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.

So the testimony from a director that he believed and I must say the after-the-fact testimony from a director that he believed that if Pantry Pride had simply been invited to make a bid without being told what Forstmann Little's bid was, but simply told "We're running an auction. It's going to end tomorrow. The rules have changed. It's going to be sealed bids. Put your best bid on the table," then the directors would have been in a position where they could have made a decision on an informed basis.

Now, let me go back to the question and again come at it a different way. What would have happened if Mr. Forstmann had walked, as he said? Well, the reality here is that Mr. Forstmann couldn't have walked. If he walked, he gave up his $25 million cancellation fee. Now, I can understand Mr. Forstmann deciding if he loses the auction that he wants to go away. But if he's going to be paid $25 million, there is absolutely no reason why he shouldn't sit there with this $56 million merger proposal which he knows has been beaten by Pantry Pride, let Pantry Pride go ahead and win the contest, take the company, and then he gets paid

25 million.

JUSTICE MOORE: You mean $56?

MR. SHAPIRO: I'm sorry. Did I say -- ?

JUSTICE MOORE: 56 million.

MR. SHAPIRO: Ah! $56, yes.

JUSTICE MOORE: I hope there wasn't a transaction I'm missing!

MR. SHAPIRO: Well, there have been a lot in this one but I don't think so, your Honor.

So as a realistic matter what the board was facing, if that risk was real -- and I would submit to you that the minutes do not disclose that that was a real risk. Let me step back for a moment. No director asked at that meeting "Why hasn't Pantry Pride been invited to bid?" No director said, "How can we decide if we're taking the top bid if we don't know what one of the two bidders would put on the table if he knew that the auction was about to end?"

Now, maybe if a director had asked that question, he would have gotten an answer. But no director thought it was important enough to find out why he only had one bid in front of him.

In any event, Forstmann as a practical economic matter couldn't walk away from this $56 merger proposal. Whatever else is now being claimed belatedly, it didn't make any sense. He'd lose his 25 million. So the Revlon board was at risk --

JUSTICE MOORE: Incidentally, Mr. Shapiro, is there anything in the record at all to indicate that Forstmann Little was about to exercise any of its potential legal rights under the October 3 merger agreement to withdraw?

MR. SHAPIRO: No. There is no suggestion of that at all. Indeed, every suggestion, Mr. Forstmann's own affidavit says that one of his alternatives was that he would sit there at $56 and collect his 25 million. He doesn't say in his affidavit he was going to walk or run away. And it just beggars common sense. Here's a man who is a friend of the Revlon management, who is going to be in business with them. In putting together his $57.25 bid, it's a bid with the Revlon management. This is a self-interested transaction.

And it is only on the evening of October 11 when obviously somebody said to him that if you do this and management is a part of this,

there's just no chance in the world that this won't be enjoined. It's just rampant self-interest. So management withdrew at that point for the day.

But the transaction was conceived in a tainted fashion. It was a transaction conceived for the purpose of locking up a deal for management and Forstmann and excluding Pantry Pride. And all they really had to do as a practical matter of common sense, if they were truly disinterested, solely interested in procuring the best bid for the shareholders, all they had to do was call Pantry Pride and say "The auction is going to close. Tell us what your best bid is."

I think it would be very difficult for me to be standing here addressing the court if they had done that. If we had put in a bid that didn't win, I couldn't tell the court as I can today that the directors didn't have full information. I mean, how is it conceivable that a director can believe that he has availed himself of all the information that is reasonably accessible to him if there's a two-bidder auction and he only invites one of the bidders to bid? Especially when he's told by the other bidder and by its investment banker that

Pantry Pride will bid higher and especially when his lawyer predicts to him that Pantry Pride will bid $58.

So, as I recall, your Honor, Justice Moore asked Mr. Silverman the question why didn't Pantry Pride get invited? After all, they did make a $58 bid later. And Mr. Silverman's response, I think, ran something like, "Well, the board couldn't be clairvoyant. How would they know what Pantry Pride would bid on October 12?" And he's right. They couldn't know because they had consciously kept themselves in ignorance by not inviting Pantry Pride to submit a bid.

Now, a lot was made of this question as to whether there is some sort of invidious feature in what has been characterized by my friends as nickel and diming or 25-cent raises. I would like to address that briefly. 25 cents paid now is worth somewhere close to a dollar a share, 30 million to 35 million dollars on Lazard's calculation, because it is paid now as against a deal which at the most optimistic will close in 35 days and which the Lazard people advised the Revlon board might not close for several months. You clearly have a

significant, not a trivial, economic advantage to shareholders.

The second thing I just observe in passing is that we did not add 25 cents to the pot. We went from 53 to $56.25. That was a very significant bid from our perspective. So that any suggestion that somehow we were acting in a fashion which was not generous I think has to be rejected.

I would also point out that Revlon had consistently refused to share information with us. There's a lot of criticism made in this argument and in the briefs of Mr. Perelman's posture that he was going to have to use Mr. Forstmann as his investment banker. But that was motivated by a total absence of information on our part. If Mr. Forstmann and we had had equal information, then we could have made our own decision. But Revlon refused to give us the information. And if you look at Mr. Perelman's affidavit, you will find that he was told by Mr. Bergerac and by Mr. Forstmann that they wouldn't give us the information because that gave them an advantage. And that was at a point when Mr. Bergerac and Mr. Forstmann were putting together their own competing bids against Pantry Pride.

Now, let me address, although I'm not sure that it is the most important issue, this list of reasons why a lock-up option as between 100 and 200 million dollars below value -- and I throw in the 25 million just for that purpose -- is really what it appeared to be to Judge Walsh below and what we say it is. First of all, there is nothing in the record that I'm aware of that supports the allegation, the claim that was first made in argument below, that we offered to sell those assets to Forstmann for 557 million.

Now, if the court would like, I can go outside the record and tell you what happened. But my understanding is that there simply is no record of that. And that offer was not made with -- We didn't have the information. We didn't know what these assets were earning. Any offer we made in that connection was conditioned upon finding that out.

On the financing, Mr. Silverman makes an argument which is first made in this court, not even made in briefs, and that is that they actually had the money; they didn't need the extra 400 million. Now, I just point out that the 800 million

in bank financing was dependent upon getting the additional 400 million in bank financing, as we mentioned in our brief. They didn't have the 800 million if they didn't have the 400 million.

In addition, the proceeds of the sale of Norcliff Thayer, 335 million to 350 million, would occur after the merger. Mr. Forstmann needed that money before the merger to pay for it. So that sale was not going to take place in time for him to have that money for the merger.

Morgan Stanley in the Case affidavit did an evaluation of those assets we were talking about and came to the conclusion they were worth 600 million to 700 million dollars. And that's the Case affidavit. That was his latest evaluation, still based on not inside information but outside information but some sense of the market as to what people were talking about being willing to pay for those assets.

Let me focus just for a moment -- and I'm afraid I've lost my time so I don't know how much I've used up, but let me focus for just a moment on the question of the duty of loyalty. And I would like to look at it in its simplest terms.

Put aside the question of whether the directors believed or didn't believe that there was a potential for personal liability. Put aside the question of lawsuits and the like. They made a condition of any deal that the noteholders be taken care of. They said, "We won't entertain your bid unless you do that."

Now, unless Justice Walsh were to find and unless this court were to find that the directors owed a higher duty to the noteholders than to the shareholders, they had no right to tell prospective bidders who might pay more to the shareholders that they couldn't bid if they weren't willing to take care of the noteholders. And when Judge Rifkind was asked, as I mentioned earlier, "Why didn't you go to Pantry Pride and ask for a bid," he said "Because he wouldn't take care of the noteholders. I knew he'd pay more money, but he wouldn't take care of the noteholders."

So the concession seems to me clear that the duty of loyalty was breached regardless of interest or anything else.

JUSTICE MOORE: Mr. Sparks says that they had a duty to treat the noteholders equitably.

MR. SHAPIRO: I thought that that was an interesting argument. And I confess I'm not familiar with his case, so I'll try to come at it from a different angle. The contract says that the directors can waive these covenants. Now, assuming Mr. Sparks is right as a matter of law that there is a good-faith obligation in exercising that covenant, which I must say there's no legal support for in any brief I've read -- Let me step back for a minute.

You know, when you go to a banker and you get a loan, if you go into default the bank has to give you a waiver. The fellow who lends you the money gives you a waiver. For the debtor to be able to waive his own defaults is a very novel approach. It is, I suppose, appropriate if you want to have poison pill provisions that you can use to fend off takeovers. But it doesn't suggest that there was any great duty that was implied.

But even taking Mr. Sparks to be correct and that there was a duty, the duty as Mr. Lipton and Lazard told the directors on October 3 in the minutes was to ensure that there was adequate coverage for the interest and that the principal could be repaid. And one director on the

last page of the minutes said, "Well, these noteholders, yeah, the price may have gone down but they were all shareholders once and they're getting the benefit of this transaction. And the people who bought the notes in the market afterwards and weren't shareholders, they had disclosure. That's their problem."

That same advice was given by counsel, Mr. Lipton, at both board meetings. There was no belief at the Revlon board that they had an obligation to make those notes trade at par. As you go through the October 3 minutes, what Mr. Lipton is examining Mr. Forstmann about is his coverage of the interest and his ability to repay the principal. And that's all he asks him about. He also asks him incidentally about his plans for those notes, and Mr. Forstmann says he doesn't have any plans for them except to keep paying the interest and the principal. They're well-covered.

Your Honors, I think I may well have trespassed on Mr. Stargatt's time. As you can imagine, I have a lot of other things I would like to say to you but I think a lot of them are covered very well in our briefs. If you have no further

questions, I will yield to Mr. Stargatt.

JUSTICE McNEILLY: Thank you, Mr. Shapiro.

Mr. Stargatt?

MR. STARGATT: With deference to your Honors, I find that frequently arguments of this sort particularly where they come on a short-fuse fast track tend to be exercises in possibly glibness. I do wish to sort of amplify one comment made by Mr. Shapiro in his argument because I think it is illustrative of that point.

Mr. Silverman in his very entertaining address to the court made very much of and devoted a lot of time toward the proposition that Pantry Pride had offered on October 9 to sell National Health and Vision Care to Forstmann for $557 million. And Mr. Shapiro said that there's nothing in the record to support that. I believe that's true. I believe there is nothing in the record to support that statement. Mr. Silverman is an able advocate and I could be in error about that. When he stands up again, maybe he can tell us more about it.

The suggestion is incredible for the reasons that were said before. We didn't have

access to the financials of those divisions. Still don't. So for us to be able to formulate a price to sell them at doesn't make any sense at all. And the evidence has shown that the value, as the court knows, was notably in excess of that. My friend Mr. Silverman neither addressed himself to the court's finding on that issue, the court recognizing that our affidavit gave a completely different version and it is the only fact of record now.

Mr. Perelman's affidavit at B958-959 says that what occurred was that Forstmann offered to go away if we, after acquiring Revlon for $56 a share -- and that was what was on the table at the time -- would sell Forstmann the assets he wanted for $530 million. Pantry Pride turned him down because we said we wanted Revlon. The court did not find that fact particularly important. Neither did we. Mr. Silverman apparently does, building on what is not in the record and ignoring what is. The court below said "On Wednesday, October 9 Pantry Pride met with representatives of Forstmann Little, with representatives of Revlon present, to determine whether an arrangement could be made to divide Revlon between Pantry Pride and Forstmann. But no

agreement could be reached." So it can hardly be said that the court made some determinative finding, although it would have been entirely entitled to, our way had it wished to. There was no contrary evidence.

The second area that I find that sometimes colorful prose and speedy talking conceals, not purposely but has the effect of concealing actual facts, relates to the financing. And, Justice Moore, you you did ask some questions about this. It is obvious the court has some knowledge about it, particularly with respect to the Schedule 14B that had been filed. But our friends say that their financing was absolutely, positively firm and clear.

There is a wealth of evidence against that. But the thing I found most pointed and persuasive was that on the day the merger agreement was amended, October 12, a week passed when their financing was supposed to be clear; the amendment to the merger agreement at B786 promises only that they will use their best efforts to get financing. It does not commit the financing but only says best efforts and says that they are highly confident that

they will get financing. Of course, on our side it wasn't really us but Drexel which had never issued a "highly confident" letter that they hadn't delivered on with respect to the financing.

I was also taken by the omission in Mr. Silverman's argument to repeat the argument that had been made in his brief that I took to be a central argument and cannot ignore. That was that the moneys and assets which the lower court found to be payable Forstmann as a product of a breach of fiduciary duty should nevertheless be paid over to Forstmann. That's what they said in brief. And Mr. Silverman repeated it only so far as the cancellation fee. Maybe with respect to the lock-up he had difficulty verbalizing it orally.

But what is the sense of that? Why should equity, a court of fairness and common sense, allow assets and large amounts of money which have been found to be produced by a breach of fiduciary duty to be paid out and put beyond its control? First, Forstmann said in brief that it wants those assets and then it says "When we win control of Revlon, we ought to sue the Revlon directors to get them back." I'm not I think misstating that.

Pantry Pride has an adequate remedy at law. If Pantry Pride acquires Revlon for $58 a share and Forstmann exercises its option, Pantry Pride can pursue its litigation against the Revlon board for the difference between $525 million in cash and any higher amount that the court might say it ought to receive. If Pantry Pride has confidence in the claim it has asserted, it should be willing to acquire Revlon for its current offer of $58 per share, permit Forstmann to exercise its option and recover damages against the Revlon board.

From our point of view on the equities, that is an unworthy argument: allow them to take the money, the gold, and leave their partners to pay the piper. On the facts it is a mispremised argument because at least if a lock-up is not enjoined, Forstmann will get the lock-up assets because we are not going to proceed with our tender offer. And the people who will be hurt will be the Revlon stockholders who won't have the advantage of it.

Third, it is a bad argument on the law because it was rejected by Chancellor Marvel -- then Vice Chancellor Marvel -- in the Kempner case.

There Sugarland, a Delaware corporation, entered into what the board of directors considered to be a binding contract before getting the best bid. Chancellor Marvel enjoined the consummation of the contract at the lower price. The low bidder argued that it should have the benefit of its bargain, just as Forstmann does here, and that plaintiffs should bring a derivative suit on behalf of the Sugarland stockholders against its directors to cover the shortfall.

The court said "I am also of the opinion, while in the absence of granting injunctive relief plaintiff could be expected to proceed derivatively, any recovery in such litigation would presumably have to come from the pockets of the corporate directors. A laborious and internally unproductive procedure, not adequate for plaintiff's present needs and those of the corporation."

Pantry Pride has no desire to buy Revlon without National Health and without Vision Care so it can bring a suit against the Revlon directors. Its wish is to make peace, not war. Kempner is direct authority for the holding of the court below both with respect to the asset lock-up

and the $25 million.

On the subject of the dual relationship between the $25 million and the asset lock-up, I sort of apprehend from the style of Mr. Silverman's argument, although he skillfully smudged it, he said "Well, at least let us take our" -- he's trying to say "At least let us take our $25 million." He did it with far more skill than I've just said it. But stripping aside the conversation, I think that's what he is trying to get at. The court below said, "The link between the escrow of the lock-up assets and the cancellation fee, the $25 million, suggests that Forstmann Little and Revlon considered the two as combined security to secure the exclusion of Pantry Pride from further participation in the bidding." And I quoted from slip opinion, page 29.

This fact-finding is amply supported by the record. First, at the very beginning of the transaction on October 3 when the $25 million cancellation fee was written into the contract -- This, incidentally, was on top of Forstmann Little's expenses. Revlon is supposed to pay its expenses. This $25 million is a large bonus. Forstmann knew that that was the equivalent of almost a dollar a

share that anybody else coming into the bidding was going to have to pay, which otherwise could have gone to the Revlon stockholders. And if there's anything that is clear in this case, it is that there was not the slightest attempt -- there is some effort to smudge over what happened after October 3. But before October 3, there was not the slightest effort to negotiate with Pantry Pride.

It had been making successively higher offers, but Revlon was in favor of its sweetheart favored partner Forstmann and made no effort to negotiate with Pantry Pride. So Pantry Pride was not asked to offer more. Mr. Sparks said there were two bidders, one friendly and one hostile. I would more accurately say there were two bidders, one favored by Revlon and the other shut out by Revlon.

The October 3 agreement contained a second cancellation --

JUSTICE MOORE: Let me ask you something about that. As I understand it, one of the reasons, although not mentioned here in oral argument, for not negotiating on the same level with your client as they were with Forstmann Little was that your client had been asked to enter into a

standstill agreement so that they could negotiate and your client had refused. Now, why wasn't that a reasonable approach on the part of Revlon?

MR. STARGATT: First off, your Honor, to my best knowledge Forstmann was never asked to enter into a standstill agreement either. I mean, we were. They were not. And it would seem to me --

JUSTICE MOORE: But they were not making a tender offer. You were.

MR. STARGATT: We were not making a tender offer at the time we were asked to enter into a standstill.

JUSTICE MOORE: But you certainly made the threat and the motions.

MR. STARGATT: Oh, yes, we certainly indicated that we planned to proceed to try to take the company.

JUSTICE MOORE: So why wasn't that approach reasonable on the part of Revlon to deal more directly with Forstmann and not your client in light of the approach that your client was taking that it was going to come in with the tender offer which was hostile and it was not going to stand still to negotiate?

MR. STARGATT: The tender offer once made resulting, as it did, in a bidding contest, once two parties were vying for control of the company, it seems to me that the least that could be said is that both should be put on equal footing. They may not have believed Forstmann was going to act hostile but, believe it or not, they didn't ask for a standstill from Forstmann and they had asked for one from us. They had a standstill from neither and they shared their information with Forstmann only. And notwithstanding that, we kept coming, despite the failure to share information.

I don't know if I'm completely responding to your question.

JUSTICE MOORE: I guess what I am asking is, why wasn't that a rational business decision on the part of Revlon to deal with your client in a different capacity than it was dealing with Forstmann?

MR. SHAPIRO: If I may, your Honor? Because this happened before Mr. Stargatt got into the case.

I asked Mr. Bergerac on his deposition way back when, and Mr. Perelman also testified about

it. They had a meeting and Bergerac said "I won't talk to you, won't negotiate at all unless you give me a standstill." Perelman said, "If I give you a standstill, will you consider selling the company?" Bergerac said "No."

I mean, there was no rational reason for Pantry Pride to put itself in a position where the only thing that motivated Revlon to consider an offer for the company was the presence of a tender offer.

JUSTICE MOORE: Thank you.

MR. STARGATT: That's a penalty you pay for only having been in the case for two weeks.

The entire chain of facts leading up to the escrow of the $25 million and the assets leads to the inescapable conclusion that they were put there to retard Pantry Pride from bidding. And I will not take and do not have the time to develop it, but if your Honors have not had a chance to review the proceedings that resulted in Justice Walsh's temporary restraining order against the putting of these assets into escrow, a fact that I think was impressive to him as it was to all of us, that might be a worthwhile exercise.

The only other point I wish to make -- and I'm making it recognizing that we were derelict on this in our briefs and apologizing to the court for it -- deals with a subject that was not addressed by our adversaries here. It is not a subject of major moment, but a word ought to be said about it. One of the arguments made in the briefs of our opponents is that the rights plan and the covenants in the notes ought not to be enjoined because in effect they have agreed to waive them in favor of our offer if we proceed. That is, if a lock-up --

JUSTICE MOORE: I thought Justice Walsh had found those issues moot, essentially.

MR. STARGATT: He entered a restraining order. He covered those in his preliminary injunction order, although -- and this is the center of the question, your Honor -- in other circumstances they might have been made moot by the undertaking of our adversaries.

We did not say it in brief and the word I wanted to say on that subject was simply this: What had occurred previously was, there had been a similar undertaking that had been made by our

opponents with respect to the rights in connection with a $56 offer. When they took Forstmann's $56 offer, they had committed to redeem the rights for anybody else who offered $56. We went ahead and offered $56.25. They refused to redeem the rights. They made a new deal with Forstmann and they moved the target up to $57.25. We didn't know what they had up their sleeve next and I'm not sure Justice Walsh did. In any event, I believe that's why he entered the order.

Thank you.

MR. SPARKS: It looks like a lot of paper, your Honor, but it will be very brief.

JUSTICE McNEILLY: You have a total of ten minutes.

MR. SPARKS: Thank you, your Honor.

First, your Honor, I would like to address the point that has been made where there has been a suggestion that under these circumstances we should adopt some Delaware law that the only way when you get to the stage that this particular bidding process has gotten to is to have in effect some sort of simultaneous sealed-bid auction as distinguished from an auction or a bidding process

run by the board of directors as they see best fit in their business judgment and, of course, run independently by what in this case was a hostile bidder who wasn't restricted by any negotiating agreement of any sort.

The first thing I think the court needs to be aware of when you look at the facts of this case -- And, first, I don't think the court can adopt that as a rule of law. I think that would be a tremendous mistake to adopt a sealed bidding procedure and to take away a board's discretion under these circumstances. But apart from that, the fact here -- and it is a fact that frankly I didn't get to in my opening argument but it is terribly material -- is that on Friday, October 11th, this board knew on that day when it met on the 12th that Pantry Pride had refused to extend a stipulation in the federal court that they would not buy under their offer without 24 hours' notice and had made clear that they could unilaterally decide at any time to commence buying.

Now, they couldn't buy everything, apparently because they didn't have all their financing. But they could commence buying at $56.25

and in effect lock up themselves this so-called auction or bidding contest. In other words, when the board met on the 12th of October they were facing in effect sudden death. You say, well, under these circumstances the suggestion from the other side is you should have had a bidding contest.

Your Honor, if you had a bidding contest, this board ran the risk that two bids would come in; maybe only one bid would come in. But Forstmann Little didn't seem very interested in bidding again unless it was not nickel-dimed any more, and you submit yourself to the vagaries of a sealed bidding contest and you may well just end up with Pantry Pride putting in a bid for $56.25, a dollar less than what the board ultimately got in exercising its business judgment to try to get the last dollar for the stockholders.

There was a statement made that nowhere in the minutes does it appear that the board knew what the bidding strategy was, which of course dictated what the board's response was. And indeed Mr. Shapiro went further and he said they never asked, no director ever asked, "Well, why don't we go and get in touch with Pantry Pride before we

accept this Forstmann Little deal?" Well, Judge Rifkind has already stated one reason why the board didn't do that.

But the other reason is that the board already knew the answer because it is at page 886 of the minutes: "Mr. Lumis stated that Ted Forstmann had indicated over the past few days that he wanted to better the Pantry Pride offer but he said that he believed that whatever Forstmann Little would do Pantry Pride would increase its offer 25 cents per share over Forstmann Little's proposal."

Everybody knew what the bidding strategy was because Pantry Pride intended that everybody know what it was. And that gets to the crucial point of this case. There isn't any $58 bid in this picture unless there is a $57.25 bid from Forstmann Little. And there isn't any $57.25 bid from Forstmann Little unless there's a lock-up. So if you don't accept the Forstmann Little bid, you're not left with $58; you're not left with anything except Pantry Pride walking off with its $56.25 bid. That is the fact. That is the reality that this board faced on October 12 when they considered whether or not to take the Forstmann Little

proposal.

JUSTICE MOORE: Is that the reality today?

MR. SPARKS: The reality today, your Honor, is that they have raised in the litigation context right after the hearing, they said "All right, we'll bid 58." But if this court goes down the road to voiding a good contract to facilitate a later bid, then I submit that we have just lost any principle in our dealings in this state.

It's just like me contracting with somebody nextdoor to sell my house for a hundred thousand dollars and the next day somebody coming along and bidding 110,000. And let's say all of the proceeds from my house are going to go to the best charity that you can think of. We'll give it to the United Way; it's time for their campaign. And it came into this court and somebody said, "Well, it's a higher bid, $110,000, and it goes to a charity, the United Way." Or, it goes to the Revlon stockholders.

Is this court going to void the contract, the original contract for $100,000, because of that? No, it's not. I don't have the

option sitting here as Revlon if I've entered bona fide into a contract in good faith for the purposes of getting what we think was the best deal for the stockholders to renege in favor of a $58 --

JUSTICE MOORE: How is it in the best interests of the stockholders to have protected the noteholders?

MR. SPARKS: Your Honor, the issue -- let's --

JUSTICE MOORE: Well, tell me how is it in the best interests of the stockholders to have kept the floor underneath the note? They're not all the same people.

MR. SPARKS: They are not all the same people, that is correct. A lot of them are probably the same people but they are not all the same people.

We've got to go back and see how this started off. It was the bidders, both Pantry Pride and Forstmann Little, who were demanding a waiver of the provisions in favor of the noteholders as a condition. It is a written condition of the Forstmann Little deal. If that isn't waived, then there is no merger and the stockholders don't get

their extra dollar.

Then the board faces the problem, we are being required to waive this and we have to consider the interests of the creditors and the interests of the stockholders. If we don't waive it, there isn't any deal for the stockholders. And if we do waive it, then we have to at least try to do what we can in good faith for the creditors under this circumstance. And so they hack out the best deal that they can. If they didn't solve the noteholder problem, then there isn't any $57.25 offer. Simple as that. And that's how it helps the stockholders.

JUSTICE MOORE: But I don't understand what the noteholder problem is. They had an indenture. They had a contract with your company and you could say that your clients dealt with them absolutely directly. There was no disclosure problem. So what was the note problem that you're alluding to?

MR. SPARKS: The independent --

JUSTICE MOORE: Other than the possibility of suit.

MR. SPARKS: The independent directors

of Revlon are vested in that contract with the discretion to waive the covenants against Revlon assuming additional debt. Both of these lock-up deals require massive additional debt. Neither could go forward without the waiver of the note covenants.

In waiving that, the implied obligation of good faith in the Gilbert case -- and the Gilbert case is cited in my opening brief here -- the implied covenant of good faith in the Gilbert case requires that you consider the interests of the creditors and that you just don't make a one-sided decision.

We sometimes get lost here. We think that the only duty because we practice all these cases in the Court of Chancery --

JUSTICE MOORE: No, excuse me. I asked a question, what was in the interest of the stockholders?

MR. SPARKS: It was in the interest of the stockholders to get a dollar more. And if you --

JUSTICE MOORE: How was dealing with the noteholders in the interest of the

stockholders? That was my question.

MR. SPARKS: Because the buyers, Pantry Pride, Forstmann Little, insisted that the noteholders be dealt with. At least Forstmann Little did. You had to waive the noteholder covenants.

JUSTICE MOORE: The noteholder covenants were waived. Now, how was it in the interest of the stockholders to put a floor under the noteholders?

MR. SPARKS: No, they weren't waived. The decision to waive them was on the table on the 12th of October. When the original deal was signed, for example, with Forstmann Little back on October 3, they weren't waived. It was a condition.

JUSTICE MOORE: It was a condition and the market responded as it would as if they had been waived because --

MR. SPARKS: The market responded --

JUSTICE MOORE: Excuse me. -- because the transaction wasn't going to go forward unless they were waived.

MR. SPARKS: That is correct.

JUSTICE MOORE: So the market perceived

them as being waived.

MR. SPARKS: No. The market perceived that they would have to be. It probably perceived that it was likely or more likely than not that they would be waived.

JUSTICE MOORE: Certainly. Now, how by restoring the floor under the notes was that in the interest of the shareholders by the October 12 date?

MR. SPARKS: Because the independent directors had a decision to make. They either were going to walk away from the Forstmann Little deal in effect by not satisfying that condition -- because this had been sort of left open. It was not waived on the 3rd of October. And if they had done that, then there wouldn't be any deal. There wouldn't have been $57.25 for the stockholders.

It was in the interest of the stockholders to allow the board, the independent directors, to satisfy their good-faith obligation to the noteholders by making some provision if they could in the bargaining process for the noteholders so that the deal could go forward.

Now, it is obviously -- I mean, that is the answer. Let me get back to just finish up

the other couple points I had.

Both bidders here were demanding a waiver. I mean, the waiver was going to -- It was a condition of the offer of Pantry Pride. It was a condition of the merger agreement with Forstmann Little. We aren't injecting this problem into the picture. It was something that the buyers were insisting be dealt with, and the board was trying to deal with it in good faith.

JUSTICE MOORE: How was it to their advantage to shore up notes that they could have paid off or bought on the open market for less? How is it in Forstmann Little's interest to shore up the notes? What obligation did they have to shore up the notes?

MR. SPARKS: It was in Forstmann Little's interest because we were insisting on this as a condition to the deal.

JUSTICE MOORE: You were insisting on the shoring-up of the notes.

MR. SPARKS: That's right, because we had --

JUSTICE MOORE: Not Forstmann Little. And how was that, therefore, in the interest of the

shareholders if you were insisting on it?

MR. SPARKS: Because we had two obligations. We had an obligation to the noteholders and there is an obligation to the stockholders. We were trying to get the best deal for the stockholders and yet not get into a position of breach vis-a-vis the noteholders.

There is one other problem that I've got to clear up. It arises from a statement that Mr. Shapiro made based upon Mr. Drapkin's affidavit. Mr. Drapkin's affidavit was submitted to the court below just before the hearing and we had no chance to respond to it. There was a statement made by Mr. Shapiro based upon that affidavit that Mr. Liman represented to Mr. Drapkin that there would be no lock-ups in this transaction. And I must tell the court -- because I told Mr. Liman I would do it under the circumstances -- that if he had the opportunity to do so, to supplement the record, he would absolutely deny that statement. The court below did not rely upon that affidavit, and I would ask this court not to do so either for the same reason.

And I guess in concluding -- and maybe

this is just the same point and maybe Mr. Wachtell is outlining it better. But, as I think as I've said before, both Forstmann Little and Pantry Pride needed the waivers. They couldn't get their financing without the waivers. And we couldn't waive the provisions in bad faith. The only way to get any of the deals done for the shareholders was to deal responsibly with the waiver question, and that's what this board tried to do in good faith. It doesn't indicate self-interest. It indicates the effort to try to deal with two constituencies, one to whom you owe a fiduciary duty and the other to whom you owe a contractual duty. Thank you.

JUSTICE McNEILLY: Thank you.

Mr. Silverman? You're out of time but we'll give you a couple minutes.

MR. SILVERMAN: I'm sorry, your Honor. I didn't hear you.

JUSTICE McNEILLY: I said you're out of time, long out of time, but we will hear you.

MR. SILVERMAN: You're very kind, sir.

JUSTICE McNEILLY: Very briefly.

MR. SILVERMAN: Let me come to the note issue. Your Honor, let me come to the note issue in

a different way. Forstmann Little when it made its $56 offer had reserved the $56 million penalty in the notes that existed. That is, there was a penalty under certain circumstances and we thought in the course of conduct that we would have to pay that penalty. We came up with an idea, and it's a good idea, because my friends have adopted it no sooner did they hear it. And that is, exchange new notes for the old which will have an interest factor that will bring the new notes up to a hundred. You have satisfied the noteholders. You have relieved yourself, in your computation, of $56 million. You can use that money to bring the bid up to $57.25. And therefore the stockholders are benefited, with no cost to the noteholders, no cost to Revlon, no cost to Forstmann that had already used that money for other purposes.

Now, when the judge rhetorically asked below "Who's paying for this, where did all that come from," that's where it comes from. Your Honor, the stockholders were permitted to get an extra dollar because of our ingenuity.

Now, let me cover in summary form the matters that my friends have raised. And I wish

this were more coherent. It will not be.

We could walk away from the deal under the litigation out without sacrificing the cancellation fee.

Two, they talk about the time factor, and that's in the agreement. The time factor, 60 days, 90 days before we can close. Since everybody seems to be going to whore the record, let me say that the SEC comments on our proxy statement are today. Our responses will be tomorrow or Monday. And twenty days thereafter the stockholders will get their money.

Three, I am being chastised by my friend for having alluded to $557 million without support in the record. Well, let's understand how this comes about. Just before the argument before Justice Walsh, my friends came in with an affidavit from Mr. Perelman. We had not disclosed in any of our papers the conversations between Perelman and us because those were in the nature of settlement talks and we thought that improper. Mr. Perelman, with a rather partial disclosure, disclosed so much of that conversation as he thought fit to disclose. Mr. Cherno at the argument made the 557 argument

without objection, without refutation. In their original brief they say nothing about the 557 figure. We mention it five times in our original brief. In their reply brief, no comment. They had no problem about that. It is only for the first time at this argument that Mr. Stargatt gets up and says, "Ha! There's no record citation." Well, it may be so. But I ask the court's understanding of it.

Was the commitment firm? Glucksman, Rifkind, Zilkha, and Lazard, looking at the same materials that my friends look at, concluded that our commitments were firm. And I say no more about that.

The lock-up provision. Lock-ups were asked by us before our $56 merger agreement. They were refused by Revlon. The no-shop provision was asked. It was refused because Revlon then thought it had a bidding contest. They gave it only when the bidding contest had ended in order to jack up the price by the additional dollar for the noteholders.

The cancellation fee. My friends have still not addressed themselves to the fact that

there isn't a single finding in this record that the judge can rely on and he made no findings to support the injunction against the cancellation fee.

In brief, we have done everything that has been asked of us legally or morally. We have produced hundreds of millions of dollars for the Revlon shareholders. And as I get this byplay, everybody says "Thank you, Forstmann Little, but you don't count." Well, I submit that in a court of equity we do. We bargained for what we got. We paid handsomely for what we got and there is no earthly reason why we should not get the benefit of our bargain.

Thank you, your Honor. I have trespassed too long.

JUSTICE McNEILLY: Thank you, Mr. Silverman.

Court stands in recess till 9:00 o'clock tomorrow morning. We'll ask you to return at that time.

(Hearing concluded at 4:21 p.m.)

State of Delaware)
)
County of New Castle)

C E R T I F I C A T E

I, J. Edward Varallo, Registered Professional Reporter and Notary Public for the State of Delaware, do hereby certify that the foregoing record, pages 1 to 91 inclusive, is a true and accurate transcript of my stenographic notes taken on Thursday, October 31, 1985, in the above-captioned matter before the Supreme Court of the State of Delaware.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of November, 1985, at Wilmington.

I N D E X