BMS

BEFORE 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,	:	Nos. 427 and 428, 1993 (Consolidated)
v.	:	COURT BELOW:
QVC NETWORK, INC.,	:	Court of Chancery of the State of
Plaintiff Below Appellee.	:	Delaware in and for New Castle County
IN re PARAMOUNT COMMUNICATIONS INC., SHAREHOLDERS' LITIGATION	:	C.A. No. 13208 C.A. No. 13117 (Consolidated)

- - -

Courtroom No. 301
Public Building
Wilmington, Delaware
Thursday, December 9, 1993

- - -

BEFORE:

HON. E. NORMAN VEASEY, Chief Justice
HON. ANDREW G.T. MOORE, II, Justice
HON. RANDY J. HOLLAND, Justice

- - -

ORAL ARGUMENT

- - -

CHANCERY COURT REPORTERS
135 Public Building
Wilmington, Delaware 19801
(302) 577-2447

APPEARANCES:

CHARLES F. RICHARDS, JR., ESQ.,
DONALD A. BUSSARD, ESQ.,
THOMAS A. BECK, ESQ. and
ANNE C. FOSTER, ESQ.
Richards, Layton & Finger
-and-
BARRY R. OSTRAGER, ESQ.,
ROBERT F. CUSUMANO, ESQ.,
MARY KAY VYSKOCIL, ESQ.,
PAUL C. CURNIN, ESQ. and
New York Bar
Simpson Thacher & Bartlett
for the Paramount Defendants-Appellants

A. GILCHRIST SPARKS, III, ESQ.,
WILLIAM M. LAFFERTY, ESQ.
Morris, Nichols, Arsht & Tunnell
-and-
STUART J. BASKIN, ESQ.,
JERMEY G. EPSTEIN, ESQ.,
ALAN S. GOUDISS, ESQ. and
SETH J. LAPIDOW, ESQ. of the
New York Bar
Shearman & Sterling
for Viacom Inc. Defendant-Appellant

DAVID C. McBRIDE, ESQ.,
JOSY W. INGERSOLL, ESQ.,
WILLIAM D. JOHNSTON, ESQ.,
BRUCE L. SILVERSTEIN, ESQ. and
JAMES P. HUGHES, JR, ESQ.
Young, Conaway, Stargatt & Taylor
-and-
HERBERT M. WACHTELL, ESQ.,
THEODORE N. MIRVIS, ESQ.,
BARBARA ROBBINS, ESQ.,
PAUL K. ROWE, ESQ. and
GEORGE T. CONWAY, III, ESQ.,
YVONNE M. DUTTON, ESQ., of the
New York Bar
Wachtell, Lipton, Rosen & Katz
for QVC Network, Inc. Plaintiff-Appellee

IRVING MORRIS, ESQ.,
ABRAHAM RAPPAPORT, ESQ.
Morris & Morris
-and-
PAMELA S. TIKELLIS, ESQ.
Chimicles, Burt & Jacobsen
-and-
JOSEPH A. ROSENTHAL, ESQ.
Rosenthal, Monhait, Gross & Goddessw
-and-
ARTHUR N. ABBEY, ESQ. and
MARK C. GARDY, ESQ., of the
New York Bar
Abbey & Ellis
-and-
DANIEL W. KRASNER, ESQ. and
JEFFREY G. SMITH, ESQ., of the
New York Bar
Wolf, Haldenstein, Adler, Freeman & Herz
for Plaintiff-Shareholders
Plaintiffs-Appellees

- - -

MR. RICHARDS: Good morning, Your Honors.

JUSTICE VEASEY: Good morning, Mr. Richards.

MR. RICHARDS: With the Court's permission, I would like to introduce my colleagues at counsel table. I believe the Court has already met Barry Ostrager, of Simpson Thacher & Bartlett, who will be presenting the argument on behalf of Paramount, also his partner, Mary Kay Vyskocil and Paul Curnin, also of Simpson Thacher. Thank you.

JUSTICE VEASEY: Thank you. Mr. Sparks.

MR. SPARKS: Good morning, Your Honors. I would also like to introduce to the Court those persons here with me at counsel table for Viacom. To the Court's left is Mr. Stuart Baskin. With the Court's permission, Mr. Baskin will argue today on behalf of Viacom.

JUSTICE VEASEY: Welcome, Mr. Baskin.

MR. RICHARDS: Also at counsel table with me, also from Shearman & Sterling, Mr. Alan S. Goudiss and Mr. Jermey Epstein.

JUSTICE VEASEY: Good morning.

Mr. McBride.

MR. McBRIDE: Good morning, Your Honors. I would like to introduce to the Court at counsel table for QVC Network, Inc., from the firm of Wachtell, Lipton, Rosen & Katz, Mr. Herbert Wachtell.

MR. WACHTELL: Good morning, Your Honors.

MR. McBRIDE: Mr. Wachtell will make the argument for QVC. Mr. Theodore Mirvis.

MR. MIRVIS: Good morning, Your Honor.

MR. McBRIDE: And Ms. Yvonne Dutton.

MS. DUTTON: Good morning, Your Honor.

JUSTICE VEASEY: Good morning. Before we begin, I would like -- Oh. Mr. Morris. I'm sorry. I beg your pardon.

MR. MORRIS: No problem.

JUSTICE VEASEY: You were slow getting to your feet, uncharacteristically.

MR. MORRIS: Your Honor, I'm older. Takes me a little time.

May it please the Court: I should like to introduce my colleagues at counsel table on

behalf of the plaintiff stockholders. To my immediate right Mr. Arthur N. Abbey, of Abbey & Ellis.

THE COURT: Welcome, Mr. Abbey.

MR. ABBEY: Thank you.

MR. MORRIS: To his left, Mr. Gardy, a partner of Mr. Ellis.

THE COURT: Good morning.

MR. MORRIS: And to Mr. Gardy's left Mr. Jeffrey Smith, a partner of the Wolf, Haldenstein in New York.

JUSTICE VEASEY: Good morning.

MR. MORRIS: Mr. Abbey, with the Court's permission, will present argument on our behalf.

JUSTICE VEASEY: Thank you. Before we begin, I would like to express the thanks of the Court to everyone: Steve Taylor, our court administrator, who did yeoman work in setting up this argument. I would like to thank --

The Court would like to thank the lawyers for their hard and efficient work. I know what kind of hard work and all nighters go into these kinds of cases, and the briefs and the record are

very well done. The briefs are thorough. They dissect meticulously the cases and the record, the Vice Chancellor's opinion, the points of the adversaries. They were filed on time. The huge record, which we all have, was organized very well, and you all have done a great job presenting that. And you have kept the Court very busy and awake at night, also.

It's difficult to fault such good lawyering. The only thing that is lacking, and I think the Court would appreciate counsel addressing in -- somewhat lacking, because of time. The Court would appreciate counsel addressing an in-depth scholarly development, if you will, of some of the policy issues that are involved here. I'm sure that counsel has that in mind.

I hope we can explore those issues in a spirited question-and-answer period, which is characteristic of this court. I understand counsel have divided the time of their argument, and I believe we have a system for advising counsel when the time is drawing to a close. In Dover, at our regular Supreme Court, we have electronic devices with green lights and yellow lights and a red light.

We don't have that here today, so we'll try to do it the old fashioned way.

We'll begin with Mr. Ostrager.

MR. OSTRAGER: Thank you, very much, Your Honor.

May it please the Court: I appear on behalf of the Paramount defendants. Your Honor, it's the position of the Paramount defendants that the September 12th Viacom merger was the culmination of a deliberative process by the Paramount board that led the Paramount directors, in the words of Vice Chancellor Jacobs, to the, quote, fervently and honestly held view that the Viacom deal is the only valuable transaction that will serve the best interests of Paramount and its shareholders.

JUSTICE MOORE: Mr. Ostrager, the Vice Chancellor also said that the defendants concede that this sale of control entitlesthose shareholders to a control premium. Indeed, they emphasize that the Viacom transaction affords such a premium.

Do you challenge that at all?

MR. OSTRAGER: Your Honor, Paramount's position is that a control premium is customary. And in the sale with strategic merger

involving substantial transfer of assets, if a board can obtain a premium, a board should obtain a premium.

JUSTICE MOORE: Do you accept the fact, then, that the premium was paid for control of Paramount?

MR. OSTRAGER: We concede, Justice Moore, that in negotiating at arm's length, over a period of many months, the Paramount board was successful in obtaining a premium for the transfer of control to Viacom.

JUSTICE MOORE: And in that regard, then, what consideration did you and your clients give to the following language in the case of Barkan versus Amsted: "We believe..." -- Supreme Court of Delaware speaking. "We believe that the general principles announced in Revlon, Unocal and Moran govern this case and every case in which a fundamental change of corporate control occurs or is contemplated"?

MR. OSTRAGER: Your Honor, we believe that the quoted language from Barkan reflects the longstanding bedrock fiduciary principles of Delaware law, which require a board to act in the best

interests of the shareholders, its corporation, which we believe is precisely what was done in connection with this transaction.

JUSTICE MOORE: Well, in Revlon, in Smith versus Van Gorkom, in Macmillan and in Barkan, all of which involve changes of control, this court was very specific that the directors had a duty to obtain the highest value possible for the shareholders.

What did your clients do to discharge that duty?

MR. OSTRAGER: Well, in this case, as the Court is well aware, Paramount directors, over a long period of time, steered the corporation toward a strategic plan to become an international entertainment and publishing company. In May of 1993, at a board meeting and retreat, the board considered voluminous materials in connection with deciding on the strategic direction of the corporation.

The board decided that because of the competitive circumstances confronting Paramount, it was necessary for Paramount to increase its size and increase its asset base in order to participate in

global competition. It was decided to explain many different combinations --

JUSTICE MOORE: Excuse me. Excuse me. Excuse me, please. What did you do in terms of testing the marketplace under the guidelines of Revlon, Barkan, Smith versus Van Gorkom, to see whether you had the best transaction to return the best value to your shareholders? What market test was made, as those cases require?

MR. OSTRAGER: Your Honor is familiar with Mr. Rohatyn's affidavit in this case. He indicated that he contemplated a strategic merger, which Paramount ultimately decided to do. It would be counterproductive to, quote, shop the company, close quote. Paramount was not pursuing a sale. It was not pursuing a breakup or a dissolution of the company. It was pursuing a strategic merger.

JUSTICE VEASEY: Mr. Ostrager, pardon me. It is clear that there was a change of control contemplated by this Paramount-Viacom transaction. That's correct. Is it's not?

MR. OSTRAGER: It was an inevitable consequence of doing a transaction with this particular merger partner, which had this particular

set of voting stock.

JUSTICE VEASEY: So the answer to my question is yes?

MR. OSTRAGER: Yes, Your Honor.

JUSTICE VEASEY: And the public stockholders in the aggregate are now in the majority of Paramount. Is that correct?

MR. OSTRAGER: Yes, Your Honor.

JUSTICE VEASEY: And after the transaction, if consummated, they would be in the minority. That is the public stockholders, in the aggregate, would be in the minority and Mr. Redstone, of Viacom, would control the majority, the power of the corporation. Isn't that correct?

MR. OSTRAGER: We stipulate to all of that, Your Honor.

THE COURT: There is no dispute about that?

MR. OSTRAGER: No, there is not.

JUSTICE VEASEY: That was true, was it not, in the original September 12th merger agreement?

MR. OSTRAGER: Yes, it was. It was always the contemplation of this transaction that by

virtue of the voting control arrangements which Mr. Redstone had, that any combination of these two companies, no matter how structured, would as a practical matter result in Mr. Redstone having voting control.

JUSTICE VEASEY: And a person who has voting control then has the power to take certain corporate action, merge the corporation again, change the strategic plan, cash-out minority stockholders, assuming that they have complied with their fiduciary duties. Isn't that correct?

MR. OSTRAGER: It is correct, Your Honor. And I would emphasize that it is the teaching of this court in Gilbert and in Aronson and in numerous other cases that a control shareholder who appoints board members, those board members have fiduciary duties to the shareholders.

And in this particular case, it was unquestioned that Paramount's strategic vision, Mr. Redstone's vision as a controlling shareholder, Mr. Redstone's vision as a businessman, was to keep the Paramount assets intact and to provide the long term return for the minority shareholders that the Paramount board was seeking in the exercise of its

fiduciary obligations to achieve for its shareholders.

JUSTICE HOLLAND: Mr. Ostrager, we have been talking about September 12, which is where this began. But today we are really reviewing an amended agreement that was entered on October 24th. Isn't that correct?

MR. OSTRAGER: That is correct.

JUSTICE HOLLAND: Now in Viacom's reply brief, they characterize what they did prior to the October 24th agreement as requiring a dramatic restructuring of their capital. Assuming everything you said is true about September 12th, why was the board not looking at this transaction differently on October 24th?

MR. OSTRAGER: Your Honor, if I could answer your question together with the earlier question Justice Moore asked me, the Paramount board satisfied itself during the period May through September that the Viacom arrangement was the best transaction for its shareholders.

The Paramount board had numerous presentations made by Lazard Freres. The Paramount board had valuation studies concerning the intrinsic

value of the corporation. The Paramount board viewed other possible combinations, both in terms of specific discussions with other potential merger partners --

JUSTICE HOLLAND: Mr. Ostrager, I understood your answer with respect to what they did prior to September. And there is no doubt in the record that the board and the Vice Chancellor found -- thought that on September 12th, that was the best arrangement.

But on October 24th, and as we take the facts beyond that, we have Viacom increasing its offer by almost -- by more than a billion dollars. And we have it increasing its cash component by $3 billion.

So with hindsight, it appears that what the board thought was a good deal on September 12th wasn't on October 24th. And yet the Paramount board reacted to Viacom as if it was still best.

Now why was that a good exercise of business judgment?

MR. OSTRAGER: Your Honor, I believe it's clear from what I just earlier indicated that there was a market check before September 12th. The

QVC proposal was a form of market check. And what the Paramount board did on October 24th was reasonable and proportional in response --

JUSTICE MOORE: How could the QVC offer be a reasonable market test when everything your client did was to block it, including the statements, public statements, of your client CEO, Mr. Davis, that this is a marriage that will not be cast asunder?

MR. OSTRAGER: The Paramount board, on October 24th, took no defensive action whatsoever. The Paramount board carried forward its strategic merger in an altered form, to, Justice Veasey -- to conform with the realities of the marketplace, by announcing a hostile tender offer on October 21st, and creating an expectation in shareholders that there would be an immediate cash premium available to shareholders. PThe stock profile of Paramount shareholders changed, and all the Paramount board did on October 24th was to allow Viacom to match the then-existing QVC proposal in terms of cash and, in connection with the negotiations that were conducted with Viacom, have the complete and total flexibility to choose a superior transaction if the superior

transaction came along.

On October 24th, Paramount achieved a complete fiduciary out, a complete ability to terminate the strategic Viacom merger if a proposal, which in the judgment of the board -- came along which was superior to the Viacom proposal. So our position with respect to October 24th was that it was a win-win situation for the Paramount shareholders.

The Paramount shareholders had the benefit of the strategic merger with Viacom at a price that was competitive with the alternative, and the complete option to move forward to a different transaction if that was appropriate.

JUSTICE VEASEY: I wanted you to finish that answer, because I understand what you just said, but let's talk policy and doctrine here for a moment. Is it your contention that on September 12th, when the original merger agreement was entered into, the board's conduct was governed by the traditional business judgment rule?

MR. OSTRAGER: It's our position that it was. But we are prepared to say that even under the Unocal standard, the conduct of the Paramount board on September 12th was beyond reproach.

JUSTICE VEASEY: Beyond reproach and reasonable?

MR. OSTRAGER: And reasonable.

JUSTICE VEASEY: And that the Court can then determine -- if you took a snapshot on September 12th, the Court could then determine whether in its judicial review the conduct of the board was reasonable --

MR. OSTRAGER: Absolutely, Your Honor.

JUSTICE VEASEY: -- under the Unocal standard. And that applied throughout. Is that correct?

MR. OSTRAGER: It's our position -- yes, Your Honor.

JUSTICE VEASEY: And it would apply, then, because, among other things, there was a change of control, and the September 12th agreement and thereafter -- in that agreement and thereafter there were these defensive mechanisms, the stock option, which we haven't really dwelled on, and the termination fee and the no-shop provisions. They were all in there, and they were to be tested by Unocal. Isn't that correct?

MR. OSTRAGER: It's our position that it was a business judgment standard, but we are prepared to address what took place on September 12 under a Unocal standard.

JUSTICE VEASEY: Okay. If the Court is to credit the wisdom of the directors in looking ahead, long term, to a strategic alliance, doesn't the board also have an obligation, because of the change of control and because of the application of the Unocal standard early on, to obtain the best value available to the stockholders?

MR. OSTRAGER: Our position, Your Honor, is that the Paramount directors have the responsibility to manage the company with a view toward obtaining the best long-term value for the shareholders.

JUSTICE VEASEY: So the answer to my question is yes?

MR. OSTRAGER: Yes, Your Honor.

JUSTICE HOLLAND: Mr. Ostrager, isn't it true that if the Paramount board accomplished this strategic alliance and control was transferred, that whether or not their vision ever was accomplished would really be something they would have no say in,

because there is no guarantee they would continue to be board members?

MR. OSTRAGER: That is correct. The Paramount board members are managing Paramount's interests with the view toward achieving what is best for the shareholders in the long run.

JUSTICE HOLLAND: But once control changed and the Paramount board accomplished this strategic alliance, who would have the final decision in whether or not it was implemented in the future?

MR. OSTRAGER: The fiduciaries of the combined Paramount Viacom International. But the issue --

JUSTICE MOORE: Who are they?

MR. OSTRAGER: They would be the elected directors of Paramount Viacom International.

JUSTICE MOORE: And how about Mr. Redstone, who would have effective control?

MR. OSTRAGER: Mr. Redstone would certainly be influential in determining who those directors would be.

JUSTICE MOORE: And doesn't the law of Delaware say that a person who does control a corporation as a stockholder has a fiduciary duty

even to the minority, even if one is not a director?

MR. OSTRAGER: Yes, Your Honor.

JUSTICE MOORE: So how, therefore, can the stockholders, the -- now the minority stockholders under this scenario, be guaranteed of any strategic advantage by the transaction when there were no such guarantees written into any of the agreements?

MR. OSTRAGER: The Paramount board determined that their strategic vision was the same as the Viacom strategic vision. The Paramount board determined that in protecting the interests, the $5 billion back-hand interests which existed as of October 24th, that the Paramount shareholders -- there was something to protect for the board. This is a board which exercised its very best business judgment on behalf of the shareholders.

JUSTICE MOORE: But the shareholders can clearly be frozen out, can they not, at any time?

MR. OSTRAGER: We think the shareholders would have the benefit of the bargain that the Paramount board achieved.

JUSTICE MOORE: That is not an answer to my question, Mr. Ostrager.

MR. OSTRAGER: The cases in Delaware deal with an inevitable bust up of the company or an inevitable termination of shareholders' interests. There is no evidence in this case that the Paramount interests -- Paramount shareholders' interests would be in any way, shape or form extinguished here.

JUSTICE VEASEY: Let's talk about inevitable. It is clear that Mr. Redstone would control the surviving entity and he would have those powers of a majority stockholder. You say in your reply brief, at page 13, that the case law addressing the Revlon trigger, which we haven't introduced before -- and I don't really want to dwell on the term Revlon trigger or Revlon duty. I want to talk about obtaining the best available transaction for the stockholders. "...holds that Revlon duties do not arise unless the board makes a purposeful decision to liquidate the stockholders' stake in the corporate enterprise. As explained in Time-Warner, Revlon is only," your words, "triggered when, one, a corporation initiates an active bidding process (i.e. an auction)..."-- those words are not in Time-Warner -- "..seeking to sell itself or break-up the company or, two, in response to an offer, a

target abandons its long-term strategy and seeks an alternative transaction involving the breakup...."

I wonder whether "only" is a proper word there, because at page 1150 of Time-Warner, which you cite for that proposition, the Court begins by saying that the Chancellor found that the Time-Warner merger agreement -- not to -- found the "agreement not to constitute a 'change of control,' and concluded that the transaction did not trigger Revlon duties. The Chancellor's conclusion is premised on a finding that 'before the merger agreement was signed, control of the corporation existed in a fluid aggregation of unaffiliated shareholders representing a voting majority -- in other words, in the market,'" and that's the case here, before this transaction. "The Chancellor's findings of fact are supported by the record and his conclusion is correct as a matter of law."

Then the Court goes on, "However, we premise our rejection of" the Revlon doctrine "on different grounds, namely, the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or the break-up of the corporate entity inevitable, as

was the case in Revlon."

Then the Court goes on to say, "Under Delaware law there are, generally speaking, and without excluding other possibilities, two circumstances," namely, the two that you referred to here.

What policy reason would there be for this court to say that there had to be an imminent, immediate or inevitable break up of the company in order to invoke a doctrine that the Paramount stockholders, while taking into consideration strategic concerns, nevertheless, in the end, had a fiduciary obligation to obtain the best value available to the stockholders? What is the policy reason to talk about inevitability of a breakup?

MR. OSTRAGER: There are several policy reasons, Your Honor. First --

JUSTICE VEASEY: And what does "inevitable" mean?

MR. OSTRAGER: Inevitable means not theoretical. QVC says that the Paramount shareholders' equity interest in the combined Paramount Viacom International company hangs by a thread because of the possibility that they will be

cashed out.

Well, $5 billion equity interest is a very thick thread. There is no Delaware case that talks about the theoretical possibility of a cash-out being a Revlon trigger. And the reason why this --

JUSTICE VEASEY: There is no case that holds otherwise.

MR. OSTRAGER: That's correct, Your Honor.

JUSTICE VEASEY: And this language in Time-Warner about the Revlon claim being decided on different grounds, that was not essential to the holding in that case, was it?

MR. OSTRAGER: That's correct, Your Honor. And we recognize that in identifying the situations where a corporation initiates an active bidding process, seeking to sell or break up the company or an -- and identify a situation where the corporation abandons its category, the genius of Delaware law is that there is flexibility.

The Court clearly contemplated that there be other circumstances. But we don't believe that one of those other circumstances would be a mere change of control, because if that was one of the

other circumstances, this court probably would not have decided on different grounds than Chancellor Allen did.

JUSTICE VEASEY: But what's the policy reason?

MR. OSTRAGER: The policy reason is, in one sentence, that a board should be able to manage and exercise its responsibility as directors when there is a long term to protect for the shareholders.

JUSTICE VEASEY: But we know that Mr. Redstone has the power to cash out the minority and to change its strategic plan.

MR. OSTRAGER: That is correct, Your Honor.

JUSTICE VEASEY: That may not be imminent, but it certainly is out there and within his grasp.

MR. OSTRAGER: It is a theoretical possibility. We believe there is no evidence that that's so. And in making a decision about the uniqueness of this strategic merger and the long-term value to be available to the Paramount shareholders, the board had to be mindful of the fact that the

shareholders would have the benefit of those long-term values for as long as -- as long as they were shareholders of the company.

JUSTICE VEASEY: Yet, there is no -- excuse me. Yet there is no protection for the stockholders in the end to maintain that strategic plan or to maintain the surviving company as a whole, is there?

MR. OSTRAGER: The protection of the shareholders is the entire fairness doctrine this court recognized in Weinberger versus UOP and Weinberger versus Getty Oil, which is if the Paramount board is correct in its strategic vision and it's correct in the synergies and it's correct that this mix of assets is going to enhance long-term value, even if this theoretical possibility were some day to become a reality, that business judgment, made in good faith by a disinterested board, that had no interest other than giving its best, very best, business judgment for the benefit of the shareholders would be achieved for the benefit of the shareholders.

JUSTICE HOLLAND: Mr. Ostrager, you are focusing on this strategic alliance and September

12th. And in your briefs you point out that the deal price, to quote the brief, as of September 12th, was in the midrange of the financial analysis that you received.

But if we look at joint appendix, page 737, what we see there is an estimate of the value if the company was broken up. Why was it relevant to be considering the company from a break-up point of view in light of this strategic merger?

MR. OSTRAGER: It was part of the diligence and information process which the Paramount board engaged in to determine the intrinsic value of the company and to satisfy itself that this was the very best transaction for the shareholders.

JUSTICE HOLLAND: But the record would show, then, as of September 12th the Paramount board knew that it was transferring control, and in making that decision, it took into consideration the breakup value of the company. Is that correct?

MR. OSTRAGER: The Paramount board considered numerous methods of valuation in the exercise of --

JUSTICE HOLLAND: Was one of them the breakup value of the company?

MR. OSTRAGER: Yes, Your Honor.

JUSTICE VEASEY: Is the final deal price on September 12th within the midrange of the estimated breakup value?

MR. OSTRAGER: Yes, it is, Your Honor.

JUSTICE VEASEY: Is that relevant to what the board did after September 12th?

MR. OSTRAGER: We do not believe so, Your Honor. We believe that the whole tenor and thrust of the business judgment rule is to allow informed directors who act in good faith and who are loyal to have their judgments presumed to be correct, absent evidence that they in some way, shape or form failed to exercise their fiduciary duties.

The directors have the responsibility to manage the affairs of the corporation, to achieve the best interests of the shareholders, and that is what we believe was done here.

JUSTICE HOLLAND: Mr. Ostrager, we have taken up a lot of your time with questions. But there is one part of the record the Court would like your help in clarifying. When the Paramount board met on the 24th, Sunday morning, they went in with an

offer from Viacom at 43 percent. There is -- the minutes reflect that a note came into the meeting and Viacom unilaterally, on Sunday morning, raised its offer to 51 percent.

Does the record show somewhere whether someone went and called Viacom and asked if they would raise their offer, or how Viacom knew the Paramount board was meeting? How did that happen on that Sunday morning, that the offer went from 43 to 51?

MR. OSTRAGER: That was part of the ongoing negotiations between Paramount and Viacom. It was not a unilateral increase. Mr. Davis testified at his deposition --

JUSTICE HOLLAND: My question, though, is, how did it happen? If you look at the minutes of the meeting, it said the directors expressed concern at 43 percent.

MR. OSTRAGER: That's correct.

JUSTICE HOLLAND: And during the meeting, Viacom increased its offer. My question is: How did it happen that Viacom increased its offer? Was it just an unsolicited phone call?

MR. OSTRAGER: It was part of an

ongoing negotiation, Justice Holland. When the Paramount board convened on October 4th, the board was convened for the purpose of being informed as to what the state of negotiations were with Viacom. If Your Honor will recall, Viacom had imposed an October 25th deadline for resolution of its proposal.

JUSTICE HOLLAND: Mr. Ostrager, I didn't want to take up all of your time with this question. The question is simpler than your answer. When the board expressed concern at 43 percent, did someone go out and call Viacom and say, "Will you raise your offer to 51 percent"?

MR. OSTRAGER: Yes, Your Honor.

JUSTICE VEASEY: And who went out and made that call?

MR. OSTRAGER: The management of the company was in touch with Viacom with respect to its proposal.

JUSTICE MOORE: Who specifically?

MR. OSTRAGER: I can not answer that. Probably would have been Mr. Oresman, Your Honor.

JUSTICE MOORE: Mr. Oresman is the general counsel of Paramount. Is that correct?

MR. OSTRAGER: That's correct.

JUSTICE MOORE: Who was he contacting?

MR. OSTRAGER: Probably his counterpart at Paramount.

JUSTICE VEASEY: Mr. Ostrager, you have about one more minute, and I know we have taken a up a lot of your time with questions, but I have one more question I would like to ask you. It goes to the no-shop provision and the fiduciary-out language.

Did the board rely on the no-shop provision and fiduciary out in not negotiating with QVC?

MR. OSTRAGER: Your Honor, what the board did was to obtain information from QVC during periods of time when it was not a violation of its contractual relations with Viacom to do that. The board, as this record reflects, received information from Viacom on October 20th. That information was reviewed not only by the board but by Paramount's financial advisors, Lazard Freres.

Paramount did in fact meet with QVC on November 1st, and at that point QVC, instead of providing any further information to Paramount about

anything that it wanted to communicate to Paramount, merely presented a list of, quote, fair bidding procedures, which QVC knew at the time was a violation of Paramount's agreement with Viacom to comply with.

JUSTICE VEASEY: Let's go to November 12th-15th period, when QVC raised its bid to $90 the 12th of November and then the board met on the 15th of November. Was the board under the impression that it was contractually precluded from negotiating with QVC at that time by reason of the no-shop clause or otherwise?

MR. OSTRAGER: I believe the board was under that impression. I believe also the board believed that the information that the board needs is itself a matter of business judgment, and the board believed on November 15th, in light of having received information from QVC -- had an opportunity to evaluate that information. It had all the information it needed to deal with an unfinanced, non -- a conditional and an offer that was incapable of acceptance.

JUSTICE VEASEY: Let me finish this with one policy question. Is it your position that

the no-shop clause, the contractual provision of the no-shop clause, and the fiduciary-out provision can define or limit the fiduciary duties of a director of a Delaware corporation?

MR. OSTRAGER: It's our position that the contractual provision with Viacom is something that the board had a fiduciary obligation not to lose, absent the opportunity to receive a better -- a better offer in a way that QVC knew how to communicate.

JUSTICE VEASEY: Can you answer my question yes or no?

MR. OSTRAGER: Yes.

JUSTICE VEASEY: That it could define or limit the fiduciary duties of a Delaware corporation -- of a director of a Delaware corporation?

MR. OSTRAGER: If the board, for good and sufficient reason, entered into a contract with Viacom which contained a valid no-shop clause for the purpose of achieving an important and valuable strategic merger, that the board would be bound by that provision in dealing --

JUSTICE VEASEY: And that would trump

their fiduciary duties under Delaware law?

MR. OSTRAGER: It doesn't trump anything.

JUSTICE VEASEY: Could it define or limit their fiduciary duties under Delaware law?

MR. OSTRAGER: It would define the manner in which it would deal with QVC. And it was well known to QVC how proposals to Paramount could be communicated.

JUSTICE VEASEY: Thank you, Mr. Ostrager.

MR. OSTRAGER: Thank you, Your Honor

JUSTICE VEASEY: Mr. Baskin, are you ready?

MR. BASKIN: I'm ready, Your Honor. May it please the Court: Let me just say it's a very, very special honor for me to be here today addressing this court. I will try to restructure the argument I was going to make to take into account some of the policy considerations that you raised. Let me first perhaps address at least one of the -- something I can do probably quite quickly within my twenty minutes.

Many of you asked the question as to

how did the change occur on October 24th between 43 percent and 51 percent. If Your Honor's will look in the joint appendix at pages 57 to 61, which is the deposition of Mr. Greenhill, and in addition, 5838, which is the deposition of Mr. Rohatyn, the two financial advisers, the Court will see that in the course of their dialogue on that day, Paramount communicated that it wished Viacom to raise the first step of its tender offer and Viacom, accordingly, responded.

If I may, Your Honors, in part focusing on the policy questions that the Court addressed --

JUSTICE HOLLAND: Well, Mr. Baskin, I know that it was discussed on the 23rd, but the Court's understanding of the record is that when the meeting started on the 24th, Viacom's offer was at 43 percent, and that during the course of the meeting it changed to 51 percent.

Do you agree with Mr. Ostrager that the change was made because Paramount initiated a phone call to Viacom on Sunday morning?

MR. BASKIN: Yes. I believe those -- that the record will reflect that it resulted from

the interplay between the financial advisers and the management for the respective companies on that day, Your Honor.

JUSTICE HOLLAND: So the management and the financial advisers had the authority to make that significant change in the percentage that was being offered?

MR. BASKIN: No. All the record reflects is that Mr. Greenhill was the conduit of the information back and forth to Viacom. Obviously, Viacom management and whatever authority they had from the board is what ultimately generated the decision.

But the question I thought that was being asked earlier was what was the flow of dialogue that produced the increase. And those two record citations in the transcript I think will reveal that the flow of dialogue was from Paramount to Viacom, requesting the increase in the first step of the tender offer.

JUSTICE VEASEY: One quick question. Was it your understanding that there was no committee of outside directors that was functioning on this qua committee, that it was being handled by the entire

board of Paramount? Is that your understanding?

MR. BASKIN: That is my understanding, Your Honor, yes.

If I may address some the policy concerns, particularly with the focus on the stock option issue, which obviously is an issue that is near and dear to my client's heart, I would like to begin by focusing on September 12th, 1993.

And perhaps, Mr. Justice Moore, this will address one of the questions that you raised as as well.

On that day, September 12th, 1993, it seems clear to us, by virtue of multiple precedents of this court, including the precedent that Your Honor cited, that the decision to grant the stock option to Viacom is a decision that was governed by the business judgment rule of the state of Delaware. And that is true irrespective of whether or not there was a change of control transaction, which it plainly was. That is true irrespective of whether or not we were in Revlon land at that juncture.

JUSTICE MOORE: Well, the Court doesn't use those kind of terms.

MR. BASKIN: Then I will stop using

them as well, Your Honor.

JUSTICE MOORE: At least that's what I tell my students.

MR. BASKIN: Factoring out my faulty terminology, irrespective of how you characterize the transaction of September 12th, we think that Van Gorkom, Cede -- which obviously were cash-out mergers, 100 percent sales. By any possible characterization, those cases as well as Citron and the others that we cite in our brief all establish that the applicable standard for that date is the business judgment rule.

JUSTICE VEASEY: Unocal did not apply?

MR. BASKIN: It is our proposition, Your Honor, that Unocal does not apply.

JUSTICE VEASEY: Post the September 12th merger agreement?

MR. BASKIN: In the execution of the September 12th merger agreement, Unocal did not apply. It's our position Unocal began to apply upon the emerging of QVC days later.

JUSTICE VEASEY: Let's examine that. The September 12th merger agreement did transfer

control to Mr. Redstone.

MR. BASKIN: That is correct.

JUSTICE VEASEY: No dispute about that. And it contained the stock option --

MR. BASKIN: That is correct.

JUSTICE VEASEY: -- referred to by some as a lockup. Maybe not by you. And it also contained the termination fee of $100 million.

MR. BASKIN: Correct.

JUSTICE VEASEY: And it contained a no-shop provision. And it contained certain provisions with respect to the rights plan and when it would be pulled or how it would be pulled. Is that correct?

MR. BASKIN: No, sir. That was, I think, resulting in a merger and not a tender offer --

JUSTICE VEASEY: That's right.

MR. BASKIN: I think that would be later on.

JUSTICE VEASEY: The rights plan was not an issue on September 12th. But the others were there, the defense mechanisms and change of control. It's your position that Unocal did not apply but the

traditional business judgment rule did apply at that time.

MR. BASKIN: That is correct. Also, however, to take it one step further, as we been briefed and has been never denied by the other side, even if you wanted to characterize the stock option as a structural safety device to protect the strategic merger, under Time-Warner, that structured safety device, even under a Unocal standard, would be plainly viable and acceptable.

JUSTICE MOORE: But Time-Warner was a very different case. There there was no sale of control. The case makes that point very clear. The Vice Chancellor made that point very clear in his opinion in this case. So how can you, from a policy perspective, say that Time-Warner is the controlling law in this case when your clients have bought control of Paramount, or attempted to do so, and that did not occur in Time-Warner, and the Court -- both the Court of Chancery and the Supreme Court went to great lengths to make that point clear?

MR. BASKIN: Let me answer your question both doctrinally and policywise, Your Honor. Doctrinally, we read Time-Warner -- and obviously, we

are either right or wrong, but read Time-Warner as saying that change of control is not determinative in that case; what is determinative is the standard enunciated in Revlon, as effected in the tests that Time-Warner raised on page 1150 of that decision.

JUSTICE MOORE: Doesn't that, therefore, cause you to ignore Barkan, to ignore Macmillan, to ignore Smith versus Van Gorkom?

MR. BASKIN: I don't believe so, Your Honor.

JUSTICE MOORE: How would you incorporate them into your analysis, because you seem to be excluding them?

MR. BASKIN: No. I think each of those cases provide that the actions of the Paramount board took in implementing the strategic merger with us on September 12th must be measured by the standards of loyalty, standards of good faith and standards of breach of duty, measured by gross negligence standard, and that the test is not whether or not they had an obligation to maximize short-term value as of September 12th.

JUSTICE MOORE: But who was to get the long-term value? That's the point of the

previous questions that we addressed to Mr. Ostrager. There were no guarantees whatsoever in the agreement to assure the minority stockholders of Paramount, once your transaction was consummated, of any protection whatsoever.

MR. BASKIN: Well, the Court is correct that there was no mechanisms built into the merger agreement. However, let me make three points in connection with Your Honor's proposition.

Number one, after a very copious record, sort of the War and Peace of judicial records, I think, that is before the Court, there is nothing in the record to suggest that any such squeeze-out or cash-out is contemplated, or anything beyond a theoretical possibility.

JUSTICE MOORE: Is there anything to say that it won't happen?

MR. BASKIN: Apart from the fact that I believe that my client's 14D-1 and other such documents say that the purpose of the merger is to expand and grow the business, that -- that, I think, rebuts the notion, at least factual notion, that there will be a squeeze-out. Taking it one step further --

JUSTICE MOORE: Can't that be changed any time?

MR. BASKIN: Plainly, it could. If that were to happen, Mr. Justice Moore, obviously at that point the full panoply of rights provided by Delaware law would begin --

JUSTICE VEASEY: Would this case turn on the present intention of Mr. Redstone not to do anything other than carry out the strategic plan? If that is his present intention, do we have to rest there, knowing that he has the power tomorrow, if this transaction is consummated, to change the plan, to merge, to cash out, to liquidate?

MR. BASKIN: No, Your Honor. I don't think it turns on that, in part because, again, I think if there is going to be a colorable argument that that is something the Court should be concerned about, that the plaintiff had some obligation to show, for example, that it's even financially feasible.

I remind the Court that what we are talking about is not just squeezing out the Paramount shareholders at the sums of billions and billions of dollars, but Viacom, whose public shareholders--

JUSTICE VEASEY: What is the policy reason to say that one would have to show that this is feasible or is contemplated? What is the policy reason to separate this case, where there may be no present intention but the power to do it in the future, from a case where it is clear that there is going tomorrow to be a dissolution of the company? What's the policy reason?

MR. BASKIN: Well, I think there is a -- one policy reason borne out of the judicial process, that preliminary injunctions ordinarily don't lie for speculative conjectural injury.

I think there is a second policy reason borne out of practical experience, that Delaware law and other jurisdictions create rights in minority shareholders. They are not simply toys, and will not be toys, of Mr. Redstone. There is a board of directors that have fiduciary duties, a board of directors --

JUSTICE VEASEY: But Mr. Redstone can freeze out the minority consistent with his fiduciary duties, can he not?

MR. BASKIN: Only if he follows the rules of the state of Delaware.

JUSTICE VEASEY: And your good advice, I'm sure, but it can be done.

MR. BASKIN: Certainly can. We believe -- there is nothing in the record to indicate it can financially be done in this manner.

JUSTICE HOLLAND: What was your -- let's come forward in time, still talking about . policy. We have been talking about September 12th, which involved a merger. And if the September 12th deal price held over time, the stock option would be worth zero. So what we have is an exercise of business judgment, according to you, to enter into a merger and grant a stock option that has no present value.

But on October 24th, things have changed, and Viacom was making a tender offer and, as part of the agreement, the stock option, according to the briefs, could have had a value of $250 million.

What's the policy reason in the context of a tender offer to grant a $250 million stock option?

MR. BASKIN: Well, I guess I don't conceptualize October 24th as a totally independent event, Your Honor. At that juncture --

JUSTICE HOLLAND: Wasn't it your brief I was reading from that said on October 24th to go forward you had to dramatically rearrange your capital structure?

MR. BASKIN: We brought in -- what it says is -- we brought in equity partners at that point in time in order to fund a nonleveraged tender offer. In other words, to minimize the leverage in the transaction -- there was no alteration in the asset base.

JUSTICE HOLLAND: Going back to policy, then, you are saying that under Delaware law mergers and tender offers are looked at the same way?

MR. BASKIN: No, not at all. I think under Delaware law is the case -- is that the October 24th transaction represented a continuation and not a departure from the strategic merger of September 12th.

JUSTICE HOLLAND: Let's make my question, then, a hypothetical for policy reasons, that the merger is not a consideration. We have a tender offer. And as part of the contract, there is a $250 million stock option granted. What's the policy that would support that?

MR. BASKIN: Well, I guess if you are saying -- if we are starting from ground zero as your hypothetical, I take it you would apply the business judgment rule and decide whether that was a suitable inducement to achieve the tender offer. That is to say that in some cases such a raw number might be inappropriate. In other cases it may be perfectly appropriate. And I guess what it boiled down to, whether under the standards of Revlon and Macmillan, whether the grant of the stock option, even in your hypothetical, was being achieved principally for the purpose of inducing a favorable transaction for the shareholders.

JUSTICE HOLLAND: Let's come back to this case. The record reflects that between September 12th and the 24th, and a few days thereafter, that your client's offer had gone up $1.3 billion dollars and an additional $3 billion in cash. That change is characterized in the briefs as unilateral decisions by Viacom.

Why did Paramount need to induce Viacom to do anything? Things were going pretty well unilaterally.

MR. BASKIN: Well, in saying that we

decided to respond to the flow of stock and short term interest on October 24th by restructuring the transaction, we are not saying, and certainly my brief does not suggest, that we are prepared to forego and relinquish vested rights that vested as of September 12th.

The October 24th transaction did not alter the stock option to our advantage. It merely carried forward the preexisting stock option which had vested for six weeks, and we think vested appropriately under the business judgment rule.

But there is a policy issue that indeed is reflected in your question. And the policy issue is this: Does it make sense to say that if a board on September 12th enters into a strategic merger -- and I would like to get back to that in a second, the policy underpinning for that decision. But if the board enters into a strategic merger on September 12th which it believes to be -- and the record here is in good faith -- it believes to be in the best interests of its shareholders, and if by virtue of changed circumstances thereafter the recipient of the option decides to increase its bid, I submit to you it is perverse both under Delaware

law and for the benefit of the shareholders to say that if we jump our bid on October 24th, we thereby lose our vested right in the stock option that precipitated these events in the first place.

JUSTICE VEASEY: Do you contend that the board of directors of Paramount was powerless, if they believed their fiduciary duty otherwise, to cancel or in any way to affect your, quote, vested, end of quote, rights under the stock option agreement, even as of November 15th?

MR. BASKIN: Yes. I don't think -- I think we had vested contract rights as of November 15th, and that unless -- again, as a part of policy contractual rights are going to be governed by hindsight snapshots of how contracts mature over time, I think we had a vested contract right that was inalienable as of that date.

JUSTICE VEASEY: How about on October 24th? There was an amended merger agreement.

MR. BASKIN: That is correct.

JUSTICE VEASEY: And was it within the power of the Paramount board in negotiating with Viacom that amended merger agreement to do away with or significantly alter the option agreement?

MR. BASKIN: Well --

JUSTICE VEASEY: It was on the table for discussion, wasn't it?

MR. BASKIN: It was not within their power, because we wouldn't agree. I mean we had a vested right that had -- we had bargained hard for -- there is no dispute about that -- leading to the September 12th transaction.

JUSTICE MOORE: Even if that in itself constituted a violation of a fiduciary duty?

MR. BASKIN: If what did, sir?

JUSTICE MOORE: If the agreement was an improvident act and constituted a violation of a fiduciary duty and there was a fiduciary duty that supervened that agreement?

MR. BASKIN: Well, I'm not sure -- if you are saying that the stock option -- if we hypothesize that it was void ab initio because the original agreement was invalid, then obviously as of October 24th, the natural consequence of your question is the stock option was not valid as of October 24th.

I urge the Court that I don't think that is a correct interpretation of what happened on

September 12th.

JUSTICE MOORE: I think the Chief Justice's question and that of Justice Holland is what is the limit upon one's fiduciary duty as a director under all of the line of cases that we have been discussing that are applicable here, and can that be limited by contract, the same question that was posed to Mr. Ostrager?

MR. BASKIN: Well, I would think that there is no question that Delaware law recognizes that fiduciaries, companies, enter into contracts, and contracts, if they are valid when executed -- if the contracts are valid, if a third party relies on the contract in entering into a transaction, that a retrospective look back of what thereafter happened ought not change those contractual --

JUSTICE MOORE: There is a countervailing principle also that one who joins with a fiduciary in breaching that fiduciary's duty is equally liable. That's the case of Pennmark Realty versus Becker, and also the case of Macmillan.

Are you familiar with the case of Wilmington Trust Company versus Coulter?

MR. BASKIN: I think not.

JUSTICE MOORE: Well, I think you would find it instructive on that basic principle. Also, from a policy standpoint, I notice that there was an interesting citation to an article called, "What Triggers Revlon," written by Professors Gilson and Kraakman.

What is your response to the policy issues that they discuss? And I should warn you, Professor Kraakman is in the courtroom and may give you a grade.

MR. BASKIN: Well, then I think I will flunk his test, because I have not focused on their policy issues. I think the policy issues that are pertinent and grow out of Revlon and like cases is really this, Your Honor: There are -- many of the most dynamic and entrepreneurial companies, particularly to the telecommunications industry, have controlling shareholders. And I think it is a perfectly valid question to ask, and the sort of threshold issue is if a company decides to entertain a strategic merger with a company like Viacom, that is among the most dynamic companies in the entertainment industry, is there some policy reason in Delaware to say that the consequence of entering

into that transaction is that Viacom's strategic partner will thereby be put in play?

If that is the rule in Delaware, then obviously such strategic mergers will not happen. No one would have folly enough to contract with the Viacoms of the world, and the other companies on -- if you look at page 61 of our brief below, you will see represented "Who's Who of Corporate America" in the telecommunications and entertainment industry.

We read Time-Warner and Revlon and other cases as saying that change of control is not the operative issue. The operative issue is --

JUSTICE MOORE: How do you read out Barkan? Why do you do that?

MR. BASKIN: I don't think we are reading out Barkan. Barkan was a straight sale transaction.

JUSTICE HOLLAND: But, Mr. Baskin, the Chief Justice was reading from Time-Warner, on 1150. And there the Court said, "The Chancellor found the agreement did not constitute a change of control and concluded that the transaction did not trigger Revlon duties."

Change of control and Revlon are all

in that same short sentence.

MR. BASKIN: That is correct. And obviously, if that was the basis for the affirmance, the Court could have stopped there. But --

JUSTICE HOLLAND: The Court went on to say, at the top of the next column, "The Chancellor's finding of fact are supported by the record and his conclusion is correct as a matter of law."

That's what the Court said before it went on. So when it went on, wasn't it deciding the case on an independent alternative ground?

MR. BASKIN: I read that as saying that his conclusion that there was not a change of control is correct as a matter of fact and law. But I read the rest of the discussion in the opinion as being the triggering test as to whether or not Revlon is satisfied or is not satisfied.

JUSTICE HOLLAND: I wanted to ask you one question, Mr. Baskin, about your position in the briefs to make sure the Court understands it.

As the Court understands your argument, you are saying that the Vice Chancellor took no action against the $100 million termination

fee and yet he enjoined the stock option, and that they were reached in the same agreement. As I understand your argument, you are suggesting that's not logical. Is it your position that they should stand and fall together?

MR. BASKIN: No.

JUSTICE VEASEY: Package deal. Is it a package deal?

MR. BASKIN: No. Our position is that in applying the rights standard, and said he was applying the rights standard, the business judgment rule, in upholding the termination fee, in the very next page he applied the wrong standard in validating the stock option.

What we are saying is the standard he applied as a matter of law was inconsistent from page to page and, therefore, if you apply what we read to be the correct standard, the business judgment rule, with respect to both -- both parts of the same transaction, that the termination fee and the stock option will both survive.

JUSTICE VEASEY: Thank you, Mr. Baskin. Thank you. You wanted to save some time for your rebuttal. Mr. Wachtell.

MR. WACHTELL: If it please the Court, Your Honor, Herbert N. Wachtell, representing QVC Network, Inc.

First, just to respond to the narrow factual question that this court has raised as to what transpired at the October 24th meeting, if I can refer the Court to Joint Appendix 5659, I am questioning Mr. Davis. "Question: Now..." -- this is at page 168 of the deposition transcript, starting at line ten.

"Now, did anyone communicate with Viacom during the meeting to say to them in words or substance that it was necessary for them to go from 43 to 50?

"Answer: No. Those discussions, when we had our discussion prior to that meeting, we had asked for 51 percent. That was part of our negotiation. They came in with 43 percent. We said we would take it to the board. In the course of, in the middle of our meeting, a phone call was received...," etc.

Now I would respectfully submit that this case may be viewed through different prisms of this court's precedence. It can be viewed as a

Revlon case. It can be viewed as a Unocal case. It can be viewed as a Household-Barkan case, involving what are the permissible uses of a rights plan. It can be viewed as Van Gorkom, Technicolor case, having to do with the fundamental duties of due care of a Delaware --

But these, as this court has emphazised,are not watertight compartments. They all are founded on the same fundamental duties of care and loyalty. And I submit that no matter which of these prisms or combination of prisms this case is viewed through, one reaches the identical conclusion, that the Paramount board, in the fase of the $90 QVC tender offer, could not use Paramount's pill and other corporate mechanisms to block that offer and cram down upon the shareholders the partial front-end loaded Viacom offer, having a far lower market value, and without ever having made a meaningful evaluation as to the relative economic values of the two offers.

Mr. Baskin referred to the record as being War and Peace. And he was perfectly correct. War against QVC, peace with Viacom.

JUSTICE VEASEY: Mr. Wachtell, I understood your statement a moment ago, and I am not

going to go back and parse every aspect of that out. Just talk about a matter of doctrine for a moment. Could it be reasonably contended that you are asking the Court of Chancery and this court to become superdirectors and not to allow directors to take into account the long-term strategic values that they apparently thought in good faith were important here in this transaction?

MR. WACHTELL: No, Your Honor. We are not asking for that at all. The position we took in Chancery Court and the position we take here is that even if Revlon duties were triggered, we are not saying that that means that a board has no role. And --

JUSTICE VEASEY: What is the role of the board here?

MR. WACHTELL: Excuse me?

JUSTICE VEASEY: What is the role of the board here. I mean they made these decisions on September 12th, October 24th, and other times, including November 15th. The Vice Chancellor found that they were acting in good faith, and he faulted them for the November 15th meeting. They didn't have enough information, and they didn't go back and

negotiate.

But, according to the Vice Chancellor, I think they -- he felt that they were acting in good faith, and it is a legitimate province for the board of directors to exercise their reasonable business judgment on strategic considerations. Should we throw that out the window?

MR. WACHTELL: No. You certainly should not, Your Honor. Of course, if you look at Time-Warner itself -- and I am not relying on this, but this court said that once Revlon duties are triggered, the board's duty is to maximize shareholder value in the short term, to maximize immediate shareholder value.

But that has not been our position here, because it isn't necessary in this case. There is no reasonable long term here, and the directors never informed themselves here in any way, shape or form.

Your Honor, first place, I think that it bears pointing out that on the present transaction, only one-third of the consideration involved in the Viacom offer involves ongoing equity. Two-thirds of the consideration is either cash or a

preferred stock, which is redeemable by Redstone at par, by the use of a debt. And although there is a conversion feature, the premium going in is well in excess of 50 percent, so it is highly unlikely that any shareholder would ever have the opportunity or economic incentive to convert until such time as the mandatory exchange feature could be invoked by Mr. Redstone.

JUSTICE VEASEY: But a significant aspect of a long-term value of the surviving enterprise were the assets of Paramount.

MR. WACHTELL: That is correct, Your Honor. But they were not -- no longer going to be the assets of the Paramount shareholders. The Paramount shareholders are being cashed out as to two-thirds of the consideration by cash and an exchangeable preferred stock.

JUSTICE VEASEY: But they are minority stockholders. They share in the fortunes of the enterprise.

MR. WACHTELL: Only so long as Mr. Redstone wished them to do so here. And it is not just that he could have cashed them out. And Mr. Baskin says, well, he would not have the economic

wherewithal to do so. Well, that isn't true. He could cash them out for paper. He could bust up the assets and sell off all of the assets.

JUSTICE VEASEY: But there is no evidence that he intended to do that.

MR. WACHTELL: There is no evidence that he intend to. There is no evidence that he did not. You have a man who is in excess of 70 years old, who would be the reigning king of this enterprise, and as long as it was lawful under Delaware law, he could refuse a offer from any third party under this court's precedent, under Bershad and Curtiss-Wright.

He could change the direction of the enterprise. He could sell off the assets. He could cash out the stockholders. He could liquidate, if he decided that the tax -- personal estate reasons, that he wished to liquidate the enterprise or sell it to a third person. His power to do these things, provided he did not enter into an unfair transaction, is unfettered, and there is no --

Five minutes or five weeks or five months after this transaction was consummated, Mr. Redstone could die and his estate could decide to

do these things.

JUSTICE VEASEY: Mr. Baskin says all those things are theoretical or hypothetical.

MR. WACHTELL: Everything in the world is theoretical and hypothetical, and that is why the touchstone is, I submit, power and control.

And to go to the policy issues that the Court has indicated that the Court wishes to have us address, I think that the change of control standard, fundamental change of control standard articulated in Barkan, is a very sound standard from a policy point of view.

JUSTICE HOLLAND: Well, Mr. Wachtell, staying with that point, we have been discussing this case chronologically. So on September 12th there was going to be a change of control. I know you are primarily concerned with later events and your client's $90 offer. But focusing on September 12th, do you see anything in the record that would indicate the Paramount board did not discharge its duties properly?

MR. WACHTELL: Yes.

JUSTICE HOLLAND: What would that be?

MR. WACHTELL: First place, I do not

agree with the statements that have been made here that the proper standard on September 12th was the Revlon -- was the business judgment standard.

And may I say this is not critical to an outcome of the case, but first place, with respect to the lockup stock option and the other defensive mechanisms, I think those stand as Unocal governed, just as the pill was held to be Unocal governed by this court in Moran. I think it is a precise parallel. But the transaction generally, I would maintain, was Unocal governed at that time.

The evidence here -- the record shows that this transaction came about because of Mr. Davis' fear -- at least there is very strong evidence in this record -- because of Mr. Davis' fear and knowledge that Mr. Diller was coming after the company. Mr. Malone expressly told him that from the QVC board room. Mr. Davis told Mr. Diller, "I know you are coming after me." Mr. Davis called --

JUSTICE MOORE: Well, Mr. Wachtell, if that is the case, why did your client wait until September to make an offer for Paramount when it had been studying the idea since at least May, if not earlier?

MR. WACHTELL: They were just -- they were basically working on the project, Your Honor, and were putting their affairs in order and had not made the offer.

JUSTICE VEASEY: Mr. Wachtell --

MR. WACHTELL: If I may --

JUSTICE VEASEY: Let me ask my question.

MR. WACHTELL: Anything else wrong on September 12th? I answered the question yes. Let me say why.

JUSTICE VEASEY: Finish that.

MR. WACHTELL: No one on September 12th even raised the question in the board room. This is the deposition testimony. "How come we are taking exactly the same number of shares that we rejected on -- and less cash, $4 -- plus less cash than we rejected as inadequate two months ago?"

Not even discussed in the board room, that critical element, what was the consideration. Not discussed in the board room. Mr. Davis' luncheon with Mr. Diller, when Mr. Davis told Mr. Diller, "I know you are coming after me." Not discussed -- nothing in the Lazard book to compare the stock

option with any other stock options. No one told the board that the poison note provision was unique and that someone such as Mr. Greenhill had never seen one in 31 years of investment banking experience.

No one told the board that Lazard had conducted an analysis of 61 other different no-shop agreements and none of them had this restriction in it whereby they could not even use their business judgment, except, as they maintain, if somebody came forward with an offer that was fully financed at that time.

JUSTICE VEASEY: Mr. Wachtell, your recitation of these facts highlights the question I'm about to ask. It's a doctrinal question. That is: You say that Unocal applied and that the board had to act, I guess -- it would be reasonably --

MR. WACHTELL: Yes. I'm not saying it would not make any difference even if you judged it by business judgment at that date.

JUSTICE VEASEY: But if this court -- if the Court of Chancery and this court are to apply judicial review to the conduct of the board of directors throughout this transaction, what is the scope of that review? I asked you earlier about

courts not being superdirectors. In the Hanson Trust case, you know Judge Kier said the courts are ill equipped. That was a New York case.

But what is a court to do in applying judicial review? It's clear what the Court does under the business judgment rule. But when the Court gets into Unocal and determines reasonableness in this setting, what is that? Do we substitute our business judgment for that of the board of directors? Or do we apply a range of reasonableness? And what are the standards?

MR. WACHTELL: I would think you probably do something akin to what this court said it does in Aronson, which is take a hard second look. I think you apply an enhanced level of scrutiny, as was stated in Unocal. I think you apply exacting scrutiny, as was stated in Macmillan. But I don't think that this is the case where one has to define what the precise role of the Court is, because I think by any standard of review what this board did can not pass muster from day one.

I know the Chancellor did not feel this was necessary to his decision, but I think the it cries out from the record that from day one this

was a board that was uninformed, that was misinformed and evidenced no desire to be informed.

JUSTICE VEASEY: Let me make sure I understand what what you are saying. The Vice Chancellor said at page 56 that he did not fault the board of Paramount up to the November 12th meeting. You don't agree with that.

MR. WACHTELL: Your Honor, I'm not quite sure -- I hate to parse out the language. He said there was no basis for doing so. And then he went ahead to say that even if there were questionable things -- I, frankly, read his language as saying he did not think it was necessary, but this is -- I grant you the language is ambiguous.

He later does indeed fault what they did and held that they were uninformed in connection with the issuance of the stock option. So I'm not quite sure what the Chancellor was saying there, when he necessarily was saying that he was finding there was nothing wrong with it, or whether he was simply saying it was not necessary for him to find there was anything wrong with it. But there is record --

JUSTICE VEASEY: I had the wrong page.

MR. WACHTELL: The overwhelming evidence in this record cries out that on September 12th -- and I have ticked off some of the things they did not know. If you want to look to the next two weeks that goes by, on October -- not two weeks. On October 11th, they vote and say, "We have a fiduciary duty to have discussions with QVC." And two weeks goes by. Never happens.

JUSTICE VEASEY: So you think that is a charade?

MR. WACHTELL: No. Of course, it was a charade, but the point is management stalled, as the Vice Chancellor found. And where was the board's oversight, the intense scrutiny and oversight that this court said in Macmillan the board must bring to the process? Where were they? To use this court's words, "Torpid, if not supine." You come to the October 24th meeting.

JUSTICE MOORE: There were those who didn't like that language.

MR. WACHTELL: Excuse me, Your Honor?

JUSTICE MOORE: I said there were those who do not like that language.

MR. WACHTELL: That may be, Your

Honor, but if there was ever a case that that language was apt, I respectfully submit it is the case at bar. Whe we come to the October 24th meeting --

JUSTICE VEASEY: We don't need to make that characterization.

MR. WACHTELL: You do not need to make that characterization. This is an easy case. You do not have to reach any frontiers here. And I don't think that the Vice Chancellor came close to any frontiers of either doctrinal law or the evidence in this case.

JUSTICE VEASEY: Well, I'm concerned about one frontier that Mr. Baskin seems to suggest, and that is are we running roughshod over the contractual rights of Viacom?

MR. WACHTELL: Well, what were the contractual rights of Viacom? In the first place, as I pointed out, at the initial meeting on September 12th, the board was not given a comparison of comparative stock options and was not told that this one had this highly unique feature to it that would be exercised by use of a note. No one has ever come up with an option that had a provision of that

nature.

JUSTICE HOLLAND: Mr. Wachtell, you know later on in the record, although they didn't have it at that time, it indicates that there were 227 similar transactions, and that what Paramount had negotiated appeared in some respects to be better than 172.

MR. WACHTELL: Your Honor, I don't believe there are any other transactions that have this note feature. I don't believe that has been claimed. Mr. Greenhill had testified that he had never seen it in 31 years of his experience.

JUSTICE HOLLAND: I'm speaking independent of the note features.

MR. WACHTELL: Independent? Sure. I mean in a classic matter, there is nothing with giving an option per se. This court has held it is not per se illegal to give an option, but you have to bring a very hard focus on it, because it can be used for an improper purpose.

JUSTICE MOORE: Isn't it the test that any of these measures that are designed to enhance the bidding process must bear some relationship to enhancing shareholder interests and

not the board's interests?

MR. WACHTELL: Well, of course. And what did you have here? Was this some you ultrarich deal? The question is what -- even on September 12th -- I'll come back to October 24th, which I think is the critical date. Even on September 12th was this such a munificent deal for what they were getting and what they were giving? They were getting the same stock and less cash than what they had rejected as inadequate two months earlier. The only thing --

JUSTICE HOLLAND: Excuse me, Mr. Wachtell. What Viacom says is if the problem was with the note, the note was only one of three ways that --

MR. WACHTELL: I'm not referring to the note now, Your Honor.

JUSTICE VEASEY: Don't interrupt.

MR. WACHTELL: I'm sorry, Your Honor.

JUSTICE HOLLAND: We are talking about the problem from Viacom's point of view. They are suggesting that as an innocent party, if the real problem was the note, the Court of Chancery could have invalidated that feature and still permitted the

option to remain in place.

JUSTICE VEASEY: It was severable. Wasn't it?

MR. WACHTELL: I don't know if it was severable, but I think the vice here far transends the note. You have a transaction which on its face is worse in September than July. And they know it. And they know that what has changed is that in the intervening period, the purpose, the acquisition currency -- the Viacom stock ran up in the market during the same period where Mr. Redstone went into the market to buy over 400,000 shares of what Lazard characterized as a thinly-traded volatile stock.

They know that. Does the board know this on September 12th? No. The board does not know this. There are memoranda circulated at Lazard and to management prior to the board meeting specifying the stock transactions, evincing great concern with respect to them. None of those memoranda are in the Lazard book on September 12th, and the board is never told that.

We come down to October 24th. Whatever allusions the board may have had as to the deal on September 12th should have been long since

dissipated. It had been shown that the bid was not a good one. The price -- the Viacom stock had promptly plunged after the deal. And of course, there was no collar.

When we came in, our offer was $2 billion better than the then value of the Viacom offer. And Mr. Redstone, on October 24th, had his tongue hanging out to be able to make a tender offer and get a timing advantage, to jump the gun on our tender offer.

JUSTICE HOLLAND: Mr. Wachtell, on the 24th, what precedence of this court should we be looking at in examining what the Paramount board did on the 24th?

MR. WACHTELL: Well, you certainly -- what they are doing on the 24th concededly is governed by a Unocal standard. So you bring an enhanced level of scrutiny to what they did.

And what did they do? They had the whip hand in the negotiations. Mr. Davis conceded that on deposition. They had the whip hand in the negotiations. They know that they made a bad deal, a $2 billion bad deal, the previous month. If they didn't know it then, they clearly know it now. It's

staring them in the face. Both bidders are willing to bid at the $80 level, not the $69 level.

Do they ask Viacom, as the quid pro quo for letting them go forward with the tender offer, "Will you modify or eliminate the stock option?" The question was asked by one of the justices, one of Your Honors, "Would you pay $250 million as the -- give $250 million in-the-money stock option at that point," which is still going to go higher as Mr. Oresman's memoranda shows. "Would you give it at that point to get the tender offer?" Would any reasonable businessman do it when the party on the other side is dying to make the tender offer and is coming to you to ask you for permission to make the tender offer?

They don't ask and they don't even discuss it, according to the testimony, in the board room. Was there any discussion in the board room as to whether they had inquired of Viacom; would Viacom be willing to modify or eliminate the option? No.

JUSTICE VEASEY: Do we need to decide who was courting whom at that point?

MR. WACHTELL: No.

JUSTICE VEASEY: Do we need --

MR. WACHTELL: No. I do not think you do, Your Honors. I think that by any standard of reasonableness, of due care, they did not have the information before them. They were not informed either on September 12th or on October 24th. On October 24th, if you want to talk what did not go up in that board room, there was --

They originally had said, "Well, we are not getting a collar on September 12th, but that's okay, because the stockholders will have a vote. So if the stock plunges, you don't really need a collar. The stockholders will vote the deal down."

On October 24th, the total structure of the deal was changed. There now will never be a meaningful stockholder vote because once the first-step tender offer is accomplished, Mr. Redstone will control the vote.

Does anybody even ask, given -- and the stock has plunged in the interim. Does anybody in the board room even discuss the fact that the stockholders are no longer going to have a vote, so the rationale for not getting a collar that previously existed no longer exists? Does anybody even ask, "How come we are not getting a collar?"

No.

JUSTICE VEASEY: Is it your position that the board at that point, October 24th, had a fiduciary duty when they started amending things to write on a clean slate, start all over again, redo the option and everything else?

MR. WACHTELL: Well, it is my contention that the board had the option to act -- the obligation to act as reasonable people act. And reasonable people look to their bargaining position and their negotiating position. They do not ignore the critical issues. They do not ignore the fact that they never even asked to modify it. They were never rejected --

JUSTICE VEASEY: It was important to this board to keep Viacom in the deal. Viacom was very important to the strategic vision of this board.

MR. WACHTELL: Well, I must say, Your Honor, that I think that that is a myth that has attempted to be perpetrated here. The entire concept that this is a long-term strategic plan, and so on, I think is largely a litigation construct. I think the evidence indicates it.

If this was a long-term strategic

plan, it was rejected on July 7th. The long term strategic values were exactly the same on July 7th that they had been on September 12th.

JUSTICE VEASEY: What is there in the record that supports your position that it was a litigation construct?

MR. WACHTELL: I can point to any number of things, Your Honor.

JUSTICE VEASEY: Give me your three best.

MR. WACHTELL: The only difference between July 7th and September 12th was current market price. What they rejected on July 7th, all the same. Long term values, strategic values were the same on July 7th as September 12th. They rejected them on July 7th. The only difference was current market price.

For three or four years they had been talking about a combination of these wonderful companies, the supposed long-term values, strategic consideration. Why didn't it happen? Because as the Chancellor -- Vice Chancellor found, Mr. Davis insisted upon being CEO.

JUSTICE VEASEY: But the Vice

Chancellor found that they had a good faith belief in this long-term strategic vision. Are we -- what is our scope of review of that finding?

MR. WACHTELL: The Vice Chancellor also found that they made -- were not informed as to the converse, what were the long-term strategic values of the QVC transaction? And the record here -- it is idle for them, first place -- I don't want to repeat ground -- to talk about long-term values when the directors did not lift a finger to protect them, and never even discussed in the board room, either on September 12th or October 24th, protecting them.

But they never got information as to the comparative economic values. They blindly --

JUSTICE HOLLAND: Mr. Wachtell, when you make that statement, aren't you discounting the Booz-Allen report?

MR. WACHTELL: I'm very definitely discounting the Booz-Allen report as a devise, Chancellor. Booz-Allen report, Your Honor, to be frank, is a joke, and a very bad joke. In the first place --

JUSTICE VEASEY: Did the board have

the right to rely on the Booz-Allen report?

MR. WACHTELL: No.

JUSTICE VEASEY: We do have Section 141(e) of our --

MR. WACHTELL: Yes. And Section 141(e) says that the subject matter, quote, must be within such person's professional or expert competence. And the testimony of the Booz-Allen people is that they were not experts on markets. They were not experts on shareholder values. They were not experts on valuation of equity securities.

This court in Weinberger talked about what the board should look to in terms of valuing securities.

JUSTICE VEASEY: Wasn't Lazard there for that purpose?

MR. WACHTELL: And they didn't ask Lazard. That is the point. They never asked Lazard to value the comparative transactions. And Lazard never gave them the -- Lazard, the people who would be qualified, never gave them an opinion as to the comparative transaction.

In Weinberger, this court said you look to prove the values by any techniques or methods

which are generally considered acceptable in the financial community.

They had Lazard there. They did not want to get an opinion from Lazard. They prohibited Lazard from even talking to QVC. That was the Lazard testimony. "We never gave an opinion on comparative values. We were never asked for an opinion on comparative values. We could not have given such an opinion because we were prohibited from talking to QVC."

JUSTICE VEASEY: Let's go to November 15th and just test that one issue. If the board made an informed and reasonable decision that the QVC offer was too uncertain on November 15th to consider, was it necessary for the board at that point to value the QVC transaction?

MR. WACHTELL: It is a hypothetical, Your Honor, which I -- obviously, does not bear a relationship to the facts that we are dealing with, because they never sought to ascertain whether the offer was indeed too conditional. They deemed themselves to be contractually barred from even considering the offer.

Your Honor, I think that a reasonable

businessman looks at all the factors. If you have a house and you go to sell your house and somebody comes in and says, "I will give you $250,000 more than the bid you already have, but I have to go to the bank to get a mortgage," you don't say to the fellow, "Never darken my door again."

This is not reasonable business conduct. You don't say to them -- well, don't you first ask them, "What's the likelihood of your getting a mortgage? What's your income? Have you talked to the bank? Have they said yes? Are they about to sign a commitment?" You don't just say, "Get lost with your higher bid." This is under any standard of review.

JUSTICE VEASEY: What is your position, then, on the no-shop provision?

MR. WACHTELL: The no-shop provision --

JUSTICE VEASEY: At that point, on November 15th.

MR. WACHTELL: The no-shop provision, I think -- to answer questions that Your Honor has put to my adversaries, is I do not think that a Delaware board can contract away its fundamental

fiduciary duty to be informed. I do not think that it can contractually abrogate its responsibilities under Van Gorkom and Technicolor. As they have interpreted this no-shop, it wasn't no-shop at all. It wasn't a matter of -- No-shop means you don't go out and shop a bid. You don't go out and solicit another bid.

This was a no know. We can not get information. They testified they were precluded from getting information if someone did not have a fully contractually-bound financed bid.

I asked one of the directors, "Well, don't you factor in..." -- Mr. Pattison -- "Don't you factor in all factors in reaching a reasonable business judgment, and isn't financing one of those?" And he said, "Yes."

And I asked him, "Well, isn't it an abdication of your responsibility to use business judgment to say you will not even consider another bid unless it's contractually fully financed?" He thought about it, and he said, "Yes."

And indeed, it is. That can not pass muster. There is no other no-shop. Lazard made -- reviewed 61 other no-shop provisions.

JUSTICE VEASEY: I read every one of them.

MR. WACHTELL: We did, too. I didn't. My colleagues did and assured me there is no other one of them. I will take that assurance. There is no other one that has this provision. Not only that, but the board was never informed of that minor little detail in the no-shop, that they now contend -- they say, "We could not see because we had blindfolded ourselves, and therefore, how can you fault us for a breach of fiduciary duty because we contractually bound ourselves?"

JUSTICE HOLLAND: Mr. Wachtell, I would like to come back to another point, besides the no-shop, relating to our standard of review. In this case, which is an interlocutory appeal, you certainly weren't obligated to a file a cross-appeal. But we read in Viacom's brief that by permitting the $100 million termination fee to be paid and not permitting the stock option to go forward, the Chancellor was inconsistent and that the same logic that led him to allow the fee to go forward should have permitted the stock option to go forward.

How does this court review that?

MR. WACHTELL: Well frankly, I think both them were bad. And because it is merely an interlocutory review, we did not feel the need to burden this court with cross-appeal on the $100 million stock option, because although the 100 million -- the $100 million breakup fee. Excuse me.

Of course, because in Revlon both were invalidated, both lockup and the breakup fee, by Justice Walsh -- that was affirmed by this court.

Because -- although we did not like to, we can swallow the $100 million as part of our tender offer and fight about it later. We did not think it was necessary to burden this court with a cross-appeal.

JUSTICE MOORE: But would you not, if I understand you correctly, view all of these agreements, the stock option, the no-shop, the breakup fee, as one bundle of defensive mechanisms? Or are you breaking them out?

MR. WACHTELL: No. I think they are one bundle of defensive mechanisms, agreed to by a board that was not informed either as to their unique atypicality, was not informed as to their consequences, that was motivated by -- to lockup the

deal for Viacom, and I think in the last analysis, they all fall.

However, the impact of them, I will concede, is different. In other words, although I think they are all illegal and they are all the product here of a breach of fiduciary duty, particularly under a Unocal enhanced scrutiny, enhanced obligation standard, the no-shop which they say contractually prevented them from even considering our offer, the option which would effectively would prevent us from making our tender offer, in terms of impact, I would think stands somewhat different than the breakup.

JUSTICE HOLLAND: Your position is that when a final judgment was ultimately entered in this case by the Court of Chancery, they should stand and fall together?

MR. WACHTELL: I think they will fall together. I don't want to be presumptuous here, yes, I think on the record, which I do not think will appreciably change, that this board was not informed, did not know the facts with respect to these matters, that they should all fall. I don't think that is an issue that we have to deal with, certainly --

JUSTICE MOORE: From the doctrinal standpoint, in connection with one of the questions that the Chief Justice posed, you seemed to indicate that these various defensive mechanisms could be validly employed in a proper case. Did I understand you correctly?

MR. WACHTELL: I said that this court has said that they are not per se illegal and that if you have a case where in order -- it is necessary to --

JUSTICE MOORE: To enhance the bidding process.

MR. WACHTELL: Enhance the bidding and not foreclose the bidding, clearly this court has not said they are per se illegal.

JUSTICE MOORE: May I then go from there to ask you one question that I thought you were trying to address, and maybe I misunderstood you? Is it your position that in this case, given the facts that are in this record, there was no basis for giving such enhanced agreements to Viacom, because Viacom was an anxious and willing bidder and your client was in the same position?

MR. WACHTELL: I think that there was

no basis to do it on September 12th, because the deal was not remotely a sweet deal. It was not necessary to induce Viacom to bid. Mr. Davis conceded that it was not necessary to induce QVC to bid. And a fortiori, it was not necessary to do it on October 24th, when you had everybody, every Baby Bell, everybody else has come banging on the door, and it is clear that there is an inordinate amount of interest of parties to acquire Paramount.

It is certainly not necessary at that point to use these defensive mechanisms. They were used as war, of the War and Peace. They were used to lock up. That was what the contemporaneous memorandum showed even back on September 12th.

JUSTICE MOORE: Is it your contention that they were used to block QVC or any other bidder?

MR. WACHTELL: Yes. That was stated by Mr. Davis. Mr. Davis stated, "No hostile bidder." Not just us. "No hostile bidder is going to succeed in getting in the way of our transaction." I mean that has been the position of these people. They concede it. They say, "We were not under Revlon. We do not have any duty to maximize value. We don't have to talk about the frontiers of present or long

term."

Their conceded position here is that they weren't trying to do it. That was the testimony of their directors. The testimony of their directors was Revlon says you have to sell the company to the highest bidder. Mr. Davis, upon deposition said -- and I asked him. "I don't think anybody was interested in selling the company to QVC." Then he gets -- in a press release he says, "No hostile takeover bid will be permitted to obstruct the Paramount-Viacom merger."

JUSTICE VEASEY: But you have to read that in context.

MR. WACHTELL: The context is --

JUSTICE VEASEY: The context -- I mean you scoff at the idea that they were making a business judgment on a strategic alliance for the future, but that's the context in which that statement was made, as I understand it.

MR. WACHTELL: Your Honor, at that point, when he made that statement, we had an offer on the table that was worth $2 billion more. And the evidence is that there is no hard or even soft evidence in this record that the Viacom deal would

bring higher values to the stockholders. There is no economic analysis by any qualified person. All you get is testimony from the directors, "Well, our management felt comfortable with them," and, "Well, you know, some mesh of the businesses."

JUSTICE VEASEY: You fault their process.

MR. WACHTELL: I certainly fault their process.

JUSTICE VEASEY: And consequently, you fault the outcome of their conclusion? But this doesn't exclude the hypothetical case, not in your view of this case, where the board does look at everything, does make a judgment about the strategic value, weighs that against cash in hand, if you will, and says, "The long term strategic value is important, even though they will need minority stockholders." That could be within a range of reasonableness.

MR. WACHTELL: Yes. I am not prepared to say that a board does not have a role even under Revlon in looking at long term. I think an informed objective board that is not playing games, and that gets -- does its job can indeed

evaluate. But even then, what is the consequence of -- suppose they were to decide one offer is better than the other.

JUSTICE VEASEY: Let me interrupt you with that rhetorical question and ask you what this language in Time-Warner means at page 1154. "Directors 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," citing Revlon?

MR. WACHTELL: Yes, Your Honor. That very precisely was in the context that this court had determined that the corporation was not in a change-of-control mode. I think you have a very, very different -- the question was: Are the stockholders going to substitute their view for the directors making an acquisition that the corporation was embarked upon? That was the issue in Time-Warner.

JUSTICE VEASEY: It all comes back to change of control.

MR. WACHTELL: It comes back to the fact that when you have a change of control transaction such as this, even if the board

determines, absolute good faith, full-informed basis, reasonable, that one transaction is better than the other, they still can not cram it down. They can put it to the stockholders. They can enter into a merger agreement and give the stockholders the opportunity to vote upon it. They can recommend it. But there is nothing in Delaware law that has ever remotely suggested that it is open to stockholders -- the directors, just because they think one transaction is better than another, to cram it down --

JUSTICE VEASEY: When you say cram it down, you are referring to the fact that they would not let the stockholders take advantage of it because they wanted to keep the rights plan in the way to prevent it?

MR. WACHTELL: That is correct. Where the only offer they were prepared to let go to the stockholders is a front-end loaded partial coercive offer.

JUSTICE VEASEY: So is yours.

MR. WACHTELL: Yeah, but we are not asking ours be crammed down. That's the point. I think it would be just as wrong to cram ours down on the stockholders. What we have said is you have to

give the stockholders a meaningful choice here. Ours wasn't at the time in Chancery. In today's market price, yes, it is --

JUSTICE MOORE: Is it that you are simply prepared to let the market take its course?

MR. WACHTELL: Your Honor, I think there are many things that the board could do here.

JUSTICE MOORE: No. No. I'm speaking of if you prevail.

MR. WACHTELL: Yes.

JUSTICE MOORE: Is it your position that the market will then just take its course?

MR. WACHTELL: Not necessarily. That's my point. I think that a -- what we suggested previously is let the two offers go to the stockholders simultaneously. Now we are told that would cause terrible confusion.

Very simple way to remedy that confusion and make sure no stockholder is prejudiced, all they have to do is ask each bidder to agree as a condition for their pulling the rights plan that if the bidder is successful and gets more than 51 percent, that it will then extend this offer for five days to let people who have tendered into the other

offer pour over so no one will be left out and it will not be coercive in any way, shape or form.

We are not remotely arguing for director passivity here.

JUSTICE VEASEY: We don't require in lifting the plan to have it be a free for all in order to -- that is not necessary for our decision.

MR. WACHTELL: No, but the board -- No, it certainly is not, Your Honor. I just gave you hypotheticals of what a well-motivated board could do here.

JUSTICE HOLLAND: Coming back to what a board could do, on page 14 of your answering brief, in a footnote, you have some notes that the Paramount advisers evidently prepared before the meeting, that characterize the Viacom offer as onerous, and indicating that one of its effects would be to preclude QVC from accomplishing what it wanted to do.

Based on the depositions that were taken, is there any evidence in the record that the board knew when they voted on the 24th they were voting for something their own advisers characterized --

MR. WACHTELL: No. The evidence is

that Mr. Oresman, after he prepared this memorandum in consultation with Lazard the night before the board meeting, destroyed it. And the board was never told about it. And we would never have known about the memorandum if a copy had not turned up from the files of Lazard. That was the record evidence with respect to this damning memorandum.

JUSTICE VEASEY: Let's me ask one question about that. Your opponents say this memorandum is helpful to their cause because it shows good reason on the board's -- part of the board considered all factors. Are you saying because -- you interpret it differently, obviously. But are you also saying that because it was destroyed we should draw an inference against Paramount?

MR. WACHTELL: Your Honor, I think there are two issues here. Let me answer the implicit question first. It is not just because it was destroyed, but because the substance of it was never conveyed to the board, it's not the board that was considering these factors at all. This was Lazard and Oresman reaching the conclusion that the offer that they were going to put before the board was coercive, would stampede stockholders in and QVC

could not win at any price. That's what the memorandum says. The board never considered these factors. They weren't told about the memorandum.

JUSTICE VEASEY: Isn't that true of a partial tender offer, whether it's 43 percent or 51 percent? It's coercive?

MR. WACHTELL: That's what the memorandum says. Yes, that's what Unocal says, if it's front-end loaded.

JUSTICE VEASEY: Yes, front-end loaded.

MR. WACHTELL: Absolutely. That's this court's holding in Unocal.

JUSTICE HOLLAND: The board -- did the board minutes reflect, in light of this memorandum which says the purpose of the rights plan was to protect the stockholders against coercive offers, why they would want to redeem it to permit a coercive offer to go forward?

MR. WACHTELL: Of course not. These board minutes are skeleton -- talk about inferences. These board -- these board minutes are skeleton minutes. No notes were taken. If you can belief it, the testimony is that the secretary of the meeting,

the person who was going to prepare the minutes of a Delaware corporation, took no notes whatsoever.

JUSTICE MOORE: When I read Mr. Greenhill's testimony, he said he was taught by your firm not to take notes.

MR. WACHTELL: I must have missed that page in his testimony, Your Honor. But Mr. Greenhill was not the secretary of the meeting. We asked directors were they told not -- we asked directors were they instructed not to take notes at the meetings, and we were told they can't answer that. Attorney/client privilege. You have --

You do not have the kind of record here that one would expect. You do not -- you have skeleton minutes. You have no notes taken. You have anything that was taken destroyed. You have this critical memorandum destroyed. And yes, I think you can draw an inference that there were probably lots of other documents that either never came into existence that should have or came into existence and were destroyed.

JUSTICE VEASEY: But we don't have to draw that --

MR. WACHTELL: You do not have to

draw that inference, but is it a fair inference? Yes, it is a very, very fair inference.

Your Honor, I think I have covered most things. One thing that I wanted to -- well, to go back to this question of long-term values, they -- and the meeting of November 15th, and the fact that they never talked to us, well, they say, "What's the point of talking to you? You know, all you are is -- you are only bringing 10 percent of the assets to the table. We know our own assets. All you are is an 800 number."

JUSTICE VEASEY: And they said you didn't have your act together as far as financing.

MR. WACHTELL: We had an offering that was closing on November 26th. This board meeting was held on November 15th. We were in the process of getting the bank commitments. They never asked us, as the Vice Chancellor points out -- back in October they came to us and said, "Where do you stand on financing?" What --

JUSTICE VEASEY: If they asked you on November 15th, what would you have told them?

MR. WACHTELL: We would have told them, as we put in an affidavit -- in fact, there was

an affidavit on the morning of November 15th, two affidavits, one by -- we prepared them for Chancery, for the hearing, one by our investment banker and one by our financial vice president, which detailed the fact that we were indeed getting the financing, that there was no problem getting the financing, that it was all being worked out. The board was never told of those affidavits.

It wasn't a matter of our not having our act together. It was a matter of people coming in with a slanted presentation and saying, "These people's offer is illusory."

And they did not only say so -- it's a very interesting thing here, Your Honor. They make an argument in their brief that this whole thing was really a terrible mistake. They really planned to have another board meeting, after midnight on Thanksgiving eve. They had not finally determined this at all. It is the most astounding argument, that this whole thing was premature and they really weren't planning -- no one ever said they really were going to pull the pill for Viacom. This is just myth.

What did they tell the Vice

Chancellor? Here is Mr. Ostrager telling the Vice Chancellor on the argument. He is saying --

JUSTICE VEASEY: This is on the form of order. Is that correct?

MR. WACHTELL: No. Before this, Your Honor. On the merits argument Mr. Ostrager said, "How can you tell us we can't pull the pill for Viacom? We are contractually obligated to do so. We have no power not to do so."

JUSTICE VEASEY: So you think --

MR. WACHTELL: Why did he say that? Not only because we didn't have financing, but he argued it was illusory because it was conditioned on an injunction against the lockups. This was his argument. He said, "The offer is conditioned on this court invalidating terms of the existing agreement between Paramount and Viacom. The offer is as a matter of law illusory because it is conditioned on action that the Court has yet to take and we say should not take."

So he is basically saying that their position on November 15th was -- and indeed it was -- that they were powerless as a matter of contract to consider our offer because it was -- it was

conditioned on an injunction against the lockups.

JUSTICE VEASEY: I heard you say conditioned on action the Court had to take but hadn't taken. You meant to say the board.

MR. WACHTELL: No. The Court.

JUSTICE VEASEY: The Court.

MR. WACHTELL: Yes. He is saying because we conditioned our offer on an injunction against the lockups, that this rendered our offer illusory. That was his precise argument. This is at JA 6395 and JA 6400. This is his argument: It is illusory. We are contractually precluded -- not to refuse to pull the pill, because we are bound to pull the pill unless there is a better offer. Your offer isn't a better offer because it's conditioned on the Court issuing an injunction.

JUSTICE HOLLAND: Doesn't the validity of that position depend on whether or not giving the lockups was a proper exercise of the board's fiduciary duty?

MR. WACHTELL: Yes, it does, Your Honor. The point I'm making is they never purported to consider our offer. As Mr. Ostrager told the Court, they deemed themselves contractually

precluded, not only because there was a financing condition, which they never sought to find out about, but also because there was an injunction condition. So you have circular reasoning here.

They come in to this court and they say the injunction was -- finish my sentence. The injunction was totally unnecessary. It was premature. We are going to have a phantom board meeting after midnight. They told the Chancellor, "We are powerless not to pull the pill."

JUSTICE VEASEY: I think we have your point. Thank you.

MR. WACHTELL: Thank you, very much for your courtesy, Your Honor.

JUSTICE VEASEY: Mr. Abbey.

MR. ABBEY: Good morning, Your Honor. My name is Arthur Abbey. I speak on behalf of the class of Paramount shareholders in the consolidated class actions. We have a singular interest. I think we are the only ones here today who have such a singular purpose. And I want to bring out to this court --

JUSTICE VEASEY: How does your position differ from QVC's position?

MR. ABBEY: Your Honor, it differs in the following regard: We think that this auction essentially is in the seventh inning, that Paramount has a duty to review the offer by QVC, and that the pill should pay stay in place for both. It should only be used, under Macmillan, at the end of the game, not in the seventh inning.

So while QVC's position is -- is that the pill should be pulled as to both, we don't take such a radical view. We think that the pill can be used effectively to enhance shareholder value.

JUSTICE VEASEY: So you would embrace what Judge Sand said in the Federated case, that the pill is a shield and a gavel running the auction?

MR. ABBEY: That's what we think. We don't think it's being used that way by Paramount. We think that essentially if this court were to reverse, we would have, because of the coercive nature of the Paramount offer, we would have the Paramount -- the Viacom offer consummated immediately, because of the coercive two-tier front-end loaded offer.

So in that situation, we think that the pill should be there. And why we say that this

auction is not over, on page 6941 of the joint appendix, there is a letter dated November 19th from Mr. Diller to Paramount's board. And I quote from that letter. That's page 6941. "Again, QVC requests that the Paramount board engage in negotiations with QVC with respect to its offer, which remains over $1 billion greater in value for the Paramount stockholders than the Viacom offer. We and our advisors..." -- and I emphasize this, Your Honor -- "We and our advisors are now, and have always been, prepared to sit down with you to negotiate all aspects of our offer."

And we view 'all aspects' to mean that price is one of the items that still could be negotiated here.

The Vice Chancellor, in his opinion held that meeting with QVC was the last thing management wanted to do.

Now frankly, there is nothing in this record to indicate that Viacom has put on the table its highest offer. And where you have a bidding contest for control, we think that that's where it should come to.

JUSTICE HOLLAND: Mr. Abbey, as you

know, before the Court we are reviewing the Vice Chancellor's action with respect to the stock option, also. What's the stockholders' position with respect to the stock option, and do you think that is separable from the termination fee?

MR. ABBEY: I do in the following regard: We view the stock option as being invalid from day one. It was a time bomb waiting to go off. It was meant to -- the testimony in the record is clear that it was meant to be preclusive. It was defensive. Unocal applied from September 12th going forward.

JUSTICE VEASEY: Why was it void ab initio?

MR. ABBEY: It was void ab initio because when the board agreed to the $69.14 option exercise price, the board was not informed --

JUSTICE VEASEY: So are you saying --

MR. ABBEY: -- as to what the highest price was.

JUSTICE VEASEY: If you had brought a hypothetical injunction action on September the 13th, you would have gotten an injunction against that lockup because it was void on its face?

MR. ABBEY: I don't know if we could have gotten an injunction on that basis at that time. But I do think that because there was no cap, and because of the note feature to that option, that the option clearly was meant to be preclusive. And we would have been, on September 13th, operating in a vacuum. The Court might have said, "Is there any evidence that there is any higher offer out there."

JUSTICE VEASEY: It could come down to reasonableness.

MR. ABBEY: It would come down to reasonableness. Yes. I think it would come down to reasonableness. I think that's what the Delaware law is, whether it's under Unocal or Revlon. Any time you judge the board of directors, you have to apply a reasonable -- in some instances it requires enhanced scrutiny.

JUSTICE VEASEY: Is reasonableness a range or a point?

MR. ABBEY: Reasonableness is a range. I think that would be the situation.

JUSTICE MOORE: In what respect do you view any of those various devices, the lockup, the stock option, the termination fee, the no-shop

clause as being employed to spur the bidding to benefit your clients?

MR. ABBEY: In this case?

JUSTICE MOORE: Yes. Since you said that you don't -- you do see a distinction between various --

MR. ABBEY: I do. I'll tell you what the distinction is. When the board agreed to the $100 million for the bust-up fee, it was an estimate as to what it would cost Viacom out of pocket to do this. So there seems to me there was a reasonable standard to which to judge the $100 million.

JUSTICE HOLLAND: But Mr. Abbey, wouldn't the proper focus be on the 24th? Moving away from the 12th, was it still reasonable to grant the termination fee on the 24th?

MR. ABBEY: I don't think on the 24th, given the fact that QVC had made its offer on the 20th -- I think that the board certainly, again using a reasonable standard, could have, if it wanted to -- I think the record is clear, and the Vice Chancellor used the term it was more a pretext than a problem on November 15th. But I think the same thing was true on November 24th, that it was more of a

pretext.

They could have, in my opinion, at least, negotiated and certainly reduced, capped the stock option, perhaps negotiated on the bust-up fee. I'm not -- there is no cross-appeal. I think that the bust-up fee is really not something that we complain about at this point in time.

JUSTICE HOLLAND: No. The reason the Court is asking the questions, Mr. Abbey, is because they both originated with the October 24th agreement. And Viacom is arguing in this court that it wasn't logical to permit the termination fee to go forward and invalidate the stock option, that the same logic applies to both.

MR. ABBEY: Well, I don't think that's true. I think that the bust-up fee is meant to compensate --

JUSTICE HOLLAND: You don't think that's their argument or --

MR. ABBEY: No. That's their argument. I don't think it's a valid argument. I think the basis of the bust-up fee is to reimburse Viacom for its expenses. But the stock option I think really coercive, particularly one with note

feature and the cap. I think that whether it was entered into on September 12th or October 24th, the same reasoning applies to the stock option. It was really a defensive mechanism designed keep somebody else away from buying Paramount.

Turning to the question of what law applies here, we do say that it comes down to a change of control and that Revlon applies here. You don't need a breakup --

JUSTICE VEASEY: Your opposition argues that there has to be a breakup, that it has to be inevitable.

MR. ABBEY: No. We think Gilbert against El Paso, where there was a 51 percent change of control and no breakup states the law, that you do not need a breakup in order for the Revlon trigger to occur.

JUSTICE MOORE: Or the Unocal standard to apply.

MR. ABBEY: Or the Unocal standards to apply. That's correct. I might --

JUSTICE VEASEY: Is there any policy reason why there should be a requirement of a breakup?

MR. ABBEY: In what regard, Your Honor?

JUSTICE VEASEY: That the duty to obtain the best available value for the stockholders happens only when there is a breakup. Sale of control alone doesn't do it. Would there be any policy reason for such a ruling?

MR. ABBEY: I don't think so, because you have a premium that Paramount sought. And it would seem to me that if you have to get a premium -- and I think there was questioning by the Vice Chancellor during the argument. Is any old premium sufficient, a 5 percent or 10 percent? Or does it require the highest possible premium? It would seem to me there is no logical basis for that.

This is not Time-Warner, because clearly in Time-Warner there was no change of control in Time. I would like to make one point which I think distinguishes this from Time-Warner. In Time-Warner there were cross options. Warner had an option against Time and Time had an option against Warner. Here there was only a one-way option.

That is, Viacom had an option against Paramount. That is because Viacom, if there is any

question about this, clearly was acquiring Paramount. The option in this case was one way. And we think that under Barkan it's a requirement that you get the highest value in this situation. Again, the option, as I've indicated, is preclusive.

I would like to briefly just turn to November 15th.

JUSTICE VEASEY: It will have to be brief, because your time is almost up.

MR. ABBEY: The board essentially was not informed. It hid its head in the sand. It hid behind the no-shop agreement. The fiduciary out was there.

Why was the fiduciary out bargained for on October 24th? The fiduciary out was bargained for so that Paramount could fulfill its Delaware duties. If it bargained for a fiduciary out, it should have, on November 15th, exercised its rights under that and looked at Paramount at that point, and looked at the -- at QVC

Lastly --

JUSTICE VEASEY: Your time is up, Mr. Abbey.

MR. ABBEY: Okay. Thank you, very

much.

JUSTICE VEASEY: Mr. Ostrager, you saved, I believe, eight minutes. Seven minutes. Mr. Taylor is very precise.

MR. OSTRAGER: If Your Honor please, I have been looking forward to having for the first time in my professional career the last word with respect to Mr. Wachtell. I must take great exception to Mr. Wachtell's characterizations of the record both in terms of the proceedings before the Chancery Court and the record before the Chancery Court.

With respect to the proceedings before the Chancery Court, I want to call the Court's attention to colloquy before Vice Chancellor Jacobs. I said, quote, The Paramount board has reserved the right to terminate the merger agreement and the tender offer if it determines in the exercise of its fiduciary duties that there is a better alternative available to Paramount shareholders." I said, quote -- and it's page page 6397 --

JUSTICE HOLLAND: Mr. Ostrager, what are the dates of these statements?

MR. OSTRAGER: This is before Vice Chancellor Jacobs on November 16th. I said, quote,

"If, as and when QVC makes a real offer to Paramount, the Paramount board will consider that real offer on its merits."

JUSTICE VEASEY: Didn't you say on November 24th that, "But for Your Honor's ruling, the stockholders would have their cash at midnight"?

MR. OSTRAGER: In connection with the bond, Mr. Richards did say the Court should consider what fund would be available to protect the shareholders if, for example, the market cratered and Paramount lost the Viacom deal and lost the QVC deal.

I think the key point here is -- and Justice Veasey, you addressed this. The Paramount board has always recognized that it has to get the best transaction for its shareholders. And best means long term and short term.

JUSTICE MOORE: How has it done that when it has turned down a $2 billion advantage?

MR. OSTRAGER: The Paramount board has not turned down a $2 billion --

JUSTICE MOORE: Why has it not acted on it and addressed it in a fully-informed way and not under the comparisons that the Vice Chancellor found were defective?

MR. OSTRAGER: It has on every stage here. On October 24th, it obtained equivalence in the front end. And the Vice Chancellor found that the equivalent offer that was obtained was better in the short term and on the long term. That is a specific finding that the Vice Chancellor made.

On November 15th, the Paramount board was presented with an un -- a conditioned unfinanced offer, no provision with respect to back end.

JUSTICE MOORE: But your own investment banker, Lazard, had it been asked of it, said the financing was going to be readily available.

MR. OSTRAGER: We understand the --

JUSTICE MOORE: Why wasn't that conveyed to the board?

MR. OSTRAGER: The board was well aware that it was financeable. And the board was well aware --

JUSTICE MOORE: Where is that in the record?

MR. OSTRAGER: Lazard had told the board in earlier meetings that the QVC proposal could be financeable. But QVC made a proposal which was conditional and QVC made a proposal that was not

capable of acceptance.

JUSTICE MOORE: Weren't some of those conditions similar to conditions that are now imposed by Viacom?

MR. OSTRAGER: They were. But Viacom was a guaranteed transaction. That goes to my next point.

JUSTICE MOORE: Were those conditions that Viacom had imposed and were so clearly called to the board's attention with respect to QVC also disclosed to the board?

MR. OSTRAGER: Yes, they were, Your Honor.

JUSTICE MOORE: Where is that shown in the record?

MR. OSTRAGER: I'll get to that in a moment. I want to make clear that the Viacom transaction was a guaranteed transaction.

JUSTICE MOORE: Please tell me, where is that found in the record, that these total fully-disclosed comparisons that it is said were not made were in fact made?

MR. OSTRAGER: At each of the board meetings, the board was advised of the contractual

arrangements that Paramount had with Viacom. At each of the board meetings, the board was explained that the Viacom transaction was guaranteed under the merger agreement, on September 12th. It was guaranteed on October 24th that even if the tender offer failed, the merger part of the agreement would remain in place.

JUSTICE MOORE: Was it told, specifically told, that certain of the conditions in the QVC bid were similar to the conditions that Viacom had imposed?

MR. OSTRAGER: I believe that the board was aware of that.

JUSTICE MOORE: Where is that in the record?

MR. OSTRAGER: I believe that on October 24th the board was -- it was explained to the board that by going to a tender offer format, there were going to be conditions in the tender offer. But if those conditions failed, the Viacom transaction was still a guaranteed transaction.

Mr. Wachtell made much of the October 24th memo. The October 24th memo is the best document in this case demonstrating that the

Paramount directors discharged their fiduciary obligation.

JUSTICE VEASEY: He said the board never saw it.

MR. OSTRAGER: The October 24th memo was prepared by the Paramount negotiators to address deficiencies in the proposal that Viacom made to Paramount. Every single one of the deficiencies identified in the October 24th memo was cured before the board met, every single one of them.

JUSTICE VEASEY: Where is it in the record that the raising of these questions and the answers to the questions were presented to the board and discussed with the board and the board maturely considered them?

MR. OSTRAGER: The board was given an explanation on -- at the board meeting on October 24th of the state of the discussions with Viacom. Reference was made to the proposal that was made by Viacom, and the changes to that proposal that were negotiated by the Paramount negotiators.

If Your Honor will look at Mr. Wachtell's footnote on page 14 and 15, Your Honor will see that every single one of those deficiencies

in the Viacom proposal was cured. I specifically direct to you eight and nine. Viacom said they could walk away from the merger agreement. That was negotiated away. Viacom wanted the pill to be pulled for Viacom and no one else. That was negotiated away. We have to look at this as the Bayliss Manning article --

JUSTICE MOORE: No. Let's go back to that footnote. Mr. Oresman's own note begins with the heading, "There 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."

What is that intended to mean?

MR. OSTRAGER: That was intended to mean that the proposal that Viacom had made, which was, "You must pull the pill for Viacom only," would have -- would have prevented the Paramount board from exercising its fiduciary obligation. Paramount rejected that. Paramount, in the flux of an ever changing situation, as Mr. Manning said, in the real world -- in the real world in September and October and November, the Paramount board had a guaranteed transaction with Viacom.

JUSTICE MOORE: Excuse me. Look at Number 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."

MR. OSTRAGER: That is correct.

JUSTICE MOORE: That doesn't sound like you are trying to deal openly with both sides.

MR. OSTRAGER: Your Honor --

JUSTICE VEASEY: What's the board going to do when it's told that the QVC offer can't be consummated?

MR. OSTRAGER: The board is going to take the transaction that is the best transaction for the shareholders. The Paramount --

JUSTICE MOORE: Lazard was not even asked to give an opinion.

MR. OSTRAGER: Lazard said that the Viacom proposal was fair. QVC has --

JUSTICE MOORE: No. Excuse me. It says, "Not expressing an opinion regarding the QVC offer."

MR. OSTRAGER: That is correct.

JUSTICE VEASEY: How, then, was the board given both sides of the picture by financial

analysts who were capable of rendering a proper opinion under Section 141(e) of the general corporation law?

MR. OSTRAGER: The board evaluated each and every one of the nine offers that QVC made at the time that they were made, none of which were ever capable of acceptance.

JUSTICE HOLLAND: Mr. Ostrager, why was it in the best interests of the shareholders for the board to vote on this action Sunday morning, October 24th, and not to -- the directors, and not to wait?

MR. OSTRAGER: The Paramount board wanted to preserve its strategic merger with Viacom, which it believed was the -- in the best interests of the shareholders for the long term and for the short term. Viacom was making proposals and conditions.

As Mr. Manning said, in the real world, in the real world negotiations, the board responded on an informed and deliberate and in a good faith manner, to do what was best for the shareholders. Paramount never abandoned its right to pull the pill for the best offer, and it's never made a decision as to which the best offer is. It hasn't

precluded anything.

JUSTICE VEASEY: Thank you.

MR. OSTRAGER: It has preserved it's locked-in Viacom offer.

JUSTICE VEASEY: Thank you. I think this court is aware of what the real world realities are.

MR. OSTRAGER: Thank you.

JUSTICE VEASEY: Mr. Baskin, I think you have five minutes.

MR. BASKIN: I have five minutes, Your Honor. If it may please the Court, let me rush through my points rather expeditiously.

Number one, I remind the Court -- now the record is closed. Mr. Wachtell and Mr. Abbey have expressed their views. As we sit here today, there is not one shred of evidence in the record that the stock option has served to preclude anything.

Indeed, as Your Honors know, if you look at pages nine -- look at our brief, our reply brief, at pages seven through eight. We show the Court both as a matter of law -- that no court has treated a 20 percent stock option as legally preclusive. We show as a matter of fact --

JUSTICE MOORE: But has there ever been a stock option, as Mr. Greenhill testified, that involved the payment of -- by a note that is subordinated as this one was, that would dilute -- have a dilutive effect?

MR. BASKIN: The answer is yes, Your Honor. In fact, if you look again at the record, at our brief, number one, the Buffalo Forge case in the 2nd Circuit, which upheld a 20 percent stock option, was paid with just such a note. Number two, there is an affidavit in the record of similar such cases.

But let's say you were right. Let's say in fact that there is something infirm about the note. That is the only thing we've heard in the course of this argument as to what is bad about the stock option. In all other respects, it is totally customary. Let us say the note feature was --

JUSTICE MOORE: It is totally customary to give this size stock option?

MR. BASKIN: Absolutely. We showed in an affidavit before the Court, which has never been contested, that in merger transactions precisely like this, stock options of this rate, 19.9 percent, there are over two hundred of them.

JUSTICE MOORE: That's when you are using it to spur the bidding. How is it used to spur the bidding?

MR. BASKIN: That's when it's used to induce a bidder to come in the first instance. It is not to spur the bidding.

JUSTICE MOORE: Sorry. I participated in a number of cases where I think that's what we said. It's appropriate to spur the bidding.

MR. BASKIN: But the issue is whether it is also appropriate to induce a bidder to come in in the first instance.

JUSTICE MOORE: But that I view as partly spurring the bidding. Now your client, it is said, was an extremely anxious suitor. Your client, Mr. Redstone, was quoted as saying he had been waiting for three or four years to get Mr. Davis to the alter.

MR. BASKIN: Number one -- we addressed that in our brief. Number one, the fact of the matter is that assumes that my client, as the suitor, was prepared to do the deal on any terms at any time. That is plainly not true. The

uncontroverted record here, everyone negotiated a transaction without exception, and the Court so found.

JUSTICE MOORE: Well, excuse me. Excuse me. I would like you to address this. The hang up, according to the record, also was that Mr. Davis wanted to be the chief executive officer.

MR. BASKIN: But he was told he could be the chief executive officer early on, still, in July.

JUSTICE MOORE: But it dealt with his powers as chief executive officer.

MR. BASKIN: The point is whatever Mr. Davis wanted, we were not going to do the deal without the stock option. That is the uncontroverted fact in the record. Every single negotiator said, "No stock option, no deal."

JUSTICE VEASEY: Doesn't the viability of your stock option rise and fall with the fiduciary duties of the Paramount directors?

MR. BASKIN: The viability of the stock option rises on whether or not it was a proper exercise of business judgment as of September 12th to try to induce what they perceived to be a strategic

merger.

JUSTICE VEASEY: How about the reasonableness of the business judgment on October 24th, when the deal was amended?

MR. BASKIN: On October 24th, the issue was this: They were faced with a takeover offer which they perceived as seeking to disrupt the strategic merger, produce, as we showed in our brief, a tremendous flow of shares away from long-term institutional investors to short-term investors.

We mirrored their stock option. Excuse me. We mirrored their tender offer. When we went before the board, the board accepted the fact that in order to, number one, preserve the strategic merger, and number two, Your Honor -- this is in the Court's finding. They got the best value on the table.

They agreed to have us restructure our transaction to reflect this new reality. They gave us no sweetener at that point in time. The stock option was already vested for six weeks. We weren't going to give it back. We were not going to say, "By the way, we want to do a new transaction, so we'll give back what took months and months to

negotiate."

JUSTICE HOLLAND: Mr. Baskin, the price had already been vested for six weeks, and yet your client unilaterally raised the price twice, and the amount that your client raised the price far exceeded the value of the stock option. Isn't that correct?

MR. BASKIN: I'm not -- my client raised the price on October 24th to match the price that was put on the table by QVC, at least putatively was put on the table, because they wanted to effect the strategic merger. So what they did is they went out. They basically brought in equity investors and restructured the transaction from a stock-for-stock merger to a tender offer. In exchange for that they got nothing new. The stock option was carried forward, intact, from September 12th.

JUSTICE HOLLAND: My question is, you were never saying to Paramount, "We have a deal on September 12th at $69. We are holding you to that." You changed the price, but you seem to be saying, "But we are going to hold you to the stock option." Is that correct?

MR. BASKIN: It was clear and it

would have been folly for us to do otherwise. We were not going to turn back the vested stock option on October 24th at the same time that we were giving a much sweeter deal.

The stock option had vested in September. It vested because it was necessary to induce us into the transaction. There is no proof in the record it has ever forestalled a single bid as either a matter of law or fact. And unless the Court's ruling is going to be that stock options can not be utilized in order to effect merger transactions -- and there are over two hundred such cases where they have been used exactly for that purpose.

JUSTICE VEASEY: We don't have to come to that conclusion to strike down -- to affirm the Chancellor's striking down of the stock option in this case if we come to the conclusion that the board was powerless to consummate the stock option transaction because it was a violation of their fiduciary duties. Isn't that true?

MR. BASKIN: If you conclude on September 12th that the board --

JUSTICE VEASEY: Why do we have to

pin it to September 12th? Why not October 24th?

MR. BASKIN: Either day.

JUSTICE VEASEY: Or later.

MR. BASKIN: That's right. And either day the question is whether or not the board exercised proper fiduciary duties in inducing us to bid on September 12th, and indeed to permit --

JUSTICE VEASEY: Is there a total package of fiduciary duties? Not just the inducing but the maintaining of the stock option. Isn't that --

MR. BASKIN: That is correct.

JUSTICE VEASEY: It's also part of the whole package, the stock option and the no-shop, that has to be considered as a whole. Doesn't it?

MR. BASKIN: I think so. But in each case, you have specific findings. For example, in connection with the stock option, that the stock option was needed in September to induce the transaction. In October, you have the finding that it generated the best transaction, either long term or short term.

And I submit to the Court the real issue is, when you have a commonplace mechanism like

this, which is routinely utilized to generate exactly transactions like this, time after time, and the only difference -- the only issue raised here is the note issue, which is a false issue, because the note was a freely marketable note --

JUSTICE VEASEY: I think we have your point.

MR. BASKIN: Thank you.

JUSTICE VEASEY: Thank you Mr. Baskin. We'll suspend here and the Court will confer briefly here at the bench.

The Court has not decided this case, but we will go back and confer. What we would like to do is to adjourn this proceeding until 4:00 o'clock today.

We'll come back into this courtroom at 4:00 o'clock today, and we may have a decision, in which case we may have an order. Certainly, we won't have an opinion. Or we may not have a decision. And at that time, we'll give you better information about when we will have a decision. I want to --

The Court would like to compliment -- all the lawyers in this case did an excellent job for their clients in briefing and arguing this matter.

It was excellent lawyering, and it's a privilege to hear that kind of an argument presented to this court. We want to thank you.

The Court will stand in recess until 4:00 o'clock.

(Court recessed at 12:18 p.m.)

- - -

AFTERNOON SESSION

4:03 p.m.

JUSTICE VEASEY: Good afternoon. The Court appreciates everyone returning for this resumed session, and on behalf of a unanimous court, I have signed an order setting forth the decision of the Court.

It is not feasible because of the exigencies of time for the Court to complete an opinion setting forth more comprehensively the rationale of the Court's decision, but unless otherwise ordered by the Court, such an opinion will follow in due course.

These are some excerpts from the order: The consequence of the Viacom tender offer and the amended merger agreement, which is called the Paramount-Viacom transaction, is a change of control of Paramount. That change of control was also a key provision in the original merger agreement entered into on September 12, 1993, for which Paramount contends it received a control premium. The public stockholders, in the aggregate, currently control Paramount. Following the consummation of the Paramount-Viacom transaction, the public

stockholders, in the aggregate, would be in the minority.

The majority stockholder following the consummation would be Viacom's current chairman and chief executive officer, Mr. Sumner Redstone. The current Paramount public stockholders would have received cash and a minority equity voting position in the surviving corporation. The control by Mr. Redstone of the surviving entity would provide him the voting power in the future, under certain circumstances, to cause a breakup of the company, to cash-out the minority stockholders, or to alter materially the equity interests of the minority public stockholders. Irrespective of the present board's vision of a long-term strategic alliance, once control passes to Mr. Redstone, he has the power to alter that vision.

The Paramount directors, in entering into the original merger agreement and in making decisions on related aspects of the Paramount-Viacom transaction, concluded in their business judgment that the Paramount-Viacom transaction constituted a sound strategic alliance. The traditional business judgment rule was not applicable, however, to

decisions made by the Paramount defendants at times relevant to the issues before the Court of Chancery and before this court, since Paramount's strategic alliance with Viacom was predicated upon a sale of control to Mr. Redstone. The Paramount-Viacom transaction also included defensive measures that were improperly designed to deter other potential bidders. In either case, established Delaware law set forth in the holdings of the following decisions of this court, and other decisions, were thereby implicated:

These are just the shorthand references to these decisions, set forth in reverse chronological order. Technicolor, Gilbert, Time-Warner, Barkan, Citron, Macmillan, Ivanhoe, Revlon, Household, Unocal, Smith versus Van Gorkom and Pogostin.

Under the circumstances of this case, the Court of Chancery properly applied enhanced scrutiny to the decisions of the Paramount directors relating to the QVC tender offers and the Paramount-Viacom transaction. In applying enhanced scrutiny, courts will not substitute their business judgment for that of the directors, but will

determine if the directors' decision was, on balance, within a range of reasonableness, citing Unocal, Macmillan and Nixon versus Blackwell.

While the Paramount directors were entitled, indeed required, to bring to bear their independent, informed, good faith, reasonable business judgment on strategic issues, as they relate to the best interests of the Paramount stockholders, in the end the Court of Chancery and this court must be satisfied that the course of action determined by the directors in the context of the sale of control was reasonably calculated to secure the best value available to the Paramount stockholders. Any judgments of the directors as to strategic alliance issues must be consistent with that ultimate objective, where, as here, the strategic alliance is predicated on a change of control.

The obligations of the Paramount directors included the duties (a) to be vigilant and diligent in examining critically the Paramount-Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to summon, and act with due care on, all material information reasonably available, including information necessary to compare the two

offers to determine which of these transactions, or an alternative course of action, would provide the best value available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end.

Having decided to sell control of the corporation, the Paramount directors were required to evaluate critically whether or not all material -- material aspects of the Paramount-Viacom transaction (separately and in the aggregate) were reasonable and in the best interests of the Paramount stockholders in light of current circumstances, including: the change of control premium, the stock option agreement, the termination fee, the coercive nature of both the Viacom and QVC tender offers, the no-shop and fiduciary-out provisions, and the proposed disparate use of the rights plan as to the Viacom and QVC tender offers respectively.

These duties necessarily implicated various issues, including the question of whether or not -- questions of whether or not those provisions and other aspects of the Paramount-Viacom transaction separately -- (separately and in the aggregate): (a) adversely affected the value provided to the

Paramount stockholders; (b) inhibited or encouraged alternative bids; (c) were enforceable contractual obligations in light of the directors' fiduciary duties; and (d) in the end would advance or retard the Paramount directors' duty to secure for the Paramount stockholders the best value available under the circumstances.

The Paramount defendants contend that they were precluded by certain contractual provisions, including a no-shop provision, from negotiating with QVC or seeking alternatives. Such provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties under Delaware law, when selling control. To the extent that such provisions are inconsistent with those duties, they are invalid and unenforceable.

Since the Paramount directors had already decided to sell control, they had a duty to continue their search for the best value available to the stockholders. This continuing duty included the responsibility, at the October 24, 1993 board meeting

and thereafter, to evaluate critically both the QVC tender offers and the Paramount-Viacom transaction to determine if: (a) the QVC tender offer was, or would continue to be, conditional; (b) the QVC tender offer could be improved; (c) the Viacom tender offer or other aspects of the Viacom-Paramount transaction could be improved; (d) each of the respective offers would be reasonably likely to come to closure, and under what circumstances; (e) other material information was reasonably available for consideration by the Paramount directors; (f) there were viable and realistic alternative courses of action; and (g) the timing constraints which could be managed -- the timing constraints could be managed so the directors could consider these matters carefully and deliberately.

The Paramount defendants argued that the Court of Chancery erred by assuming that the rights plan was pulled at the November 15, 1993 board meeting. The problem with this argument is that under the merger agreement, Viacom would be exempted from the rights plan in the absence of further board action and no further meeting had been scheduled or even contemplated prior to the closing of the Viacom

tender offer. This failure to schedule and hold a meeting shortly before the closing date in order to make a final decision, based on all the information and circumstances then existing, whether to exempt Viacom from the rights plan was inconsistent with the board's responsibilities and does not provide a basis to challenge the Court of Chancery's decision.

The stock option agreement, the termination fee and the no-shop provision, taken together, were clearly designed to impede potential competing bidders for Paramount. The change of control feature and the defensive aspects of the Paramount-Viacom transaction, each independently, subjected the directors' decisionmaking to enhanced scrutiny to determine reasonableness. The Paramount directors' decision, on October 24, 1993, to proceed with the Paramount-Viacom transaction, which included a sale of control and all of the above described defensive measures, under the circumstances presented, was not reasonable, and thus in violation of their fiduciary duties.

Preliminary injunctive relief was appropriate, and the nature and scope of the relief ordered by the Court of Chancery on November 24 -- in

the November 24, 1993 order was within the discretion of the Court of Chancery. It appears to this court, however, that all the defensive measures contained in the September 12, 1993 agreements and reincorporated in the October 24, 1993 amended agreements are inseparable. Because there is no cross-appeal from the Vice Chancellor's decision declining to grant preliminary injunctive relief as to the termination fee, and since this appeal is from an interlocutory order, not a final order, it is unnecessary for purposes of this order for this court to determine whether the decision of the Vice Chancellor to treat the termination fee separately and differently was error.

To the foregoing extent, and without necessarily adopting or rejecting all findings and conclusions, or the rationale therefor, set forth in the Vice Chancellor's opinion and order, we affirm the November 24, 1993 order of the Court of Chancery.

It is ordered as follows:

A. The November 24, 1993 order of the Court of Chancery is affirmed;

B. This proceeding is remanded to the Court of Chancery for proceedings consistent with

this order;

C. Unless otherwise ordered by this Court, an opinion setting forth more comprehensively the rationale of this Court's decision will follow in due course; and

D. The mandate shall issue immediately.

The Court is now adjourned.

(Recess at 4:16 p.m.)

- - -

CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 140 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 10th day of December, 1993.

Official Court Reporter
of the Chancery Court
State of Delaware