package was the creditors.

Now, we submit that on that point Judge Walsh was just dead wrong. Because what he did as we understand his opinion -- and I must confess it is a little hard from time to time to grab hold and find out exactly what the rationale for the self-interest decision was. But as we see it, what he said is, one, he made what we think was a legal error in saying that they didn't have a legal

obligation to the noteholders. He said because the contract terms are set, that's the end of it.

Well, not in this contract. There was a discretionary term. But apart from that, he takes it one step further and his reasoning seems to indicate that because he doesn't find a legal obligation, that therefore there is a prohibition against a good-faith consideration of the noteholder constituency. And we don't see that. We think that's contrary to Unocal and we certainly think it is contrary to El Paso v. --

JUSTICE MOORE: Well, you were in Unocal. You were the successful attorney in Unocal and you understood what was being addressed there, the coercive two-tiered tender offer.

MR. SPARKS: That's right.

JUSTICE MOORE: And that particular language is addressed to that particular issue.

MR. SPARKS: Well, your Honor, I read the opinion. Your Honor has authored the opinion. If your Honors say that is what it was addressed to, then I can't quarrel with that.

JUSTICE MOORE: Doesn't it follow in the course of the discussion regarding the effects

of two-tiered tender offers?

MR. SPARKS: The whole opinion was in the context of two-tiered tender offers and it is certainly in that opinion and it is near the end of that opinion.

I think the answer to that question is yes. I had thought, frankly, reading it, and very candidly, that the opinion was saying that in the context of considering takeover matters, one of the areas that a board may consider -- and I frankly can't see the distinction, to be very honest with your Honor, between the two-tiered situation and the one we're on here for purposes of this discussion -- was that one of the constituencies that you may pay attention to is creditors. In fact --

JUSTICE MOORE: In Unocal we were dealing with a two-tier coercive tender offer. Here you're dealing with an any or all offer for cash.

MR. SPARKS: That's correct.

JUSTICE MOORE: And you concede that by late September/early October your client recognized that it was going to have to break up the company.

MR. SPARKS: I think that's correct.

JUSTICE MOORE: So the directors at

that point found themselves in a bidding contest for the company in their role as auctioneer. Isn't that correct?

MR. SPARKS: Well, I'm not quite sure that "their role as auctioneer" is quite the right way to put it. But certainly the board of directors was faced with a duty to try to get the best price that they thought they could in the context of knowing that there were two bidders and only two bidders out there because all the white-knight possibilities had been exhausted by this time and they were faced with a circumstance of one bidder choosing to proceed hostilely and at $56.25 and another bidder who was in a negotiating posture. And they knew that the $56.25 bidder wasn't going to bid again, based on all the information that had been given to them including the information that came from that bidder himself, unless there was some way that they could get some other bid.

It turned out the only other bid they could get was one that basically prohibited the other bidder from bidding again. But something in that context for stockholders was better than nothing for the stockholders in that context, and

they extracted it. They got an extra dollar.

JUSTICE MOORE: What did it cost the stockholders in terms of the deal for your client to support the notes?

MR. SPARKS: I don't think on this record you can find that it cost the stockholders anything.

JUSTICE MOORE: Didn't cost them a thing?

MR. SPARKS: I think if you hadn't solved the note problem, you wouldn't have had a deal. I mean, I think it really goes the other way around.

Back on October 3 the problem of the notes first arose. This is before any noteholder reaction or revolt or anything like that, but people appreciated -- and the October 3 minutes show it. There's a statement by Mr. Lipton that evidences an awareness of the fact that once it becomes public that the company is in effect going to have to be broken up, that the security for the notes which everybody thought was there is probably going to be imperiled because there's going to have to be at least consideration given to the problem of waiving

the covenants. And you're looking at that circumstance. The October 3 agreement contains a condition that the covenants will be waived.

Now, the board then between October 3 and October 12 had to face the problem of whether in good faith it was going to go through with that October 3 merger agreement and waive the covenants or whether their obligations to the creditors were going to make that an insuperable problem. And so they sat down and considered, you know, how do we solve our contractual problem with these creditors and at the same time what do we do about the stockholders? And fortunately Forstmann Little said "We're going to go ahead," going to go ahead and, based on Forstmann's brief, for its own self-interest deal with the creditors, "and we'll take care of that problem." Ultimately Pantry Pride said it would take care of that problem also.

There's nothing in that record that indicates that any money was diverted from one constituency to another. And even if it were, that's not a matter for an injunction here. That doesn't have anything to do with the $56.25 bid that's out there from Pantry Pride. That would be a

question to sort out internally, I suppose, at some later point in time.

JUSTICE MOORE: Would it not have any reflection on the duty of loyalty?

MR. SPARKS: I think this board exercised in every respect its duty of loyalty. It had a duty of loyalty to the stockholders and it extracted, from all this record shows, the most it could extract for those stockholders. It also had a legal duty and, I submit, also just a general duty in businessmen's good faith to these creditors under this unique situation and it also tried to get something done for them and it did get something done for them.

I don't know how much time I have left. I'm on page 1 of my argument.

JUSTICE McNEILLY: You've used up 30 of your 15 allotted.

(Laughter)

MR. SPARKS: Well, I don't want to take up more than my time.

I will tell the court what I intended to address that I haven't addressed and it is of obvious and critical importance to the members of

the board of directors of Revlon who I represent. And that is that I would like the opportunity and, if I could be given five minutes, I would like the opportunity to address the finding of the court below that they acted in bad faith based upon some perceived self-interest by the court below arising out of the fact that they might get sued. Because we think there's nothing in the record to support that and it logically doesn't follow. And if the court wishes to hear that argument, I will give it. And certainly my clients would like me to give that argument, because if there's anything that upsets them in this opinion, it is that finding based on the --

JUSTICE McNEILLY: We're not going to be here all night, Mr. Sparks.

MR. SPARKS: Your Honor, then let me just quickly go through that portion of my argument and then I will sit down.

Your Honor, in trying to discern how the court below got to that finding, there seem to be only two bases that we saw. One, they seemed to draw a conclusion that there was some self-interest simply from the fact that the notes were issued. I

think we've pretty much covered that in the discussion we've already had.

The other aspect of the court's finding seemed to be premised upon some idea that because four of these directors had lawyers present at the October 12 meeting, that somehow that is an indication that they were self-interested. The fact is, the law firm was present at the October 3 meeting before the noteholder matter became a hot issue, if you will, because of the noteholder public reaction. And the fact of the matter is that Mr. Glucksman in his testimony when asked at A846 why he retained counsel made it clear that he always retains counsel in situations like this and these people have been his counsel for years and years and years.

JUSTICE MOORE: But were there not indications of threats of litigation? Even your client Judge Rifkind said that he received a, quote, deluge, unquote, of complaints.

MR. SPARKS: There were threats of litigation, your Honor. And that's all they were. There wasn't even a complaint in this record for the court below to analyze.

JUSTICE MOORE: Wasn't there also an article in The Wall Street Journal on I think October the 10th that referred specifically to threats of litigation and that counsel were being consulted by some of the institutional investors?

MR. SPARKS: There was such an article. And, your Honor --

JUSTICE MOORE: That didn't have any effect on your clients?

MR. SPARKS: Your Honor, there's not a bit of evidence in the record to show that --

JUSTICE MOORE: Did that have any effect on your clients?

MR. SPARKS: There is a flat-out denial in the record, your Honor -- and I can only speak for what the record shows -- that both Mr. Glucksman and Judge Rifkind have categorically denied that in their testimony. They thought they had no financial liability and they were not motivated in any way by the threat of these lawsuits, all of which they had been told -- and I think there was only one, the lawsuit. They were told by their counsel that they had no financial liability. And they believed that and they were not so motivated. A1477-1491 --

JUSTICE MOORE: Excuse me. Wasn't the question of financial liability related to the disclosure problem?

MR. SPARKS: It was, your Honor.

JUSTICE MOORE: It wasn't related to the question of shoring up the notes, was it?

MR. SPARKS: It was related to the disclosure problem, your Honor. The question of good faith and the notes, of course, was a different problem and one they thought they had to address. And that would have arrived, if there had been a problem under that branch of the law, against both Revlon and, arguably, against Revlon and the directors themselves.

What we're getting down to here and I guess the problem with this holding is that if every time in a takeover, because directors are always sued in takeovers that are hostile, you are to disqualify directors from exercising their business judgment because they were defendants in a takeover-related matter, then we might as well write the business judgment rule off the books.

And there's nothing in this record more than the fact that a Wall Street Journal article

said somebody is going to get sued. There isn't even an analysis of the claims. The complaint isn't even in the record. I submit, your Honor, there is just no basis to find personal liability.

I don't have any time to reserve under these unique circumstances, but I will sit down and let Mr. Silverman make his argument. Thank you.

JUSTICE McNEILLY: Thank you.

Mr. Silverman?

MR. SILVERMAN: May it please the Court, I would like to depart for a moment from my prepared text in the first instance to address myself to a question put by Judge Moore: Why didn't Revlon go to Pantry Pride on the 12th and shop the deal? Why they didn't lies in their heads. What would have been the impact if they had done it? My clients told them on the 11th that if the deal was shopped, we walk away. Lest you think --

JUSTICE MOORE: Walk away from what?

MR. SILVERMAN: From the entire deal, but the $56 offer that we made. And to anticipate your Honor's question, we had a legal right to walk away because of paragraph 10.2 of that agreement which is the litigation out which appears at A463.

We had a legal right to walk away. That was not an empty threat.

Lest you think, however, that my client is rather capricious or whimsical, let me tell you why people walk away or why my client would have walked away. In a deal of this complexity, when you deal with people on the other side, here Revlon, with the innumerable complicated matters to be taken care of if the deal goes forward, trust and confidence are implicit. My client was banking its economic life on this deal. It would not have entrusted that life to people who were sleazy. And it would have been sleazy --

JUSTICE MOORE: Excuse me. Where is it in the record that your client was banking its economic life on this deal?

MR. SILVERMAN: Well, your Honor, I believe there is testimony that they are putting $445 million or $480 million out of a $500 million purse of their own money into the deal. And, if your Honor please, that may fit into your Honor's concern about the firmness of the financing, which I will address in the course of my argument.

Now, it is indeed ironic that Forstmann

Little and Revlon have been cast in the role of the black hats as we come to this appeal. Forstmann Little has been responsible for increasing by hundreds of millions of dollars the amount to be received by Revlon's shareholders had Pantry Pride's original offer of $47.50 or $42 been the one on the table. And it was the only one on the table.

JUSTICE MOORE: Justice Walsh found that your client's lock-up of these assets in this deal was $75 million below the lowest value that Lazard Freres had placed on Revlon's assets. Now, what is your answer to that, Mr. Silverman?

MR. SILVERMAN: The $525 million price was altogether fair, and I will give you six reasons which the judge did not allude to and I will treat with the reason that the judge does allude to.

In the first place -- I don't trust my memory, if the Court please -- our investment bankers, Goldman Sachs, had valued the assets between 500 and 650. 525 is within that range. Pantry Pride's investment bankers -- it is curious that they relied on Revlon's investment bankers -- but Pantry Pride's investment bankers, Morgan Stanley, first valued the assets at between 445 and

528 million. Our offer is at the higher range of that. They subsequently upped that valuation to between 500 and 600 million. We are within that range.

But dispositive of this, I believe, albeit only my third reason, is that Pantry Pride offered those assets to us for $557 million. That's $32 million in a deal that you can calculate between 1 billion 8 and $3 billion. $32 million is what they are talking about. They offered it to us and we said no thank you.

Four, we get to the Lazard valuation. Nobody has tried yet to point out that the Lazard valuation was predicated on a liquidation over a period of time, taking each item in the bottle and flogging it to the highest seller. Pantry Pride by its first tender offer prevented that orderly liquidation. It made a hostile tender offer, requiring Revlon to deal with the entire corpus under a gun.

To now say that that offer was below the 600 or 700 million which was not their valuation in connection with the sale under these circumstances is to stretch their opinion rather

much. Particularly in light of their opinion and indeed, more than that, their recommendation that the total deal that Forstmann Little was offering on October 12 was higher than the deal that was proposed by Pantry Pride. And Mr. Rohatyn, not a neophyte in these matters, said that if he were a director, he would vote for the Pantry Pride -- excuse me -- (Laughter) Not, I hope, to be taken as an admission against interest. (Laughter) -- he would have voted for the Forstmann Little offer.

Now, in addition to that, they haven't come in with a single affidavit or mention of anybody in the whole world who would want these assets for more than 525 million. It is their ipse dixit which doesn't make it so.

And, if I may be permitted a nasty footnote, $557 million in cash for these fellows is the best deal that they've ever had. They don't have to pay interest. They don't have to pay banking fees. They don't have to pay investment bankers' fees. They get $557 million. That's whole, net, to them.

And they protest that that was insufficient. Maybe it was. Maybe the figure

should have been 557 million. I'm not smart enough to negotiate. If I were, Mr. Forstmann would be arguing for me. But the fact that my client is pretty savvy and he knows how much these things are worth to him, now, he has no relationship to Revlon; they're not doing him a favor. There is no --

JUSTICE MOORE: Well, excuse me. Your client was treated much more favorably in the negotiating process than Pantry Pride, wasn't it?

MR. SILVERMAN: May I explain why, your Honor? It is fact.

JUSTICE MOORE: Well, it was, wasn't it?

MR. SILVERMAN: Most surely it was. Because my client came in and said "I will not make a hostile tender offer."

JUSTICE MOORE: No, I'm not speaking of that. I am speaking of the long train of dealings between your client and Pantry Pride during the course of the --

MR. SILVERMAN: Your Honor, inevitably a person with whom you are negotiating is treated rather differently from the man whom you perceive to be a robber with his gun at your head.

JUSTICE MOORE: Well, this was a bidding situation, wasn't it, Mr. Silverman?

MR. SILVERMAN: It was, until October 11th. And let me deal with that, if your Honor please. The judge says that this was a device to end the bidding process. May I suggest that that is wholly in error, both factually and analytically.

This is October 11. And it is the 12th when this court must take a photo, a picture of what happens. What they did on October 18 is irrelevant. That was not known to the board on the 12th. But on the 12th the company had been on the block for two months. Nobody had come forward. Pantry Pride and Forstmann Little were the only players. Pantry Pride had announced "We have decided, A, on a hostile tender offer and, B, our tactics are going to be as follows. We put nothing on the table. We will top anybody else's offer by a quarter."

We choose to call that nickel-diming. That is a terribly effective tactic, because --

JUSTICE MOORE: Doesn't it mean in some instances $30 million more to the shareholders?

MR. SILVERMAN: I'm sorry. I didn't hear that.

JUSTICE MOORE: Doesn't it mean as much as $30 million more to the shareholders, what you call nickel-diming, each 25 cents?

MR. SILVERMAN: A dollar is 30 million. A quarter is one fourth of 30 million.

JUSTICE MOORE: Excuse me.

MR. SILVERMAN: And, if your Honor please, their tactic is terrific. It is imaginative. They didn't dream it up themselves but they have accommodated to it very well. They preempt anybody's bid. Nobody is going to come in and bid to have his bid just exceeded by a fraction. Indeed, as my friends and their investment bankers well know, fractional bids in an auction situation are not permitted. That has been thought of and thrown out.

They have decided in this context to have fractional bidding. Now, what position does that put Forstmann Little in? Forstmann Little has gone to 56. It has gone to the maximum that it intends to go. It said so. These fellows come in with $56.25. Forstmann Little knows if it comes in with 57, it's going to be $57.25. It does not want to be a stalking horse for Mr. Perelman. It has

committed itself over months, or a month, its entire staff. It has made financial commitments. It has put money away. It has avoided other opportunities for investment. For what? Why, Forstmann Little is not an eleemosynary institution. They went the last dollar, and they went the last dollar for two specifically bargained-for advantages. Without that last dollar, the stockholders and Forstmann Little sit there at peril, at their peril, because this is a company that has been known to reduce its offer.

However, it went the last dollar and got for that, A, a no-shop provision and, B, a lock-up of the assets that it wanted, at a fair price. Is that to be condemned as stopping a bidding contest? A $32 million figure in the totality of this transaction? I believe not.

JUSTICE MOORE: Well, it did stop it, hasn't it?

MR. SILVERMAN: It hasn't stopped it at all. My friends have never said that they will not bid. May I analogize what they have said? Which makes this irreparable injury, which I don't believe it to be. They have said translating it to a transaction between you and me, your Honor /SP-F, I

transaction between you and me, your Honor, "I want to buy a book from you for $10." And you say, "I won't sell it to you for $10." And I say, "I will kill myself if you don't." Now, that's pretty irreparable injury.

That's their irreparable injury. They say, "You've made it impossible for us." Why? $37 million in this transaction does not make it impossible unless they choose to make it impossible. If they would come in and bid like normal decent people do, they would come in and give us an offer of more than 25 cents.

JUSTICE MOORE: They did. They came in and offered $58.

MR. SILVERMAN: Your Honor, if the board had been clairvoyant on October 12, it might have known that. But since that offer didn't come in until after the argument before Judge Walsh, I respectfully suggest that that amounts to judicial blackmail. Because what they said is "We'll give you $58 if you, Judge Walsh, throw this out." Now, that's not nice either.

Now, if your Honor please, I do want to spend just one moment on something that was

overlooked below and that I fear will be overlooked here. Let me talk for one instant about the cancellation fee and the injunction which the court gave against that.

Three aspects of an injunction are likelihood of success, irreparable injury or adequate remedy at law, and balancing. There is not a word in the opinion with respect to any of those texts. The judge's findings are clearly inadequate. And on that aspect of this case, and I don't mean on that aspect of this case alone, I would hope that this court would reverse that aspect of the injunction almost summarily.

Your Honor, I did not do what I promised to do and that was to talk to you about the firmness of the financing, which seems to be of concern. Let me say that the firmness of the financing is not very difficult to derive from this record. On October 3 $800 million had been committed by the banks. I'll cite the record, if you want it. $445 million was our contribution. $335 million had been gotten in a commitment from American Home Products for other assets in the board record.

That totals to 1 billion 770. I haven't talked about the 400 million that seems to have excited the judge below. Excited the judge below, may I add, on a completely erroneous reading of this record. He said that it was the withdrawal of the Revlon management that left this $400 million short. Not so. Indeed, $400 million was not short. On October 12 the only thing that changed was that Forstmann Little had increased the 445 to 480 million, making a total firm commitment of $1,815,000,000.

What is this 400 million all about? That is the belt and suspenders that my client wants for protection. It didn't want the $400 million. It's not going to use it. And if you take money, you pay for it. And banks when they commit want to lend it. So $400 million is a safety net which the lead banks said they could get. Not necessary to the financing.

Contrast that with my friends. They are $350 million short. Theirs is junk bond financing. They don't have safety nets. They have to have every penny committed if their deal is to go. And they didn't have it on the 12th, and this

board of directors would have been acting contrary to the interests of their shareholders had they considered the commitments to be of the same quality.

Your Honor, I have trespassed on your time. I think I should sit and hopefully have saved a few minutes for rebuttal.

JUSTICE McNEILLY: Thank you, Mr. Silverman. Now we'll hear the rest of the story.

Mr. Shapiro?

MR. SHAPIRO: Your Honor, may it please the Court, like Mr. Silverman and Mr. Sparks, I have a long written argument. But it is clear to me that the court is fully familiar with the facts and I would prefer to try to take up out of order the issues that as I understand from the court's questions the court is focusing on, because I think perhaps I can be most helpful that way.

If I may go through what might seem a pro forma reminder to all of us about what the court's standards are on review. And I don't mean to suggest that the court doesn't know it, but I think at this stage it's good to remind ourselves

since this is such an intensely factual case that the court below must be affirmed as long as the court has treated fairly with the record, as long as its fact findings are sufficiently supported by the record.

And I would point out that in this case the facts are almost entirely created for purposes of litigation, by Revlon. These minutes, which are unsworn, which are only draft but which all of us are relying upon, were written by the lawyers for Revlon. The facts that are in this case were found by Justice Walsh from those minutes.

With respect to a number of key issues, let me remind us all that, first of all, the $56.25 tender offer which was scheduled to close in only a few days -- I think it was October 21 -- under which we could buy shares at any time we were free of the poison pill rights, that price in the opinion of Lazard Freres, Revlon's investment banker, was a fair price.

There were two fair prices on the table: a $56 merger proposal, which involved management and so necessarily was an interested transaction Justice Moore pointed out in his

questioning, and a higher price from Pantry Pride. In addition, the higher price from Pantry Pride was going to close much earlier. The time value of money, which has taken on such a significance in this case, demonstrates, according to Lazard Freres again, Revlon's banker, that approximately 60 cents a month is lost to the shareholders at these levels every month that passes without a transaction closing and the money being paid. So at $56.25 we are somewhere in the range of $1.50 to $1.75 on the Lazard analysis ahead of management and Forstmann Little.

Now, what happened? Forstmann and management were acting together during the week of October 9th, 10th and 11th, declined to negotiate with Pantry Pride. We kept sending them letters, we kept calling them, we kept saying "We're here; we'd like to talk." Instead, what they did is they went off and they met by themselves, and Forstmann and management put together a deal which they thought would beat the Pantry Pride deal. It was to be $57.25 but they insisted that there be a lock-up, that Pantry Pride not be given an opportunity to top them after the deal was accepted.

And the reason they wanted the lock-up was, Mr. Forstmann was very plain and it's in the record in the October 12 minutes; he said "I want a lock-up because I don't want to have Pantry Pride top my bid again." Now, what happened? Pantry Pride is sitting there on October 10; counsel for Revlon talks to Mr. Perelman. It's in Mr. Perelman's affidavit. He says "Don't worry. There will be no lock-ups here. This will be decided in the marketplace."

Pantry Pride has not heard when the board meeting is going to be. As far as it knows, it has the top bid on the table. Now, it knew that this was an auction. It did everything it could to try to end the hostilities and get negotiations going. That failed. But it had every right to believe that the procedures that it had been told would be followed would be followed and that it would be given a chance to bid.

On October 11 Mr. Drapkin, my partner, is waiting for a call from Mr. Lipton, Revlon's counsel. Because Mr. Lipton had promised to call him. He's going to meet with Mr. Bergerac and he's going to call Mr. Drapkin to talk about anything

that Pantry Pride can do to make its bid more palatable to Revlon.

The call doesn't come. Mr. Drapkin calls Mr. Lipton. Mr. Drapkin says "You've got a problem with these noteholders." We understand that. "What do you want us to do about that?" Lipton doesn't say "This is what we'd like you to do." He says, "If you don't have a proposal for me, I don't want to talk to. Negotiations would be futile."

He doesn't tell him that at the board meeting the next day, he doesn't tell him the board is going to close out the auction the next day, that the rules have changed. He doesn't tell him -- and this is all he really had to say. All he had to say was "Pantry Pride, we're going to have an auction. It's going to end tomorrow. Whoever wins that auction, whoever makes the best bid will get a lock-up. There will be sealed bids; there will be no rebidding. You will get a lock-up whoever wins and it will be a fair auction and it will all be over."

JUSTICE MOORE: Revlon says that that wasn't possible because Forstmann wasn't going to be

put in that position. It either was going to have its bid submitted or it was not going to submit any bid.

MR. SHAPIRO: I heard that with interest. And I heard Mr. Silverman's representation that there is a statement that Mr. Forstmann actually had told Revlon that if Pantry Pride were told his bid, that the bid would be pulled. That does not appear, to my knowledge, in the record anywhere.

But, passing that, it is an interesting position that Revlon is in. The court below asked that precise question at page 71 of the transcript. There was never an answer suggested by Mr. Wachtell to the court below that that was a concern of the advisers to Revlon, let alone the board. It was totally unaware presumably of this decision that was being made by a management which had a piece of the deal, which was at that point interested whether it was making the decision to not call Pantry Pride.

Mr. Wachtell said there's a negotiating process that goes on. Mr. Lipton said "Mr. Drapkin, will you get back to us and tell us what you're prepared to do?"

"How many times do you have to call people?"

That was his answer. He didn't say "Mr. Forstmann made it a condition of our deal that we not give the only other bidder in the process a chance to bid." The record does not disclose that that was the case. In fact, the record discloses that what Mr. Forstmann had negotiated for on October 3 did not include a no-shop provision, that he did not have a contract, that he did not have any legal right to insist upon it, and that the no-shop provision would only come into effect as is traditional in these kinds of arrangements at the point that the contract was made with the board on October 12.

JUSTICE MOORE: But there was testimony from Judge Rifkind, one of the directors, and others to the effect that they firmly believed that Mr. Forstmann would walk away from the transaction. Now, why doesn't that leave us in the realm of business judgment?

MR. SHAPIRO: First of all, with all due respect to Judge Rifkind, he was not a part of the negotiations at the time. He was relying on,

presumably, his own mental processes but no evidence. Secondly, the question was put to Judge Rifkind, "Why didn't you call up Pantry Pride and ask them if they would beat the Forstmann bid?" And his answer was, "There was no reason to do that. We knew that they would beat the bid." This was at page 89 of his transcript. "But Pantry Pride had said they wouldn't take care of the noteholders so we had no interest in talking to Pantry Pride."

What he was saying quite candidly was that the noteholder problem assumed such proportions that an absolute condition of doing a deal with Revlon was that you took care of the noteholders. And that is also reflected in the October 12 minutes at about page 8, I believe, where Mr. Lewis describes the course of discussion with Mr. Forstmann. And he said on I believe it's October 10th "We talked with Mr. Forstmann and we said 'If you want to make a new proposal to beat Pantry Pride, there are two conditions.'" And the first condition was, you have to take care of the noteholders. And only the second condition was that you ought to make your best price and put it on the table.