IN THE

Supreme Court of the State of Delaware

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 Below-Appellants,

v.

QVC NETWORK, INC.,

Plaintiff Below-Appellee.

IN RE PARAMOUNT COMMUNICATIONS INC. SHAREHOLDERS' LITIGATION

NOS. 427 AND 428, 1993
(CONSOLIDATED)

COURT BELOW:
COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CIVIL ACTION NO. 13208

CIVIL ACTION NO. 13117
(CONSOLIDATED)

ANSWERING BRIEF OF PLAINTIFF BELOW-APPELLEE QVC NETWORK, INC.

YOUNG, CONAWAY, STARGATT & TAYLOR
Eleventh Floor, Rodney Square North
P.O. Box 391
Wilmington, Delaware 19899
(302) 571-6600

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Attorneys for Plaintiff Below-Appellee QVC Network, Inc.

December 4, 1993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PAGE

Statutes and Rules

Other Authorities

STATEMENT OF NATURE OF PROCEEDINGS AND ORDER APPEALED FROM

This is an appeal from the Court of Chancery's entry on November 24, 1993 of a preliminary injunction upon plaintiffs' motion. An interlocutory appeal was certified on November 24, 1993, and accepted on November 29, 1993. This is the answering brief of plaintiff QVC Network, Inc. ("QVC").

SUMMARY OF ARGUMENT

A. Response to Paramount's Summary of Argument

1. Denied. *Revlon* duties were triggered by the voluntary decisions of the Paramount board to transfer absolute voting control of Paramount to Sumner Redstone, and to assure the success of Viacom's cash purchase of 51% of Paramount's shares in a coercive, front-end-loaded tender offer.

2. Denied. The record overwhelmingly established that, at the November 15 meeting, the Paramount board failed to make an informed, comparative judgment between Viacom's offer and QVC's higher-valued offer, and thus had no basis to use Paramount's rights plan to facilitate Viacom's offer and block QVC's.

3. Denied. The stock option was clearly granted (and regranted) to Viacom for the improper purpose of deterring and penalizing competing bids, and without the Paramount board being fully informed.

B. Response to Viacom's Summary of Argument

I. Denied, for the reasons stated in response 3 to Paramount's summary of argument above, and because Viacom was not an "innocent" third party.

II. Denied, for the reasons stated in responses 1 and 2 to Paramount's summary of argument above.

STATEMENT OF FACTS

A. Events Leading Up To The Original Paramount/Viacom Merger Agreement

In January of 1993, Barry Diller—who had formerly headed Paramount Pictures Corp. and later Fox, Inc.—became Chairman and CEO of QVC. Op. 5 n.4; JA2669; JA5633(4).* QVC operates a televised retail shopping network; its business plans include the introduction of interactive electronic technologies into its retailing business. Op. 4; JA2637; JA5889(150-52). If QVC acquires control of Paramount, QVC and BellSouth Corporation (which is also supplying $1.5 billion in equity financing for QVC's bid) will form a joint venture to develop interactive networks for delivering entertainment, shopping services and information to customers. JA6280. Even before Diller joined the company, QVC was a rapidly-expanding corporation with approximately $1 billion in revenues and virtually no debt. *E.g.*, Op. 5; JA1317; JA2638.

Soon after Diller joined QVC, speculation intensified that Paramount would become a takeover target—with QVC and Tele-Communications, Inc. ("TCI"), an affiliate of a major QVC stockholder, prominently mentioned as potential acquirors. Op. 7; JA3271; JA3273; JA5205(24-25); JA5633(5-6); JA5856(17-19). To some extent, the speculation was not new. Paramount "is an extremely attractive company," owning "the last 'independent' major studio as well as one of the world's largest publishing companies." JA759. But Paramount's stock price had languished. *E.g.*, JA3271; JA3273. As a result, "there were a lot of people interested in Paramount, and had been for some time." JA5205(25); *see also* JA5205(22-23); JA5733(28).

These potential acquirors included Viacom, whose chairman and CEO, Sumner Redstone, had first expressed interest in Paramount to his personal friend of four decades, Paramount's chairman and

* The Joint Appendix is cited as "JA ____." Citations to individual pages of deposition transcripts appear within parentheses following each Joint Appendix citation. The Court of Chancery's revised opinion dated November 29, 1993 (JA7187-7248) is cited as "Op. ____".. "PB ____" and "VB ____" refer to the opening briefs upon this appeal of the Paramount defendants and Viacom, respectively. "QOB ____" and "QRB ____" refer to QVC's opening and reply briefs below, respectively.

CEO, Martin Davis, in 1989. JA5635(17-18); JA5576(23); JA3064; JA3037. As Redstone put it, however, it took Viacom "four years to get [Davis] to the altar." JA3034; *see also* Op. 60 n.47; JA3035; JA3264-65. That was in large part because Davis "had always taken the position that he would not look at . . . any bid in which he did not end up being CEO." JA5088(65); *see also* Op. 6-7; JA5088(66-67); JA5104(131-32); JA5115(173).

The speculation about QVC's interest was correct: QVC was indeed considering a bid for Paramount. JA5870-71(74-77); JA5079(30-32); JA2023-42. Davis and Paramount's financial advisor, Lazard Freres & Co., were fully aware of QVC's reported interest—they discussed more than once a possible bid by QVC or TCI. JA5466-67(20-24). Yet Davis did not ask Lazard to find out whether QVC or TCI in fact had an interest in Paramount. JA5467(23); JA5468(28). Meanwhile, told that Davis was "feeling the pressure," Redstone resumed his overtures to Paramount. JA3231; *see* JA5269(64). In April 1993, Davis, Redstone, and Viacom's investment banker began a series of private meetings to explore a possible deal. Op. 7; JA3115. No Paramount financial advisor participated. JA3115; JA5469(37-38).

Redstone has candidly described the talks as centering, at Davis's insistence, on "management" issues: "[W]hen I suggested that price was a critical issue, what I heard was that that was *not* the most important issue, that that could be easily resolved, but that *management* was the issue." JA2522 (emphasis added); *see also* JA5736(46-47). It was understood that Redstone would have voting control after a Paramount/Viacom merger, since he already owned 85.2% of Viacom's only class of voting stock (Op. 4; JA2692; JA2806; JA2508), and that Davis would have the *title* of CEO. JA5734(35). What made the discussions "difficult" in Viacom's view, however, was Davis's concern about the "*authority*" he would have under Redstone's control. JA5265(39); JA5734(36).

Nevertheless, by July, the central components of a proposed transaction had been agreed upon: Viacom would acquire Paramount largely with nonvoting Viacom shares, so that Redstone would maintain control; Paramount stockholders would receive a premium for their "sale of control"; and Davis would be CEO. Op. 7-8; JA5470-71(45-46, 49); JA5472(56); JA5473(61); JA5264-65(30-36, 38); JA5635-36(20-21). On July 7, however, the negotiations foundered.

Paramount's executive committee rejected as "inadequate" the price being offered by Viacom—1/10th of a share of Viacom voting Class A stock; 9/10th of a share of Viacom nonvoting Class B stock; and $13.50 in cash per share. JA526; JA5421(30-31); JA5474(65-67); JA5027-28(19-22); JA518. Lazard also found Viacom's offer inadequate. JA5474-75(66-67, 70); JA5027-28(19, 25); JA518. The rejected offer had a market value at the time of $60.86. JA526.

As the Court of Chancery noted, "two events occurred" during the summer hiatus in negotiations (Op. 8)—events that ultimately helped bring about a deal. First, on the heels of Paramount's rejection of Viacom's proposal on July 7, Redstone (through his controlled entity, National Amusements, Inc. ("NAI")) began a heavy purchase program in Viacom stock—stock that, as Lazard described it, was "very thinly traded" and very volatile. JA5479-80(101). In July, excluding the days he was out of the market, Redstone's purchases amounted to 18.79% of all trades in Viacom B stock. JA3157. In August, his purchases intensified: in the week of August 2-6, they amounted to 32.9% of all transactions in Viacom B. JA3239. Simultaneously with this massive purchase program, the price of Viacom shares rose dramatically—from $46.875 on July 7 (when negotiations ended) to $57.25 on August 20 (when they resumed)—an increase of 22.1%. Op. 9; JA526. (As of the date of this brief, the market price of Viacom B shares was $43.75.) Concerned that Redstone was inflating the price of his stock for use as acquisition currency, Lazard carefully monitored Redstone's purchases and sent written reports to Davis and other top management of Paramount detailing the magnitude of Redstone's purchases. JA5476(78); JA5477-78(88-91); JA3155-57; JA3158-60.

The second event during the summer was a meeting on July 21 between Davis and Diller, held at Davis's behest. Op. 8-9. Davis had become convinced that Diller of QVC was in fact preparing a bid for Paramount. Indeed, Davis was expressly so advised by John Malone, the CEO of TCI, and (at the time) a director of QVC. JA5642(60); JA5643(66). At the July 21 meeting, Davis repeatedly insisted to Diller: "I know you are after my company." JA5897(181); *see also* Op. 9 n.5. At the meeting, Diller determined to be noncommittal, telling Davis simply that "when I had something to say to him I would pick up the phone and call him." JA5897(181). On other occasions during the summer, Davis also called Malone to implore him "to keep Barry [Diller] on a leash," JA5411(73); *see also* Op. 15 n.12; JA5407(59). And Davis emphatically told both Diller and Malone that he had numerous "antitakeover defenses" that would stop Diller. JA5407(60); *see also* JA5896(180).

Shortly thereafter—apparently at Paramount's instance (*see* JA2522-24; JA5586(85-87))—negotiations between Viacom and Paramount resumed. Op. 9. With Viacom B now trading at levels 22% higher than six weeks earlier, Redstone and Davis quickly reached agreement on a $65-70 bid-asked range—a range based on the new peak price of Viacom shares. JA3145; JA3116; JA526. Paramount's decision to set this range was Davis's alone: the directors were not consulted. JA5150(41-45). Ultimately, on September 7, the final deal price was set: 1/10th of a share of Viacom A voting stock; 9/10th of a share of Viacom B nonvoting stock, and $9.10 per share in cash—the same package of shares and $4.40 *less* in cash than the price rejected as "inadequate" just two months earlier. Op. 10; JA528. As of September 12, this package had a market value of $69.14 per Paramount share. JA5290(192); JA722.

The deal was hurried to conclusion. In just four days, due diligence was performed and documentation was drafted; and the deal was approved by the Paramount board and announced on September 12. *E.g.*, JA2696-97; JA953-61; JA2504-11. A merger agreement and a stock option agreement (the "Stock Option Agreement") were executed. Op. 10; JA1524-88; JA1589-1604.

B. The Pre-September 12 Negotiations And The September 9 And 12 Board Meetings

It is not disputed that, in the negotiations leading up to the September 12 merger agreement, Davis and the other Paramount negotiators knew:

- that Viacom was proposing the same number of shares and less cash than Paramount had rejected in July. JA5648(101-02).

- that there had been a sharp run-up in the price of the Viacom shares—and that this run-up was the only reason why the value of the Viacom package could be viewed as better than that rejected in July. JA5211-12(64-66).

• that this run-up had been accompanied by Redstone's massive purchase program in the "very thinly traded" stock. JA3155-57; JA3158-60; JA5477-78(88, 91); JA5480(101).

• that the transaction constituted handing over control of Paramount to Redstone, who would personally control 70% of the voting power of the combined company. JA5649-50(106-08); JA5220(119-20); JA6026(117).

• that other companies, including QVC in particular, were actively interested in acquiring Paramount. JA759-60; JA5642(60); JA5643(66); JA5205(25-26); JA5411(73).

And yet Paramount:

• before entering into the transaction, made no market check whatsoever to ascertain what other known, interested potential acquirors were prepared to offer. Op. 13 n.11; JA951; JA5472(52); JA5827(46).

• agreed to a "no shop" covenant so restrictive that, as a Paramount board member admitted, it constituted an "abdicat[ion] [of Paramount's] right even to exercise any business judgment unless the competing offeror proved that it had financing in place." JA5217(103); *see also* Op. 16-17 & n.14; JA1562-64.

• agreed to a merger agreement that (i) had no "fiduciary out" provision that permitted Paramount's board to terminate the merger agreement in the event of a decline in Viacom's stock price or in the event of a superior transaction; and thus (ii) purported to oblige Paramount, in violation of Delaware law, to convene a stockholder meeting even if its directors could not recommend the transaction. JA5823-24(26-27); JA5292(206); JA5424(51); *see Smith* v. *Van Gorkom*, Del. Supr., 488 A.2d 858, 873 & n.14, 888 (1985); 8 *Del. C.* § 251(b).

• agreed, apparently without hesitation (JA5646(86)), to a lockup stock option on 19.99% of Paramount's outstanding shares exercisable at the $69.14 deal price, with no cap; an option that, moreover, could be exercised by Viacom by issuing subordinated debt rather than by paying cash. Op. 12-13 & nn.9, 10; Op. 58-59.

• agreed, in addition to the option, to a $100 million "break-up" fee (JA1579).

• agreed to transfer absolute voting control to Redstone without even attempting to bargain for any structural provisions that would protect the Paramount stockholders from being squeezed out of the merged entity by Redstone, or that would provide any other restrictions on Redstone's absolute control over Paramount and its assets. Op. 48; JA5650(111-13); JA5423-24(44-46).

The proposed transaction was first discussed with the board—for forty-five minutes—at its regular September 9 board meeting. Op. 11; JA699-702; JA5030(37). It was then taken up again and approved three days later at a special meeting of the board held on Sunday, September 12. Op. 11; JA953-61. The latter meeting, at which the board decided to end Paramount's separate existence, lasted two and one-half to three hours. JA5652-53(127-29). According to the record:

• the directors could recall no discussion whatsoever of why Paramount was accepting the same number of shares and less cash than it had rejected just two months earlier; no director asked. JA5211(62-63); JA5654(139).

• there were no materials before the board concerning the heavy Redstone purchases that had accompanied the run-up in Viacom stock—the schedules that had been prepared by Lazard and previously circulated to management were *not* included in the Lazard board book or otherwise distributed to the directors; although there is evidence that the subject was generally mentioned (JA5428(75-76); JA4728), neither Davis nor the outside directors who were deposed could recall any mention of the purchases at the meeting (JA5033(57); JA5159-60(100, 102); JA5211-13(65-77)); and there is no evidence that Lazard told the board that Redstone's purchases did *not* affect the market, or that the board was told that Lazard had considered the matter and had not reached any conclusion.

• although the board was aware that other potential acquirors, including QVC, might have an interest in Paramount, Davis chose not to recount his July 21 meeting with Diller or to advise the board that he was in fact convinced that QVC planned an offer. JA5205-06(26-28); JA5029-30(32-33); JA5033(54); JA5151(49-50); JA5182(240); *see also* JA5647-48(95-96).

• no director asked whether it made sense to talk with QVC or any other potential acquiror before locking up a deal with Viacom. JA5208(41); JA5032(49-50).

• the Lazard "board book" contained no information comparing the size and structure of the lockup stock option and break-up fee with those in other transactions, or valuing the option in the event of its exercise, or in any way explaining how the option worked or its effects. JA717-65; JA5219(113-15); JA5652(125-26).

The Paramount board was indisputably told, however, that control was to be transferred from the public to Redstone, and that the stockholders would be receiving a "premium because of the sale of control." JA701. The board fully understood that there would "be a new [corporate] entity created that will have a dominant shareholder." JA5145(13); *see also* JA5649-50(108); JA5220(119-20). Nevertheless, there was no discussion of Redstone's ability—as a 70% stockholder—to terminate or alter the equity interest of the public stockholders in the future. And no one told the board of Paramount's failure to ask Redstone for protection on that score. *E.g.*, JA5650(112-13); JA5423-24(44-46); *see also* JA6027(118); JA5145-46(14-19).

Paramount's minutes and the contemporaneous (out-of-court) statements of Davis, Redstone, and others make abundantly clear that all participants understood that Paramount was being sold and that it was being sold to Viacom. For example, the minutes of the September 9 Paramount board meeting reflect advice that the transaction would be "done at a premium because of the *sale* of control." JA701 (emphasis added). Other such statements are quoted at QOB 29-31, 68-69.

C. Paramount And Viacom Try To Ward Off Other Bidders.

Once they had signed up their deal, Paramount and Viacom jointly sought to "ward off other bidders" by letting them know "that other bids were unwelcome." Op. 14, 15. On September 12 and 13, Redstone called Diller and Malone to deter them from making bids, offering business inducements to Malone (JA5414(87-88)), and telling Diller that, if Diller bid against Redstone, "all you will do is cost me money." JA5897(182-83). At a September 13 press conference, with Davis at his side, Redstone announced flatly that he and Davis would "guarantee" that the Paramount/Viacom "marriage will never be torn asunder." JA3032; JA3262.

Speculation grew about an unsolicited bid from QVC or others. *E.g.*, JA1300; JA3289. Determined to squelch this talk, on the morning of September 20, in response to a *Wall Street Journal* report of an imminent bid from QVC (JA3293), Davis and Redstone issued a joint release saying that "*no* hostile takeover bid" for Paramount would be allowed to succeed. JA3066 (emphasis added). This statement was not reviewed or authorized by any of Paramount's outside directors. JA5043(112-14). That same day, Redstone told a reporter that only a "nuclear attack" could break up the Paramount-Viacom deal. JA3294.

D. The September 20, 1993 QVC Proposal And Paramount's Response

On September 20, QVC proposed a merger with Paramount at $80 per share—$30 in cash and $50 in QVC voting stock. Op. 15. Because of a decline in Viacom's stock price, the market value of the Viacom deal had declined to approximately $63 per share. JA2020. The QVC proposal had a market value of roughly $9.5 billion (approximately $2.0 billion more than that offered by Viacom). The cash portion of QVC's proposal was $3.6 billion, or about $2.6 billion more cash than was being offered by Viacom. QVC told Paramount that its proposal was fully negotiable, and assured Paramount that Allen & Co. had stated that financing for the proposal was available. JA2020-22; JA2243.

QVC's proposal "was hardly welcome news at Paramount." Op. 15. Paramount management immediately responded with another press release reaffirming Paramount's commitment to the Viacom deal. Op. 15; JA3067. On September 27, Paramount held a special board meeting. At that meeting, Davis told the board that the QVC proposal had a market value of $83.80, as compared to the Viacom deal market value of $65.45, and that Paramount had also received expressions of acquisition interest from BellSouth and NYNEX. Nevertheless, Davis told the board that Paramount was still proceeding with the Viacom deal. Op. 16; JA1362-64.

As the Vice Chancellor found, Davis also "told the board that the Original Merger Agreement prohibited Paramount from entering into discussions with QVC (or any other party) without *evidence* that the proposal is free of financing contingencies." Op. 16-17 (emphasis added); JA1362. The board accepted this position, and decided that it would consider QVC's offer only after it received satisfactory "evidence" of financing. Op. 17; JA1367; JA3068. The merger agreement, however, said nothing about requiring evidence of financing. JA1562-64; *see* Op. 17 n.14. Indeed, Davis and other Paramount executives freely admitted to the press that they knew financing would be readily obtained by QVC. JA3297-98; JA3295.

QVC moved quickly to present evidence of financing. On October 5, it delivered to Lazard commitment letters for $3 billion in bank financing and $1 billion in equity financing for the merger, and once again asked that discussions begin. Op. 17-18; JA1372; JA2643. In response, Paramount took six days, until October 11, to hold another board meeting. Op. 18. As the Vice Chancellor noted, Davis told the board at this meeting that while "[t]he merger agreement does not require us to further explore the QVC proposal," nonetheless "[t]he Delaware law . . . does." Op. 18 n.17 (quoting JA1374). The board adopted a resolution stating that it had "determined that it is necessary to authorize management to enter into discussions with QVC Network, Inc. with respect to its proposal." JA1379. According to later SEC filings made by Paramount, this conclusion was based upon the board's findings that

> (i) the QVC Proposal was not subject to any material financing contingency and (ii) that such discussions were necessary for the Board to comply with its fiduciary duties to the Paramount stockholders.

JA2741; JA2750. Thus, by resolution, the Paramount board acknowledged that its fiduciary duties *required* it to talk with QVC.

As the Court of Chancery found, however, "[d]espite the October 11 board authorization to enter into discussions with QVC, Paramount delayed and avoided meaningful discussions with QVC," Op. 18—and none took place. Instead, management imposed a new precondition for merger talks. On October 13, Paramount demanded that QVC supply documents and respond to broad questions about QVC's business, finances, and other items. JA2741; JA3121-23. Thereafter, as the Vice Chancellor found, "[o]ne week elapsed before Paramount returned [a] signed confidentiality agreement" to

QVC that was a predicate for Paramount to receive the confidential information it had requested from QVC. Op. 19; JA3404-07; *see* JA2643. On October 20, the same day Paramount returned the signed agreement, QVC provided the requested documents and answered Paramount's questions. JA2643. QVC also requested that a meeting be scheduled within the next three days, and asked for confirmation that Paramount was prepared to enter into discussions in good faith. All Paramount would say was that it would "be in touch." JA2537; JA2538; *see* Op. 19.

E. QVC's $80 Per Share Tender Offer

QVC's board met on October 21 to consider the status of its merger proposal. QVC was aware that, since September 21, when Paramount and Viacom had filed applications for required approvals from the Federal Communications Commission ("FCC") and Federal Trade Commission ("FTC"), the clock was running for the Viacom transaction but not for QVC's proposal. This was because, under federal regulations, neither the FCC nor the FTC would even accept for processing applications filed by a would-be acquiror who had neither an executed merger agreement nor a pending tender offer. Accordingly, any further delay by Paramount created the prospect that QVC's approvals would be so far behind Viacom's in time as to preclude QVC's proposal.

Thus, on October 21 the QVC board decided to make an offer directly to Paramount's stockholders. Op. 19. The QVC tender offer was for 51% of the Paramount shares at $80 in cash; consideration in a proposed second-step merger would consist of QVC securities valued on October 21 at $80.71 for each Paramount share. Op. 19; JA2618-19, JA2646. QVC's October 21 proposal offered $1.2 billion more in cash than QVC's September 20 proposal. On its cover page, QVC's tender offer stated that QVC continued to seek to negotiate a merger agreement with Paramount. JA2616.

F. Viacom's Response: An $80 Partial Tender Offer That Paramount Accepts Without Prior Discussions With QVC

With QVC offering $2 billion more than Viacom, Viacom and Paramount recognized that their proposed merger would be rejected by Paramount's stockholders were it put to a vote. *E.g.*, JA5045-46(131-32).

On October 23, Viacom made a new proposal, one that almost matched the offer made by QVC: Viacom proposed a partial tender offer for 43.75% of the Paramount shares at $80 per share in cash, and a second-step merger offering a package of nonvoting Class B Viacom shares and other Viacom securities with a market value of $80 per share on October 22. Op. 20; JA2697; JA5835(100-01). Viacom's tender offer was subject to financing. JA2677; JA1386. Viacom proposed that other provisions of the September 12 agreement, notably the 19.9% stock option and $100 million termination fee, remain the same, and asked that Paramount agree to lift its poison pill defense for the Viacom tender offer. JA1494; Op. 20-21; JA5760(202-03). Redstone would still obtain the 70% voting control he was to have under the original agreement. JA3385.

Viacom set no deadline for consideration of its new bid. JA5604(199). Yet Paramount moved swiftly to accept the new 43% Viacom offer, without speaking with QVC and without trying to exploit the negotiating opportunity that QVC's offer had created. Davis, who had repeatedly "delayed and avoided meaningful discussions with QVC" in response to QVC's September 20 proposal, Op. 18, called his board into session at 9:00 a.m. on Sunday, October 24. The inference is clear that Paramount wanted Viacom's partial two-tier tender offer to start—and therefore be ready to close—before QVC's, so that it could succeed even if it were less attractive than QVC's offer.

By the time of the October 24 board meeting, it is undisputed that Paramount's management knew:

• that the original Viacom deal price, which had dropped to $62.71 per share—a price comparable to that rejected as inadequate in July—had been topped by QVC by some $2 billion. JA3381.

• that the Viacom bid had not been necessary in order to elicit the QVC bid. JA5680(300).

• that the lockup option and break-up fee were worth a total of $350 million at the $80 QVC offer price. JA5225(149).

• that both QVC and Viacom were willing to pay $80 per share, and that higher bids were still possible (JA3401; JA3395-98); indeed, that Lazard believed that both Viacom and QVC could increase their offers significantly above $80 per share within the limits of their existing bank financing. JA3395-98.

• that QVC had never been asked whether its $80 offer represented its "best and final" price. JA5664(198-99); JA5226(159).

• that other bidders had expressed interest in Paramount, and that other parties were lining up to participate in the rival bids. JA1363-64.

• that the QVC $80 offer gave Paramount "as good a bargaining position [as against Viacom] as anyone can have." JA5662(190).

• that a 43% tender offer was coercive—that, "even worse than [a] 51% tender, this stampedes stockholders"—and that the Viacom "[b]ack end may be worth a lot less." JA3401.

• that Viacom was seeking Paramount's agreement to convert a one-step merger agreement that the Paramount stockholders could vote down if they so chose, into a two-step transaction beginning with a partial tender offer that would result in the vote on the second-step merger being controlled by Viacom's newly-acquired stock holding.

• that, if Viacom's tender offer proposal were accepted, Paramount's stockholders would no longer be able to vote to reject it if a higher bid were made or if Viacom's stock price dropped. JA6385-86.

During the brief negotiations, Paramount management prepared a set of notes, typed on general counsel Oresman's typewriter, that reflect an understanding that, among other things, Viacom's proposed partial offer was coercive, and that Paramount's rights plan could ensure that "QVC can never prevail, no matter what its bid." JA3401; JA5437(128-30).* Still, no one at Paramount expressed any

* The notes read in relevant part (JA3401):

2. . . . [T]here are onerous conditions that eliminate the assurance that the [Viacom] $80 package will stay in place as well as preclude a higher bid by QVC:

1) We have to agree under the merger agreement to a coercive tender offer at the 43% level. Even worse than 51% tender, this stampedes stockholders to take front end. Back end may be worth a lot less.

2) Our pill was designed to protect against coercive two tier tender offers.

(footnote continued)

opposition to Viacom's 43% proposal. JA5659(168-69). No one tried to contact, or considered contacting, QVC. JA5226(158-59); JA5664(198). Instead, dealing only with Viacom in the intervening hours before the October 24 board meeting, Paramount sought only minor modifications of the existing contract terms. Paramount obtained Viacom's agreement that Paramount could terminate the merger agreement to accept a better bid. Op. 21; JA1680. Viacom also agreed that, in the event of a better offer, Paramount could be excused from its contractual obligation to lift its poison pill in favor of Viacom's bid. Op. 20; JA1647-48.

While Viacom "acceded to just about everything that Paramount asked for" in the hours before the board meeting (JA5606(208)), Paramount made no effort:

• to obtain price protection (through a "collar") against any drop in value of the second-step Viacom securities (JA5663(193), JA5681(307)), despite the facts that (i) Paramount stockholders could no longer vote to reject the merger, (ii) Viacom stock had already suffered a decline, (iii) Viacom was to incur more debt to finance its tender offer (which could negatively affect the value of the stub equity), and (iv) the directors had justified their willingness to forgo a collar initially on the basis (now non-existent) that the stockholders would be able to vote down the Viacom deal if Viacom's stock price dropped. JA5219(111).

• to obtain any assurance that Redstone would not act to eliminate or radically alter the continuing equity of the public stock-

---

3) So is fair price amendment.

4) Viacom is asking us to pull the pill for it but for no one else.

5) The result is that if a higher offer were made by QVC, we would be precluded from giving our shareholders the benefit of it by our agreement not to pull the pill.

6) While QVC is blocked by us, Viacom can take whatever shares that come in—and they'll come in because the QVC offer can't be consummated.

7) It is entirely possible that Viacom can get enough shares so that QVC can never prevail, no matter what its bid.

8) Under Viacom's new proposal, if Viacom doesn't get 43%, it can exercise its breakup fee and option by terminating the agreement.

9) Viacom also has the right not to complete the merger agreement if the tender offer fails.

3. The most prudent position is to keep the poison pill in place for everyone.

holders (JA5650(111-13), JA5423-24(44-46)), even though that protection had become even more important given the absence of any shareholder choice under the new Viacom proposal, and despite the rationale of "long term" gains that had supposedly motivated the transaction.

• to renegotiate the terms of the lockup stock option, even though the $69.14 option price—which everyone now knew to be absurdly low—meant that the option was already worth $250 million (above and beyond the $100 million break-up fee) and would go even higher if further bidding ensued. JA5662(187-88).

When the board assembled on Sunday morning, October 24, management recommended the Viacom 43% offer, and Lazard opined that the (admittedly coercive) 43% offer was fair. JA1494-95; JA5659(167-68); JA5838(119). Specifically, Davis described the terms of the proposal, and Lazard made a financial presentation comparing Viacom's offer to the pending QVC tender offer. Op. 21-22; JA1494-95. Lazard's analyses were all arithmetical calculations based upon or derived from current market values. JA1413-18. In one such analysis, Lazard indicated that "at the weighted average 'unaffected' multiple, QVC stock would trade at $39, implying a per-share transaction value of $68.10."* Op. 22; JA1414. Using the same analysis, Lazard advised the board that Viacom Class B could trade at $40.75 per share, implying a per-share transaction value of $70.75. Op. 22; JA1417. Lazard did not opine that the QVC offer was inadequate, nor did Lazard opine that the Viacom offer was superior to QVC's. JA1495; *see also* JA5438(137). Lazard was not asked either question. JA5833(87-88); JA5168(156-57). Rather, Lazard opined only that the Viacom 43% offer was "fair", the same opinion Lazard had given for the initial $69.14 transaction. Lazard did not address "long term value" on October 24; nor did it address the long-term financial impact of the acquisition debt Viacom would incur to fund the tender offer. *See* JA1402; JA1413-18; JA1493-1503; JA5174(191).

After management's presentation and Lazard's opinion were given, a note was brought into the boardroom informing the board

---

* The "weighted average unaffected multiple analysis" assumes a future price/cash flow multiple based on selected market data, and then computes a hypothetical market trading price based on assumptions of future cash flow. JA5474(68).

that Viacom would be willing to tender for 51% of the shares. Op. 22; JA5176(206-07).

The Paramount board next heard a presentation from Michael Wolf of Booz-Allen & Hamilton ("Booz-Allen"). Although Booz-Allen purported to compare the "synergies" of a Viacom merger with those of a QVC merger, it had never spoken with QVC or factored in QVC's contributions to the merged Paramount, and its analysis did not use nonpublic QVC information. Op. 23; A5707(47-48). Booz-Allen concluded that a Viacom merger could "create over $3 [billion] more incremental shareholder value than a merger with QVC." Op. 22; JA1434. Booz-Allen based this conclusion on a series of assumptions about potential "synergies" as well as potential future cost reductions, largely through layoffs of personnel (JA1443), despite the fact that Davis and Redstone had publicly committed the merged company to hire, not fire, employees. JA2562; JA3058. Booz-Allen did not analyze the capital structure of the merged company to link any such projections to "shareholder value"; Booz-Allen did not advise the board as to the value, in either the short or long term, of the Viacom securities Paramount stockholders would receive in the back end. *See* JA1493-1503; JA1419-92.

As the Court of Chancery found, "the Booz-Allen report was self-described as a 'first cut' and was not based on any non-public information about QVC and Paramount." Op. at 23; JA1433. Moreover, there is no dispute that Booz-Allen is a firm of management consultants and not financial professionals (JA5702(16-19)); that the Booz-Allen employees who worked on the Paramount assignment were trained in marketing and management, not in corporate finance or equity valuation (JA5703-04(27-29)); and that the Paramount board was not told of Booz-Allen's contemporaneous work for Paramount management. JA5705(36). Booz-Allen did not consider such fundamental matters as the debt load of a combined Paramount/Viacom, or the impact of a change in management. JA1419-1503. In addition, none of Paramount's SEC filings have identified Booz-Allen as an advisor upon whom the board relied with respect to the Viacom or QVC proposals. *See* JA2742-43; JA2760-61. For all these reasons, the Vice Chancellor's finding that the Booz-Allen report was "not a sufficiently reliable basis" for a conclusion about the relative merits of Viacom's and QVC's offer is amply supported by the record. Op. 55 n.45.

The Paramount board agreed to accept Viacom's 51% tender offer proposal. But it is undisputed that no one in the Paramount boardroom on October 24 asked:

• whether Paramount had sought to modify the $350 million lockup option and break-up fee (JA5662(187-88), JA5224-25(148)).

• whether discussions should be held with QVC (JA5664(198-99), JA5226(158-59)), even though the board had previously determined that such discussions were required by its fiduciary duties.

• whether $80 represented QVC's best and final bid (JA5664(198-99), JA5227(165)).

• whether Paramount should obtain price protection for the Viacom back end (JA5228(171), JA5158-59(95-96)).

• whether Paramount should obtain an opinion from Lazard that the Viacom offer was superior to QVC's. JA5168(156-57), JA5225(150-51).

The board agreed, moreover, to lift its poison pill for the Viacom offer, but not for the QVC offer, and it passed a resolution authorizing and directing *management* to execute all documents needed to allow the Viacom offer to close—including, for example, the necessary rights plan amendment lifting the pill for Viacom. JA1502; JA5173(185). The Paramount board reached these decisions even though Viacom had no financing in place for its tender offer. JA1386; JA2677; JA3386; JA5296(231-32).

On the next day, Davis and Redstone appeared at a press conference, their hands clasped and raised in triumph. JA3304-06. Davis emphasized to the press that "we [Paramount] have a board that is functioning in lock step. . . . There is no separation of thought." JA3105-06. He also said that a transaction between Paramount and any other company was "unthinkable." JA3093.

G. QVC Continues To Attempt To Negotiate With Paramount, And Both Viacom And QVC Raise Their Bids.

The Paramount board's willingness to rush forward with a proposal that changed even during its weekend board meeting enabled Viacom to obtain a two-day timing advantage: Viacom's offer commenced on October 25; QVC's on October 27. On October 28, QVC addressed a letter to Paramount's directors, again seeking a meeting to discuss its proposal (Op. 23; JA3128-29); but the letter was not given to the board before the response by management was made. JA5165(137-38). When the directors later learned of QVC's request for negotiations, it "amused the entire board," which "laughed about it," and deemed it to be merely a "tactic." JA6000-01. A ten-minute meeting of legal advisors occurred on November 1, at which QVC's representative presented a list of proposed "fair bidding process" procedures (Op. 23; JA3131) and suggested that QVC would raise its bid if the procedures were followed. JA3132. The Paramount side made no response. Later in the day, Paramount management sent a letter to QVC summarily rejecting all of QVC's suggested bidding procedures; the board again was not consulted. JA3132; JA5442(161-62); JA5055(190-91); JA5237-38(230-31).

On Saturday, November 6, Viacom informed Paramount that it wished to raise the cash portion of its tender offer, and the indicated market value of the securities to be exchanged in the second-step, to $85 per share. In a brief telephone board meeting the same day, Paramount's board agreed. Once again, the Paramount board authorized *management* to execute all documents—which would include necessary rights plan amendments—needed to allow the Viacom offer to close. Motion to Supplement, Exh. A at 6. There is no evidence that the board at this November 6 meeting considered the effect of Viacom's decision to increase the cash to be paid in the first step, and thus to increase the amount of debt burdening the combined company, on the value of the Viacom equity securities Paramount stockholders were to receive.

On November 12, QVC countered by raising its bid to $90 per share for 51% of the stock, with securities of an equal market value for the second step. Op. 24; JA6272. (Paramount's statement in its brief to this Court that the new offer was for 51% of the shares at *$45* per share (PB 25) is simply wrong. JA6272.)

H. Paramount Rejects QVC's $90 Bid Without Holding Any Discussions With QVC.

The Paramount board met late on Monday, November 15, to consider its response. Op. 25. As the Court of Chancery found, at this meeting, management "by skillful advocacy," and by placing "disproportionate emphasis on [the QVC offer's] contingencies" "rather than the comparative economic merits of the offers," succeeded in persuading the board "that no exploration [of the QVC offer] was required." Op. 26, 54. Before the meeting, management sent the directors a summary of "the conditions and uncertainties of QVC's offer" that contained no mention of the financial terms of QVC's offer. Op. 25; JA6602-05. The summary "emphasized management's view that the QVC offer was highly contingent"—in particular, contingent upon financing. Op. 25. The document created "a negative impression of the QVC offer" (Op. 26): when one director reviewed it twenty minutes before the board meeting, he became "very negative on the whole subject" of QVC's offer. JA6221(7). Davis, in turn, told the directors that QVC's offer was "highly conditional," but that the Viacom offer was not. JA6653.

At the meeting, comparisons of the two offers furnished by management to the board "focused the board on the conditions of the QVC offer, but *omitted* disclosure of several similar conditions in the Viacom offer." Op. 26 (emphasis added); JA6607-6618. Given management's emphasis on the "uncertainties and contingencies" of QVC's offer, the board felt itself unable "to even consider" QVC's offer. JA6135(20). Indeed, as the Vice Chancellor found, the board was led to believe that it was precluded from even considering the QVC offer by virtue of the "no-shop" clause in the Viacom merger agreement. Op. 26-27; JA6186-87(50-55); JA6191(80-81); JA6192(86); JA6223(24-26); JA6224(31). The board thereupon rejected the QVC offer because of its supposed "conditions and uncertainties"—not its economic merits. JA6189(68); JA6182(22-23); JA6190(73); JA6135(20); JA6140(51); JA6220-21(7); JA6223(23); JA6224(31); JA6660-61. The supposed uncertainty of QVC's bank and equity financing was of greatest concern to the directors. JA6135-36(21-22); JA6137(28); JA6223(23); JA6228(53-54). In short, as the Court of Chancery found, "the board simply followed management's lead in rejecting the unwelcome offer." Op. 27.

The directors "did not have sufficient information to even determine the viability of the offer" (JA6135(20)), because they made no effort to inform themselves whether the conditions to QVC's offer were likely to be met. JA6190(74-77); JA6136(26); JA6137(31-32); JA6223(26). The board had no information as to where QVC stood in obtaining financing (JA6190(74); JA6136(22-23); JA6223(26); JA6234(92-93)); indeed, as the Vice Chancellor noted, no director even "suggested that inquiries be made to QVC to ascertain whether its financing conditions could be resolved." Op. 27; JA6136(22); JA6190(74-77). Lazard itself was "prohibited" by Paramount's management from obtaining information from QVC about its bid on the ground that QVC's bid was not "bona fide." Op. 27 n.25. JA6163(60-61). No one told the board that QVC would not be able to obtain financing. JA6163(60-61); JA6190(74); JA6234(94); JA6136(22). To the contrary, Lazard advised the board that "this [Paramount/QVC] combination [was] within the range of what appeared to be financeable." JA6164(67); JA6167(87). As matters turned out, QVC obtained financing commitments within a few days. *See* JA6674-6757; JA6758-59.

In rejecting QVC's offer on November 15, moreover, the Paramount board had no informed basis to conclude that Viacom's offer was superior to QVC's offer. Lazard gave no opinion to this effect. Once again, Lazard was not even asked to comment on the relative value of the two bids. JA6626-52; JA6155(12); JA6620-25; JA6159(34-35); JA6162(56); JA6138(35); JA6227(48); JA6231-32(76-78). Lazard explicitly stated that it was "not expressing an opinion" regarding the QVC offer (JA6625); indeed, "Lazard was *unable* to express an opinion about the QVC offer, because it had been 'prohibited' by Paramount from having discussions with QVC." Op. 29; JA6163(60-61). Lazard gave no opinion regarding "long term values." Op. 29 n.32; *see* JA6155(10); JA6159(38); JA6232(78). And Lazard did not provide separate values for the respective offers' paper back ends, either at market or on any other basis. Op. 28; JA6619. The Vice Chancellor correctly found that "it is undisputed that neither Lazard nor Booz-Allen provided the board with any information that would support quantitatively the conclusion reached by the board that a Paramount-Viacom merger would create higher long-term value than the QVC alternative." Op. 29.

The November 15 Lazard presentation contained a "weighted average unaffected multiple analysis" along the lines of the one in the October 24 Lazard presentation. Op. 27-28; JA6626-52. This time, however, the *QVC* bid emerged as higher in value: $80.01 for QVC as opposed to $74.29 for Viacom, a difference of $5.72 per share (an aggregate disparity of $600 million). Op. 28; JA6644. Lazard has tried to walk away from its analysis in two ways. First, in deposition testimony, Lazard's witness stressed the "highly theoretical, nonpredictive" nature of this type of analysis. Op. 28; JA6160(43); JA6157(22); JA6168(94). Second, Lazard testified that the figures in the November 15 presentation that it gave the Paramount board were incorrect because of "computer errors," and that Lazard was revising them to show that QVC's bid is only about $1.50 superior to Viacom's (although Lazard noted that even these revisions were not complete at the time of its deposition). Op. 28 n.28; JA6158(29-32); JA7073.

Booz-Allen did not advise the board on November 15. Lazard referred to Booz-Allen's October 24 report, but Booz-Allen had not updated its "first cut" in any way—for example, to take into account potential synergies from BellSouth's entry into the QVC bid on November 12. Lazard did note that "the market has valued the [QVC-Paramount] combination *more favorably* than the Booz-Allen analysis would suggest." Op. 29; JA6647-48 (emphasis added).

The board was told on November 15, that, as of 3:00 p.m. on the day it met, the QVC offer was worth $89.74 per Paramount share, and that the Viacom offer was worth $80.56 per share—a difference of approximately $1.2 billion. JA6619; JA6181-82(21-22); JA6222(14-15). The Lazard presentation actually demonstrated that the Viacom offer was highly "front-end loaded"—an arithmetic calculation of the figures given to the board shows that the Viacom back end was worth only $75.94 per share at current market prices (compared to its $85 front end)—while the QVC offer (worth $89.74 at November 15 market prices) was *not* similarly front-end loaded. *See* Op. 28 n.30; JA6619.

Despite the difference in value and structure between the QVC and Viacom offers, and without attempting to learn more about QVC's bid, the board recommended that its stockholders reject QVC's offer. JA6659. Moreover, the board did not reconsider its earlier decision to pull Paramount's poison pill for Viacom and not for QVC. JA6196(114-15); JA6142(63). The clear, foreseeable and intended result of the board's November 15 decision was foreshadowed by Oresman's notes of October 23: "[w]hile QVC is blocked by us, Viacom can take whatever shares that come in—and they'll come in because the QVC offer can't be consummated." JA3401.

In fact, QVC was very close to eliminating the very "uncertainties and contingencies" relied on by the Paramount board. Op. 30; JA6672-73. On November 19, QVC paid millions of dollars in commitment fees for $3 billion in bank financing for its tender offer. JA6674-57. On the same day, QVC and BellSouth entered into a formal, binding contractual commitment providing for the BellSouth $1.5 billion investment (JA6760-75); and QVC informed Paramount that no further FTC approvals for QVC were required. JA6776. On November 22, QVC received approval from the FCC.

The board's lack of consideration of QVC's tender offer on November 15 was consistent with the board's mindset from the outset of QVC's bid—in the Vice Chancellor's apt phrase, that "Paramount was for sale only to Viacom" and "other bids were unwelcome." Op. 14. *See* QOB 53n*; JA6238(115); JA6239(122-23); JA6143(70-71); JA5175(198-200).

Paramount's repeated assertions to this Court that, by November 15, its board had *not* decided to "amend the rights plan for Viacom" (PB 7, 26) are utterly false. As noted above, the board had twice approved resolutions—on October 24 and on November 6—*directing* Paramount management (the "Authorized Officers" referred to in the resolutions) to execute all documents necessary to allow the Viacom offer to close. JA1502; Motion to Supplement, Exh. A at 6. Indeed, the Paramount board on November 15 had already determined that the QVC $90 offer was not a "better alternative" to the Viacom offer (*see* JA6661-62), and—having so decided—Paramount was contractually obligated to pull the pill for Viacom (*see* JA1647), and the board had already authorized management to do so. In truth, after November 6, *no further action of the board was required in order for the Viacom offer to close.*

Paramount ignores these resolutions (which put pulling the pill on automatic pilot), citing instead the vague testimony of one director that is clearly inconsistent with the resolutions and with Paramount's representations in the Court below. PB 8, 26, 28 (citing JA6234, 6874). In the early evening of Wednesday, November 24, in seeking a $5 billion injunction bond, counsel for Paramount represented to the Vice Chancellor that this $5 billion figure was "the cash amount which *but for Your Honor's injunction* the Paramount shareholders would be in a position to receive at midnight tonight." JA7159 (emphasis added); *see also* JA7172 ("all of the shareholders tonight, at midnight, could receive $85 cash"); JA7176 ("it is the injunction . . . that is actually stopping the tender offer"). Paramount's suggestions of an additional board meeting (PB 7-8, 12, 28-29), to be held before midnight on November 24 so that the board could consider whether to do what it indisputably had already done, is both incorrect and belied by Paramount's own representations.

* * *

In reviewing the decision below, this Court should be aware that the record before it is highly unusual, in that it does not contain documents that ordinarily would be expected to be found in the files of a corporation, such as Paramount, about to engage in a $10 billion sale of control. For example, there exist no contemporaneous documents that reflect what happened at the seven relevant Paramount board meetings—no handwritten notes, no memoranda, no draft minutes. The only written "records" are scripts, agendas and advisors' presentations prepared in advance, and short-form minutes that do not give any details of the actual board deliberations. *See, e.g.*, JA5418(10-11, 14); JA6134(10-11); JA1366-67; JA1361-65. Certain directors testified that they took notes but threw them away—even after the onset of litigation. JA5647(90); JA5210(54); JA6221(12-13). The secretary of the board claims to have taken no notes to prepare the minutes; and although draft minutes were commented upon by counsel, none were kept. JA5418(12-13). Only one Paramount-created document reflecting its negotiating position with Viacom—general counsel Oresman's typewritten notes of October 23—was produced in discovery; according to Oresman's testimony, Paramount's copies of this document were discarded or destroyed by Paramount—even after the onset of litigation. JA5437(128-30). Fortunately, a copy survived in Lazard's files and Lazard produced it. All other negotiating documents, according to Oresman, were discarded or destroyed. JA5419(18-20).

Under these circumstances, all factual inferences should be drawn against Paramount. *See, e.g.*, *Smith* v. *Van Gorkom*, Del. Supr., 488 A.2d 858, 878 (1985); *Wilmington Trust Co.* v. *General Motors Corp.*, Del. Supr., 51 A.2d 584, 593 (1947).

ARGUMENT

The Court of Chancery's decision was correct and well-reasoned. The record clearly supports the Vice Chancellor's conclusion that the Paramount board could not use the Paramount pill to preclude QVC's offer, while compelling the stockholders to accept Viacom's bid. The board, which triggered *Revlon* duties by its own conduct, failed to fulfill its fiduciary duty to make an informed comparative judgment of the QVC and Viacom proposals. The record also clearly supports the Court of Chancery's conclusion that the lockup stock option granted to Viacom on September 12 and regranted on October 24 was improperly motivated—designed not to induce superior bids but to impede them—and approved by an uninformed board.

Paramount's attacks on the Court of Chancery's opinion are misguided and misleading. The opinion's focus on the November 15 board meeting is certainly logical, since it was at that meeting that the board rejected the $90 QVC bid in favor of the $85 Viacom bid. Nor was the Court of Chancery illogical in returning to September 12 to consider the board's state of knowledge and purposes when adopting the lockup. Paramount's repeated complaints (PB 8, 25) that QVC's increase of its offer and steps towards its fulfillment—actions that created hundreds of millions of dollars in greater value for the Paramount shareholders—were "antics" that somehow "confused" the Court below hardly merit comment.

In their opening briefs, neither Paramount nor Viacom addresses the central issue on this appeal. While Paramount discusses a variety of legal doctrines, Paramount never attempts to justify Paramount's use of its rights plan to coerce stockholders to sell control to Viacom while blocking QVC. The only defense Paramount offers for its course of conduct is that the directors had not "finally" decided to pull the pill and, thus, it was "premature" to enter an injunction restraining them. PB 13-31. Resort to this argument—which is factually incorrect—highlights Paramount's inability to find a principled justification for its use of its rights plan. As for Viacom, it expends its greatest effort trying to save its bonanza stock option, rather than justifying the economic merits of its acquisition proposal; and Paramount (oddly) joins Viacom in the effort to reburden the Paramount stockholders with the stock option from which the Court below freed them.

I. THE COURT OF CHANCERY PROPERLY ENJOINI THE PARAMOUNT BOARD FROM USING ITS RIGH' PLAN TO COERCE THE STOCKHOLDERS INTO SEL ING CONTROL OF PARAMOUNT TO VIACOM WHII PRECLUDING THE STOCKHOLDERS FROM CONSI ERING THE QVC TENDER OFFER.

The Paramount directors claim the right, by use of the rights pla to coerce their own stockholders into the management-sponsore control-changing, front-end-loaded Viacom partial $85 tender off while precluding QVC's $90 per share tender offer. The injuncti below against such discriminatory use of the rights plan was pro erly entered—whether as an articulation of *Revlon* duties, the pr portionality test of *Unocal*, the basic principles of Delaware la under which rights plans are permitted in the first place, or the fu damental duty of care.

A. Standard And Scope Of Review

The Court of Chancery's grant of a preliminary injunction ma only be reversed for abuse of discretion, *see, e.g.*, *Gimbel* v. *Sign Cos.*, Del. Supr., 316 A.2d 619, 620 (1974) (*per curiam*)—that is, "the action taken below was arbitrary or capricious." *Daniel D Rappa, Inc.* v. *Hanson*, Del. Supr., 209 A.2d 163, 166 (1965). More over, this Court "will accept the findings of the trial [court]," "eve though [it] might have independently reached different conclusions, if those findings "are supported by the record, and otherwise are th product of an orderly and logical deductive reasoning process. *Mills Acquisition Co.* v. *Macmillan, Inc.*, Del. Supr., 559 A.2d 1261 1278 (1989); *see Levitt* v. *Bouvier*, Del. Supr., 287 A.2d 671, 67 (1972).

B. Rather Than Defend Its Use Of The Rights Plan Paramount Argues That The Injunction Was Prematur Because The Directors Had Not Finally Decided to Remov Paramount's Poison Pill.

The Paramount defendants make the incredible assertion that th directors had *not* decided to pull the pill for Viacom, *see* PB 7-8, 26 28-29, and thus that the injunction (entered hours before the Viacom tender offer was to close) was "premature," "advisory" and unnec essary. PB 28-29. Paramount's argument must be rejected. *First*, i flatly misstates the record, as explained *supra* at pp. 23-24. *Second*, this argument was never advanced below and cannot be urged for the first time on appeal. Del. Supr. Ct. Rule 8.

Third, the argument ignores the reality that, unless the Paramount directors had committed *not* to pull the pill, the Court of Chancery and the plaintiffs were faced with the imminent threat that the pill would be pulled, Viacom would buy 51% of the shares, and a situation would be created that could not be undone. This imminent threat—which Paramount never denied in weeks of litigation below and actually reinforced by its bond argument *after* the decision below was rendered—clearly justified judicial intervention regardless of whether the board could still have "finally" acted to reverse its prior decisions. *Wilmington Federation of Teachers* v. *Howell*, Del. Supr., 374 A.2d 832, 836 (1977); *Diebold Computer Leasing, Inc.* v. *Commercial Credit Corp.*, Del. Supr., 267 A.2d 586, 590 (1970).

The argument that no judicial review was appropriate before 12:01 a.m. on the night of the closing date of Viacom's tender offer, when Paramount management would actually execute the necessary amendment to the rights to exempt Viacom's offer, is a smokescreen: once Paramount "finally" did that, meaningful judicial review would be too late. Paramount's argument to this Court is, in essence, that judicial scrutiny of its use of the pill is either too early or too late—*i.e.*, that there should be *no* judicial review.

C. The Paramount Board Violated Its Fiduciary Duties Under *Revlon*.

1. *Revlon* duties were triggered by the Paramount board's decision to sell control to Viacom.

The Paramount directors do not claim that their conduct could be squared with *Revlon* if it applies. Instead, their anti-*Revlon* argument is—and has to be—that *Revlon* does not apply here. They are wrong. Under this Court's precedents, under the policy reasons that prompted the decision in *Revlon* itself, and under the policy embodied in 8 *Del. C.* § 203, *Revlon* duties were triggered (a) when, on September 12, Paramount's directors agreed to a merger in which Redstone would receive 70% voting control over Paramount, and (b) when, on October 24, in the face of QVC's announced intention to commence a tender offer, Paramount's directors agreed to change the Viacom transaction so that Viacom could buy 51% of Paramount's stock in a cash tender offer. After the Viacom transaction, Redstone will have absolute control over what is now Paramount, with the voting power, by himself, to absolutely control the company's destiny. What remains of the stockholders' equity (*i.e.*, their participation in the "long term") will hang by a thread that Redstone can cut any time he so chooses: he will be free to cash out or otherwise extinguish that equity by a merger under 8 *Del. C.* § 251; to dissolve the merged company or cause the sale of all or substantially all of its assets under 8 *Del. C.* §§ 271 and 275; to change the merged company's business or business strategies as he wishes or as his other business interests may dictate—all without any contractual limitations, and with a board composed entirely of his nominees. The Court of Chancery was clearly correct that, in such circumstances, *Revlon* is triggered.

For a fuller statement of QVC's position on the *Revlon* trigger issue, the Court is respectfully referred to QOB 57-71 and QRB 23-35. In summary, QVC relies upon:

(1) this Court's formulation of the *Revlon* trigger in *Revlon* itself as whether the board action acknowledged "that the company was for sale." *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173, 182 (1986).

(2) the equivalence between "sale" and change of corporate control recognized by this Court in *Macmillan* in the very context of elaboration upon the *Revlon* trigger. *Mills Acquisition Co.* v. *Macmillan Inc.*, Del. Supr., 559 A.2d 1261, 1285 (1989) ("the sale of corporate control").

(3) this Court's statement in *Barkan* that "the general principles announced in [*Revlon, Unocal* and *Household*] govern this case and every case in which a fundamental change of corporate control occurs or is contemplated." *Barkan* v. *Amsted Industries, Inc.*, Del. Supr., 567 A.2d 1279, 1286 (1989).

(4) this Court's specific holding in *Macmillan* that the restructuring at issue in *Robert M. Bass Group, Inc.* v. *Evans*, Del. Ch., 552 A.2d 1227, 1236-37 (1988) ("*Macmillan I*")—which would have shifted effective control to the management group albeit would not

have extinguished a majority of the equity (*see* 552 A.2d at 1243)—triggered *Revlon* duties. *Macmillan*, 559 A.2d at 1285.

(5) this Court's holding in *Gilbert* v. *El Paso Co.*, Del. Supr., 575 A.2d 1131, 1146 (1990), that the imminent completion of a tender offer for 51.8% of El Paso's shares meant that "it had become apparent that the breakup of the company was inevitable" and thus that *Revlon* duties were triggered. Paramount's attempt to argue that its agreement to a control-changing 51% tender offer did *not* trigger *Revlon* simply ignores *Gilbert* v. *El Paso's* holding on this point.

(6) this Court's decisions rejecting the applicability of *Revlon* in two circumstances in which there was no change in control. *Ivanhoe Partners* v. *Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1344-45 (1987) (*Revlon* not triggered by dividend financing third-party's acquisition of 49.9% of the stock where special provisions in a standstill agreement assured continued public stockholder control of the company and its board); *Paramount Communications Inc.* v. *Time Inc.*, Del. Supr., 571 A.2d 1140, 1151 (1990) ("*Time-Warner*") (*Revlon* not triggered as to Time Inc. by the originally proposed Time-Warner stock-for-stock merger under which control of the merged corporation would have remained in the hands of the public stockholders, and the Time stockholders would not have had any portion of their equity cashed out, otherwise terminated or converted into nonvoting stock).

(7) this Court's approval in *Cede & Co.* v. *Technicolor, Inc.*, Del. Supr., No. 336, 1991, Horsey, J. (Oct. 22, 1993, revised Nov. 1, 1993), slip op. 63-65, of the Court of Chancery's holding—after *Time-Warner*—that *Revlon* applied to a consensual cash merger agreement even though there was no auction.

(8) the factual record here, which establishes the common understanding of all key participants on the Paramount-Viacom side that their transaction was not a simple merger but rather a sale of Paramount to Viacom—including the statement in Paramount's September 9 board minutes that the transaction was a "sale of control." JA701.* It makes no sense to say that Paramount was not "for sale" if—as their own out-of-court statements reflect—Davis sold it and Redstone bought it.

(9) the fact that, on October 24, the Paramount board was persuaded by management to approve the $80 Viacom tender

* *See* p. 9, *supra*; *see also* QOB 29-31, 68-69.

offer/lockup agreement on the ground that it granted Paramount a "fiduciary out" right to terminate the agreement for a superior transaction and a right to keep its pill in place if a "better alternative" to the Viacom offer were proposed (JA2734)—as a result of which, even if a board's initiation of an "active bidding process" (*Time-Warner*, 571 A.2d at 1150) is thought to be a prerequisite to *Revlon*, Paramount has done precisely that. *See* QOB 50-51, 69-70.

That change of control triggers *Revlon* follows logically from the reason that enhanced duties are imposed on directors in the takeover context: the recognition that "*where issues of corporate control are at stake*, there exists 'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.' *Unocal*, 493 A.2d at 954." *Macmillan*, 559 A.2d at 1287 (emphasis added). As this Court recognized in *Macmillan* and *Barkan*, that fundamental proposition applies both to defensive action tested under *Unocal* and conduct leading to a change of control transaction tested under *Revlon*. "Although the board's *responsibilities* under *Unocal* are far different, the enhanced *duties* of the directors in responding to a potential shift in control, recognized in *Unocal*, remain unchanged. This principle pervades *Revlon* . . . ." *Macmillan*, 559 A.2d at 1287 (emphasis in original).* And a change of control is the one opportunity that the stockholders have to receive a control premium—an opportunity that should be vigilantly protected from unilateral board action that prevents market forces from providing the stockholders a choice of the best available alternative. The public stockholders can only benefit once in the life of a corporation from a sale of corporate control. If *Revlon* does not apply to Paramount now, it never will.

That the sale of more than 50% of a corporation's stock in a tender offer triggers *Revlon* has been recognized by the Delaware General Assembly and is embodied in the Delaware General Corporation Law itself. As one leading treatise explains, the proposition is reflected in 8 *Del. C.* § 203(b)(6), which establishes a "competitive bidding" exception to the Delaware Business Combinations Statute:

> The basic policy behind Section 203(b)(6) is that once the board of directors has decided to sell the corporation or a

* *See also* Gilson & Kraakman, *What Triggers Revlon?*, 25 Wake Forest L. Rev. 37, 43, 50 (1990).

> majority of its assets or has approved (or not opposed) a tender offer or exchange offer for fifty percent or more of the corporation's outstanding stock, the stockholders of the corporation are benefited by the promotion of bidding contests. Section 203(b)(6) furthers this policy by exempting subsequent bidders from the operation of Section 203 if certain conditions are satisfied. The theory is that once the board has determined that the corporation, or a significant portion of its assets, is for sale, Section 203 should not prevent subsequent bids from being received. Thus, a board is effectively prevented from using Section 203 to favor one bidder over another. In this respect, Section 203(b)(6) can be regarded as a codification of the doctrine of *Revlon* v. *MacAndrews & Forbes Holdings, Inc.* that a board of directors has the obligation to obtain the highest and best price for the corporation once it determines to sell the corporation. Section 203(b)(6) treats a board's decision to sell more than half of the corporation's assets or the board's approval of a tender offer for more than fifty percent of its outstanding stock, as being the equivalent, for the purposes of Section 203, of a sale of the corporation.

R. Balotti and J. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 6.36, at 6-56 to 6-57 (2d ed. 1993).

To hold *Revlon* triggered here would not have any effect on strategic stock-for-stock mergers. *First*, what is at issue here is whether directors may coerce and preclude stockholder choice with respect to competing *tender offers*. *Second*, to the extent that a holding in this case will have implications with respect to mergers, it would do so only by reason of the *unique* circumstances of this case. In the typical stock-for-stock merger—as with the originally-proposed Time-Warner merger—control of the corporation would always remain with the public stockholders, "in the market." *Time-Warner*, 571 A.2d at 1150. It is only the *unique* circumstances of this case that cause the Viacom/Paramount transaction to trigger *Revlon*—namely, the fact that Redstone has insisted on using cash and *non*-voting Viacom stock as the basic acquisition consideration, thereby giving him absolute control over the combined entity and its future. There is thus no force in Paramount's argument that holding *Revlon* triggered here would foreclose mergers with closely-held corporations. Such mergers generally would be unaffected by *Revlon* unless the acquiring company insists—as Redstone did here, for his own purposes—on using *non*voting stock as the merger consideration (thereby rendering the merged company takeover-proof).

That a change of control test is no threat to true stock-for-stock mergers is well recognized. *See* D. Drexler, L. Black and A. Sparks, *Delaware Corporation Law and Practice* § 15.14 at 15-101 (1993) ("As a result of the *Time* decisions, *Revlon* would appear to have no application to negotiated stock-for-stock mergers involving two widely-held public companies without a dominant shareholder, whether one applies the Chancellor's reasoning or that of the Supreme Court."). It has been settled since *Gilbert* v. *El Paso, supra*, 575 A.2d at 1146, that *Revlon* is triggered when the success of a control-changing tender offer for a majority or more of a company's stock becomes assured.

In contrast, the *Revlon* tests proposed by Paramount ("significant continuation of stockholder equity participation in an ongoing enterprise," PB 20) and Viacom (a "link between [the] present stockholders and the future merged entity," VB 26) would invite endless manipulation. Under those formulations, virtually any amount—or, at best, some *undefined* amount—of ongoing equity would render *Revlon* inapplicable. Guidance and predictability would be impossible. And the standard makes no sense when—as here—the so-called "continuing" equity is immediately subject to extinguishment or radical alteration at any time by a controlling shareholder. On appellants' tests, what causes *Revlon* not to apply—the "ongoing equity" or "link"—could be made to disappear one minute after the Viacom transaction is done.

Here, there is *no* "long term" for the stockholders. A majority of their equity is being cashed out now, and the minority remnant can be extinguished by Redstone unilaterally or transformed into something completely different whenever he so desires. The Paramount directors made no attempt to secure a "long-term" for the stockholders. *See* JA5145-46 (14-19); JA6025-27; JA5650 (111-13); JA5423-24 (44-46). *Revlon* and the principles that underlie it would be rendered meaningless if they have no application to this case.

2. Under *Revlon*, the Paramount board cannot use its rights plan to coerce the stockholders into the Viacom tender offer while blocking the QVC offer.

When *Revlon* is triggered, the directors are obligated to evaluate competing bids, to inform themselves thoroughly about the bids, and to compare the bids on their merits, with a view to determining which bid provides the greatest immediate value to the stockholders. *See Revlon*, 506 A.2d at 182. As this Court described it in *Time-Warner*, the *Revlon* duty is "to maximize immediate shareholder value." *Time-Warner*, 571 A.2d at 1150. *See also Macmillan*, 559 A.2d at 1282 (duty is "to obtain the highest price reasonably available for the company"); *Barkan*, 567 A.2d at 1286 ("highest possible price for shareholders"). The directors must affirmatively seek out, advisedly and in good faith, the best available transaction and be in a position to satisfy the "enhanced scrutiny" to which their conduct is subject. *See* Op. 46-47.

Here, the record speaks clearly that the only thing that the Paramount directors have sought to "maximize" is Redstone's opportunity to get control of Paramount's assets at the *lowest* possible price. Most clearly, the directors cannot under *Revlon* be permitted to use their rights plan to block the QVC offer while pulling the pill to coerce the stockholders into the front-end-loaded Viacom offer. Under *Revlon*, the board must refrain from any action that is "auction-ending" in a way that prevents the best bid from succeeding. *Revlon*, 506 A.2d at 182, 183. The controlling principle was stated in *Revlon* itself:

> [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. And the Court's statement in *Barkan* likewise directly refutes the Paramount directors' extreme position here:

> 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. *Revlon*, 506 A.2d at 182-85. . . . *When multiple bidders are*

> *competing for control, this concern for fairness forbids di tors from using defensive mechanisms to thwart an auctio to favor one bidder over another.*

Barkan, 567 A.2d at 1286-87 (emphasis added).

D. The Paramount Board's Decision To Use Its Rights Plan Compel The Success Of The Viacom Transaction And Bl QVC Violates The Proportionality Requirement Of *Uno*

Apart from whether *Revlon* duties were triggered here, Paramount board's discriminatory use of its rights plan is subjec heightened scrutiny under *Unocal*. A board's use of a rights pla always subject to review under the *Unocal* proportionality t *Moran* v. *Household International, Inc.*, Del. Supr., 500 A.2d 13 1357 (1985) (citing *Unocal*). Likewise, whether or not *Revlo* triggered, *Unocal* review remains applicable to board cond involving a change of control. *Barkan*, 567 A.2d at 1286. Judi review under *Unocal* requires the Court to assess, on an object basis, the reasonableness of the board's defensive conduct in re tion to a legitimate threat to corporate or stockholder interests t the board identifies in good faith and based on a reasonable inv tigation. *Time-Warner*, 571 A.2d at 1152.

Here, the Paramount board's repeated discriminatory treatmen QVC, culminating in its use of the rights plan to coerce the sto holders into Viacom's tender offer while precluding the QVC of cannot be justified as a reasonable response to any threat. On a view, QVC's \$90 bid is not a threat. It far exceeds the original V com \$69.14 bid that Lazard declared fair. Lazard's own valuati analysis of Paramount showed ranges of values from \$61 to \$73 share on a discounted cash flow basis, and \$62 to \$76 or "breakup" basis. JA756; JA737. Lazard's "*unaffected*" share pr analysis of November 15 actually demonstrated that the QVC \$ bid was greatly *superior* to Viacom's current bid (\$80.01 for Q versus \$74.29 for Viacom). JA6644. As of November 15, the Q bid (\$90 tender offer/\$88.57 back end) was far *less* front-end-load than the Viacom bid (\$85 tender offer/\$75.94 back end). S JA6619; Op. at 28 n.30. Moreover, since QVC at all times has be actively seeking to enter into a one-step merger agreement w Paramount, the two-step nature of its bid would not justify treati it as a threat in any event.

The only "threat" the QVC offer poses is that it is not being made by Viacom. That "threat" cannot justify the use of the rights plan to block stockholder consideration of QVC while coercing tenders into the Viacom offer. Deploying the rights plan in Viacom's favor is not proportional: it is 100% preclusive, and it has the undeniable effect of coercing the stockholders into selling control to Viacom via its front-end-loaded offer. As this Court noted in *Time-Warner*, 571 A.2d at 1154:

> We have found that even in light of a valid threat, management actions that are coercive in nature or force upon shareholders a management-sponsored alternative to a hostile offer may be struck down as unreasonable and nonproportionate responses. *Macmillan*, 559 A.2d 1261; *AC Acquisitions Corp.*, 519 A.2d 103.

In *Time-Warner*, Time's tender offer for Warner was deemed reasonable because it was "not aimed at 'cramming down' on its shareholders a management-sponsored alternative" and because it "did not preclude Paramount from making an offer for the combined Time-Warner company." 571 A.2d at 1154-55. The Paramount board's actions here are indeed aimed at "cramming down" the management-sponsored Viacom deal, and no one will ever be able to bid for the Redstone-controlled Paramount/Viacom once that deal is done.

E. The Paramount Board's Decision To Use Its Rights Plan To Compel The Success Of The Viacom Transaction And Block QVC Is Irreconcilable With Basic Tenets Governing Rights Plans As Set Forth In *Household* And Its Progeny.

First principles of Delaware law governing the use of rights plans likewise require the conclusion that the Paramount board cannot use the rights plan to compel the success of the Viacom tender offer and block QVC. It is indisputable that the Viacom tender offer is a coercive front-end-loaded tender offer:

> It is now well-recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction.

Unocal, 493 A.2d at 956. And a revealing document that Paramount's general counsel destroyed (*see* JA5439(140)), but that survived in Lazard's files shows that Paramount well understood that Viacom's tender offer was coercive. *See* JA3401 (Oresman memo), quoted *supra* at p. 14n*.

Delaware law permits boards to adopt and manage rights plans precisely to enable the board to *protect* shareholders from the threat of "coercive two-tier tender offers." *Household*, 500 A.2d at 1356. Our courts have further recognized that the power to use a rights plan is designed to provide the board "full negotiating power" in dealing with competing bidders *(MacAndrews & Forbes Holdings, Inc.* v. *Revlon, Inc.*, Del. Ch., 501 A.2d 1239, 1251 (1985), *aff'd*, Del. Supr., 506 A.2d 173 (1986)); to "spu[r] the bidding to new heights, a proper result of its implementation" (*Revlon*, 506 A.2d at 181); to "protect shareholders from coercive takeover tactics and to enhance the bidding" (*Barkan*, 567 A.2d at 1287)—and *not* "to unfairly favor one bidder over another." *Id.*

In this case, uniquely, a Delaware board is confronted with two competing two-tier tender offers. If the board permits one to close before the other—or if the board blocks one while facilitating the other—the board-favored bid will win, because the stockholders will be "stampeded" into that bid. The board could use the power available to it through the rights plan to insure that timing considerations do *not* dictate the winning bid and to eliminate coercion by requiring both to close at the same time. Paramount's own financial advisors and management came to just that conclusion (albeit they never so advised the board): "The most prudent position is to keep the poison pill in place for everyone." JA3401. But what the board *cannot* do is what Paramount's board is claiming the right to do: use a rights plan to compel the success of the Viacom bid and block the QVC bid—precisely the *opposite* of the reasons identified by our courts for giving directors the power to adopt rights plans.

The Paramount directors' position is a direct affront to this Court's statement in *Barkan*:

> When properly employed, the function of a "poison pill" is to protect shareholders from coercive takeover tactics and to enhance the bidding for a corporation that is for sale. Because potential bidders know that a pill may not be used to entrench management or to unfairly favor one bidder over another, they

> have no reason to refrain from bidding if they believe that they can make a profitable offer for control of the corporation.

Barkan, 567 A.2d at 1287 (citing *Household*, 500 A.2d at 1354-56). *See also CRTF Corp.* v. *Federated Department Stores, Inc.*, 683 F. Supp. 422, 439 (S.D.N.Y. 1988) (a rights plan "provides the directors with a shield to fend off coercive offers, and with a gavel to run an auction"). The Paramount directors are claiming the right to use their pill not as a shield, not as a gavel, but as a sword.

F. *Time-Warner* Provides No Defense To The Paramount Directors.

The Paramount directors' attempt to hijack *Time-Warner* in defense of their conduct here is misguided. *See* QOB 64-69; QRB 24-30. In *Time-Warner*, this Court held 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. 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 Time directors to select "a time frame for achievement of corporate goals" and the principle that the Time directors could not be forced to abandon their corporate plan "unless there is clearly no basis to sustain the corporate strategy." *Time-Warner*, 571 A.2d at 1154. Here, the Paramount directors have agreed to surrender control of the corporation, and to foreclose their stockholders from having any meaningful say in the merged enterprise. It is Redstone who will dictate the future strategy, and it is only *his* "time frame" and only *his* plans that will matter.

Time-Warner in no way supports either of Paramount's chief legal propositions—that a board can use its rights plan to coerce stockholders to accept one offer and preclude another, or that a board can sell control without a pre- or post-agreement market check. This Court in *Time-Warner* made plain that the Time directors were carrying out their directorial functions under Delaware law: they were pursuing a combination with Warner. 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 nub of the matter is this: In *Time-Warner*, Paramount was asking the Delaware courts to enjoin Time from acquiring another company in a transaction that did *not* transfer control of Time away from its public stockholders. In essence, Paramount was asking the courts to enjoin Time from acquiring an asset because Paramount preferred to effect an acquisition of Time without that asset. Paramount was not asking the courts to knock out defensive antitakeover devices that the Time directors had placed between the Time stockholders and Paramount's tender offer. *Time-Warner* was not about a pill or lockups. Here, the Paramount directors are, in short, saying that *they, not the stockholders*, should decide who gets control of Paramount; that they may use their pill to coerce the stockholders into selling control to Viacom while blocking QVC. That is something that the *Time-Warner* decision does not remotely support.

G. Consideration Of "Long-Term Values" Provides No Legitimate Basis For The Paramount Board To Block The QVC Offer And Coerce The Stockholders Into The Viacom Offer.

The Paramount directors have never recognized any obligation to seek the highest immediate shareholder value or the best available transaction. They have at all times acted as if the Viacom transaction was the only conceivable transaction. Their justification is their claim that the minority equity remaining in the Paramount/Viacom merger has better "long-term values" than the continuing equity in a Paramount/QVC combination. Such reliance on "long-term values"—in the face of a $1.3 billion difference in immediately realizable value—is disproportionate and can provide no reasonable basis for the directors' preclusive action.

First, on the undisputed facts of this case it would not be *rational* for the board to prefer the Viacom bid on the basis of "long-term values." There is no cognizable "long term" here since the Viacom bid will transfer absolute control to Redstone, who will then be in a position to do with the stockholders' equity and the corporation's assets as he pleases. In this specific circumstance, it makes no sense to consider the Viacom transaction to be the "best available transaction" on account of "long-term values," since the "long term" is simply not "available" to the Paramount stockholders.

Second, as the Court of Chancery found, the Paramount directors had no informed basis for concluding that the "long-term values" of the Viacom transaction were superior to the "long-term values" of the QVC transaction. See pp. 20-23, *supra*. It bears emphasis in this regard that the Paramount board chose to blind itself in critical respects—by not engaging in a market check of any type; by not eliciting the best available bids from all interested parties, or even from Viacom or QVC; by not engaging in any discussions with QVC, even after its board resolved (on October 11) that its fiduciary duties required it to do so; and by prohibiting its advisors from talking to QVC. This was in clear contrast, for example, to the concrete basis (in the form of quantified financial expert advice) relied on by the RJR Nabisco special committee, when it was called upon to evaluate competing bids involving untraded, newly-created securities. *In re RJR Nabisco, Inc. Shareholders Litig.*, Del. Ch., C.A. No. 10389, Allen, C. (Jan. 31, 1989) slip op. at 28-29. Here, the Paramount board had no such concrete basis from a financial advisor. The board further chose to ignore the information available from the current market evaluation of the relative values of Viacom and QVC securities, which reflects the market's view of future prospects.

While there was no one way that the Paramount board was obliged to proceed in order to inform itself adequately, its conduct here forcefully recalls this Court's admonition in *Barkan* that there are limits to the circumstances in which a board considering a change of control transaction can adopt a solely "passive approach," 567 A.2d at 1288, and further that " '[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.' " *Id.* at 1287. *See* PB 35 (relying on just such a "pale substitute"). Here, the Paramount board put itself (or allowed management to put it) in a position where it could not demonstrate its good faith, since:

> [T]he crucial element supporting a finding of good faith is knowledge. It must be clear that the board had sufficient knowledge of relevant markets to form the basis for its belief that it acted in the best interests of the shareholders.

Id. at 1288. Indeed, since *Revlon* was decided in 1986, no decision of the Delaware courts has approved the conduct of a board that approved the sale or merger of the corporation without *some* form of market check or effort to determine whether another party would be willing to pay a higher price to acquire control. *See* QOB at 78-80.

Third, the purported reliance by the Paramount directors on "long-term-values" is belied by the record of Paramount's negotiations with Viacom. Whatever litigation arguments it makes now, Paramount's conduct in rejecting Viacom's July 7 proposal and accepting a virtually identical one on September 12, when only *market prices* (not "long term values") had changed, establishes that the *sine qua non* of the deal with Viacom from the outset was *market price*, not "long-term values."

Finally, whatever the scope of a board's discretion in valuing securities that have no ready market (*see In re RJR Nabisco Sh. Litig.*, *supra*, slip op. at 44), a board cannot have limitless discretion where there *is* a liquid market for the very securities being evaluated.

The Paramount defendants concede that the "long term" will exist only at Redstone's pleasure, arguing that nonetheless it was appropriate for the directors to relegate the stockholders' long-term interests to an appraisal or rescissory damage lawsuit in the event of a "cash-out." *See* PB 21-22. That is no answer. On its face, this lawsuit argument does not even address Redstone's power to terminate or radically change the long-term in ways *other than a cash out*. Appraisal is available only upon a merger (*see* 8 *Del. C.* § 262), and there could be no stockholder claim of any sort if Redstone (for example) sold all of Paramount's assets, radically changed its "strategic" direction, or even dissolved the company. Even in the case of a "cash out," judicial consideration of "elements of future value" is limited to values that are "known or susceptible of proof at the date of the merger." *Rosenblatt* v. *Getty Oil Co.*, Del. Supr., 493 A.2d 929, 940 (1985); *see In re Tri-Star Pictures, Inc. Litigation*, Del. Supr., No. 123, 1992, Moore, J. (Nov. 24, 1993), slip op. at 44 (same for rescissory damages). Yet Paramount itself argues in its brief that it is wrong to assume that "long-range values and 'business fit' are susceptible to tallying up." PB 31. Likewise, there is no force to Paramount's argument that Redstone may not "intend" to effect a "cash out" (PB 20-21): that assertion does not even address Redstone's freedom of action other than a "cash out," and the point is not Redstone's "intent"—which, of course, can change at any time—but his unfettered *power*.

Paramount's argument (PB 30) that *Smith* v. *Van Gorkom*, Del. Supr., 488 A.2d 858 (1985), permits Paramount's board to ignore market values, refuse to become informed about relative long-term values, and to rely exclusively on "gut feelings" about the comparative values of equity securities, is completely misplaced. *Van Gorkom* teaches that, when a board agrees to a merger, it must be fully informed about the intrinsic value of the company and cannot rely *solely* on the fact that an offeror is willing to pay a premium over current market. 488 A.2d at 875-76. *Van Gorkom* is not a license for a board to act to block one transaction and force acceptance of another deal without a market check, without informed expert advice comparing the value of the two offers, and without any verifiable, reviewable basis to judge one back-end more valuable than another. "Sophisticated and effective business generalists of the type likely to be found on the board of such companies as RJR will seldom have the specialized skills useful to most accurately value [complex] securities." *In re RJR Nabisco Sh. Litig.*, *supra*, slip op. at 44 (permitting special committee to determine two bids were roughly equivalent, based on quantified investment banker advice). The Court of Chancery correctly found that where, as here, a board acts to compel success of an offer that contains $1.3 billion less in certain, realizable value, it must have a fully informed basis to do so. *Van Gorkom* supports that holding rather than undermines it.

H. The "No Shop" Provision In The Viacom Merger Agreement Does Not Excuse The Failure Of The Paramount Directors To Fully Inform Themselves.

On this appeal, Paramount does not defend its board's conduct by arguing that the board in fact was fully informed about QVC's offer. To the contrary: Paramount's position is that the board was contractually obligated *not* to become fully informed. Paramount's principal defense is that the no-shop clause in the Viacom merger agreement "*flatly prohibited*" Paramount's obtaining information from QVC about QVC's $90 offer. PB 9.

Paramount's position is untenable. A board cannot curtail or escape its fiduciary duties by contract. Paramount's claim resembles the claim of the Revlon directors, who argued that the contractual obligations they had undertaken to the Revlon noteholders obliged or empowered them to avoid the full measure of their fiduciary duties to the stockholders. *Revlon*, 506 A.2d at 182. As this Court stated in *Revlon*, "shareholder[ ] interests" require that "the board remain free to negotiate," rather than be tied up so as to be unable to perform the duties imposed on it by 8 *Del. C.* § 141 and the common law.

This Court has since *Revlon* recognized that no-shop clauses can only be justified in very limited circumstances—"that the use of such a device is even more limited than a lockup agreement," and that "a material advantage to the stockholders" must arise in order for a no-shop to stand. *Macmillan*, 559 A.2d at 1286. Here there was no "material advantage" to the stockholders on either September 12 or October 24. To the contrary, the board's agreement to the "no shop" is further evidence of its breach of duty: "Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids." *Barkan*, 567 A.2d at 1288. Here there was no such "reasonable basis," since no market check of any type had occurred, and the board's intent to forestall competing bids could not be clearer.

The "no shop" here (as interpreted by Paramount) is much more restrictive than the typical version. The "no shop" here goes far beyond a bar on "shopping" Viacom's bid—it is really a "no *know*" provision that prevents Paramount from even informing itself about other bids. The analysis of 61 merger agreements produced from Lazard's files (but never given to the Paramount board) found that *not one* contained a "no shop" clause that, like this one, restricted the board's ability to inform itself to proposals with committed financing. JA3327-3375. Viacom's investment banker likewise testified that he had never seen a "no shop" so restrictive. JA5754(161).

Nor does the "financing contingency" principle Paramount relies on have a basis in our law. *See Revlon*, 506 A.2d at 179 n.7 (restraining order entered when bidder's "entire financing was not firmly committed"); *Macmillan I*, 552 A.2d at 1234 (enjoining management restructuring when bidder had no financing). And Paramount's claim (PB 27) that the case law supports its "no shop/no know" is specious. *In re Vitalink Comm. Corp. Sh. Litig.*, Del. Ch., C.A. No. 12085, Chandler, V.C. (Nov. 8, 1991), slip op. at 13-14 (no-shop was "subject to a fiduciary out clause whereby the

Board could shop the company so as to comply with, among other things, their *Revlon* duties"); *see Time-Warner*, Del. Ch., *supra*, slip op. at 25 (no shop did not apply to tender offers for 25% or more of either Time or Warner stock).

In short, Delaware law does not permit directors, through contract or otherwise, to close their eyes to offers—even offers that are not yet financed. Here, Paramount's board was, in all events, acting on a pretext—as made clear by Lazard's testimony that it told the board that QVC's $90 offer was "financeable," JA6164(67), and the directors' knowledge that it is "not unusual" for tender offers to be made subject to financing. JA6190(75).

The Paramount directors put on a blindfold and now claim before this Court that they cannot be faulted for failing to see. If that is sound, directors' due care obligations can be discarded at will.

I. The Paramount Board Breached Its Duty Of Care Under *Van Gorkom* and *Technicolor*.

Paramount now finds itself contractually obliged to pull the pill for Viacom unless the board determines that the QVC offer is a "better alternative," while at the same time the board claims to be barred from informing itself about the QVC offer by the "no shop/no know" clause. Paramount also finds itself burdening bidders other than Viacom with an option worth half a billion dollars ($5 per share). This situation is the result of the directors' total abdication of their fundamental duty to inform themselves " 'of all material information reasonably available to them.' " *Smith* v. *Van Gorkom*, Del. Supr., 488 A.2d 858, 872 (1985). It has been compounded here by the directors' breach of their duty "to take an active and direct role in the context of a sale of a company from beginning to end." *Technicolor*, slip op. at 59. *See also Citron* v. *Fairchild Camera & Instrument Corp.*, Del. Supr., 569 A.2d 53, 66 (1989) (warning against directors' sole reliance on "hired experts and management" in "change of control situations," citing *Macmillan*). The directors' due care violations are set forth in the Statement of Facts, *supra*, and addressed with particularity in the briefs below. *See* QOB 82-94; QRB 35-46.

II. THE COURT OF CHANCERY PROPERLY ENJOINED THE $500 MILLION LOCKUP STOCK OPTION.

A. Standard and Scope of Review

See Point I.A, *supra*.

B. The Court of Chancery Properly Enjoined The $500 Million Lockup Stock Option.

The Court of Chancery upheld Viacom's $100 million break-up fee (Op. at 57-58) and QVC does not challenge it on this appeal. But Paramount and Viacom press this Court to let Paramount give Viacom an additional $500 million by allowing it to exercise a 20% stock option unprecedented in its size and preclusive effect. While it is understandable that Viacom continues to press hard for its unearned advantage, it is telling that Paramount joins in that request—a request that at this stage can *only* be detrimental to the Paramount stockholders.

The stock option operates perversely (1) to *reward* Viacom for having made a *low* initial bid, since its cost advantage has ballooned out of all reason by virtue of the fact that it remains tied to the $69.14 value of the September 12 Viacom offer; and (2) to *reduce* the incentive to Viacom to increase its bid, since it stands to receive $500 million at current bidding levels if the option is validated and it simply withdraws from the contest. The sum of the option on top of the $100 million fee dwarfs lockups that have been before the Delaware courts in the past, both as to the gross cost of *$600 million* and the per share cost of $5 (6% of the gross value of the transaction). For a list of the fees and options that have been before the Delaware courts, see QOB 94. Viacom's reliance on "227 other deals" (VB 11) is irrelevant, since few of those deals ever received judicial scrutiny. (Tellingly, *none* of the voluminous lists of other stock options now trumpeted by the appellants was ever provided to the Paramount board.)

But it is not only the size of the option that is offensive. Under Delaware law, the *only* circumstances under which lockups can be justified at all are if they (a) "confer a substantial benefit upon the stockholders" as in the case of a lockup that is "necessary to draw any of the bidders into the contest" *and* (b) are approved by a decision of directors that was fully informed. *Macmillan*, 559 A.2d at 1284, 1286. Lockups that "end an active auction and foreclose further bidding operate to the shareholders' detriment." *Revlon*, 506 A.2d at 183. *Macmillan* makes clear that the board must compare what the locked-up bidder receives in relation to its offer, and that "[t]he care and attention which independent directors bring to this decision are crucial to its success." *Macmillan*, at 1286. Here, as the Court of Chancery held, the lockup stock option fails on both grounds.

1. The Court of Chancery properly found that the lockup option was granted for the improper purpose of deterring competing bids.

The record demonstrates that the lockup option cannot be justified as having been necessary to induce Viacom to bid. Redstone has publicly stated that it was *Viacom* that had been trying for four years to induce *Paramount* into a deal—in Redstone's words, *he* had spent four years in getting *Davis* "to the altar." JA3034. Moreover, on the day after the initial Viacom deal was announced, Redstone was ready and willing to pay more for Paramount: on that day Redstone urged Malone to stay out of the bidding for Paramount because "all we would succeed in doing is increasing the price of the transaction to him." JA5414(88). Redstone called Diller on the same day with the same message: "He said all you will do is cost me money." JA5897(183). These are not the words of a man who has just been "induced" to make his highest bid through the grant of lockups. And Davis himself admitted that he had "never heard" anyone say that the lockups were the only way to induce anybody to bid for Paramount, or that they were even necessary to induce Viacom to bid; while clearly, a bid from QVC would have been forthcoming without any lockups—as both Davis and Redstone were acutely aware. JA5650(114); JA5680(300).

The note in Lazard's files offers the only rational explanation: "lockup—want deal to look strong." JA3227. Paramount argues (PB36-37) that this reflected Viacom's desires, but its brief cites no evidence supporting its reading. And Paramount's reading is also at odds with the admission of one of the directors: "this was a question of protecting the deal." JA5042(108); *see also* JA5151-52(51-52); JA5153-54(63-64); Op. at 58.

Moreover, as the Court below recognized (Op. at 59), one key feature of the stock option—Viacom's ability to purchase the optioned shares with subordinated *notes* ($1.6 *billion* face amount)—is irreconcilable with any purpose other than to "protect[ ] the deal" by deterring competing bids. This unique feature requires a competing bidder to finance virtually the entire cost of acquiring the optioned shares, unlike the typical option which at least requires the optionee to pay cash. The note feature has no possible rationale apart from deterring competing bidders. No wonder Viacom's advisor had never seen its like before in his 31 years' experience in the acquisition field. JA5755(172).

Viacom responds to the Court of Chancery's findings by arguing that the stock option (and the note feature) were the product of arms'-length bargaining, and that Viacom initially sought much more onerous lockups. VB 16-17. But the fact that a bidder may have asked for an option worth even *more* than half a billion dollars does not prove that a board that gave "only" that amount acted responsibly. On this appeal, moreover, Viacom does not respond to the Court's finding (amply based on Section 5.02(c) of the Stock Option Agreement itself (JA1599-1600)), that the $1.6 billion subordinated note would not be fully registrable if, for example, such registration would affect the market for other Viacom debt. VB 18; *cf.* Op. 59; JA6295. Instead, Viacom's answer is to speculate that the unregistrable $1.6 billion note could be used as collateral or sold privately. VB 18. Needless to say, such speculation in no way undermines the Court of Chancery's conclusion that the "notes could, therefore, detrimentally affect the capital structure of Paramount. An acquiror other than Viacom would be left owning a company diluted of 20% of its equity, which held notes unlikely to be converted into cash." Op. 59. It cannot be disputed that such an effect would "deter competitive bids." *Id.*

Moreover, if the lockup is not enjoined, Viacom could cause QVC's 51% majority stock ownership position to be diluted down to a minority 42% position. And, importantly, under the provisions of Article XI of the Paramount charter, an 80% vote is needed to approve a second-step merger not approved by a majority of "disinterested directors." JA2622; Motion to Supplement, Exh. B at 10-17. If QVC bought 51% of Paramount's stock, and Viacom exercised the option, QVC would thus need each of the remaining non-QVC, non-Viacom shares to effect a second-step merger. For $24 million and an illiquid subordinated note, Viacom would have bought itself a *complete* blocking position against any second step.

2. The Court of Chancery properly found that the Paramount board lacked an informed basis for granting the lockup stock option.

The record demonstrates that the lockup option was not the subject of the requisite careful consideration by the Paramount directors. Before they approved the uncapped option lockup, the directors had done no "market check" and therefore had *no* informational basis to justify the $69.14 exercise price. As events quickly proved, that price was manifestly far too low and has resulted in the deterrent cost of the option ballooning out of control to $500 million. Moreover, the directors neither received nor asked for information about stock options and break-up fees in other transactions (JA5174(194)); any reasoned advice (even oral) as to the lockups' effect on other possible bidders (JA5153(61); JA5180(229-30); JA5183(248-49); JA5219(116); JA5220(119-20)); and no explanation of the "poison note" feature. There was no consideration given to whether the lockups could deter other bidders. JA5180(229-30); JA5215(85); JA5219(115-17); JA5652(125). There was apparently no consideration of the fact that the higher the competing bid, the greater the deterrent effect of the option. JA5651(116). There was no consideration to the interplay between the 20% stock option and the 80% supermajority vote requirement for business combinations in Article XI of Paramount's charter. JA5215(90). The minutes of the September 9 and 12 board meetings (JA698-702, JA953-61) contain *not one word* on the terms of the lockups. The directors had no basis to make any determination of the lockups' reasonableness.

The directors' lack of care before agreeing to give Viacom an option on 20% of their company, on top of a $100 million break-up fee, is simply astounding. Similarly, when the board agreed to the amended merger agreement on October 24, there was no consideration given to even asking that Viacom, in return, relinquish the lockups or that their terms be at least renegotiated or capped. JA5224(146-47). Importantly, the Paramount board at that point had all the leverage—in Davis' words, "as good a bargaining position as anybody can have." JA5662(190). But as to the stock option—then worth $250 million, now swollen to $500 million—Paramount did not even ask for any concessions. Because of its own failure to ask, the Paramount board on October 24 had no informed basis to conclude either (a) that granting the lockups *anew* was necessary to "induce" Viacom to agree to a tender offer it was straining at the bit to commence, or (b) that Viacom would not have yielded at least a portion of the unconscionable amount that the option had come to represent. Had Paramount held discussions with QVC, BellSouth or any other interested company, it might have (a) obtained an equal or better transaction without *any* lockup, let alone one of this size; or (b) persuaded Redstone to agree to a transaction without (or with reduced) lockups. Paramount obviously did not want to know such "information."

Viacom now argues that the Court of Chancery's determination that the stock lockup is a breach of duty conflicts with its statement that the Court had no basis to criticize the board's information prior to November 12. Op. 52; *see* VB12. This misses the Vice Chancellor's point, *i.e.*, that any defects in the board's information were "immaterial" after October 24 once Viacom matched QVC's then-$80 offer. *See* Op. 52-53. There is no inconsistency as to the lockup option.

Viacom further argues that the Court of Chancery's reference to the fact that the option is worth $500 million to Viacom at current bidding levels means that the Court engaged in judgment by hindsight. VB 13. Once again, Viacom misconstrues the Court's opinion. The present cost of the lockup is evidence of the impeding effect of the option, but this does not detract from the Court's finding that as of September 12 the grant of the lockup was uninformed and improperly motivated. Viacom's claim that QVC's financial advisor "conceded" that the stock lockup was not preclusive is misleading and incorrect. The testimony Viacom cites (VB 21) relates to QVC's $80 per share offer. JA5095(93); JA5867(62-64); JA5357(50). There is no testimony or other evidence from any source that the stock lockup is not both economically and structurally preclusive with respect to QVC's *$90* offer—which, indeed, is conditioned on an injunction against the option.

Nor do Viacom's denied "contractual rights" justify saddling Paramount with the cost of this $500 million bonanza. Viacom is simply incorrect when it states that in the Court below "plaintiffs abandoned any claim" that Viacom committed any legal wrong. VOB 8. To the contrary, QVC's briefs marshalled the clear evidence that Viacom knew of and participated in the Paramount board's breaches of duty in connection with the option. QOB 16-17, 26-29; QRB 10, 12-13, 48. Indeed, Redstone's own memorandum to his investment banker complained that Davis was not concerned with price but with "management issues" (*see* p. 4, *supra*), reflecting Redstone's personal knowledge that he was dealing with a fiduciary who did not have the stockholders' interests uppermost in mind. Moreover, contrary to Viacom's claim (VB 12), the record does establish that one of the unusual features of the October 24 Paramount board meeting was that, while there was no Lazard "book" (only seven pages of Lazard material), the board *was* given a presentation about Viacom's offer prepared by Smith Barney, *Viacom's* banker, on Smith Barney stationery. JA3383-92. And when Viacom received the option, Viacom of course knew that it was prepared to pay more; Redstone intervened personally to forestall QVC or TCI from making competing bids. JA5414(87-88); JA5897(182-83). Viacom's conduct was not that of an "innocent third party." *See Newmont*, 535 A.2d at 1344; *Gilbert* v. *El Paso*, Del. Ch., 490 A.2d 1050, 1057 (1984). The Court of Chancery's decision in *Revlon* disposes of Viacom's argument: "[T]he need for both bidders to compete in the marketplace far outweighs the limiting of Forstmann Little's contractual rights." 501 A.2d 1239, 1251 (1985); *see also In re RJR Nabisco, Inc. Sh. Litig.*, *supra*, slip op. at 32-34.

CONCLUSION

It is respectfully submitted that the Preliminary Injunction Order entered by the Court of Chancery should be affirmed.

Respectfully submitted,

/s/ DAVID C. MCBRIDE

Bruce M. Stargatt
David C. McBride
Josy W. Ingersoll
William D. Johnston
Bruce L. Silverstein
James P. Hughes, Jr.
YOUNG, CONAWAY, STARGATT & TAYLOR
Rodney Square North
Eleventh Floor
Wilmington, DE 19899
(302) 571-6600

Attorneys for Plaintiff Below-Appellee QVC Network, Inc.

Of Counsel:

Herbert M. Wachtell
Michael W. Schwartz
Theodore N. Mirvis
Paul K. Rowe
George T. Conway III
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

December 4, 1993

CERTIFICATE OF SERVICE

I, James P. Hughes, Jr., 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 December 4, 1993:

Charles F. Richards, Jr., Esq.
Richards, Layton & Finger
One Rodney Square
Wilmington, DE 19899

A. Gilchrist Sparks, III, Esq.
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
Wilmington, DE 19899

Karen Morris, Esq.
Morris and Morris
1105 North Market Street
Wilmington, DE 19899

Joseph A. Rosenthal, Esq.
Rosenthal, Monhait,
Gross & Goddess, P.A.
First Federal Plaza
Wilmington, DE 19899

Pamela S. Tikellis, Esq.
Chimicles, Burt, Jacobsen &
McNew
One Rodney Square
Wilmington, DE 19899

In addition, courtesy copies were caused to be served in New York upon:

Barry R. Ostrager, Esq.
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017

Arthur N. Abbey, Esq.
Abbey & Ellis
212 East 39th Street
New York, NY 10016

Stuart J. Baskin, Esq.
Shearman & Sterling
153 East 53rd Street
New York, New York 10022

/S/ JAMES P. HUGHES, JR.
James P. Hughes, Jr.