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November 14, 1993

The Honorable Jack B. Jacobs
Vice Chancellor
Court of Chancery
Public Building
Wilmington, DE 19801

Re: QVC Network, Inc. v. Paramount Communications Inc., et al.
C.A. No. 13208

Dear Vice Chancellor Jacobs:

Enclosed please find four copies of the reply brief of plaintiff, QVC Network, Inc. ("QVC"), along with four copies of the supporting papers filed with the brief. The supporting papers consist of a compendium of unreported opinions and the affidavits of Enrique Senior and William Costello.

Attached as an Exhibit to the Senior Affidavit is Amendment No. 6 to QVC's 14D-1, increasing the price of QVC's tender offer to $90 per share.

Respectfully,

Josy W. Ingersoll

JWI:vp
Enclosures
cc: Register in Chancery
A. Gilchrist Sparks, III, Esquire
Charles F. Richards, Jr., Esquire
Karen L. Morris, Esquire
Barry R. Ostrager, Esquire
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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

QVC NETWORK, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 13208
PARAMOUNT COMMUNICATIONS INC., VIACOM INC., MARTIN S. DAVIS, GRACE J. FIPPINGER, IRVING R. FISCHER, BENJAMIN L. HOOKS, FRANZ J. LUTOLF, JAMES A. PATTISON, IRWIN SCHLOSS, SAMUEL J. SILBERMAN, LAWRENCE M. SMALL, and GEORGE WEISSMAN,	)	
Defendants.	)	

REPLY BRIEF OF PLAINTIFF QVC NETWORK, INC. IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This reply brief is respectfully submitted on behalf of QVC Network, Inc., in further support of its motion for preliminary injunctive relief to enable the Paramount stockholders to consider QVC's $90-a-share tender offer for Paramount shares on its economic merits. The array of defensive and obstructive tactics that Paramount's management has deployed against QVC -- and that Paramount's "independent" directors have consistently and unquestioningly rubber-stamped, even though QVC is offering more to the stockholders than management's chosen partner, Viacom -- requires this Court to intervene. A preliminary injunction against the $600 million in lockups that the Paramount board granted to Viacom and the directors' discriminatory use of poison pill and other corporate defenses should be entered prior to the November 22 closing date of Viacom's inferior tender offer.

Timing is critical here. Absent relief from this Court, Viacom and Paramount are claiming the right to close on an inferior transaction on November 22, before QVC's superior offer can close. This timing advantage arises from a course of directorial misconduct at Paramount which exposes the Paramount stockholders to the irreparable harm of having their company sold to Viacom at less than the best price.

The answering papers filed by defendants make clear that there is no remotely adequate justification for the Paramount directors' conduct. Thus, the answering papers make much of the fact that the merger with Viacom assertedly has great "strategic" value and constitutes a great corporate "fit." In the same vein, they tout the fact that the directors' preference for Viacom reflects a "long-term" view to which the Court supposedly must defer.

Yet nowhere do they come to grips with the ramifications of the undeniable fact that Sumner Redstone would keep 70% of the vote in the merged company. Thus it would be Redstone, not the Paramount stockholders, who would be in total control of this wonderful "strategic" entity. And it would be a matter of Redstone's unfettered discretion whether the Paramount stockholders have <u>any</u> long-term interest in the strategic entity:

Redstone's voting power will enable him to extinguish the other equity at any time of his choosing. Concededly, Redstone (and his heirs) would have a long-term interest in the merged entity; but the Paramount directors did not obtain -- and did not even seek -- any assurance that the Paramount stockholders will share in it.

From these crucial, undenied and undeniable facts, several conclusions follow:

First, the Paramount stockholders were entitled to the full protection of the value-maximizing duties associated with the Revlon decision. When the Paramount management and directors agreed to let Redstone take control of Paramount -- a decision not forced on them but a course voluntarily chosen -- Paramount was for sale, and could not be sold unless and until the directors satisfied themselves by some reasonable method that they were obtaining the best available price. The situation that Paramount put itself in is crucially different from that facing the board of Time Inc. when Paramount tendered for it: Time was to remain a public company whose shareholders would be able to control its corporate destiny and receive a control premium even after the merger with Warner. That is simply not true here: if Revlon does not apply to Paramount now, it never will.

Second, the Paramount directors have no right to rely on "long-term" intangibles in valuing the Viacom deal. Having failed to obtain -- or even seek -- any long-term guarantees for the Paramount shareholders, the Paramount directors cannot justify blocking QVC's offer on the pretext of "long-term" considerations.

Third, the Paramount directors were under the highest duties under our law to be fully informed prior to having agreed to transfer control to Redstone. Yet the defense offered for the directors' conduct reveals that -- again on the premise that the "strategic" nature of the Viacom deal satisfied any and all duties -- they purposefully failed to seek out material information about alternatives to the control-changing Viacom deal. The directors blinded themselves both before and after they agreed to management's Viacom transaction.

The Paramount defendants' answering papers are liberally larded with ill-founded attacks on QVC and its chairman, Barry Diller. But, as detailed below, and in the accompanying affidavit of Enrique Senior, these charges are completely wrong: QVC is not only a well-managed, well-positioned company with a recent record of financial performance far better than Paramount's (or Viacom's) -- it is also a strategic partner of some of the most technologically advanced, financially resourceful and well-managed companies in the entire communications industry: BellSouth Corporation (which recently committed $1.5 billion in equity financing to QVC); Comcast Communications ($500 million in equity financing); Cox Communications ($500 million in equity financing); and Advance Publications ($500 million in equity financing). The fact that these sophisticated investors are backing QVC gives the lie to Paramount's attacks on the quality of QVC as a company.

QVC is one of the great success stories in the developing fields of cable television and electronic retailing and is well-positioned to be among the first businesses to bring the "information superhighway" to the marketplace. Barry Diller, unlike Mr. Davis, has a remarkable record as an entertainment company executive. That is why BellSouth, Cox, Comcast and Advance have eagerly sought to put their resources behind QVC's future combination with Paramount. Paramount, on the other hand, has consistently lost market share in its core entertainment business; and Viacom is the personal fiefdom of a 70-year-old owner who is unlikely to be able to lead the company through the rapid changes revolutionizing the communications industry. Viacom, moreover, despite its pretensions to be a "world-class communications company", is chiefly a music video channel (MTV) and a situation comedy rerun channel (Nick at Nite), whose self-proclaimed trophy property is "Beavis and Butt-head." See Ex. 22 at 25-26; Ex. 35 at 23.*

Finally, Paramount's papers attempt to rebut the showing QVC made, based on the depositions of four nonmanagement directors, that the board acted with undue haste,

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* As used herein: "QOB" refers to QVC's Opening Brief; "PAB" refers to the Paramount defendants' Answering Brief; "VAB" refers to Viacom's Answering Brief; "Ex." refers to exhibits to the previously filed transmittal affidavit of David C. McBride.

and in undue ignorance. Paramount's rebuttal showing is based heavily on affidavits of directors who were not produced for deposition (or in the case of Lester Pollack, the affidavit of a director who, because he is a Lazard Freres partner, cannot be called "independent").* Paramount's rebuttal showing necessarily does not depend on contemporaneous written evidence since, as detailed in QVC's opening brief, all such evidence was destroyed by the Paramount "truth squad."

Paramount's litigation showing conflicts in some details and in some large matters with QVC's. All QVC asks is that the Court review the deposition transcripts of Samuel Silberman, Lawrence Small, James Pattison and Hugh Liedtke, the four outside directors whom Paramount permitted to be deposed. If the Court contrasts the actual testimony of witnesses subject to cross-examination at deposition with the set of lawyer-created affidavits submitted to rehabilitate the Paramount board, QVC is confident that the Court will conclude that this board did not meet the Van Gorkom and Technicolor standards.

Moreover, since Paramount has no contemporaneous written records of its September 9, 12, 27, October 11 and October 24 board meetings other than brief minutes and (for some of the meetings) Mr. Davis' scripts -- everything else that would show the Court what was said at those meetings having been destroyed, or never created in the first

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* Ex. 35 at 19 (Redstone: "Lester Pollack . . . is not an independent director."). For that reason, after Mr. Pollack was proferred by Paramount in response to this Court's order that a fifth independent director be made available for deposition, QVC declined Mr. Pollack's deposition.

In the carefully-drawn director affidavits, the Paramount defendants now see fit to describe, in their defense, presentations they received from their counsel at Simpson Thacher. E.g., Pollack Aff. ¶ 22; Fischer Aff. ¶ 6; Pattison Aff. ¶ 57 ("I received expert advice from counsel."). In depositions, however, the Paramount witnesses were all directed not to answer any questions about what counsel told them. See QOB 75n.

These affidavits reveal, unwittingly, the arrogance of the affiants (or the drafters) -- who testify that their decisions as directors "should not be called into question" and "should not be disturbed" (Pollack Aff. ¶¶ 26, 30); that QVC's higher bid is "an unjustified interruption of our corporate strategy" (Weissman Aff. ¶ 23); that "Paramount was never for sale" (Pattison Aff. ¶ 38); and that the board's "choice should not be disrupted" (id. at ¶ 59).

place -- QVC is entitled to all reasonable inferences arising out of an absence of contemporaneous documentation.

* * *

The conduct of the Paramount directors in locking up their management's preferred transaction manifests from start to finish a disregard of their duty to act with undivided loyalty to the public shareholders and to seek out and consider all material information before taking corporate action. What has happened at Paramount, the whole process, has an ineradicable aroma of Paramount management dealing with the sale of control as though Paramount were the same kind of private fiefdom as Viacom, and of the Paramount directors playing no other role than being rushed into hastily-called, weekend meetings to validate the decisions reached by their chairman, Martin Davis, and Viacom's Sumner Redstone. One cannot condone what has happened at Paramount without consigning Revlon, Barkan, Van Gorkom and Technicolor to the scrap heap whenever directors invoke the talisman of "strategic fit" and are prepared to give deposition testimony that they did not subjectively "intend" to become subject to Revlon duties because of the supposed "strategic" merit of their preferred transaction.

STATEMENT CONCERNING FACTUAL MATTERS

A. Facts Not in Dispute.

The most striking aspect of the litigation "fact" record submitted by defendants with their answering brief is its utter artificiality. Thus, the defendants (i) submit affidavits referring to board discussions not reflected in the corporate minutes, the Lazard books or the deposition testimony of the directors, (ii) submit testimony of the Paramount directors who dutifully recount their belief that Paramount has not been "sold" despite contemporaneous statements by Sumner Redstone that he purchased it and by Martin Davis that he sold it, and (iii) submit generalized, self-serving affidavit testimony about the difficult "arm's length" negotiations between Viacom and Paramount that are inconsistent with

the facts shown in the few surviving contemporaneous documents (including the Lazard chronologies) and the self-evident outcome of the negotiations.

But resolution of disputed fact issues is not necessary for the Court to ascertain that preliminary relief is necessary here. The undisputed facts are as follows:

-- Unless enjoined, the Viacom tender offer will close at midnight on November 22 and the Paramount shareholders will be coerced into (i) accepting a lower offer for their shares and (ii) surrendering control of Paramount to Sumner Redstone. There is no factual dispute that by reason of Paramount's selective use of the Rights Plan and other board-created impediments to preclude the QVC offer, the Paramount shareholders will be forced by economic necessity to tender to the Viacom bid. Ex. 92. There will not be any voluntary choice, and the shareholders will never have an effective vote on the "back-end" merger. Likewise, there is no dispute that Sumner Redstone will have absolute control of Paramount after the tender offer is completed. E.g., PAB 45.

-- Despite defendants' rhetoric about "long-term" value, most of the Paramount shareholders' equity will be extinguished now for cash. Moreover, in the promised second step, another additional component of that equity will be converted into nonvoting preferred stock (which Viacom can convert into outright debt) and nonvoting equity. Thus, as presently constituted, the overriding effect of the transaction is to extinguish the shareholders' long-term equity interest, not preserve it.

-- Despite defendants' rhetoric about "long-term" value, the equity that remains for Paramount shareholders after the Viacom transaction is a minority interest in a company absolutely controlled by Redstone. That equity interest could be extinguished by Redstone in a "freeze-out" merger or by virtue of any other freeze-out transaction which Redstone determines to effectuate. The Viacom transaction contains no constraints on Redstone's exercise of his majority control. Consequently, what long-term equity remains for the Paramount shareholders will survive only so long as Redstone determines it should.

-- Despite the defendants' rhetoric about "long-term" value, the September 12 decision of the board of directors to approve the Viacom merger proposal necessarily turned upon the critical fact of short-term, immediate market value. As undisputably established, on July 7 Paramount rejected as inadequate a Viacom proposal of .1 A share, .9 B share and $13.50 cash because that proposal had an immediate market value only of $60.86. On September 12, Paramount accepted an offer with the same securities and less cash, not because the "long-term" value of the proposal had changed and not because the strategic fit had changed, but because the immediate market value of the Viacom securities had increased over the preceding two months (principally between July 6 and August 20). Indeed, Viacom and Paramount focused so intensely on immediate market value that they debated which day should be used for the valuation. Ex. 51 at 3.

-- Despite Paramount's efforts to fill the record with its long-past consideration of alternative transactions, the undisputed facts are that Paramount knew of ten companies presently identified as "potential acquirers" of Paramount, but contacted not one of them before entering into the September 12 agreement (with its extraordinary Lockups). Ex. 54 at P30174; Rohatyn Dep. 46. Indeed, even over the preceding years, the Board of Directors of Paramount never considered a transaction involving a change-of-control of Paramount other than the Viacom transaction. Rattner Dep. 5-7. Moreover, it is undisputed that consummation of the Viacom transaction will preclude the shareholders or directors from ever considering another alternative. The future strategy for Paramount will be decided by Sumner Redstone, not the Paramount stockholders or directors elected by them.

-- The essential terms of the original merger agreement were negotiated in private between Redstone and Paramount's Martin Davis between April 20, 1993 and July 1, 1993. See QOB 8-10; Ex. 38. On August 16, Sumner Redstone wrote to his investment banker reminding him that in the first meeting with Davis in the Spring of 1993 Davis told Redstone "that [price] was not the most important issue, that [price] could easily be resolved, but that management was the issue." Ex. 85 (emphasis added). Even Sumner

Redstone found this "incredulous." Ex. 85. Thus, despite the defendants' "paper reality" of "hard fought" negotiations, the indisputable contemporaneous truth is that those negotiations began with Davis telling Redstone that price was not important and could be easily resolved.

-- On September 12, the Paramount directors voted to grant a stock option to Viacom on 20% of Paramount's stock, exercisable essentially for a note from Viacom, but which Viacom could compel Paramount to repurchase for cash. Exs. 1 and 20. This option would give Viacom together with management (which holds 5% of Paramount's stock) the ability to block a merger under the super majority provisions of Paramount's certificate of incorporation. Ex. 9 at 82. This option was granted despite these undisputed facts:

° the September 12 offer provided less cash than the July 7 offer rejected as "inadequate" (Ex. 53);

° the value of the September 12 offer exceeded the July 7 offer only because of appreciation in the Viacom stock during a period of extraordinary trading by Redstone -- trading that both Paramount's management and investment banker viewed with "concern" (Rattner Dep. 77-78, 87-88);

° no effort was made to negotiate with known potential third parties; and Paramount, in its "negotiations" with Viacom, never even threatened to seek any alternative in an effort to induce a better bid from Viacom (Rattner Dep. 52-53, 76, 180-82) , although Paramount knew it was an "extremely attractive" acquisition candidate and Sumner Redstone had been resolutely pursuing it for three or four years (Ex. 54 at 21).

° Viacom is rewarded via the stock option for initially offering to pay $69.14 for Paramount, whereas Viacom -- as we now know -- was prepared to pay much more for Paramount.

-- On September 27, Martin Davis told his board that he expected Viacom to raise its bid in order to compete against QVC. Ex. 15 at 3. Both he and Lazard expected Viacom to do so. Rattner Dep. 179. Yet, before signing the September 12th merger agreement, neither Lazard nor management had even attempted to induce a higher bid from Viacom by threatening to contact a potential competing bidder or, in fact, doing so. Rattner Dep. 180-87. Indeed, one must wonder how Davis could have believed he had received Viacom's best offer on September 12 when, fifteen days later and within a week of the QVC proposal, Davis expected that Viacom would increase its bid.

-- On October 11, the Paramount board determined that it had a fiduciary duty to begin discussions with QVC because the QVC proposal "was not subject to any material financing contingency" and QVC had demonstrated evidence of committed financing. Ex. 16. Nonetheless, after concluding that a duty existed to begin discussions, Paramount proceeded to execute a new agreement with Viacom without any discussions with QVC. Ex. 18. Moreover, whatever excuse Paramount had for not commencing such discussions before October 20, another month has elapsed since QVC provided the information, and Paramount still has refused to hold the discussions which the Paramount directors concluded they had a duty to hold.

-- On October 23 and 24, Paramount and Viacom rushed to a new agreement which, as Paramount realized, was substantially different from the earlier merger agreement. At this time, the Paramount directors could have determined to leave the "pill" in place for both QVC and Viacom and conduct orderly negotiations and deliberations with each. Indeed, QVC was requesting such negotiations. Instead, the Paramount directors rushed to conclude a new agreement with Viacom that selectively (albeit conditionally) lifts the "pill" for Viacom so that the shareholders effectively are forced to tender to Viacom and only Viacom. The record is devoid of any explanation for the rush. Sumner Redstone testified that he was unaware of any deadline that Viacom had imposed (Redstone Dep.

199), and the written materials submitted to the Paramount directors on October 24 do not mention any deadline. Exs. 18, 90.

-- In their rush to a new agreement with Viacom, the directors made no attempt to obtain a "stock collar" for the "back end" merger. In the original merger agreement, Paramount had accepted the lack of a "stock collar" because the shareholders could vote against and defeat the merger proposal if the value of the Viacom stock dropped. Pattison Dep. 91-92, 111. Even this protection was eliminated by the new tender offer structure. The shareholders would have no choice but to tender and Viacom, having acquired 51%, could effectuate the second step regardless of any drop in the value of the Viacom securities.

-- In their rush to a new agreement with Viacom on October 24, the directors made no attempt to eliminate the stock option. Rohatyn Dep. 124-25. By this time, it was readily apparent that Viacom, and Sumner Redstone, were committed to acquiring Paramount -- every press release trumpeted Redstone's commitment. Exs. 22, 23, 25, 67 & 82. By this time, it also was obvious that Viacom was not the only serious bidder. Thirteen days earlier the Paramount director had concluded QVC's proposal was serious enough to require the commencement of "discussions". Ex. 16. Indeed, by October 24 it must have been apparent to the Paramount directors that earlier negotiations with Viacom had failed to elicit Viacom's best bid. Nonetheless, with Viacom seeking the directors' selective approval of Viacom's coercive and selective tender offer, the board made no effort to eliminate the stock option. Indeed, the stock option actually was sweetened in Viacom's favor. Ex. 4 at § 1(b).

-- Finally, in their rush to approve a new agreement with Viacom, the Paramount directors failed a second time to get Viacom's best price. On October 24, the board approved Viacom's $80 purchase offer. Less than two weeks later, Viacom increased its bid to $85 per share and the Paramount directors, as had become routine, approved that bid, again without any contact with QVC. PAB 71.

These are undisputed facts, and they are damning. At bottom, Paramount and Viacom are asking this Court to permit Paramount shareholders to be "stampeded" into the lower priced offer. They are asking that the shareholders be forced to extinguish the majority of their equity now and surrender control of Paramount now for the lower of two prices currently available. And, in case the Court does not permit this "stampede", Viacom asks to be rewarded with a $600 million bonanza. Viacom asks for this bonanza because it agreed on September 12 to acquire control of Paramount at a price $16 per share below what Viacom now is willing to pay for it. These admitted facts compel the intervention of the Court.

B. Facts Not Subject to Good Faith Dispute.

(1) The Negotiations Between August 20 and September 9. Paramount argues that from August 20 to September 9, Paramount and Viacom engaged in "arm's length, complex and difficult negotiations . . . with Paramount winning concessions from Viacom." PAB 27-34. While Paramount cites to self-serving testimony about "hard bargaining", the reality is reflected in the outcome of these negotiations.

Price. The contemporaneous, "draft" chronology prepared by Lazard shows that on August 24 Viacom made its first offer after negotiations resumed on August 20. Ex. 51 at 1-2. By that date, Viacom had rejected any "stock collar", which necessarily meant that Viacom was proposing a transaction with neither a cap nor a floor. Rattner Dep. at 99, 101-103. Without a cap, the July proposal made by Viacom had a value of $72.93, and the Lazard draft chronology pointedly notes this fact. Ex. 51 at 1. The sanitized chronology subsequently given to the directors of Paramount did not. Ex. 53 at 1-3. Despite the fact that Viacom's July proposal without a "cap" had a value of $72.93, Viacom's offer on August 24 was $60 in cash and $9 in stock (Ex. 51 at 2) -- less than the "uncapped" value of Viacom's July proposal. Thus, from July 7 to August 24, Viacom insisted on eliminating "stock collars", which necessarily meant eliminating the "cap" it had put on its July 7 proposal, and still refused to agree to the uncapped value of its July proposal.

Between August 24 and September 12, Paramount failed to get Viacom to materially improve the price terms of the offer on August 24. Indeed, Paramount did not even obtain a commitment to offer the $13.50 in cash that had been proposed by Viacom (and rejected by Paramount) in July. The final terms: $60.04 in stock and $9.10 in cash, (Ex. 54 at 1), a mere fourteen cents better than Viacom's August 24 offer and materially less than the "uncapped" value of the July proposal.

In their Answering Brief, the Paramount directors attempt to take credit for the improvements in the bids since September 12. PAB 65-71. However, the higher Viacom bids have developed only because the original bid has been exposed to competition -- the QVC proposal. These higher bids came despite the conduct of the Paramount board, not because of it. Indeed, if Paramount's version of the law is accepted, Viacom and Paramount can stand on the "long-term" and "strategic" value of the original merger and never allow or accept a higher bid.

Stock Option. Paramount trumpets that its negotiations on the stock option resulted in the material concession that the option exercise price be set at Viacom's deal price (originally $69.14) as opposed to the then market value of Paramount stock. PAB 31. In addition, both Paramount and Viacom recite without variation that the Viacom stock option always was part of the transaction, and Viacom never was willing to withdraw it. PAB 31-32; VAB 67.

Again, the existing, contemporaneous records part company with the defendants' version of the facts. The draft Lazard chronology, which provides a detailed discussion of the negotiations (including a discussion of what day the stock valuations would be set) contains no mention whatsoever of a stock option being proposed by Viacom before August 24. Ex. 51 at 1-2. The less detailed (and carefully massaged) chronology prepared for the Paramount directors likewise first references the stock option on August 24 (Ex. 53 at 2). There is no mention in either chronology of a stock option demand in July; nor are there any term sheets which substantiate the defendants' version of the facts.

Equally interesting is the statement in the detailed, draft chronology prepared by Lazard's Peter Ezersky that Viacom "withdrew" its request for a "lockup" on August 25. Ex. 51 at 3. Paramount offers no evidence explaining Ezersky's contemporaneous statements -- in particular, no affidavit of Ezersky. For its part, Viacom suggests that the "lockup" being withdrawn may have been an "asset lockup", not the stock option. VAB 20n. However, the draft chronology makes no reference to any "asset option" ever being discussed. The only "lockup" earlier referenced in the draft chronology is described as the "lockup option on 20% of [Paramount's] shares . . . ." Ex. 51 at 2. The next entry describes the "lockup" as being withdrawn. Id. at 3.

Moreover, the terms of the option apparently improved for Viacom over the course of these difficult negotiations. According to Felix Rohatyn, the critical terms of the stock option which allow Viacom to acquire the shares for a note, but obligate Paramount to repurchase the option for cash, were accepted by Paramount in the weekend negotiations immediately preceding the board meeting. Rohatyn Dep. 29-30. And the sole significant concession that Paramount claims to have obtained in the negotiations concerning the option, an exercise price at the Viacom deal price as opposed to market price, was lost in the new agreement approved on October 24. In the new agreement, Viacom's exercise price remained at $69.14 despite the fact that Viacom's deal price became $80. Exs. 2 and 4.

Other Terms. The true reflection of Paramount's "hardball" negotiations is evidenced in notes taken by Lazard at a September 7 meeting between Lazard and Smith Barney. (Ex. 61). According to Donald Oresman, negotiations had terminated on August 25 with no agreement. The negotiations resumed in early September. Oresman Aff. ¶ 25-28.

At the meeting on September 7, Lazard's notes indicate the following proposal from Viacom:

> Price $69 bid
> Components .9/.1 + 8.80
> Board
> Name

Lock-up
Break-up fee
Fiduciary out
Management - not in dispute - MD = CEO

Ex. 61 at L6625.

Paramount's response is succinctly stated on the next page:

Our response

.9/.1 + $10 - give on all else.

Ex. 6 at L6626. From July 7 to September 9, the "uncapped" value of Viacom's offer had dropped from the low seventies to the high sixties. From August 24 to September 9, Viacom's proposal increased by a mere fourteen cents. By September 7, Paramount would "give on all else" - but what else was left to give?

(2) The Board's Knowledge of Summer Redstone's Buying. Between July 1 and September 9, the pricing of Viacom's offer improved, if at all, only as a result of the appreciation in the market price of Viacom stock. The undisputed facts are that from July 7 to August 20 the Viacom B stock, the largest component of the merger consideration, appreciated 22.1% and Redstone accounted for 15.5% of the shares purchased in the market. Ex. 66 at SB3385. After August 20 and until September 9, with Redstone out of the market, the Viacom stock did not materially increase in price. See Ex. 53 at 1-2 showing Viacom B at $57.25 on August 20 and $56.75 on September 8.

The only basis upon which the Paramount directors could have determined that the September offer was "better" than the "inadequate" July offer was the appreciation in the Viacom securities between July 6 and August 20. The "long-term" or "strategic" value of the combination of Paramount and Viacom, as reflected in the .1 A share and .9 B share, had not changed from July 7 to September 12. Thus, from the perspective of the Paramount directors on September 12, the critical and essential element of the new proposal was the trading value of the Viacom stock. If the market appreciation of the Viacom stock was suspect, the entire merger proposal was suspect.

Given the critical importance of this issue, the information provided to the Paramount directors about the appreciation in the Viacom shares was the most important information before the Board. Paramount does an "artful" job of portraying what information was given to the directors, but this artful dance cannot withstand scrutiny. First, on this most critical aspect of the merger proposal, there was nothing in writing submitted to the directors of Paramount. Paramount implies in its brief that the Lazard book of September 9 discussed this issue. PAB 38. While the Lazard book of September 9 did show the appreciation in the Viacom stock, neither it nor the September 12 book ever mentioned that Redstone was purchasing during the period and neither mentioned the extent of Redstone's purchases during this period. Rattner Dep. 124-26.* When Rattner of Lazard was asked why the Lazard book discussed the trading history of the Viacom stock, but never mentioned Redstone's purchases, he could not recall a reason. Rattner Dep. 125-126.

Second, while there were written materials prepared on the subject, these materials were never given to the board. The written materials prepared by Lazard (and by

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* Deposition testimony of Steven Rattner (Lazard):

Q. Mr. Rattner, have you reviewed the September 9 presentation by Lazard?

A. Yes.

Q. Is there anywhere in there that gives the board information concerning the amount of purchases by [National Amusements]?

A. No.

Q. Do you have any explanation as to why that information wasn't included in this report?

A. I don't recall why it was not included in this report. . . .

Q. Let me hand you Silberman Exhibit 8 which is the Lazard book dated September 12. . . . Do you have any explanation for why that information wasn't included in the September 12 Lazard book?

A. Same as my previous answer.

Rattner Dep. 125-126.

Smith Barney), which analyzed the Redstone purchases, were not provided to the Paramount directors. Compare P31933, attached to PAB addendum, with Ex. 57, Ex. 58 and Ex. 66. The Lazard materials were given to all the top management of Paramount, but those materials were never shared with outside directors on or before September 12 (see P31933).

Third, if there was an oral presentation to the board on this critical subject, that discussion is not recounted in the minutes of either September 9 or September 12 (Exs. 12 and 13). Again, this information relates to the critical distinction between the "inadequate" July proposal and the merger proposal approved on September 12. It borders on the incomprehensible that such a discussion, if it was at all substantial, would not be reflected in the minutes. Moreover, any discussion was sufficiently brief and inconsequential that the outside directors who were deposed could not recall it. Silberman Dep. 57; Small Dep. 100, 102; Pattison Dep. 65, 77.* Even Martin Davis could not recall any discussion

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* Testimony of outside director Samuel Silberman (Dep. 57):

Q. Did any director at the September 9th meeting raise a question about transactions in Viacom stock by Mr. Redstone or companies controlled by Mr. Redstone?

A. No.

Q. Was the board on September 9th advised that there had been transactions in Viacom stock by companies controlled by Mr. Redstone?

A. No.

Deposition testimony of outside director James A. Pattison (Dep. 77):

Q. And you have no recollection of this, [the Redstone Viacom trades] however, being discussed at the board meeting on September 9th?

A. I do not recollect it being discussed at the board meeting.

Q. Or September 12?

A. Either one.

Deposition testimony of outside director Lawrence M. Small (Dep. 102):

(footnote continued)

of the topic at the September board meetings. Davis Dep. 102. And two of the directors who submitted affidavits did not recall any such discussions. Weissman Aff. (no mention); Pattison Aff. ¶ 17 ("I do not specifically recall whether those stock purchases were discussed at the meeting . . ."). Rattner of Lazard could not recall whether the directors were ever told by Lazard the critical fact that between July 6 and August 20 Redstone accounted for 15% of the purchases of the "thinly traded" and "volatile" Viacom B, the stock that would comprise 9/10 of the shares the Paramount stockholders were to receive. Rattner Dep. 123.

Fourth, Paramount's litigation affidavit record on this subject merely reinforces the conclusion that any discussion which did occur was, at best, brief and very non-specific. Only three affiants recollect any discussion at all. They are Lester Pollack (a partner at Lazard), Benjamin Hooks and Irving Fischer. None of them offers any specific recollection of what was said. Hooks and Fischer, moreover, are not only unclear as to when the discussions took place, but indicate they were given the misimpression that the stock appreciation after the trading had ceased was the same as the appreciation when the trading was occurring, which is demonstrably not the fact. Hooks Aff. ¶ 8 (". . . I was

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(footnote continued)

> Q. What I'm referring to is purchases by Mr. Redstone or companies controlled by Mr. Redstone.
>
> A. No. I've seen no documentation of any sort on that.
>
> Q. You referred a moment ago to possibly having had discussions about that topic triggered either by the Wall Street Journal or by discussions elsewhere. What do you recall about any such discussions?
>
> A. I don't. I'm -- you asked me if I had heard about it at a board meeting. And I said I didn't remember where I had heard about it, but I do know it was in the press at the time so it was a topic that was under discussion during that general period.
>
> Q. To use a lawyer's phrase have we exhausted your recollection on the subject of any stock purchases of Viacom?
>
> A. Yes you have. I don't remember anything about it.

told that these purchases terminated in mid-August and that the price of Viacom shares increased after NAI ceased its purchases"); Pollack Aff. ¶ 18 ("the Lazard presentation . . . included a discussion of the trading activities of [NAI] in Viacom stock that had taken place prior to August 20, 1993."); Fischer Aff. ¶ 10 ("I understood . . . that Viacom's share price had increased after [NAI] stopped making purchases in mid-August."). See also Rohatyn Aff. ¶ 20 ("Lazard discussed the [NAI] stock purchase program with the Paramount board . . ."). None of these general and self-serving affidavits provide any specifics about what information, if any, the board was given. From the affidavits, it appears the directors were led to believe that the appreciation continued after August 20, when the trading stopped. In fact, the price of the Viacom B stock on September 8 was below the price on August 20 ($56.75 versus $57.25). Ex. 53 at P30101-05. Certainly, the Viacom stock did not enjoy the type of appreciation it had been experiencing before the trading ended.

Whatever the truth may be about any discussion at board meetings with regard to Redstone's purchase of Viacom stock, no one, either in testimony or by affidavit, has claimed that the board was given an opinion by their investment bankers that trading by Redstone did not affect the value of Viacom's stock. Any such statement is noticeably absent from the record even now: while Mr. Rohatyn states that Lazard's opinion had to "take into account" the Redstone stock buying, his affidavit does not state that Lazard concluded that Redstone had not contributed to the size of the summer run-up in Viacom stock. Rohatyn Aff. ¶ 20.

(3) QVC's Financial and Business Strengths. Paramount's efforts to denigrate QVC and the value of QVC's stock are thoroughly sham. QVC's principal shareholders from the time of its formation have included the major cable companies in the United States -- among them, Liberty Media, Comcast and Time-Warner. Roberts Dep. 10-12, 15-20; Senior Aff. ¶ 14. Since the announcement of its interest in Paramount, QVC has attracted as major equity investors Cox Enterprises, Advance Publications (an affiliate

of the Newhouse interests) and now, BellSouth, the largest of the regional Bell operating companies. The substantial interest of these highly-sophisticated companies -- leaders in telecommunications, publishing, cable and "interactivity" -- is itself compelling evidence that the combination of QVC with Paramount will constitute a powerful communications/ media enterprise, and that the stock of the combined company will represent significant increased value for the present Paramount shareholders.*

QVC's equity investors have seen the clear advantages of a combination with Paramount. See Roberts Dep. 33, 67, 102, 118-19; Malone Dep. 66-67; Miron Dep. 32, 41-44, 59-60; Dillon Dep. 32-33. Yet for all its talk of "synergies" with Viacom, the Paramount Board continues to resist any discussion with QVC concerning the benefits to the Paramount shareholders of a QVC/Paramount transaction.

Paramount also suggests that the value of the QVC stock to be issued in a second-step merger is highly speculative and is solely dependent on one consideration, the presence of Mr. Diller. PAB 11-12. While there is no doubt that Mr. Diller's talents have been positively acknowledged in the marketplace, the record shows that QVC is not simply Mr. Diller but is instead a solid company that has grown substantially over the past five years.

By way of example, as shown in Lazard's own September 27, 1993 presentation to the Paramount Board (Ex. 55), QVC's revenues have grown from $193.2 million for fiscal year 1989 to an estimated $1.07 billion for fiscal year 1993. During the same period, again according to Lazard's presentation, QVC's cash flow has increased from a positive $14.8 million to an estimated positive $164.7 million; its operating income from $10.2 million to an estimated $118.2 million; and its net income (before extraordinary items) from $9 million to an estimated $56.6 million. QVC has no significant long-term

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* Indeed, as QVC's Supplement to its Offer to Purchase discloses, Senior Aff., Ex. A, p. 10, if QVC acquires control of Paramount, QVC and Paramount, on the one hand, and BellSouth, on the other hand, will form a substantial joint venture to develop a system for delivering entertainment, shopping services and information to customers via interactive networks and to develop an interactive television service that will be marketed to customers.

debt. And QVC's equity partners are also well aware of Mr. Diller's track record -- including at Paramount -- in putting together strong management teams and creating asset value. Malone Dep. 65; Miron Dep. 83-84; Dillon Dep. 63-64. That record has motivated them to buy QVC common stock at $60 per share (if Paramount is acquired). Indeed, those same investors have also negotiated for options to purchase QVC common stock at the same $60 per share price -- in amounts ranging from $170 million to over $500 million -- if QVC does not succeed in acquiring Paramount. Miron Dep. 79-80; Dillon Dep. 91-92; Senior Aff., Ex. A, p. 12.

Paramount also seeks, absurdly, to liken the QVC Offer to the debt-ridden takeovers of the 1980s, as well as to question the strength of QVC's financing. PAB 1. The QVC Offer, however, is being financed with substantially more equity than the Viacom Offer. Thus, of the $5.5 billion required to purchase Paramount shares in QVC's tender offer, $2.5 billion will come from infusions of equity, in the form of both common stock and convertible preferred stock, that is being acquired by QVC's equity partners. Viacom has committed equity financing of only $1.8 billion, and approximately $3.4 billion in debt; in order to match QVC's Offer, Viacom would have to borrow an additional $300 million if it cannot get another equity partner. Moreover, while QVC's debt financing does not mature until December 31, 2000, Viacom's acquisition debt is pursuant to a one-year revolving credit arrangement. Senior Aff. ¶¶ 6, 9.

Further, the debt financing being undertaken by Viacom for its offer will be piled on top of the mountain of debt -- almost $2.4 billion -- that is already on Viacom's balance sheet; Viacom's resulting heavy debt to capital ratio would place significant negative pressure on Viacom's stock. In sharp contrast, QVC presently has virtually no long-term debt, and its capital structure after a combination with Paramount will reflect a far more substantial equity component than would a combined Viacom/Paramount. Senior Aff. ¶¶ 6-8.

To suggest as Paramount does that there is anything shaky about QVC's financing is simply to misstate the record. In reality, the equity component of that financing is contingent only upon consummation of the Paramount acquisition (since regulatory approvals will then by definition have been obtained). As for QVC's debt financing, its lead lender has advised QVC that such financing is available, and the specific terms and conditions are now being negotiated. There is no question that all of the financing will be available to pay promptly for shares tendered into QVC's Offer. Senior Aff. ¶¶ 3-4; Costello Aff. ¶ 3.

Finally, Paramount's efforts to disparage QVC stock based on purported price/earnings multiples (PAB 81) are clearly misguided. In the first place, cable/entertainment companies are not valued on the basis of earnings but on multiples of cash flow. Senior Aff. ¶ 15. On that basis, Lazard's own September 27 Paramount board book shows that Viacom and QVC trade at comparable cash flow multiples, although QVC's cash flow multiple is shown actually to be lower based on estimated 1993 numbers. See Ex. 55, p. 25. More interesting for present purposes, however, is Lazard's multiples comparison based on earnings: the multiple for QVC is shown to be 36.2; the multiple for Viacom, 66.8 (no doubt reflecting its high leverage). Id.

In short, Paramount's attempts to portray QVC as some kind of fly-by-night venture are for naught: QVC is a real company, with real management, offering real consideration to Paramount's shareholders.

(4) Paramount Is Not "For Sale", but Redstone Has Purchased It. The defendants' briefs, affidavits and deposition testimony are replete with the never-ending refrain that Paramount is not "for sale". But these incantations are contrary to the common sense and contemporaneous description of the transaction issued by both Paramount and Viacom. These public and common-sense descriptions were recounted in QVC's opening brief, and will not be repeated here. At bottom, these many public pronouncements relating

to the original merger agreement all describe that transaction as an acquisition of Paramount by Viacom. QOB 68-69.

If the original agreement was an acquisition, the new tender offer clearly is even more of an acquisition -- more of a sale -- than the original transaction because a greater share of the stockholders' equity now is being extinguished. Indeed, Felix Rohatyn testified in his deposition that the two factors with the chief economic significance to him in defining a "sale" are (i) whether the transaction involves a change of control and (ii) extent of the equity being extinguished. Rohatyn Dep. 64-66. In this case, both factors exist: control is changing and most of the shareholder equity is being extinguished. Moreover, what equity remains is only a minority interest subject to being extinguished whenever Sumner Redstone determines to do so. On these facts, it does not matter what the directors call this transaction or whether they intended to "sell the company." In any sense that has economic meaning, Paramount is being sold -- the only question is at what price.

(5) "Paramount Was Not Obligated to Talk With QVC," but "Discussions [with QVC] Were Necessary for the Board to Comply With Its Fiduciary Duties to the Paramount Stockholders." One point emphatically made in Paramount's brief -- indeed, it is embodied in a boldface point heading -- is that "Paramount was not obligated to 'talk' with QVC." PAB 122. That contention flatly contradicts Paramount's own disclosures to the SEC. In two separate Schedules 14D-9 -- one filed in response to Viacom's offer on October 25, and one filed in response to QVC's offer on November 8 -- Paramount represented that its board had concluded that "discussions [with QVC] were necessary for the Board to comply with its fiduciary duties to the Paramount stockholders." Ex. 7 at 14 (emphasis added); Ex. 8 at 4.

The fact that Paramount thus feels obligated in its brief to abandon representations twice prominently made to the SEC -- one less than a week before the brief was filed -- only shows how untenable Paramount's legal and factual positions on this motion must be. If Paramount really believed what it was arguing in its brief -- that it was not in any

way obligated to talk to QVC -- it would not have made the disclosures that it did to the SEC; and it would never have bothered to go through the motions of requesting information from QVC. If Paramount really meant its duty-bound "discussions" to be anything more than a sham, it would not be arguing in its brief that it was not required to talk to QVC; and its directors would not be repeatedly testifying in unison that Paramount is "not up for bid," "not [in] a bidding situation," "not having a bidding contest," and the like. Liedtke Dep. 88; Silberman Dep. 49; Davis Dep. 253.

Taken together, Paramount's disclosures -- representing that it was obligated to negotiate with QVC -- and its position on this motion -- that Paramount is not seeking to fulfill that obligation -- lead to only one conclusion: that Paramount's board has failed to fulfill its fiduciary duties in accordance with Delaware law.

REPLY ARGUMENT

I. REVLON, NOT PARAMOUNT, GOVERNS DIRECTORS' DUTIES WHEN THEY ARE SELLING CONTROL.

In QVC's view, the controlling principle here is this: "[W]hen bidders make relatively similar offers, . . . the directors cannot fulfill their enhanced Unocal duties by playing favorites with the contending factions. Market forces must be allowed to operate freely to bring the target's shareholders the best price available for their equity." Revlon, 506 A.2d at 184.

The Paramount defendants do not even claim that their conduct can be squared with Revlon if it applies. Instead, their anti-Revlon arguments are largely to the effect that Revlon does not apply here, notwithstanding the undisputed fact that the Viacom merger agreed to by the directors would transfer 70% voting control over Paramount to Redstone.

A. The Revlon Trigger.

QVC's opening brief showed that Revlon is triggered here because the Viacom deal -- indisputably -- would transfer control over Paramount to Redstone. It is a

"sale" of Paramount to Redstone. See QOB 61-71. As there shown, it is clear as a matter of both precedent and policy that Revlon is triggered by a change in corporate control, and indeed, no case has ever held that Revlon is not triggered where control of the corporation is changing hands.*

1. Paramount v. Time.

The Paramount directors here claim that the Supreme Court's opinion in Paramount Communications v. Time gives them the license to do what they have done here -- sell control to Redstone in a locked-up deal, refuse to negotiate or even talk with QVC which was at all times prepared to make a far higher bid, and use the Lockups and the directors' power over the pill (and under 8 Del. C. § 203 and Article XI of the corporate charter) to ensure that Viacom wins and QVC is precluded.

The Paramount directors' attempt to hijack Paramount in defense of their conduct is entirely specious.

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* For a thorough canvass of both the case law and the policy reasons supporting the conclusion that Revlon is triggered upon a change in control, see Gilson & Kraakman, What Triggers Revlon?, 25 Wake Forest L. Rev. 37 (1990), especially the discussion there at p. 50:

> From a doctrinal perspective, such a case-by-case search for the formation of control blocks has the advantage of focusing directly on the entrenchment problem that motivates Revlon's application in the first place. Although the Time-Warner merger would have diminished the likelihood of a subsequent hostile transaction by increasing the size of the surviving entity, only the formation of a stable control block could entirely scuttle the prospects of target shareholders for capturing a take-over premium in the acquisitions market. . . .

See also Black & Decker Corp. v. American Standard, Inc., 682 F. Supp. 772, 779-82 (D. Del. 1988) (holding Revlon triggered by a proposed change in corporate control; reasoning that it would be "unreasonable" to limit Revlon to "only these situations involving the complete sale of all shares of the company"). The court in Black & Decker further stated:

> To require that the Revlon principle apply only to an offer to purchase 100% of a company's stock would ignore the inevitability of a break-up which could follow a partial tender offer. The effect of a partial tender offer is that "it allows a raider to gain control of a target and hold a minority interest captive, with little protection for the stockholder against self-dealing or a squeeze-out merger." Martin Lipton, "Corporate Governance in the Age of Finance Corporatism", 136 U. Penn. L. Rev. 1, 17-18.

682 F. Supp. at 781 n.4.

Paramount and Revlon. In Paramount, both this Court and the Supreme Court held that the Time directors had not triggered Revlon when they agreed to the original merger agreement with Warner. The Time-Warner merger could not have resulted in a change in control of Time. Control over Time would remain in the market, with the public stockholders. Here, the Viacom merger will result in a change in control of Paramount. Control of Paramount will be held by Redstone.

There is no doubt that Paramount would have held Revlon triggered by the original Time-Warner merger agreement had it been a change of control transaction. In this Court, Chancellor Allen's opinion was express on the point: "That would, for example, plainly be the case here if Warner were a private company." Paramount, Del. Ch., slip op. at 59. Viacom here is just such a private company. In the Supreme Court, the Barkan opinion holds that "a board becomes subject to Revlon duties whenever `a fundamental change of corporate control occurs or is contemplated.'"* And the most recent Revlon decision of the Supreme Court, Technicolor, squarely holds that Revlon is triggered by a consensual merger agreement not preceded by an auction and in the absence of any break-up or dissolution of the company. Technicolor, Del. Supr., slip op. at 39. Technicolor strongly confirms this Court's previous holding in Wheelabrator that the Barkan change of control formulation of the Revlon trigger was not overruled by the Paramount decision, since the "two possibilities" for triggering Revlon specifically mentioned in Paramount do not include a cash merger such as that held to trigger Revlon in Technicolor.

Paramount and long-term strategy and values. The Paramount defendants also seek to rely on another aspect of the Paramount decision, i.e., the Supreme Court's holding that under Unocal the Time directors were not obliged to abandon their goal of acquiring Warner once Paramount made a hostile tender offer for Time conditioned on the directors' abandonment of the Time-Warner combination. Thus, defendants argue that the

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* In re Wheelabrator Technologies Inc. Shareholder Litigation, Del. Ch., C.A. No. 11495, Jacobs, V.C. (Sept. 1, 1992), slip op. at 14, quoting Barkan.

Viacom deal is not an "abandonment" but rather an "implementation" of the company's "corporate strategy." PAB 87.

This aspect of Paramount likewise provides no support for the Paramount directors here. The Supreme Court rejected the Unocal claim raised by hostile bidder Paramount in terms which have no relevance here. The Court's ruling makes this clear: the Court rejected the Unocal claim on the ground that it stemmed "from a fundamental misunderstanding of where the power of corporate governance lies," which, the Court explained, included the nondelegable duty of the directors to select "a time frame for achievement of corporate goals," and the conception of corporate plans that the directors could not be obliged to abandon "unless there is clearly no basis to sustain the corporate strategy." Paramount, 571 A.2d at 1154.

The Supreme Court thus made plain that the Time directors were carrying out their directorial functions under Delaware law: they were pursuing a combination with Warner. That is something Delaware law empowers directors to do. Paramount made its hostile offer contingent on the Time directors abandoning that strategy, and asked the Delaware courts to enjoin it. Because what the Time directors were doing was informed and did not trigger Revlon, there was no basis to interfere with their decision. The Supreme Court in Paramount made clear that the Revlon issue and the Unocal issue were really parts of the same, single issue:

> In our view, the pivotal question presented by this case is: "Did Time, by entering into the proposed merger with Warner, put itself up for sale?" A resolution of that issue through application of Revlon has a significant bearing upon the resolution of the derivative Unocal issue.

Paramount, Del. Supr., 571 A.2d at 1150. In other words, precisely because the Time directors' agreement to the original Time-Warner merger did not trigger Revlon, i.e., did not involve a change of control, there was no basis to interfere with their decision to make a tender offer for Warner once Paramount made its hostile tender offer.

The nub of the matter is this: In Paramount, Paramount was asking the Delaware courts to enjoin a tender offer that the Time board of directors had determined to make in a transaction that did not transfer control of Time away from the public stockholders. In essence, Paramount was asking the Court to enjoin Time from acquiring an asset so that Paramount could acquire Time. Paramount was not asking this Court to knock out antitakeover obstacles that the Time directors had placed between the Time stockholders and Paramount's tender offer. Paramount was not about a poison pill or massive, obstructive Lockups.

Here, the Paramount directors have determined to agree to a transfer of control of Paramount to Viacom/Redstone, and, at the same time, to block QVC's tender offer with a pill and $600 million in Lockups. The Paramount directors are, in short, saying that they, not the stockholders, should decide who gets control of Paramount. That is something that the Paramount decision does not remotely support.

Moreover, unlike the Time directors, the Paramount directors cannot argue that they are only trying to pursue "long term values" by pursuing a "strategic" combination of Paramount and Viacom, that a Paramount/Viacom merger is in the best interests of the stockholders because of the great "synergies" and "fit" they believe inherent in such a combination. Not only will 51% of the Paramount stockholders' equity be cashed out now under the Viacom tender offer, but the remaining equity will be subject to extinction one second after the Paramount/Viacom merger. One second after the Paramount/Viacom merger, Redstone -- by virtue of his holding 70% of the voting power of Paramount/Viacom -- will be able to squeeze out the stockholders in a cash-out merger, sell all or substantially all of its assets or dissolve the company altogether.*

The issue is not whether or not Redstone today intends to do any of this. The point is that the Paramount directors, by blocking QVC, are trying to force a Viacom

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* See 8 Del. C. §§ 251, 271, 275. Indeed, Redstone will be able to do it with the stroke of a pen -- by acting by written consent under 8 Del. C. § 228.

deal that will put the Paramount public stockholders in a minority position in which their continued equity participation will be hanging by a thread that Redstone can cut at any time. That is not remotely what the Time board was permitted to do in Paramount.

For the Paramount directors to talk about the "long term" interests of stockholders when the directors have done nothing to secure the long term for their stockholders, but instead have agreed to a deal under which the stockholders' continuing equity will exist only at the pleasure of Redstone, is indeed a caricature of the Paramount decision.

The Paramount management or directors did not even try to negotiate any restraint on Redstone's power over the long-term future of the merged entity. See Small Dep. 14-19; Pattison Dep. 122-23; Liedtke Dep. 116-18; Davis Dep. 112-13; Oresman Dep. 44-46. They certainly could have tried to negotiate some protections: they could at least have tried to get Redstone to agree that he would not squeeze out the minority for some period of time; that he could not acquire any additional shares sell all or substantially all the assets or dissolve the company without the approval of a special committee of directors unaffiliated with him who he could not remove or replace; or that any of the foregoing transactions could be accomplished only with approval by a majority of the public minority stockholders.*

As a result, from the Paramount stockholders' perspective, the Viacom deal is synonymous with one that is all-cash. Like an all-cash deal, the Viacom transaction puts

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* There are, of course, scores of examples of how properly-motivated directors can take steps to protect the future for the stockholders when corporate control is passing hands -- none of which protections the Paramount directors ever sought to obtain. Gilbert v. El Paso Co., Del. Ch., C.A. No. 7075, Jacobs, V.C. (Nov. 21, 1988), aff'd, Del. Supr., 575 A.2d 1131 (1990) (sale of control transaction; board obtained guarantee that any subsequent merger or cash-out by controlling shareholder must be approved by majority of the minority shareholders); In re TWA Shareholders Litigation, Del. Ch., C.A. No. 9844, Allen, C. (Oct. 21, 1988) (proposed merger by controlling shareholder contingent upon approval by both a special committee and a majority of the minority shareholders); Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701 (1983) (proposed merger by controlling shareholder contingent upon approval by a majority of the minority shareholders); Citron v. E.I. Du Pont de Nemours & Co., Del. Ch., 584 A.2d 490 (1990) (same); In re Arkla Exploration Co. Shareholders Litigation, Del. Ch., C.A. No. 12,288, Hartnett, V.C. (Jan. 14, 1992) (exchange offer by controlling shareholder contingent upon approval by majority of minority shareholders).

the stockholders in a position where they will have no genuine continuing equity, since their continuing equity will exist solely at Redstone's sufferance.

These facts compel the conclusion that the Paramount directors should not be able to use the poison pill and punitive lockups to compel acceptance of one deal over the other. Directors surely cannot do that in the case of competing all-cash deals: one that the directors like and one that they do not. The Paramount directors here -- directors who admittedly did nothing to inform themselves as to the alternatives available in a change of control of Paramount, and did nothing to elicit the best available alternative from QVC or anyone else (including, as the facts here show, Viacom)* -- have no right to decide for the stockholders whether the Viacom offer or the QVC offer will succeed.

It is simply bizarre for the Paramount directors to be portraying themselves as the protectors of long term stockholder values. That contention is not even a fig leaf: it provides not the barest cover for the Paramount directors' conduct here.

2. The argument that the Paramount directors did not "intend" to "sell" the company.

The radical error in the Paramount defendants' position is highlighted by their emphasis, and repetition, of the theme that the directors "did not intend" to "sell" the company, that they do not "view" the Viacom deal as a "sale", that the directors did not "choose" to put the company "up 'for sale'". Over and over the directors testified, and now their brief incants, that Paramount was (and is) "not for sale." See PAB 45-46, 87. See also VAB 54 (asserting that Revlon duties are not triggered unless a board "consciously" so intends).

That cannot matter. It cannot be that whether Revlon is triggered depends on whether the directors "intend" it to be. As Chancellor Allen held in Paramount, the Supreme Court in Macmillan decided this point, when it held "that a board may find itself in a Revlon mode without reaching an express resolve to 'sell' the company." Paramount, Del.

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* See Liedtke Dep. 88-89; Silberman Dep. 49-53, 79; Small Dep. 27-28, 122, 198.

Ch., slip op. at 58. Chancellor Allen there quoted the following from the Supreme Court's decision in Macmillan:

> At a minimum, Revlon requires that there be the most scrupulous adherence to ordinary principles of fairness in the sense that stockholder interests are enhanced, rather than diminished, in the conduct of an auction for the sale of corporate control. This is so whether the "sale" takes the form of an active auction, a management buyout, or a "restructuring" such as that which the Court of Chancery enjoined in Macmillan I. Revlon, 506 A.2d at 181-82.

Paramount, Del. Ch., slip op at 58, quoting Macmillan, 559 A.2d at 1285, emphasis by the Court. The Chancellor then stated:

> . . . I do not find it dispositive of anything that the Time board did not expressly resolve to sell the Company. I take from Macmillan, however, and its citation of the earlier Macmillan I opinion in this court, that a corporate transaction that does represent a change in corporate control does place the board in a situation in which it is charged with the single duty to maximize current share value.

Paramount, Del. Ch., slip op. at 58-59. The Paramount directors' "intent" is not what counts. It is what they did that counts. And what they did -- indisputably -- is to agree to turn over control of Paramount to Redstone, lock, stock and Lockups.

3. Defendants' other arguments.

a. Wheelabrator. The Paramount defendants argue that this Court, in In re Wheelabrator Technologies Inc. Shareholders Litigation, supra, supposedly "rejected" change of control as the Revlon trigger and "observed" that Paramount "may have overruled Barkan sub silentio." PAB 92-93. Defendants have it backwards. Wheelabrator observed, as to the possibility of such an overruling, that "[a]bsent a clear indication to that effect by the Supreme Court, however, I am not prepared to so conclude." Wheelabrator, slip op. at 15 (emphasis added). And contrary to defendants' flat statement, Wheelabrator did not hold that Revlon had not been triggered in that case: the Court dismissed the Revlon decision there "even assuming (but without deciding) that Revlon duties were triggered under the Barkan standard" because there was no allegation that the WTI directors

were so ill-informed that they violated Revlon by not conducting a "market check." See Wheelabrator, slip op. at 16.

b. Technicolor. In its opening brief, QVC argued that both this Court's and the Supreme Court's Technicolor opinions support the view that a change of control triggers Revlon, and necessarily reject limiting Revlon to the "two possibilities" referred to in Paramount, since both Technicolor opinions held Revlon applicable to a consensual cash merger not preceded by auction bidding or involving a break-up or dissolution. See QOB 66. The Paramount defendants' response is that the Supreme Court's "use" of Revlon in Technicolor was only "in passing." PAB 94 n.291. Neither Technicolor opinion can be dodged with that sort of sleight of hand. Technicolor is strong support for QVC's position here and cannot be squared with defendants' position.

c. Chrysogelos v. London. The Paramount defendants argue that this Court's opinion in Chrysogelos v. London, Del. Ch., C.A. No. 11910, Jacobs, V.C. (March 25, 1992), shows that QVC's Revlon position is wrong. See PAB 90-91. Chrysogelos does no such thing. Chrysogelos did not involve directors who had agreed to a sale of corporate control. The passage defendants cite dealt with a claim that the directors there violated their duties by rejecting a takeover proposal. That, of course, is not remotely the claim here. It singularly shows how far defendants will go to defend the indefensible that they argue that Chrysogelos conflicts with QVC's position.

d. Newmont. Viacom purports to portray Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334 (1987), as a case holding Revlon not triggered even though there was "effective control being placed in a 49.7% shareholder." VAB 57n. To the precise contrary: Ivanhoe held Revlon inapplicable precisely because the board had prevented Gold Fields from having control. See QOB 64n.

e. The "no auction" argument. In a slightly different version of their "no intent" argument discussed supra, the Paramount defendants argue that Revlon does not apply because Paramount has not conducted an auction: "Here, there simply is no

auction." PAB 91. But, again, it surely cannot be the decisive factor as to the board's duties whether or not the board decides to hold an auction before it sells control. Are defendants actually arguing that it is they who can determine what their legal duties are when they sell control by the expedient of the technique by which they choose to sell control? To state defendants' position is to reveal its speciousness.

f. The "unfairness" argument. In a revealing passage, the Paramount defendants argue that it would be "unfair" to hold Revlon triggered just because its "chosen strategic partner happens to have a controlling owner," and that doing so would "unfairly" create "two sets of merger rules: one for the companies with no centralized controlling interests and one for controlled corporations." PAB 93-94. By this odd appeal to "fairness" defendants apparently would have this Court ignore the dispositive difference between a merger that leaves the public in control, and a merger that transfers control away from the public and into the hands of one man who can then eliminate the remaining equity whenever he wishes. To recognize a distinction with such a difference is not "unfair." That is what fiduciary duties are all about.

g. The "merger" cases. The Paramount defendants string cite cases supposedly establishing the proposition that it is "the established rule" that a merger agreement is governed only by business judgment rule analysis. PAB 89-90. None of these decisions involved any Revlon issue, and none has any pertinence here. None of the cited cases involved a merger remotely similar to the proposed merger of Paramount and Viacom. Indeed, with the single exception of Lewis v. Leaseway Transp. Corp., Del. Ch., C.A. No. 8720, Chandler, V.C. (May 16, 1990), not one of the cases cited by Paramount involved a sale or the acquisition of corporate control where none previously existed.*

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* Stroud v. Grace, Del. Supr., 606 A.2d 75 (1992), had nothing, whatever, to do with a merger or other type of transaction involving a sale of corporate control. In fact, the corporation in Stroud was closely held, and was controlled by a single family. Similarly, the cases of Van De Walle v. Unimation, Inc., Del. Ch., C.A. No. 7046, Jacobs, V.C. (Mar. 6, 1991), Citron v. E.I. Du Pont de Nemours & Co., Del. Ch., 584 A.2d 490 (1990), and Rosenblatt v. Getty Oil Co., Del. Supr., 493 A.2d 929 (1985), all involved

(footnote continued)

Moreover, the challenged merger in Lewis did not involve competing bidders, was negotiated and approved by a special committee of independent directors, and followed an exhaustive search for acquirors, which yielded only the one offer. Lewis v. Leaseway Transp. Corp., Del. Ch. C.A. No. 8720, Hartnett, V.C. (June 12, 1987). In addition, Lewis predates this Court's later decisions in Roberts v. General Instruments Corp., Del. Ch., C.A. No. 11639, Allen, C. (Aug. 13, 1990), and Yanow v. Scientific Leasing Inc., Del. Ch., C.A. No. 9536, Jacobs, V.C. (July 31, 1991), both of which hold, in reliance upon Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., 559 A.2d 1261 (1989), that, in the context of a sale of corporate control, "the actions of even a disinterested board must satisfy an enhanced level of scrutiny before they will qualify for the deference that courts ordinarily accord to good-faith business judgments." Yanow, slip op. at 17.

B. The Revlon Duty.

In an obvious effort to create, and rebut, a "straw-man" argument, the Paramount defendants argue that even under Revlon, no "auction" was required. See PAB 95-100.

Of course, it is no part of QVC's position that the Paramount directors were obliged to announce that the company would be sold at 10:00 a.m. on September 12, October 24, or any other date, and then simply to appear at the appointed time, gavel in hand, to proclaim the winning bid. Revlon does not require any one methodology. A board under Revlon certainly has discretion as to the method to be employed to achieve the goal of the highest possible price. It is the overall requirement that the directors here violated -- the requirement they act "in a neutral manner to encourage the highest possible price for shareholders." Barkan, 567 A.2d at 1286.

(footnote continued)

mergers approved by majority stockholders. Even further afield is the decision in TW Servs. v. SWT Acquisition Corp., Del. Ch., C.A. No. 10427, Allen, C. (March 2, 1989), which involved a board's determination to oppose a change of control transaction, and to reject a proposed merger.

Beyond that, Paramount's argument is a pretense: it pretends that the Paramount directors were faced with a situation where "long-term shareholder value is the major consideration," that there are "long-term interests to safeguard." PAB 96, 100. But, as detailed above, under the Viacom deal, Redstone will be the controlling Viacom-Paramount stockholder and will be in position to extinguish the stockholders' continuing equity, via a cash-out merger or otherwise, at any time of his choosing. There is no "long-term" for the Paramount stockholders under the Viacom deal. All of the Paramount defendants' rhetoric about how directors have some role to play in assessing the "long-term" back end is relevant only to some other case than this one.*

The Paramount defendants indeed concede that, in numerous cases, "Revlon quite properly charged the board with a duty to obtain the highest possible short-term price, i.e., fungible cash, because the long-term simply no longer mattered." PAB 100. Here, for all practical purposes, the situation facing the Paramount directors when they acceded to, and then fiercely have sought to favor, the Viacom deal is likewise one in which "the long-term simply no longer mattered." The long term belongs to Redstone, not the Paramount stockholders.**

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* Paramount also cites cases that are said to allow directors to accept lower cash bids where there are significant differences in such things as timing, structure and financing certainty. See PAB 97-98. That principle likewise has no application here. Both the QVC and the Viacom bids can close within the same basic time period, their structures are essentially identical, and there can be no doubt as to QVC's financing. See Senior Aff.; Costello Aff.

** Paramount's quotation from TW Services, Inc. v. SWT Acquisition Corp., Del. Ch., C.A. No. 10427, Allen, C. (Mar. 2, 1989), slip op. at 20, bears precisely on the Viacom deal:

> The rationale . . . that recognizes the appropriateness of sacrificing achievable share value today in the hope of greater long term value, is not present when all of the current shareholders will be removed from the field by the contemplated transaction.

Here, all of the "long term" will be "removed from the field by the contemplated transaction." It will belong to Redstone.

This is not a case where directors conscientiously informed themselves of alternatives before agreeing to a change of control and then were left with two alternatives, each 51% cash with a stock second step. The Paramount directors loudly, and proudly, proclaim that they did not do that. Accordingly, this case does not turn on whether the directors' role, assuming they have properly informed themselves of alternatives, includes valuation of second step paper. What this case involves is the proposition that directors who studiously have not sought to cause "other bidders to come out of the woodwork" (Small Dep. 198) should be allowed to compel the stockholders to accept their favored suitor, and to preclude stockholder choice of a competing bidder, by the use of a poison pill and massive lock-ups. Revlon -- and the Delaware principles it embodies -- clearly says "no."

II. DEFENDANTS DO NOT RESPOND TO QVC'S CLAIM THAT THEIR FAILURE TO USE ANY KIND OF "MARKET CHECK" BREACHED DEFENDANTS' DUTY TO BE FULLY INFORMED.

Regardless of whether Revlon was triggered here, it is not disputed that the law requires directors to be "fully informed of all material facts" prior to agreeing to a change of control transaction. Technicolor, slip op. at 64-66. This requirement of full information is the basis of the board's obligation to conduct a "market check" of some kind or other when selling a company. Id.

In QVC's opening brief, QVC demonstrated that the courts have uniformly required some kind of market check, while at the same time recognizing that different kinds of conduct can permit a board to satisfy its obligation to obtain full information. QOB 78-80. QVC there showed that -- whether or not Revlon was applied -- no case has ever permitted a board to agree to a merger and sell control without any market check.

Paramount's lengthy answering brief does not address this argument, preferring to characterize QVC's argument as solely a claim that an "auction" must be conducted in every case. PAB 95-96. But this is a strawman. As the Supreme Court held in Barkan:

> This Court has found that certain fact patterns demand certain responses from the directors. Notably, in Revlon we held that when several suitors are actively bidding for control of a corporation, the directors may not use defensive tactics that destroy the auction process . . . However, Revlon does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest . . . When the board is considering a single offer and has no reliable grounds upon which to judge its adequacy, the concern for fairness demands a canvass of the market to determine if higher bids may be elicited. In re Fort Howard Shareholders Litig., Del. Ch., C.A. No. 991 (Aug. 8, 1988). When, however, the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market. As the Chancellor recognized, the circumstances in which this passive approach is acceptable are limited. "A decent respect for reality forces one to admit that . . . advice [of an investment banker] is frequently a pale substitute for the dependable information that a canvass of the relevant market can provide." In re Amsted Indus. Litig., [Del. Ch., C.A. No. 8224, slip op.] at 19-20 (August 20, 1988). The need for adequate information is central to the enlightened evaluation of a transaction that a board must make.

567 A.2d at 1286-87.

Paramount has entirely ignored -- in its conduct and in its legal submissions -- this duty to inform itself by means of a market check. Instead, Paramount's position is that -- once having decided that Viacom and Viacom alone was a desirable merger partner for Paramount -- all other information was irrelevant. Having decided that nothing could beat a Paramount/Viacom merger, the board easily concluded that it need not obtain information that a different transaction would be superior. Barkan and Technicolor simply do not permit Paramount's directors to decide for themselves that only information about Viacom is relevant, and that no information about any other company (whether "strategic" information or information about what that other company would pay for Paramount's assets) is relevant. Yet that is Paramount's position here.

Directors of a Delaware corporation are simply not permitted to base their conduct on such "logic." The "strategic merger" element of Paramount, whatever it does mean, certainly does not mean that a board can determine that only Company X meets the board's strategic criteria and therefore no other information is needed to satisfy its duty of

full information.* In Technicolor, the Supreme Court less than a month ago affirmed the Chancellor's findings that the directors of Technicolor "fail[ed] to reach an informed decision in approving the sale of the company." Technicolor, slip op. at 65. One of the five bases for this conclusion was that "the agreement was not preceded by a 'prudent search for alternatives'". Id. at 63. Quoting from the Chancellor's opinion, the Supreme Court noted:

> . . . the due care theory and the Revlon theory do not present two separate legal theories justifying shareholder recovery . . .[B]oth theories reduce to a claim that directors were inadequately informed (of alternatives, or of the consequences of executing a merger and related agreements). An auction is a way to get information. A pre- or post-agreement market-check mechanism is another, less effective but perhaps less risky, way to get information.

Id. at 65 n.37.

Delaware law's "market check" requirement does not depend on a finding that Revlon has been "triggered." QVC's point is rather that the directors, because they had no "pre- or post-agreement" market check, "failed to reach an informed decision."

The courts have not permitted boards to escape their obligations on the basis of vague beliefs held by investment bankers or directors about whether another suitor was likely to emerge.** See, e.g., Barkan, 567 A.2d at 1287 (bankers' advice is "pale substitute"). For example, the lack of a pre-agreement market canvass was upheld as consonant with directors' duties in Barkan because (a) the proposed transaction included an ESOP

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* Nor will defendants' reliance on the non-cash element of the Viacom consideration save them from the duty to be fully informed through "market check" procedures. Barkan also included non-cash consideration. 567 A.2d at 1283.

** Although Paramount's brief does not discuss this point in any of its several descriptions of the September 9 and 12 board meetings, a single paragraph in the Rohatyn Affidavit states (although this is not reflected in minutes, notes or other contemporaneous documents) that "it was Lazard's view that . . . there had been ample opportunity for any third party to express interest in a transaction with Paramount during the two months that discussions between Viacom and Paramount had been a matter of public speculation . . . ." Rohatyn Aff. ¶ 15. Pointedly, this is stated to have been "Lazard's view" -- there is no suggestion in the Rohatyn Affidavit that this was Lazard's advice to the board, much less that the board itself so determined. There can thus be no conclusion that the board even had investment banker advice (for whatever that is worth in this context under Amsted and Barkan) as a substitute for a "prudent search for alternatives."

which gave it a financing advantage over other potential offers; and (b) "the Amsted board redeemed the rights plan five weeks before the closing of the Exchange Offer, thereby leaving an extended period of time during which Amsted was wholly unshielded from competing tender offers." Id. at 1287-88.

There is nothing remotely comparable in this record.* The Paramount board acted without the knowledge that was required, and left itself no reasonable way to assure that such information could be obtained after the signing of the agreement -- and did so because it believed it was not required to obtain such information. A clearer violation of duty -- whether under the rubric of Technicolor, Revlon or Van Gorkom -- could not be imagined.

III. THE PARAMOUNT DIRECTORS FAILED TO SATISFY THE STANDARDS OF VAN GORKOM AND TECHNICOLOR.

Paramount's response to QVC's duty of care claim is to do little more than to ignore both the law and the testimony of its own outside directors. The law is straightforward: our Supreme Court has made clear that "a director's duty of care requires a director to take an active and direct role in the context of a sale of a company from beginning to end"; directors "cannot be passive instrumentalities during merger proceedings." Cede & Co. v. Technicolor, Inc., Del. Supr., No. 336, 1991, Horsey, J. (Oct. 22, 1993), slip op. at 58-59.

Nowhere do plaintiffs mention or acknowledge this standard, and it is easy to see why. The Paramount board's willingness to remain passive instruments of Martin Davis will jump off the transcript page:

> I mean, as a director, I'm not involved in the day-to-day negotiations. I wouldn't be expected, I don't think, to know that kind of thing [details of merger negotiations].

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* Paramount's board was not only wrong -- i.e., inadequately informed -- about QVC's interest in making an offer for Paramount, it also missed another bidder -- BellSouth, which approached Paramount directly (Ex. 15 at P31488) before joining QVC's bid as a co-bidder.

Q. Were you at all involved in the negotiations with Viacom in this matter?

* * *

A. Yeah, I think it would -- no -- I just -- I mean, an outside director, my golly, they don't do that.

* * *

Q. Do you have any recollection that the board of Paramount authorized at any time Paramount management to undertake [merger] negotiations with Viacom?

A. Yes, and they certainly have and they they've known all along that -- when you say the management conducts negotiations, normally speaking, I don't know what Paramount's experience is, but these negotiations probably involved batteries of lawyers and the management was, if they're half smart in my view, are sitting back and letting the lawyers -- a lot of these things are quite technical, in my view, and people in the movie business are not very apt to know in depth what the Delaware statutes are, that kind of thing.

* * *

Q. Do you have an understanding as to whether before the board met on September 9th to consider a possible merger transaction with Viacom there had been offers and counteroffers between Viacom and Paramount?

A. I'm not aware of them if there were.

Liedtke Dep. 45, 46-47, 48 (emphasis added).

This is but one of many examples of directorial ignorance and negligence that Paramount would rather ignore, relying instead on a battery of conclusory, lawyer-drafted affidavits to try to save the day.* All QVC asks is that the Court read the Silberman, Small, Pattison and Liedtke transcripts -- and then decide whose characterization of the board is more credible.

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* To the extent that defendants have submitted affidavits that are intended to contradict the deposition record that shows the directors' lack of due care, the affidavits should be accorded little, if any, weight. See Nutt v. A.C. & S. Co., Inc., Del. Super, 517 A.2d 690 693 (1986); Dardanell Co. Trust v. United States, 630 F. Supp. 1157, 1160 (D. Minn. 1986) ("because cross-examination of an affiant is impossible, where there is conflict, a deposition is generally given more weight than an affidavit").

A. **The September 9 Board Meeting**.

With respect to the September 9 Paramount Board meeting, Paramount makes two chief points: first, that the board had been informed about the talks with Viacom earlier in the year; and, second, that the Paramount directors learned all they needed to know about the Viacom transaction at that meeting. However, it remains undisputed that negotiations on the Paramount side were conducted by Davis, Lazard, and by Davis's management team, with no involvement by the outside directors. E.g., Ex. 38 at P30909-10; Small Dep. 55; Liedtke Dep. 45-48. The directors were never asked for their views on any issue in the negotiations leading to the agreement of September 12. E.g., Small Dep. 41-42. When the original Paramount/Viacom deal was finally discussed with the board, the terms were already set and the price fixed. Paramount offers no evidence, not even a brief conclusion in a self-serving affidavit, to the contrary.

As for what the directors knew going into the September 9 meeting, the record remains very clear: virtually nothing. Paramount makes a great deal of the supposed fact that "Mr. Davis had spoken to the Board about Viacom for years" (PAB 35), and that the subject of Viacom came up at a June board meeting (PAB 35) -- well before the bulk of the negotiations took place -- but offers nothing more specific as to what the board learned during this time that would have fulfilled the board's duty to inform itself in addressing a merger proposal in September. It is no answer to a Van Gorkom or Technicolor claim that, in effect, "the CEO had been telling us for years that this would be a good idea."

Paramount also places great emphasis upon the fact that Davis called the directors during the week before the meeting. PAB 35. But this only highlights how sparse even Paramount perceives the record of directorial care to be. What did Davis tell the directors? Virtually nothing: that there would be a meeting, "that there would be discussions of [a] merger", "that there would probably be a proposal to be considered" (Silberman Dep. 34, 35); but not a hint about price, about what Viacom was seeking from Paramount,

about what Paramount was seeking from Viacom, or what the "bid" and "ask" prices were. E.g., Silberman Dep. 36; Small Dep. 41-42, 45; Liedtke Dep. 48. Paramount's affidavits only confirm the point. Pollack Aff. ¶ 16 (Davis "told me that negotiations . . . had started again"); Weissman Aff. ¶ 13 (discussions "were underway" and would be a topic at board meeting); Pattison Aff. ¶ 15 (Davis mentioned discussions with Viacom "and said that he would talk about the status of the discussions" at the board meeting).

Thus, Paramount offers not a shred of evidence that the directors were given any specific information about the give-and-take of the discussions leading to the original merger agreement before the directors sat down in the boardroom on September 9. Beyond this, Paramount does not dispute that the board was not given any written materials in advance of the September 9 meeting. Small Dep. 32-33. And of course the proof of the pudding is in the eating: Even after the September 9 meeting, as noted above, outside director Hugh Liedtke remained completely uninformed about "offers and counteroffers" between Paramount and Viacom. On the question whether "the director[s] [took] an active and direct role in the context of a sale of a company from beginning to end," Technicolor, slip op. at 58-59 (emphasis added), the case could end right there.

But there is more. The September 9 meeting, despite Paramount's after-the-fact effort to build it up, involved only a perfunctory discussion of the deal Davis had already made. Paramount's affiants vaguely and variously describe the meeting as involving "extensive discussions," as "lengthy," as involving discussion of the transaction "at length," as involving "an exhaustive presentation and discussion," as involving "very detailed" discussion, Pollack Aff. ¶ 20; Fischer Aff. ¶ 5; Weissman Aff. ¶ 14; Pattison Aff. ¶ 16, but the only concrete testimony or evidence about the length of the Viacom discussion shows that it was very brief. For although the entire meeting lasted three or four hours, see Pattison Aff. ¶ 24; Silberman Dep. 37, there were numerous unrelated items on the agenda, all of which were taken up first. Ex. 12 at P20096-97. The discussion of the Viacom deal

on September 9 lasted only "three quarters of an hour." Silberman Dep. 37 (emphasis added).

Paramount now asserts in conclusory fashion that numerous aspects of the transaction were discussed on September 9, and claims that numerous pieces of paper either were given to the board or were used in the boardroom, but the support for Paramount's assertions is specious. For example, Paramount notes that "the Board was also given," in addition to the Lazard book, "a 113 page packet of materials which included Paramount's First Quarter 1994 Review." PAB Addendum at 1. But that package was the subject of the portion of the board meeting, comprising the board's normal quarterly financial review, that did not involve the Viacom merger. The fact remains that the only Viacom-related writing given to Paramount's directors on September 9 was the Lazard book. Silberman Dep. 60-61. The Paramount board was not given a draft of the proposed merger or lockup stock option agreements, a written summary of the proposed merger or lockup stock option terms, an analysis of comparable stock option agreements, or an analysis of alternative merger or acquisition candidates. Silberman Dep. 60-61.

The Lazard book (Ex. 53) consisted of little more than a cobbling together of public information about Paramount and Viacom price histories, price/earnings multiples, lines of businesses, revenues, growth rates, brokerage recommendations, and the like. Ex. 53 at P30077-30086.* Again, there was nothing about the proposed merger terms, the proposed stock option terms, no analysis of comparable stock option agreements, and no analysis of merger or acquisition candidates.

Moreover, although it is a prominent item on Paramount's chart of "specious allegations", the fact remains that QVC is correct in maintaining that the Lazard book contained no information about Sumner Redstone's open market purchases of Viacom stock and

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* To be sure, there was a list of comparable acquisition transactions (Ex. 53 at P30116-129), but that is something readily available to anyone with a subscription to the right computer database. There was a chronology of negotiations, but that was only needed because the directors had not been kept properly informed all along. Ex. 53 at 30072-74.

their impact on the stated price of the deal they were being asked to approve. QOB 20. While there is a chart detailing Viacom's price history, there is nothing -- not a footnote, not a word -- about Redstone's open market purchases. Paramount's response to this is to point to an "outline" that "Lazard and Paramount officials" supposedly relied upon in their "oral presentation".

Whether or not an oral presentation based on the outline was in fact ever made, the point is that it was not made in a fashion that caused the directors to be aware of it: directors Silberman, Small, and Pattison could not remember being told at these board meetings about the stock purchases. Silberman Dep. 57; Small Dep. 100, 102; Pattison Dep. 65, 77; Pattison Aff. ¶ 17. Director Weissman says nothing about the subject in his affidavit; he does not remember anything either. Weissman Aff. ¶¶ 13-16. Directors Fischer and Hooks are vague about when the discussions about the subject took place -- leaving open the possibility that it first came up in a board meeting after September 13, when a description of Redstone's purchases was carried on the front page of the Wall Street Journal. Hooks Aff. ¶ 8; Fischer Aff. ¶ 10. Inside director Oresman at first couldn't remember -- but then changed his story. Compare Oresman Dep. 69 with Oresman Dep. 75-76. CEO Davis didn't remember. Davis Dep. 102. As for Mr. Pollack, who appears to have the clearest recollection (Pollack Aff. ¶ 18), it should be noted that he is a general partner of Lazard, whose presentation is itself in issue here. The other directors who claim to remember this point appear to have been left with a misimpression. See discussion supra.

B. The September 12 Board Meeting.

Paramount's description of its September 12 Board Meeting amounts to after-the-fact window dressing. For example, Paramount claims that a written summary of the merger agreement was distributed to the board on September 12. But one director testified that he only remembers a written presentation by Lazard. Silberman Dep. 71. Another director testified that the directors at the September 12 meeting "hadn't had time to look at"

the written material before listening to an oral report that was "not nearly as detailed" (Liedtke Dep. 8, 9) -- and that, indeed, he received the written material the day after the meeting. Of the six director affidavits submitted by Paramount, only one (Pollack Aff. ¶ 22) suggests that any written summary of the merger and stock option agreements was provided to the board; the rest are silent on the point. Hooks Aff. ¶¶ 6-7; Fischer Aff. ¶¶ 7-9; Weissman Aff. ¶¶ 17-20; Pattison Aff. ¶¶ 26-37.*

Beyond this, Paramount -- even with its self-serving affidavits -- does not dispute that a number of critical subjects were not discussed with the Board on September 9 and 12. For example:

-- Paramount does not dispute that the board was not informed about Davis's meeting with Diller, or about Davis's belief that QVC had been readying a hostile takeover bid for Paramount. Silberman Dep. 54; Small Dep. 49-50, 240; Pattison Dep. 26-27.

-- Paramount does not dispute that the board was given no information from which it could conclude that the break-up fee and stock option was reasonable. E.g., Silberman Dep. 91-92.

-- Paramount does not dispute that there was no discussion about the possibility that Redstone could later cash out the equity that Paramount's stockholders would receive in the proposed acquisition -- and thereby deprive them of the "long-term" strategic benefits Paramount now claims it was seeking to preserve. Davis Dep. 112-13; Oresman Dep. 44-46; Small Dep. 17-19; Liedtke

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* Whatever the nature of the discussion or presentation about the merger and stock option agreements, it is clear that the directors did not understand what they were told. Much as Paramount would gloss over the point, that is what the testimony of its directors shows. Two outside directors wrongly believed that Paramount had a right to terminate the Original Merger Agreement before a stockholder vote. Silberman Dep. 73; Small Dep. 72. (Even Davis was misinformed on the point. Davis Dep. 130-33.) A director testified that they were not informed of the provision allowing Viacom to exercise the stock option by the tender of a subordinated note. Silberman Dep. 92-93.

116-18.

C. **The October 24 Board Meeting.**

What Paramount does not dispute about the October 24 meeting is alone enough to establish breaches of the duty of care:

-- Paramount admits that, at the time the board meeting began, the Viacom proposal had not yet taken its final form. See PAB 70.

-- Paramount does not dispute that, at the outset of the meeting, its management and financial advisor were prepared to have the board accept the Viacom proposal -- despite the misgivings expressed in their typewritten notes (Ex. 36 at L007429-30).

-- Paramount does not dispute that the only document prepared by Lazard comparing the merits of the QVC and Viacom offers demonstrated that those offers were of comparable economic value. Ex. 62.

-- Paramount does not dispute that Lazard presented materials indicating that both QVC and Viacom could increase their bids without negotiating bank financing. Ex. 62.

-- Paramount does not dispute that there were no written drafts or summaries of the new proposed merger agreement available at the meeting. Small Dep. 35-36.

In its "specious allegations" chart (PAB Addendum, p. 3), Paramount disputes that its financial advisor did not present any analysis of the comparative merits of the QVC and Viacom offers, but the "support" it cites (as "The Truth," id.) demonstrates that no such analysis was made. Paramount points to the Booz, Allen presentation, but Booz Allen is not -- and does not claim to be -- a financial advisory firm; and it does not give opinions as to financial fairness or value. Wolf Dep. 16-19. Lazard, of course, does. But Lazard's fairness opinion is not a comparative analysis; and the other Lazard documents,

cited in the addendum to Paramount's brief, are hardly extensive enough to constitute comparative financial analyses.* As for the other two documents cited in Paramount's chart, they consist of a single page prepared by Paramount management (Ex. 90 at 1), and several pages prepared by Smith Barney, Viacom's financial advisor (Ex. 90 at P19037 - P19045). Paramount has not given the Court the "truth".

IV. THE VIACOM LOCKUPS SHOULD BE ENJOINED.

In QVC's opening brief, QVC showed that the Viacom Lockups -- currently worth $5 per Paramount share, or $600 million -- are unprecedented in size and were unjustified under controlling principles of law. QOB 94-98. The Supreme Court's opinion in Macmillan establishes that the Lockups can be lawful only when they (a) "confer a substantial benefit upon the stockholders", such as when they are "necessary to draw any of the bidders into the contest," and (b) they are approved by a board of directors that was fully informed. Macmillan, 559 A.2d at 1284, 1286. Neither of these conditions was met here and defendants' arguments do not show the contrary.

First, defendants make no response to the perverse situation which accounts for the staggering size of the Viacom Lockups: the fact that the stock option is exercisable at the grossly inadequate $69.14 price that was "topped" in a week by QVC's $80-a-share merger proposal and that was at least $15 a share less than Viacom itself was prepared to bid. The option rewards Viacom not for offering fair value to Paramount shareholders but for not doing so. It is so hugely valuable to Viacom because Viacom's offer was not hugely valuable to Paramount.

Second, defendants rely on (a) advice supposedly given to the board by

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* They consist of an arithmetic calculation of the present market values of the offers -- the importance of which, of course, is something Paramount takes great pains to deprecate throughout its brief -- and a brief calculation showing that Viacom and QVC could afford to raise their offers. Again, that is not a comparative financial analysis.

Lazard (although not recalled by directors at depositions*) that the Lockups were comparable in size to those granted in other transactions, and (b) charts of stock options granted in other situations which are said to substantiate this advice. PAB 115; Rohatyn Aff. Ex. 1; Levitt Aff. Ex. 2. This entire line of argument is specious, and the evidence of no value. Most of the transactions relied on in the Rohatyn and Levitt Affidavits were never reviewed by this (or any other) Court. In many that were reviewed, the case was in a posture where no competing bid had emerged and, accordingly, there could be no argument that the stock option or break-up fee were going to be triggered.

The cases in which this Court has reviewed Lockups where there was a competing bid are the relevant bases for comparison.** These appear in the chart on page 115 of Paramount's brief. But these cases are illuminating for the amounts Paramount has chosen not to calculate: the cost per target company share of the exercise of Lockups triggered by a higher bid; the cost of the lockups as a percentage of the transactions; and the aggregate cost of the lockups. Counsel is not aware of a case upholding a lockup of $5 per share (approximately 6% of the gross value of the entire company), or one even approaching the $600 million cost of the present Lockups.

The Viacom stock option, moreover, is not of the plain vanilla variety. It has a special feature -- only the $1.00 par value of the stock need be paid for with cash; the other $1.6 billion can be paid in the form of a note. Paramount argues that this note -- equal to two-thirds of Viacom's existing long-term debt -- will be structured to be worth its face value, but there is no evidence in the record that the note could be sold by an acquiror

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* Silberman Dep. 91-94, 108; Small Dep. 61, 183, 229-30.

** Where a competing bid is made, a prima facie question is raised as to the informed nature of the board's decision that the "best available" bid had been procured. Paramount's argument -- that the existence of a competing bid validates a lockup because it shows the lockup was not preclusive -- is illogical in light of the fact that the board's objective must be to have a reasonable basis to think the transaction is the best available. It is also totally at odds with Revlon itself, where the breakup fee was invalidated even though it obviously had not prevented Perelman from bidding.

of Paramount. This "poison note" would enable Viacom to alter radically the capital structure of Paramount. Accordingly, QVC's initial point remains valid -- the ability of Viacom to pay with a note means that the option subjects any other buyer of Paramount to a situation where, after buying control of the company, the equity interest in the company has been diluted by 20% and all the Paramount treasury has to show for it is a note that cannot be converted into cash. No wonder Mr. Greenhill had never seen its like before in his 31 years' experience. Greenhill Dep. 172.

Third, defendants argue that the Lockups were "necessary" to facilitate the Viacom bid. PAB 116. But that claim is implausible in view of (a) Viacom's enthusiastic, determined pursuit of Paramount (a matter of "destiny, not dollars," according to Mr. Redstone (Ex. 22 at 2,5)); (b) the testimony of directors who apparently believed that the Lockups were "a question of protecting the deal" (e.g., Silberman Dep. 108); and (c) the contemporaneous written evidence explaining why the directors came to that belief, i.e., the Lazard notes of the September 7 meeting which reflect that the lockups were included in the deal "to make deal look strong." Ex. 6. Defendants' after-the-fact attempt to show that Viacom would not have signed the merger agreement without lockups is simply not credible. Every acquiror will say that, and every corporation in Paramount's situation will agree -- but that does not require the Court to accept such statements at face value. Mr. Redstone has $600 million riding on whether the Court believes him when he says the Lockups were essential to his doing the deal. The proof of the pudding is in Mr. Redstone's September 13 phone calls to Messrs. Diller and Malone -- telling them that they should stay out of the bidding for Paramount, since "all you will do is cost me money." Diller Dep. 183; see Malone Dep. 88. That is not the statement of a man who has just been "induced" to make his highest bid through the grant of a stock option.*

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* In this Court, Redstone claims that the increase in the bidding for Paramount resulting from QVC's bidding stands to Viacom's credit and supports Viacom's claim that it should not be deprived of Lockup profit. Redstone Dep. 58-59 (Viacom "earned that option", i.e., the Lockup, because Viacom offer "enriched Paramount stockholders"). Para-

(footnote continued)

Fourth, defendants have treated the board's decision to grant the Lockups as if it involved scrutiny only of the September 12 decision. See PAB 113-18 (dealing only with September 12 Lockups). In fact, Paramount's decision to re-grant or re-affirm the Lockups on October 24 is a far clearer breach of duty than even the September 12 Lockups. Consider the tactical situation: On October 23, Redstone is desperate to start a tender offer within hours in order to obtain a timing advantage over the QVC bid that was announced (but not commenced) on October 21.* Paramount's negotiating leverage is at its maximum. Yet it is not used in any meaningful way. It is certainly not used to eliminate or reduce the Lockups. The board had a "last clear chance" and did not take it: Paramount did not even ask for the Lockups to be eliminated or reduced in size for the October 24 deal. Pattison Dep. 146-47; Davis Dep. 284-85. That fact is undisputed. Two conclusions are inescapable: first, the Paramount board on October 24 had no knowledgeable, informed basis to conclude that granting the Lockups anew was necessary to "induce" Viacom to agree to a tender offer it was straining at the bit to commence; and second, in fact Viacom would not have required the Lockups as a condition to proceeding.

Fifth, Paramount argues that it "successfully minimized" the fee and option in arm's length bargaining. PAB 116-117. This point deserves little comment. The fact that an acquiror may have proposed a set of Lockups even larger than half a billion dollars does not entitle a board of directors to receive a medal for giving away "only" six hundred million. Had Paramount held discussions with QVC, BellSouth or any other company

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(footnote continued)

mount claims that the "net effect" of the Lockup was "an enormous increase in value" to Paramount stockholders. PAB 117. Meanwhile, in the Southern District of New York, Viacom has sued QVC and is seeking damages of $2 billion (before trebling) on the theory that QVC had tortiously forced Viacom to increase its bid by alleged antitrust violations by QVC and its investors. Viacom International, Inc. v. Telcommunications, Inc., et al., No. 93 Civ. 6658 (KC) (Nov. 9, 1993).

* It must be borne in mind that at all times prior to the middle of the Sunday morning meeting on October 24, Paramount was agreeing to be acquired in the 43% tender offer that Paramount's negotiators viewed as highly "onerous" and "even worse" than a 51% partial offer. Ex. 92.

interested in acquiring it, it might have (a) obtained an equal or better transaction without any Lockup, let alone one of this size; or (b) persuaded Mr. Redstone to offer a transaction that was competitive without Lockups. The truth is Paramount did not want to know such "information."

Sixth, Paramount claims that the Lockups were the product of informed board discussion. Comparison with other lockups, such as the lists now attached to the Rohatyn Affidavit, were never provided to the board. As to what the board discussion was, QVC is content to say that a reader of Silberman (pages 91-94, 108), Small (pages 51-52, 61, 64, 193-194, 229-230, 249) and Pattison (pages 83-86, 90, 115-118) would be hard put to conclude that these directors -- three out of the four independent directors Paramount permitted to be deposed -- understood the effects or reasonableness of the Lockups.

Finally, Paramount claims that the Lockups do not preclude higher bids. Its only "evidence" is the fact that QVC has made several higher bids. PAB 117-118. That, of course, is misleading; QVC's bid is conditioned on a preliminary injunction against the Lockups. The effect of the Lockups as a matter of fact cannot be disputed -- it means that QVC labors under (at these bidding levels) a $5 per share disadvantage. The Lockups may not preclude higher bids being made; what they do preclude is Paramount shareholders obtaining the full value of such higher bids. That is the preclusive effect of the Lockups, and that (along with the inadequate basis for granting them) is what makes them unlawful.*

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* Paramount argues that QVC can afford to buy out the Lockups and that it can do so comfortably. PAB 118. This misconstrues the record. Allen & Company prepared a "budget" for the $80 per share merger proposal so that QVC's board and financial officers would know what level of financing would have to be obtained on a worst case scenario. Thus, the amount of the Lockups (then $357 million) was included. That hardly suggests that the Lockups were considered appropriate. Senior Dep. 93-94. But at $90 per share QVC has not budgeted $5 per share to pay out the Lockups, and its tender offer is conditioned on injunctive relief against them.

V. THE DIRECTORS' RESPONSE TO THE QVC PROPOSAL IS UNREASONABLY COERCIVE, PRECLUSIVE, DISCRIMINATORY AND PREVENTS THE SHAREHOLDERS FROM CHOOSING BETWEEN THE COMPETING BIDS

In the opening brief, QVC demonstrated that the Paramount directors have launched a two-prong response to QVC's proposal, both of which are manifestly unreasonable under Unocal (QOB 98-105). The two prongs are (i) action facilitating Viacom's coercive $85 per share cash tender offer which will deliver control of Paramount to Sumner Redstone, and (ii) use of the Rights Plan and other powers to prevent the shareholders from choosing QVC's $90 per share tender offer.

Paramount's answering brief makes two patently wrong contentions about Delaware law as it relates to Unocal. First, Paramount argues that a board's decision under Unocal is sustainable so long as the directors act in good faith and deliberately. PAB 126. However, Paramount fails to note that the Supreme Court has specifically rejected the contention that Unocal's second prong, the reasonableness test, is satisfied merely by demonstrating objective, good faith deliberations. Paramount Communications Inc. v. Time Inc., 571 A.2d at 1154 n. 18. Second, Paramount argues at another point that a board's use of a Rights Plan is "governed by the business judgment rule." PAB at 131-32. However, as this Court is well aware, the adoption and use of a Rights Plan is subject to the Unocal test, and the business judgment rule applies only if the Unocal test is satisfied. Moran v. Household International Inc., Del. Supr., 500 A.2d 1346 (1985).

The first prong of Paramount's response to the QVC proposal is a board-sanctioned, coercive tender offer by Viacom at a price less than QVC's tender offer. There is no question that the Viacom tender offer is coercive, and there is no question that the Viacom tender offer will preclude the shareholders from even being able to choose a potentially higher priced alternative. The Delaware Supreme Court has recognized that defensive responses that are both coercive and preclusive are suspect. Paramount, 571 A.2d at 1153. In this case, the response has the additional element of being discriminatory. Paramount has obligated itself to conditionally lift the Rights Plan for one proposal, but refuses to do

so for another. These are the hallmarks of a draconian response -- coercive, preclusive and discriminatory.

The coercive nature of the Viacom tender offer is not simply based upon the Board's discriminatory use of the Rights Plan. Rather, the Paramount board has acted to give Viacom advantages that serve to preclude effective shareholder choice. For example, Paramount and Viacom rushed to consummate their new deal on October 24 in order to provide a timing advantage to Viacom. That timing advantage adds a further coercive element to the Viacom's two-tiered offer. Shareholders who may prefer the higher-priced QVC offer may be compelled to tender to the first offer to close (regardless of economic value) because they fear the majority may not share their preference (thereby precluding the higher priced, but later closing, second offer). See, e.g., Ivanhoe Partners v. Newmont Mining Corp., Del. Ch., 533 A.2d 585, 605 (1987) (a tender offer may be coercive based upon structure and based upon timing). As reported in this morning's Wall Street Journal:

> . . . .[I]f the court doesn't intervene, Viacom may be able to complete its offer on schedule on November 22. That's because traders may be afraid, given the way the Viacom bid is structured, of missing out on the cash portion of the offer even though it is $5 less per share than the QVC offer.

The Wall Street Journal, Nov. 15, 1993 at p.A3.

The second prong of Paramount's response involves the use of the Rights Plan. When the Rights Plan, as here, is used to preclude shareholders from accepting a higher-priced offer and to coerce them into choosing a lower priced alternative, a variety of additional factors must be assessed. First, the response impacts upon important shareholders' rights and this requires a threat which is "compelling." As this Court expressly recognized in approving the creation of rights plans, a rights plan impinges upon fundamental interests of the shareholders. In Moran v. Household International, Inc., Del. Ch., 490 A.2d 1059, aff'd , Del. Supr., 500 A.2d 1346 (1985), the court stated:

> This case presents a clash of fundamental interests within the corporate structure: the unrestricted right of shareholders to participate in nonmanagement sanctioned tender offers versus the right of a Board of Directors to increase its bargaining power in tender offers by limiting the ability of a hostile acquiror to secure control by fragmentary acquisition of shares.

490 A.2d at 1074.

This Court subjected the rights plans to enhanced scrutiny, not simply because of the omnipresent specter of conflict of interest, but because the rights plan and its use "results in a fundamental transfer of power from one constituency (shareholders) to another (the directors)." Id. at 1076. This Court stated:

> Because the Rights Plan permits the Household Board to act as the prime negotiator of partial tender offers through the power of redemption, the resulting allocation of authority effects the structural relationship between the Board and the shareholders. It is this fundamental result, rather than a mere conflict of interest, which requires the Board to present evidence, the business judgment rule notwithstanding, that its approval of the Plan was not motivated primarily by a desire to retain control but by a reasonable belief that the Plan was necessary to protect the corporation from a perceived threat to corporate policy and effectiveness.

Id. at 1076 (emphasis added).

With respect to the Unocal analysis, both the Delaware Supreme Court and this Court have recognized that defensive actions which impinge on important shareholder interests may only be sanctioned by the most compelling of threats. For example, in Stroud v. Grace, Del. Supr., 606 A.2d 75 (1992), the Supreme Court addressed management action taken for the principal or primary purpose of impinging upon the shareholders' ability to vote. Recognizing that such action often arises during hostile contests for control, the Supreme Court stated as follows:

> Such action necessarily invoked both Unocal and Blasius. We note that the two "tests" are not mutually exclusive because both recognize the inherent conflicts of interest that arise when shareholders are not permitted free exercise of their franchise. [Citations omitted.] Gilbert should nonetheless resolve any ambiguity. It clearly holds that a reviewing court must apply Unocal where the Board "adopts any defensive measure taken in response to some threat to corporate policy and effectiveness which touches upon issues of control." [Citations omitted.] This does not render Blasius and its progeny meaningless. In certain circumstances, a court must recognize the special import of protecting the shareholders' franchise within Unocal's requirement that any defensive measure be proportionate and "reasonable in relation to the threat posed." [Citations omitted.] A board's unilateral decision to adopt a defensive measure touching "upon issues of control" that purposefully disenfranchises its shareholders is strongly suspect under Unocal and cannot be sustained without a "compelling justification."

606 A.2d at 92n.3 (emphasis added).

In this passage, the Supreme Court recognized that defensive responses that impact the shareholders' right to vote can only be justified under Unocal in the face of a compelling threat. However, the right to vote is not the only or even the most important aspect of share ownership. At least equally important is the right of a shareholder to make determinations about when and on what terms to sell his shares. Indeed, given the practical problems of corporate democracy, the ability to sell stock is the more important and personal of shareholder rights. The ability to sell or retain stock involves a decision which is the most significant aspect of being a shareholder -- when and on what terms the individual is willing to put his capital at risk in a venture being managed by another.

Another important factor in assessing reasonableness is whether the response had a principal business purpose other than merely serving as a device to effect or secure corporate control. In the case of Paramount's use of its pill, the defensive response had no independent, business purpose. Both the Delaware Supreme Court and this Court has recognized this factor as significant. In Paramount, this Court recognized that the Time tender offer for Warner, even though a "defensive reaction," had as its origin and central purpose a bona fide strategic business plan, and not simply a purpose of effecting corporate control. This Court analogized the Time response to the ESOP at issue in Shamrock Holdings, Inc. v. Polaroid Corp., Del. Ch., 559 A.2d 257 (1989). See Paramount, Del. Ch., slip op. at 77 n.22. In making its Unocal analysis, the Supreme Court made the same distinction. Paramount, 571 A.2d at 1154-55 and 1155 n.19. In the area of voting rights, the Supreme Court similarly has recognized the distinction between action taken principally for the purpose of affecting voting rights, as opposed to action affecting voting rights but which has some other business objective as its principal purpose. Stroud v. Grace, 606 A.2d at 91.

In the present case, Paramount's use of its pill does not have any independent business significance. It is purely and entirely a device for allowing directors to "affect control". In contrast, the defensive reaction at issue in Paramount v. Time was a business

transaction clearly within the management domain, viz., the purchase of assets; and which had as its principal business purpose the acquisition of assets, viz., the stock of Warner. To the extent that it precluded the tender offer by Paramount (and the testimony was that it did not), that affect was secondary to its principal purpose.

A third factor in assessing reasonableness is whether the effectuation of the response will render the directors unaccountable to the shareholders. For example, in Unocal the Supreme Court held the defensive response permissible and concluded that "[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out." 493 A.2d at 959. In this case, the pill is being used to coerce the shareholders into surrendering control of Paramount to Sumner Redstone. Unlike the shareholders of Time or Unocal, the shareholders of Paramount will never have the opportunity to hold the directors accountable.

In summary, both prongs of Paramount's response to QVC are unreasonable and judicial intervention is necessary. The Viacom tender offer is coercive, both in its structure and its timing. If it is allowed to proceed to close, the shareholders of Paramount will be compelled by economic necessity to tender into it. The Paramount board should be enjoined from further facilitating this coercive offer by "lifting" or amending the pill as to Viacom's tender offer. Unless this coercive tender offer is enjoined, the auction of Paramount, which the Paramount directors claim has never begun, will end.

By the same token, Paramount's use of the pill to block the QVC tender offer also is wrongful. The Paramount directors may not use the Rights Plan to deny the shareholders the opportunity for a meaningful choice between the QVC and Viacom proposals. The directors may not use Rights Plan to preclude the shareholders from choosing the higher of the two bids, and the QVC tender offer clearly is the higher of two. The Rights Plan should thus be redeemed as to the QVC tender offer.

VI. QVC'S REQUESTED RELIEF SHOULD BE GRANTED

A. QVC Is Entitled To Injunctive Relief.

As previously shown, the Paramount board has egregiously breached its fiduciary duties. Because of such breaches, Paramount shareholders are being stampeded into Viacom's coercive $85 per share tender offer which is scheduled to close on November 22 when $90 is available from QVC on November 26. The selective employment of defensive measures by the board has been designed to ensure that the Paramount shareholders will never be able to choose QVC's $90 per share offer and that $90 offer will be defeated by the lower-priced, inferior Viacom offer. The Court should not allow this to occur.

Pursuant to the amended merger agreement, Paramount has obligated itself to redeem its poison pill for Viacom, but it has refused to do the same for QVC. Because the Viacom tender offer closes before QVC's, the Paramount shareholders have been given no choice but to tender to Viacom since they are at risk of being left behind and receiving only stock on the back-end of the Viacom merger.* Accordingly, with the pill in place, QVC's offer is essentially dead in the water. The discriminatory use of a rights plan by directors to achieve such a result is not permitted. See Barkan v. Amsted Industries, Inc., Del. Supr., 567 A.2d 1279, 1287 (1989) (a pill "may not be used . . . to unfairly favor one bidder over another"); Mills Acquisition Co. v. Macmillan, Inc., Del. Ch., C.A. No. 10168, Jacobs, V.C. (Oct. 18, 1988), slip op. at 50 (requiring Macmillan board to remove its Rights Plan as to Maxwell tender offer), rev'd on other grounds, Del. Supr., 559 A.2d 1261 (1989); City Capital Associates v. Interco Inc., Del. Ch., 551 A.2d 787, 799-800 (1988) (pill may not be used to deprive shareholders of choice). Paramount must be enjoined from using its rights plan for any other purpose than to permit the highest bid to succeed.

It is also clearly appropriate for this Court to grant an injunction against the unreasonable break-up fee and lock-up provisions that are being used to preclude the higher

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* The coercion inherent in Viacom's tender offer is well recognized. See QOB 107; AC Acquisitions Corp. v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103, 116 (1986).

QVC bid. See In re Holly Farms Corporation Shareholders Litigation, Del. Ch., C.A. No. 10350, Hartnett V.C. (Dec. 30, 1988), slip op. at 15-16; Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., 559 A.2d 1261, 1285-86 (1989); Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173, 183 (1986). Since the Lockups are the product of a "fundamentally flawed process and cannot be in the interest of the stockholders," Holly Farms, slip op. at 16, the effectuation of the Lockups, which at present will cost Paramount stockholders some $600 million, must be enjoined.

Accordingly, QVC requests the Court to grant the following relief:

(1) a preliminary injunction requiring Paramount to amend its Rights Plan to provide for non-issuance and non-exercisability of the rights with respect to QVC's offer and a preliminary injunction prohibiting Paramount from amending its Rights Plan in favor of Viacom's offer until further order of the Court;

(2) a preliminary injunction against any issuance of Paramount shares, or payment of money by Paramount, pursuant either to the 19.9% stock option or the $100 million termination fee provision provided for by agreements between Paramount and Viacom;

(3) a preliminary injunction requiring Paramount to take such action as is necessary to provide for the nonapplicability of the super-majority voting provisions of Article XI of its certificate of incorporation, with respect to QVC's $90 per share tender offer and second-step merger; and

(4) a preliminary injunction requiring Paramount to take such action as is necessary to provide for the nonapplicability of 8 Del. C. § 203 with respect to QVC's $90 per share tender offer and second-step merger.

If QVC's requested relief is not granted, the Paramount stockholders will be forever deprived of the opportunity to receive the highest value for their shares and to retain

voting shares in their company. Balanced against this is Paramount's self-serving claim that "the Court should not take Viacom for granted." PAB 138. But Viacom does not even claim that it could, or would, walk away if QVC receives the preliminary injunction it seeks.* Under these circumstances, the Court should prevent the Paramount directors from wrongfully precluding the higher priced QVC offer, and instead, cramming down the inferior Viacom offer.

B. Viacom Has No Right To Preclude Effective Relief Here.

There is no merit to Viacom's claim that effective relief should be denied because it is an "innocent third party." VAB 96.** First, this Court has not hesitated to fashion relief for breaches of fiduciary duty that preserves the stockholders' ability to receive the highest offer for their shares -- even if it means denying an innocent third party bidder the benefit of its contractual bargain. See, e.g., In re Holly Farms Corp. Shareholders Litigation, Del. Ch., C.A. No. 10350, Hartnett, V.C. (Dec. 30, 1988) (enjoining exercise of lock-up option and termination fee provisions of merger agreement); MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., Del. Ch., 501 A.2d 1239 (1985) (same), aff'd, Del. Supr., 506 A.2d 173 (1986). As Justice Walsh (sitting as the trial judge) explained in Revlon:

> In terms of relative hardship to the parties the need for both bidders to compete in the marketplace far outweighs the limiting of Forstman Little's contractual rights.

Revlon, 501 A.2d at 1251.

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* Nor could Viacom so argue. Viacom has no right to terminate its merger agreement on the basis of a preliminary injunction. See § 8.01 of the Oct. 24 amended merger agreement (Ex. 3).

** The dicta in cases cited by Viacom do not support Viacom's position. See In re RJR Nabisco, Inc. Shareholders Litigation, Del. Ch., C.A. No. 10389, Allen, C. (Jan. 31, 1989, revised, Feb. 14, 1989), slip op. at 33.

Second, Viacom is anything but an "innocent third party." It is well settled that "one who knowingly joins with a fiduciary, including corporate officials, in a breach of a fiduciary obligation is liable to the beneficiaries of the trust relationship." Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1344 (1987). See also Gilbert v. El Paso Co., Del. Ch., 490 A.2d 1050, 1057 (1984). Davis and Redstone have acknowledged an "intimate relationship" which fostered their ability to agree upon terms for a merger of their companies, see Ex. 22 at 7. While Viacom now argues that it dealt with Paramount at "arms'-length" and lacked knowledge of any breach of fiduciary duty by the Paramount board or any of its members (see VAB 43-46), that claim does not support the denial of relief to QVC here.

Even assuming that the so-called "negotiations" between Viacom and Paramount were at arms' length, that would be no defense to a claim that Viacom aided and abetted in the Paramount directors' breach of their fiduciary duties. See Gilbert, 490 A.2d at 1058. Where an offeror came as close to stealing the company as Redstone did in his $69.14 bid, "negotiations" may even be evidence of aiding and abetting. See, e.g., Greenfield v. Telecommunications, Inc., Del. Ch., C.A. No. 9814, Allen, C. (May 10, 1989) ("It may be that some circumstances will arise in which the terms of the negotiated transaction are themselves so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust.").

In all events, the record simply will not support the conclusion that Viacom was unaware of the fact that it was participating in a breach of fiduciary duty by the Paramount board. Thus, for example, Viacom does not claim to have been unaware that the Paramount Board had agreed to submit the proposed merger to the Paramount stockholders without regard to whether another party thereafter offered a better alternative -- in direct violation of 8 Del. C. § 251(b). Nor does Viacom claim that it was unaware that the Paramount board agreed to sell control of Paramount to Redstone without first conducting any pre- or post- agreement market check or doing anything to satisfy its Revlon duties. While

Viacom would require proof of Viacom's "actual knowledge" that the Paramount directors were acting in breach of their fiduciary duties, the law requires only that QVC establish that Viacom was aware of facts from which it can be inferred that Viacom "knew or should have known" of the Paramount directors' breach of fiduciary duty. See, e.g., Deutsch v. Cogan, Del. Ch., C.A. No. 8808, Hartnett, V.C. (April 11, 1989); Gilbert v. El Paso Co., 490 A.2d at 1057.* And, even if Viacom could argue, in good faith, that it did not know of the Paramount directors' breach of their fiduciary duties in September, Viacom cannot even begin to suggest that it was ignorant of the unlawfulness of the Paramount directors' conduct when Viacom secured the amended merger agreement on a super-rush basis on October 24, 1993. See Citron v. Fairchild Camera & Instrument Corp., Del. Supr., 569 A.2d 53, 67 (1989) (observing that "[t]he imposition of artificial time limits on the decision-making process of a board of directors may compromise the integrity of that deliberative process," and that "[b]oards that have failed to exercise due care are frequently boards that have been rushed").

In the final analysis, Viacom simply cannot claim to be "an innocent third party"; and even if Viacom could support such a claim by reference to the facts, it would be no defense to the Court's entry of an injunction necessary to protect the rights of Paramount's public stockholders.

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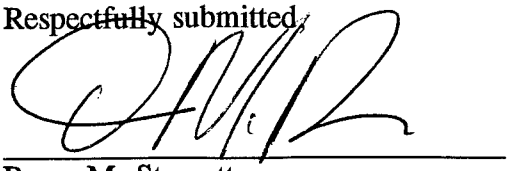
* See also Ivanhoe Partners v. Newmont Mining Corp., Del. Ch., C.A. No. 9281, Jacobs, V.C. (Sept. 23, 1987) (oral ruling), modified, (Sept. 25, 1987), temporary restraining order vacated and preliminary injunction denied, Del. Ch., 533 A.2d 585 (1987), aff'd, Del. Supr., 535 A.2d 1334 (1987). In that case, this Court preliminarily concluded that, even though there was no direct evidence of third party's actual knowledge of directors' breach of fiduciary duty, the "obvious effect" of the negotiated transaction was such that the purportedly innocent third party "had to know" what was going on. Slip op. at 13-14.

CONCLUSION

Plaintiff QVC's motion for a preliminary injunction should be granted.

Dated: Wilmington, Delaware
November 15, 1993

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Rachelle Silverberg, hereby state that I caused the foregoing documents to be served on the persons listed below by causing true copies thereof to be delivered at the addresses shown on November 15, 1993:

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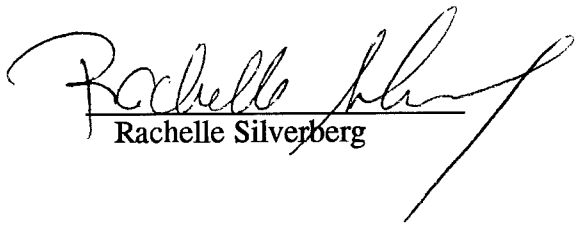

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