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IN THE

Supreme Court of the State of Delaware

Nos. 427 and 428, 1993 (Consolidated)

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

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)

APPELLANT VIACOM INC.'S REPLY BRIEF

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Dated: December 7, 1993

Table of Contents

Table of Authorities

ARGUMENT

I. THE PRELIMINARY INJUNCTION INVALIDATING VIACOM'S STOCK OPTION IS INDEFENSIBLE—AND ESSENTIALLY UNDEFENDED

A. The Vice Chancellor Failed To Apply The Business Judgment Rule And Found Facts That Undermine The Injunction

The plaintiffs totally ignore or muddle rather than clarify the legal standards at issue.

Hindsight: Plaintiffs premise their argument largely on the proposition that, over time, the stock option has grown too rich. Nowhere do they deny or seek to challenge the settled law that contract rights and directors' actions cannot be adjudged retroactively through hindsight. Viacom Opening Brief ("VOB") at 13.

It could not sensibly be otherwise. An ever-changing hindsight review of board conduct affords principled guidance to no one. The Paramount directors, as of September 12, knew that they were agreeing to an intensely negotiated principally stock-for-stock strategic merger at an approximate 30% premium, at a price in excess of any historical trading range for Paramount shares, and well within two Lazard Freres valuation ranges that, to date, have never been contested. That Viacom and QVC, weeks later, decided to dramatically alter their corporate capital structures and bring in entirely new equity investors in order to fund cash tender offers says nothing about the stock-for-stock merger before the board as of September 12. It is contrary to shareholder interest or common sense to suggest, as does QVC, that this Court effectively should adopt a rule of law providing that a party must forfeit its option if it later improves its offer.

And plaintiffs' approach provides a constantly changing target for judicial review. For example, contrary to their argument, the option today is not worth $500 million. The value of the option as of Monday, depending on the nature of the event that would trigger Viacom's right to exercise, was either $235 million or $367 million. The option may never become worth $500 million. But its value on September 12 was zero, and the "rationality" of business people in granting it, *Sinclair Oil Corp. v. Levien*, Del. Supr., 280 A.2d 717, 720 (1971), cannot turn on whether Paramount subsequently does or does not receive unexpectedly rich bids.

Business Judgment Rule: As of September 12, there is no disagreement that there existed no competing offer and no takeover proposal for Paramount. The decision to enter into the initial merger agreement is governed by normal business judgment rule standards. *Paramount Communications Inc. v. Time Inc.*, Del. Supr., 571 A.2d 1140, 1150 (1989); *Gilbert v. El Paso Co.*, Del. Supr., 575 A.2d 1131, 1143-44 (1990) (describing *Time*). In fact, *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 870 (1985); *Citron v. Fairchild Camera & Investment Corp.*, Del. Supr., 569 A.2d 53, 64 (1989); and *Cede & Co. v. Technicolor, Inc.*, Del. Supr., No. 336, 1991, Horsey, J., slip op. at 36-39 (Nov. 1, 1993), all make clear that the board's initial decision as of September 12 to enter into the merger agreement—even if it were an outright cash sale as in those cases—must be tested by traditional business judgment rule standards. Due care must be tested by a gross negligence standard and not by the Vice Chancellor's misapplied "enhanced duty" standard (Op. 60). *Cede*, slip op. at 55; *Van Gorkom*, 488 A.2d at 858.

The option, an integral part of that September 12 merger agreement, must be measured by the business judgment rule. The result is no different if this Court's *asset* "lockup" cases are considered in addition to *Time*, *Gilbert*, *Cede*, *Citron* and *Van Gorkom*. (As shown later, there is no case invalidating a *stock* option granted as part of a merger agreement.) For, as shown in VOB 9-11, 14-15, both *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*, Del. Supr., 506 A.2d 173 (1986), and *Mills Acquisition Co. v. Macmillan, Inc.*, Del. Supr., 559 A.2d 1261 (1989), applied "exacting scrutiny" only to "show-stopper" asset lockups granted in the middle of an active auction process, in which boards breached both duties of care and loyalty. *Macmillan*, 559 A.2d at 1284 n.34. Options granted by disinterested boards as part of a merger agreement benefitting shareholders, and not in an auction context, require no special scrutiny. *Revlon*, 506 A.2d at 183; *Macmillan*, 559 A.2d at 1286; *Hastings-Murtagh v. Texas Air Corp*, 649 F. Supp. 479, 484-86 (S.D. Fla. 1986) (construing *Revlon*, but ignored by QVC). Plaintiffs, like the court below, totally ignore these fundamental distinctions and improperly sidestep the business judgment rule.

In truth, this straightforward analysis has never been lost on QVC. That is why it has engaged in contorted efforts to throw the September 12 meeting into another analytical framework, specifically *Unocal v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985). QVC's argument has been this: By virtue of press rumors and, more importantly, a July lunch between Diller and Davis, Davis subjectively believed that Diller was interested in acquiring Paramount—and hence *Unocal* should apply. QVC's analysis rests on the perverse proposition that Davis must have, or at least should have, recognized that Diller was lying when he denied a threat, stating "that he had no intention of making a bid at the time." Op. 9 & n.5. Davis, foolishly according to QVC, chose to "take [Diller] at his word." *Id.* It is QVC's apparent position that Diller's "tactical" lying, *id.*, somehow created a *Unocal* threat which Davis should have communicated to the board, and hence the board's September 12 decisionmaking should be treated as if the board was responding defensively to a "threat" that Diller denied and the board never knew existed. Needless to say, the Vice Chancellor did not accept this acrobatic view of the facts or law.

Application of the Standard: With analysis properly focused upon facts known on September 12 and business judgment rule standards, any conceivable challenge to the option evaporates. Even prior to September 12, "[t]he record establishes that Paramount's board was well informed of Paramount's strategic goals and the steps taken by management to achieve these objectives." Op. 7. This culminated in the meeting and decision of September 12 to merge with Viacom, by a disinterested board aided by sophisticated advisors armed with "voluminous" backup material. Op. 13.

The Option As Inducement: The option had always been a central feature of the merger discussions. Op. 8, 10, 12, 58. "The record indicates that Viacom insisted upon a stock option as a condition to the Original Merger Agreement." Op. 58. Lazard Freres told the September 12 board that ["a]bsent these elements [the stock option], the transaction wouldn't have happened." JA 5826 [Rohatyn Dep. 44]. Every negotiator has so testified under oath. VOB 10. Even the court below found—although plaintiffs manage to totally ignore—that a purpose for granting the option was "the proper purpose of inducing Viacom to bid." Op. 58.

QVC restates that Viacom really was not induced by the option since Mr. Redstone told the press after the merger was announced that he was long trying "to get Mr. Davis to the altar." QVC 45. We addressed that specious argument previously, VOB 16-17, to which QVC never responds. Likewise, as Viacom showed, and plaintiffs never answer, neither the Lazard handwritten note nor the testimony of director Silberman evidenced that Paramount's board was acting to foreclose later bids. VOB 15-16.

But even if the Paramount directors were motivated in part by a desire to strengthen the merger with Viacom, there is nothing "improper" about that—it represents an entirely permissible and rational objective. *See* VOB 15. Again, plaintiffs fail even to address this issue.

The Information Before The Board on September 12: In typical distorted fashion, QVC attacks the board's information as of September 12. As it does throughout its brief, QVC attempts to accept the Vice Chancellor's ultimate decision while impeaching his findings. Thus, at QVC 48, it takes the liberty of rewriting the Court's contradictory finding of fact: "I find no basis to criticize the sufficiency of the board's information or processes up to November 12...." and any defects prior thereto were "immaterial." Op. 52. This finding is on its face hopelessly inconsistent with the injunction entered by the Court in the last three pages of its opinion. *Levitt v. Bouvier*, Del. Supr., 287 A.2d 671, 673 (1972).

With characteristic hyperbole, QVC states that the board "had *no* informational basis to justify the $69.14 exercise price." QVC 47. This exaggerated statement ignores: (i) that the board knew that that merger price was the result of hard bargaining and represented a 26-30% premium to immediate market value and a 54% premium from year end; (ii) that in meetings both on September 12 and earlier on September 9, the board had before it "voluminous materials," Op. 13, including "analyses of the premiums paid in comparable cash and stock swap deals," Op. 11, "comparable transactions," *id.*, and "financial analyses and valuations of the two companies," Op. 13; (iii) that Lazard had prepared both discounted cash flow and breakup valuation ranges—$69.14 falling in the middle of both—and "various valuation analyses" for the merged companies at various multiples, Op. 14; (iv) that Lazard advised "we had negotiated very hard on all aspects of this transaction," and had before the board "the best available transaction." JA 5828, 5826 [Rohatyn Dep. 55, 44]; and (v) that Lazard advised against shopping Paramount, both because Viacom would simply walk away and because the incessant rumors of merger discussions during the preceding two months had yielded no interest from any other suitor. JA 5827 [Rohatyn Dep. 47-48]. No case calls for shopping a stock-for-stock strategic merger, since to do so would deprive continuing equity holders of the very synergistic benefits sought to be achieved in the transaction.

And, of course, notwithstanding its constant claim that $69.14 was an "absurdly low" price, QVC 16, it never once has sought to explain that criticism in light of its failure to adduce expert testimony below, by affidavit or otherwise, to back up that claim, or its own advisor's preparation of a $65 bid.

The terms of the stock option were completely set out before the board, including the note-payment features. JA 703-12. Paramount's lawyers

> walked us through the principal terms of the proposed merger agreement, including operation of the stock option and termination fee. In particular Felix Rohatyn was invited to comment on whether the stock option and termination fee that Viacom was insisting upon would preclude other bidders. Lazard responded that these provisions were by no means unusual in these types of transactions, that historically they have not had a preclusive effect, and that the provisions being negotiated with Viacom would not be so burdensome as to preclude other companies from entering into a combination transaction with Paramount. JA 4728-29.

"Lazard advised the Board that those provisions should not materially deter a higher priced transaction to merge with or acquire Paramount." JA 4746.

Most importantly, the board was fully advised that "absent those elements [including the stock option], the transaction wouldn't have happened." JA 5828 [Rohatyn Dep. 55]. "[T]here was a very thorough discussion of the stock option, which I understood to have been necessary to induce Viacom to do the deal so that we could move forward with our strategic plan. I viewed [it] as the price of getting the deal done." JA 4709-10.

October 24: QVC's perfunctory challenge to the board's action on October 24, QVC 47, is equally meritless. By then, Viacom's right to the option had been vested for 6 weeks. As shown in Point II, in responding to the market changes produced by QVC's offer and recasting the merger as a tender offer and follow-up merger at a substantially improved price, Viacom received no sweetener of any kind from Paramount. The already vested option was simply carried forward into the amended merger agreement. Op. 21.

It is, of course, senseless to argue with hindsight that Viacom, in boosting the cash component of its offer by over $3 billion on October 24, should have been pressed or would have agreed to relinquish the benefit of the vested option that it had won after months of hard bargaining. Without sweetening the option, Paramount's board received a restructured commitment to the strategic merger with Viacom *plus* the most favorable deal "on the basis of immediate value alone." Op. 53. Plaintiffs never even acknowledge this undisputable finding. Indeed, the advisors showed the board that Viacom's October 24 offer was the most favorable even in the short term, Op. 22, and Booz Allen's study concluded that long term it would "create over $3 [billion] more incremental shareholder value than a merger with QVC." *Id.* Neither the Court below, nor common sense, could fault the directors for their actions on October 24.

The Note: QVC also merely repeats, without defending, the Vice Chancellor's mistaken analysis of the note feature of the option. *First*, QVC is simply wrong that the note feature is unique. *See* JA 4543; *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 758-59 (2d Cir.), *cert. denied*, 464 U.S. 1018 (1983) (shares and option paid with a 10-year, 9% note). *Second*, QVC ignores the facts set forth in VOB 18 and intentionally mischaracterizes the stock option agreement, arguing that § 5.02(c) shows that Viacom could avoid registration of the note. That provision deals with piggyback registration rights—*i.e.*, what happens if the holder of the notes, rather than obtaining its own registration, wishes to sell its notes as part of a concurrent registered distribution by Viacom. In only that limited circumstance may Viacom prevent piggybacking to the extent that it would impair Viacom's concurrent distribution. At *all* times, the holder of the note, upon demand, is entitled to three registrations of its own "as promptly as practicable." VOB 18. Viacom has no discretion in this respect under the agreement. JA 703-12. So, too, the court's statement, without reference to anything in the record or the law, that these notes cannot be priced to trade at par or be traded for cash is untrue, both as a matter of practical finance and securities law. VOB 17-19. These facts also dispose of the expert affidavits upon which the shareholder plaintiffs purportedly rely in their brief at page 5.

But equally as important, the plaintiffs do not even attempt to defend the Vice Chancellor's sweeping injunction enjoining exercise of the option in any form, even via the other two allowable methods of exercise. VOB 18-19. This totally indefensible violation of the rules of equity alone warrants reversal.

Finally, as a belated make weight, QVC files a motion to supplement and then asserts an argument never addressed by the Chancery Court: that Viacom might exercise the option so as to frustrate QVC from achieving 80% stockholder approval of a back-end merger under Article XI of Paramount's charter. This argument is completely detached from reality. Before ever reaching the second-step merger, Paramount's directors will have to determine that QVC's offer and merger are the "better alternative" so as to free QVC's first-step offer from the effects of the shareholder rights plan. If the board permits the QVC offer to go forward it would, to satisfy a condition of QVC's offer and thus to achieve the "better alternative," also approve QVC's back-end merger under the charter provision, obviating the need for the shareholder vote requirement.

B. The Viacom Stock Option Is Not A "Lockup" As A Matter Of Law And Fact

Plaintiffs totally retreat from any effort to show that the stock option constituted an impermissible lockup as a matter of law or fact.

Case Law: Even though plaintiffs jointly have now filed a total of six briefs in this litigation, they have yet to point to a single case that has treated as a voidable "lockup" a 19.9% stock option (which, on a fully diluted basis, actually translates into 16.6% of the grantor's shares).

In fact, no court has ever found a stock option grant (or outright transfer of shares) within the range of this one to constitute an invalid lockup. *See Buffalo Forge Co.*, *supra* (stock sale and option equalled 20% of target's stock); *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 380-84 (2d Cir. 1980) (19% sale to white knight); *Hastings-Murtagh, supra* (15%); *Keyser v. Commonwealth Nat. Fin. Corp.*, 644 F. Supp. 1130, 1146-47 (M.D. Pa. 1986) (warrants for 24.9%); *In re Vitalink Communications Corp. Shareholders Litigation*, Del. Ch., C.A. No. 12085, Chandler V.C., (Nov. 8. 1991), *aff'd sub. nom, Grimes v. John P. McCarthy Profit Sharing Plan*, Del. Supr., 610 A.2d 725, *cert. denied*, 113 S. Ct. 179 (1992) (19.9%); *Lewis v. Leaseway Trans. Co.*, Del. Ch., C.A. No. 8720, Chandler, V.C. (May 16, 1990) (18%); *Yanow v. Scientific Leasing*, Del. Ch., C.A. No. 9536, Jacobs V.C., (Feb. 8, 1988) (16.6%); *Hecco Ventures v. Sea-Land Corp.*, Del. Ch., C.A. No. 8486, Jacobs, V.C. (May 19, 1986) (21.7%).

The Factual Record: Moreover, there could not be a clearer record than this one that, as a matter of conceded fact as well as law, the Viacom option has not locked up anything—upon being granted, it has not "foreclose[d] further bidding to the shareholders' detriment." *Revlon*, 506 A.2d at 183. The Vice Chancellor inexplicably addressed no findings to these facts. And neither QVC nor the plaintiffs even attempt a response to the record evidence or to QVC's concession below that the option, after September 12, did not inhibit QVC. VOB 21-23.

Instead, QVC now concedes for the second time that the option did not prevent a QVC bid at $80 per share, QVC 48—a price above Lazard's two uncontroverted valuation ranges as of September 12.

But even above $80, there is no evidence of a lockup. In lieu of evidence, QVC instead writes this incredible sentence in trying to cloak its failure to meet its burden of proof: "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." QVC 48. A double negative thereby substitutes for plaintiffs' complete failure of proof in support of their claim of a lockup at $90. The only reason for the absence of "testimony or other evidence" is that plaintiffs never offered any. Even last minute affidavits by QVC's financial advisor and chief financial officer, Enrique Senior and William Costello, filed after QVC had made its $90 bid, were conspicuously silent in their failure to state that the stock option was being preclusive at $90 or at any other bidding level. JA 6259; JA 6257.

* * *

Engaging in bad revisionist history, QVC now claims that it never really abandoned its claim that Viacom committed some legal wrong and therefore should be punished with a forfeiture. QVC 49. Its papers below speak for themselves, as does the court's finding that "it has not been shown that Viacom committed any wrongdoing." Op. 61 n.49. To the extent QVC repeats its scurrilous argument that Mr. Redstone manipulated the price of Viacom stock in July, we respectfully refer the Court to Viacom's brief below at 14-18, which sets forth the true facts and applicable law and has never been responded to by QVC in any way. QVC's claim that Mr. Greenhill testified that he never saw a no-shop clause "so restrictive," QVC 42, is similarly an abominable misciting of the record. *See* JA 5754 [Greenhill Dep. 161-63]. Plaintiffs' argument that Mr. Redstone can do as he pleases in dealing with ongoing shareholders, QVC 38, not only is without any basis in the record, and seeks a current injunction based on unrealistic, speculative events, but ignores the protections afforded by 25 years of Delaware "entire fairness" and self-dealing case law. *See, e.g., Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701 (1983); *Sinclair Oil Co. v. Levien, supra.*

The Vice Chancellor's retroactive review of a stock option contract based on his second-guessing of the board's business judgment and his perception of subsequent events lacks any principled ground for judicial review under the business judgment rule and should be reversed.

II. IT IS FOR PARAMOUNT'S BOARD, NOT STOCK MARKET SPECULATORS, TO DETERMINE WHICH "OFFER AND MERGER, TAKEN TOGETHER" SATISFIES PARAMOUNT'S STRATEGIC PLAN

As of September 12, Paramount and Viacom sought to enter into a strategic partnership. It is undisputed that this followed concerted discussions by Paramount with many potential partners; that its directors have always acted in good faith and the "fervent and honestly held" view that the Viacom merger offers Paramount the best available alternative for creating genuine long term value; and that the concrete synergies with Viacom's multifaceted media, syndication, cable, television, and radio assets are real and will result in a combined entertainment powerhouse. That has been Paramount's game plan since the early 1980's.

What has changed since September 12? An unsolicited suitor has lobbed in a tender offer, recently conditioned on invalidation of a stock option that Paramount has no ability to invalidate, requiring the negotiation of final equity "commitments" that for weeks have remained in term sheets, and subject to a back-end merger that QVC retains the unfettered right to drop or change. *Compare Citron*, 569 A.2d at 57; *Gilbert*, 575 A.2d at 1135. Having sold the Vice Chancellor upon and now having argued before this Court the fiction that its offer is "$1.3 billion" better based on ephemeral, deal-driven stock market prices—a fiction evidenced by the fact that QVC lost $500 million of such "value" within days of the Vice Chancellor's decision—QVC's position now reduces to this: because its cash front end, if real, is 5.9% higher than Viacom's, Paramount's board has no choice but to use its rights plan to give arbitrageurs the "choice" of which front end to accept, regardless of which "offer and merger, taken together" is better for Paramount.

The Amended Merger Agreement squarely places the responsibility to make the choice on Paramount's board. With a 49% back-end merger in both deals, assessing the risks and rewards of the merger is the key to determining the worth of the "offer and merger, taken together." Delaware requires that directors make a determination of which merger is "better." *Time*, 571 A.2d at 1153; 8 Del. C. § 251(b). Paramount is using its shareholder rights plan consistent with this responsibility and in conformance with Viacom's contractual right under the Amended Merger Agreement.

Since at least the days of *Pogostin v. Rice*, Del. Supr., 480 A.2d 619, 627 (1984), a board has been free to reject an unsolicited offer without affording its shareholders the "choice" of considering it. Plaintiffs' "choice" argument is wholly dependent on their view that *Revlon* requires an auction respecting any change of control transaction. Neither QVC nor the plaintiffs have contended *in any way* that the merger agreement of September 12 triggered the criteria set forth in *Time*, 571 A.2d at 1150, for determining whether *Revlon* is triggered. Nor did the Vice Chancellor so find.

The only argument not addressed previously is QVC's suggestion that *Gilbert v. El Paso Co.* shows that any cash tender offer for 51% triggers *Revlon*. QVC 29, 32. This is a simplistic reading of *Gilbert*. For weeks before the key date of January 7, 1983, 575 A.2d at 1146, the board there responded to a hostile tender offer by actively seeking to sell or breakup the company rather than governing for the long term. *Id.* at 1136. That is why the Court concluded that "the breakup of the company was inevitable," *id.* at 1146—the opposite of what will happen to Paramount through the merger.

The reworking of the Original Merger Agreement on October 24 and November 6 into a tender offer and follow-up merger represented a necessary "carrying forward of the preexisting transaction in an altered form." *Time*, 571 A.2d at 1155; *Crouse Hinds Co. v. InterNorth Inc.*, 634 F.2d 690 (2d Cir. 1980). In *Unocal* terms, QVC's threatened offer was designed to disrupt the strategic merger—and did. Paramount stock in arbitrage hands grew from 4.8% to more than 27%, and long-term institutional investors shrank from 51% to 34%. JA 4671-74. In mirroring QVC's proposed two-step strategy, Viacom sought to come to grips with this "altered ... historical profile of Paramount shareholders." *Id.* In claiming that Viacom's offer followed by a guaranteed and likely tax-advantaged merger of quality equity is coercive, QVC today contradicts its position and that of its advisors and lawyers of only weeks ago. *See*

Viacom's brief below at 89-92. In any event, it was QVC, not Viacom, that chose this two-step approach.

In agreeing to the change in the transaction on October 24, Paramount's board fully complied with *Unocal*: it responded to the threat to the strategic plan, provided a $5 billion future for its shareholders in the board's chosen merger, and could "quite credibly justify [this] deal with Viacom on the basis of immediate value alone." Op. 53. If Viacom and Paramount could not so respond, then any unsolicited bidder would be free to propose a hostile bid, create short-term expectations in the market, and thereby obstruct a stock-for-stock merger.

Today, nothing has changed on the strategic merger side of the equation—what prompted Paramount's September 12 action in the first place. QVC, however, now has a tender offer with a front-end which, if real, is 5.9% higher than Viacom's. But "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is *clearly no basis* to sustain the corporate strategy." *Time*, 571 A.2d at 1154. Here such a basis clearly exists. In practical business terms, assessing QVC as a merger partner is not complicated. Neither Booz Allen nor Paramount's board must resort to QVC confidential information or mathematics (as opposed to business judgment) to understand the strategic limitations of joining with a business one-tenth Paramount's size and consisting of one television studio, two warehouses, an office building, JA 3579, and an 800 telephone number. JA 5929, 6031-32. This is especially so when QVC's "plan" for Paramount as disclosed in its securities filing is to "study" what to do following a merger. JA 3834.

Viacom's offer and merger are now fixed, guaranteed and unconditional. They afford a massive control premium to the shareholders, while providing a continuing $5 billion equity stake. There is no self dealing; management and directors get no preference over all shareholders. *Macmillan, supra.*

Even so, under the Amended Merger Agreement, JA 1647, § 3.13(a), when Viacom gives notice of its intention to accept tenders (which notice has not yet been given), Paramount's board may keep in place its pill for such reasonable period of time thereafter to determine, in exercise of its fiduciary duties, whether another alternative "that exists at the time" is better than Viacom's "offer and merger, taken together." Perhaps the directors will decide to bet their shareholders' future on the "synergies" offered by one man, QVC's CEO. Contrariwise, perhaps they will decide that QVC's offer is not "better." In either event, the Vice Chancellor was wrong in taking that fiduciary decision away from them and authorizing stock speculators to "choose" the company's future.

CONCLUSION

The plaintiffs assert that adherence to the business judgment rule for actions taken by a loyal and distinguished board here would result in the diminution of shareholder values. That is a myth. Under plaintiffs' and the Vice Chancellor's reasoning, strategic mergers like Viacom and Paramount would not occur; for companies like Viacom would not engage in protracted negotiations over a period of years to enter into a merger agreement only to put its strategic partner into play. Leaving aside all consideration of the strategic partnership and the long term value to be derived therefrom, the fact is that the merger agreement between Viacom and Paramount, as induced by the stock option and other provisions negotiated by Viacom, has already enhanced the short term value for Paramount's shareholders by billions of dollars. The alternative would have been no deal, or perhaps QVC's putative $65 bid.

For the reasons set forth in this and Viacom's opening brief, the preliminary injunctions issued by the Chancery Court should be reversed.

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CERTIFICATE OF SERVICE

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