Case: Technicolor
Taping Date & Location: May 5/31/2018 at Richards, Layton & Finger, Wilmington, DE
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Rohrbacher: Welcome. I'm Blake Rohrbacher sitting with Art Dent and Tom Allingham to discuss Cede II, the Cede & Co. v. Technicolor case, 634 A.2d 345, decided by the Delaware Supreme Court in 1993. The case started as a challenge of a third-party two-step acquisition of the stock of Technicolor Inc. by a subsidiary of MacAndrews and Forbes for $23 per share in cash. The initial petition was filed in March, 1983. The final appeal was decided in 2005. And the case was filed before some of the major Delaware Supreme Court cases decided key issues, Weinberger, Aronson, Van Gorkom, Unocal, and Revlon. And I want to ask you before we get going what do you think this litigation means today? Art?

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Dent: A lot of this case, one thing to kind of point out is the case started as an appraisal in 1983. And we can discuss--I'm sure we will discuss--how it became a liability action as well. But it started out as an appraisal and it was--it ended as an appraisal, but there were eight years there where they were liability claims as well. I think of this case, my takeaway is, if this case came before the court today, it would be one of the rare cases even today where the case went to court would have enjoined the transaction or there would be a finding of breach of the fiduciary, breach of the duty of care. And whatever that would result in in the way of damages.

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And I say that because as you pointed out like the facts in this case occurred before Van Gorkom, before Revlon, but I think if you look at the facts, even as found by the trial court, today, they would, the court would have to say there was not--they didn't satisfy

their Revlon duties. And it was--looking at it today, it would be considered a breach of fiduciary duty just in the way, just how quickly the transaction came about. So, I think that if it were decided today I think it would come at the liability case, I believe, would come out differently, maybe Tom feels differently, but that's how I see it.

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Allingham: Well, shockingly, I feel differently. I thought about this question a bit and I think that one answer is that this was, until Cede II, until what I think of as Technicolor II, the question of whether the business judgment rule or entire fairness applied, was, I think, pretty widely regarded as case dispositive. If you got entire fairness, you were going to lose. And so Cede II was the first in the appeal of the remand, was the first case that I know of where the parties engaged on the question of whether the case could be--a deal could be entirely fair in the face of a flawed process. That is to say in the balance of the question of fair price and fair dealing, whether you could have a very high quantum of one and that would solve a deficiency in the other. And I think that the court acknowledged that that is possible and that that changed the way, certainly at least in my litigation career, it changed the way I thought about deal litigation and about whether I'd rather try a case or you know, settle a case. I think it offered defendants some leverage that didn't exist before.

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Dent: I agree with that. One thing I would say though is I think the way I think it would--the reason it would come out differently in my view today is I think in large part, ultimately, the Chancellor determined the transaction was entirely fair in reference to or by reference to the number he had found in the appraisal case, which had already been mooted in an earlier appeal in the Supreme Court, and then of course we went back and had the appraisal. But he found entire fairness in large part by reference to his fair value determination, which ultimately was set aside. So, if you actually tried them together today, given the fact that ultimately the fair value determination was something like $20 and change years later in the subsequent appraisal, I think that would dictate that the transaction would not survive entire fairness. But I agree with everything that Tom said, I do think it was the first case where a party survived an entire fairness challenge where the court was placing the burden on the defendants.

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Rohrbacher: Kind of gave defendants hope that entire fairness is not--

Allingham: Well, it sort of gave two approaches. You could try to try your case as a judgment rule case, you could--you always try as a business judgment rule case, but you could also, as a fallback position, and if you're constructing a deal, create your

record in order to be thinking about the possibility of an entire fairness review. So, you know, put your record together as you're constructing the deal with a view toward the possibility of trying entire fairness.

Rohrbacher: So let me set the stage with the participants and Art, I will start with you. So, you were Potter Anderson then and now. How did you end up in Delaware?

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Dent: Actually, I was--so the merger took place, the facts giving rise to the merger took place in the Fall of 1982 and was the transaction closed and the merger closed in January of 1983 and, I think, the appraisal petition was filed sometime in the Spring. I started law school in 1983. And I graduated, took the bar in 1986 and started at the firm right after Labor Day. By that point, much of the discovery in the events that we're going to talk about today had occurred. Gary Greenberg from New York lawyer had teamed up with Bob Payson and Peter Sieglaff from my firm and had been engaged in that discovery with Tom and his folks. So, I started in the Fall of 1986. Around that time... so the appraisal had been filed, events came to light that caused the petitioners to file both a motion to amend their appraisal action to bring in liability claims and also they filed a separate liability action complaint and sought to have those cases consolidated.

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In January, I think it was, January of 1987, so I was brand new, Chancellor Allen, if I remember correctly, he denied the motion to amend the appraisal and he consolidated the cases, but he determined that, under an election of remedies theory, we had to choose which action we wanted to pursue and, so, we sought an interlocutory appeal. That's when I got involved. I remember Peter Sieglaff coming to my office, I'm going to say January, early February, and asking if I would like to get involved in this case and that's how I got involved. This is now years after Tom had been involved, of course.

Rohrbacher: And so you started essentially as a first year associate and lived the whole rest of the case?

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Dent: Yes, I started after the case was around for four years and just stuck around the next twenty--for the seventeen or eighteen years after that.

Rohrbacher: And then you mentioned Gary Greenberg. So, who else was on the team?

Dent: Sure. So Gary was a lawyer in New York. He was on his own. He had been with the government and then he joined Stroock and Stroock. And, then, at some point, he

left and went out on his own and did work for Pacific Theaters and Cinerama and some other work and he got to know the Foreman family and Jim Cotter. Ultimately, when they decided to bring... so Jim Cotter and the Foreman family from Cinerama had bought shares in Technicolor and determined to seek appraisal. And, I wasn't there, of course, but I heard later that from Bob Payson that the first call he got was from Gary Greenberg and Jim Cotter on the call discussing sort of what to do and the determination was made to seek appraisal. Again, this is back in the Fall of '82 or early '83. And so Gary was on his own.

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As the case went forward, at some point Peter Sieglaff really took over. Bob was tied up on other matters. And so Peter was the partner at Potter Anderson in charge. The case was really run primarily by Gary Greenberg. We went to trial ultimately with Gary Greenberg, Peter Sieglaff, a contract lawyer from New York named Sylvia Shapiro and myself as the only associate. During the post-trial briefing, and we'll get to that-- hundreds and hundreds of pages of post-trial briefing -- we ended up having two other folks come in to help. I know Pete Walsh did some work on it and I know that Greg Inskip, who was then a relatively junior partner, helped out. But that was sort of the team. And then after the post-trial briefing from then on it was just Gary, Peter Sieglaff, and me. Bob Payson stayed, he was sort of the big picture guy and we would run things by him and he would read the briefs but he didn't come to the trial. And he'd come to the arguments and the Supreme Court and there were many, but it was primarily Gary's show.

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So, I worked--I was very close to Gary. Worked with Gary on that case as I said for eighteen years.

Rohrbacher: So, Tom, how did you end up involved in this case?

Allingham: I was afraid you'd ask me that. I came to Delaware at Morris Nichols because it was the only job offer I had coming out of law school, as a function of my poor law school performance, and I was there for six years and then joined Skadden in late February of 1983. I was hired by a partner named Steve Rothschild, and I don't know, my third or fourth day at Skadden he walked into my office and said well you better start getting to work, here's this case Technicolor, I don't know very much about it. So, it was my first case in Delaware as a Skadden lawyer.

Rohrbacher: And who else was on the Skadden team with you?

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Allingham: Well, I mean over the course of twenty-two years, there were a lot of people. Initially, it was Steve Rothschild, who had no interest whatsoever in technical corporate valuation issues and so was delighted that I was happy to take the case. And for the first, I don't know, year and a half or two years, when most of the discovery was being taken, I was the only lawyer on the case. Steve was supervising it, but I was the only one. Once we got into the fraud case, then a whole universe of excellent Delaware lawyers were involved, David Margules, Bob Omrod, Mike Lindsay, Brian Vance. And then, as we came toward the trial, I think the client realized that they had a fairly young partner who was leading the trial team and so Rob Ward became involved you know, as a sort of overarching supervisor. But most of the--I did most of the witnesses at trial.

Rohrbacher: Now the papers show Steve Herrmann at Richards Layton came in at some point. What was his role?

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Allingham: So, the case started out as an appraisal. So, Skadden represented Technicolor as the respondent in the appraisal. When the fraud case was filed, the directors of Technicolor needed representation as well, so Richards Layton & Finger was retained to represent the directors.

Dent: And Steve was pretty active at the trial, too. I mean, he didn't bring a group of people but he was pretty active.

Allingham: He asked questions of almost every witness.

Rohrbacher: So he would have been brought--and we'll get to how the case came to be what it was, but he would have been brought on after most of the discovery had been taken.

Allingham: Virtually all the discovery had been done, if not, I think all of it had been done. I don't think we did any discovery, except experts, after the fraud case was filed. And the reason for that was, I think, obvious from both sides. As you probably saw in the opinion or in the briefs, because the case started as an appraisal case, the directors who were deposed basically focused on the price, the valuation issues.

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And we didn't spend a lot of time preparing them about the process because it was an appraisal case and there was no liability issue. So from Gary and Arthur's perspective, the fact that the directors either didn't know or couldn't remember or hadn't been

prepared for or however you want to characterize it, questions about process, that was good from their perspective once they filed the fraud case. From our perspective, we could have re-deposed the directors, but it struck us that the better--since we were going to have to in effect refresh their recollections to try to get them to testify effectively about the process that they had had limited recollection of during the depositions, we thought that would best be done live at trial. And we anticipated that of all or virtually all the directors would testify at trial as several of them did.

Rohrbacher: That comes clear in your post trial briefs where your side says, “Look, these guys knew nothing at their depositions and magically at trial they knew everything,” and yours was, “We weren't focused on that aspect of the case.”

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Allingham: I did all the deposition prep and I spent very little time on the process because, you know, we thought it was a pure valuation case. In fact, I was mystified why Gary was taking all these director depositions. I don't think you would see in that in typical Delaware case.

Dent: Right. The other thing, you're right about the discovery. And the one thing that to keep in mind is we got the decision from the Supreme Court reversing the chancellor and saying we could take both cases to trial. We got that decision sometime in the summer of 1988 and we went to trial in October of 1989, so we then went to trial in fifteen months. So there wasn't a lot of time for anything other than expert depositions, expert discovery.

Rohrbacher: So, by the time you got the decision from the Supreme Court saying you could do both at the same time, all the facts--

Dent: Facts discovery was done, was essentially done.

Rohrbacher: Art, one last question for you on the representation point: like most of the major Delaware firms, Potter does normally defense-side work. But you started your career in one of the longest plaintiff-side cases ever. So how did that affect your practice or how did that inform your practice going forward?

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Dent: It's a good question. We really, typically don't do plaintiff-side liability cases, but because it started out as an appraisal, appraisal’s the kind of thing you can do both and certainly I've done both sides of those cases, not in the same action, of course. But, so when it became a liability action, that was one of the few, if not, other than sort of

breach of contract type cases, we're not really, we don't generally represent plaintiffs in those kinds of cases, but it was sort of a natural transition because it started out as an appraisal case. I don't know if it really kind of gave me a different perspective because most of my other work was defense side other then, again, in the appraisal cases.

Rohrbacher: So, you were there at the beginning but from the other side, and you weren't there at the very beginning. Why did it start as an appraisal petition? Do you know how the case came to be the way it started?

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Dent: I only know from discussions with Gary and Bob over the years and not really getting prepared for this. My recollection is that Gary and Jim Cotter called Bob sometime reasonably close to the date of the shareholder meeting which would have been late January. He was--I don't think Bob was called until relatively close to the vote. By that time, there had been disclosure--I don't think anybody had a--Tom mentioned that Gary took sort of everybody's deposition. And I think it was through those depositions we found out a lot of things with regard to disclosures concerning, you know, Sullivan and the sort of the lack of information that was provided to the other directors beforehand. That was certainly not disclosed. So I don't know looking at it cold back then there was a sense that there was anything there other than a potential appraisal action. I do know that folks thought that the One Hour Photo sort of venture where Kamerman had led the company within the year before the transaction, had had a big impact on the press--the price.

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And I think there was a sense that, in an appraisal, the value of the company would be deemed to be significantly higher. I don't think then we had an inkling of potential liability. So I think really that's the short answer, not so short answer.

Allingham: From our perspective, though there is the question of appraisal or liability case. There's also the question of why you would file an appraisal at all. There was a cryptic handwritten note in the record and I'm dredging this up from twenty-something years ago, but which we believed... and there was someone on our side that I talked to about this, the note appeared to suggest that either Jim Cotter or Mike Foreman, the Cinerama guys, had told somebody on our side that they were happy with the price, but they wanted to get long term capital gains. And that the only way you could do that was by filing an appraisal to delay their receipt of the proceeds.

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Now, I never... actually, I think I did ask Jim Cotter about it and I think he was instructed not to answer and I think the Chancellor upheld that instruction. But there was that kind of fill of information.

Rohrbacher: Well Cinerama had been--well I guess the deal price was at twenty-three, the stock was trading at the nine to eleven range before things really got going.

Dent: If you go back, right. As you got--after the One Hour Photo announcement and then it began to build out the sort of One Hour Photo stores--the price dropped significantly. I don't remember exactly, but I do think it had been trading in the twenties not all that long before that, and that's just from memory. But it's not as if the company had always traded in the single digits and the low teens. It had been significantly higher.

Rohrbacher: Right, but at least Cinerama didn't really start purchasing and built up a significant, like a 4.4 percent stake at that lower price?

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Dent: I think--my recollection again is their shares were probably in the low double digits, high single digits. I think they did buy--

Allingham: I think the average price was, I seem to recall 9.50 or 9.60.

Dent: Yeah, I was thinking 11 but somewhere in that range, yeah.

Rohrbacher: So they bought... Their average price was less than half of the deal price and they purchased a large stake relatively recently. Which I guess now with appraisal arbitrage, you see people buying after.

Dent: They didn't know the word, the phrase ”appraisal arbitrage.” I guess that's what they were thinking.

Rohrbacher: And you had mentioned the lack of a preliminary injunction which, again, this is before Revlon, before all those cases. But I guess because they didn't know any of the facts that later came out, they just went with a pure appraisal and didn't try to do anything with the merger itself.

Dent: Yeah, my understanding was that that was never on the radar screen at the beginning. So much of what they had learned in discovery was just unexpected. We're going to get to talking about the Simone situation, for example. And that was really the precipitating event that ultimately convinced our side to go forward with either a liability

or a fraud action, however you want to describe it or characterize it. Certainly, it was not something we would have had any inkling about if not for the deposition discovery.

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Allingham: But the lack of preliminary injunction is consistent with an overall sense that this is not a deal we want to get enjoined. We might be able to do better if we can. There was the big question about which Technicolor would get valued -- the existing Technicolor, which had more Kamerman rolling out, I forget, 500 One Hour Photo stores or something like that, which had depressed the stock price pretty badly in the short term or whether, in the three months between the tender offer closing and the merger, Perelman and McAndrews had radically transformed the company so that you could get the evaluation of this different Technicolor that you now owned. That was I always thought kind of… I never thought that Cinerama was tremendously dissatisfied with price here. I think that it was more like we don't want to enjoin this deal, but maybe we can do better than 23.

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Dent: And that's--I know we're here to talk about the liability action, but that really was the big issue in the appraisal action, and we fought hard on both sides on that issue of which company do you value. I mean that was a big part of the hundreds of pages of briefing, whether or not you valued the company as it existed in November or if you valued it as it existed in January.

Rohrbacher: The Perelman plan.

Dent: Yeah

Allingham: And it was a significant issue. For example, our experts in the first trial valued the Kamerman Technicolor, which was the one we thought should be valued, at around $13, when, in the second trial, we had to value the so-called Perelman Plan Technicolor, our expert came in at, I don't remember, 20 or 20.50 or something like that, so it was a big jump.

Rohrbacher: Ok, so even from your side it was a significant difference. So one last question before we get to the discovery that changed the face of this case forever, did the appraisal action come close to settling?

Dent: I can only tell you from what I've heard. You're closer to that.

Allingham: All I heard is I heard from Steve Rothschild that the case got within $200,000 of settling at a price level of order magnitude 31 or 2 dollars a share. So you know, you're talking about a two or three percent delta that would have gotten the case settled back in March or April of 1983in a case that ultimately probably generated, gosh, I don't know, twenty million dollars in fees, maybe more. Certainly an amount of fees that dwarfed the delta.

Dent: And I heard a similar story way back when from Gary, and he thought that he and Steve Rothschild had had all but gotten to a deal and then, what I understood, was Steve came back to him and said I couldn't sell it and Gary was able to sell whatever he thought the deal was and he understood that Steve was telling him he couldn't sell what he thought wherever they were headed or whatever the deal was. But it was in that 30-32 dollar range.

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Rohrbacher: The appraisal petition filed in March 1983, the fiduciary, the fraud case filed in January 1986, and it was the discovery that changed the nature of it. This is before you joined the firm, but from your standpoint and then Art, from what you know, what happened? You have a plain old appraisal case going, doing a lot of discovery but--

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Allingham: So there were three depositions that I think mattered. One was Fred Sullivan's deposition in which the facts that Arthur's client thought led to conclusions of insider trading and the fee originally scheduled to come from MacAndrews but which, at very late in the deal, was changed to come from Technicolor. So that was one. I think both of those facts were disclosed in the proxy statement, but I think Gary, I think Gary appeared excited when got the testimony about that.

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The second one was Mort Kamerman, the CEO. That was not so much exciting to Gary because there was some self-interest. In fact, Kamerman's interest aligned very well with the shareholders. He had a lot of shares in Technicolor. But Kamerman was not happy to be in the deposition and presented himself as it's not going too far to say, an arrogant or patronizing witness, not a personality type that's going to mesh well with Gary, who could, on his own, be arrogant or patronizing from time to time.

Rohrbacher: Oh yeah we see in the Cinerama briefs mention that Kamerman would have rather been swimming or--

Allingham: He did at one point during the deposition say, I think Gary said, “is there some problem Mr. Kamerman?” and he said, “On the whole, I'd rather be swimming.” And he also said, at one point, the truth is transitory, which was a problem, I think.

Dent: It was in every one of our briefs, right?

Allingham:In fact, I think it was a frontispiece. Anyway. But I don't think--and Arthur could correct me, but I don't think the liability case would have been filed without the third deposition, which was the last director taken, Charles Simone. And it was one of the worst experiences in my professional life. Just to give you some background, I think it was--

Rohrbacher: So let's dive right into the details and have you relive it.

Allingham: I think it was taken in December of 1985. I had been told by several partners that I was on track to be made partner--and Skadden makes partners on April's Fools Day which I think is symbolic in some way. Everything is fine and so I'm defending these director depositions and thinking to myself, they can't screw that up. It's a crazy case. But the last deposition was Charles Simone so I called him and said to come in to prepare you for your deposition and he said, “No, I don't think that would be a good idea.”

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I said, “Well, you know, I can let you know what the other directors have been asked and give you a sense of how the process goes.” And he said, “No, thank you.” Okay. So, at the time, Gary's office, he shared offices with his sister, who I think was a designer or something. And the offices were in a beautiful, old New York department store. I think it was Bergdorfs, but a beautiful old building. But, the conference room in their office was a tall cylindrical room that I've always referred to when I describe it, as a missile silo. You walk in and there was a circular stone table and everything echoed because it was circular. So I was sitting there by myself thinking I just gotta get through this one and then I'll turn to something else. And the door opened and Gary walked in with Charles Simone, which I thought was not a good sign for me. And the first question was “Do you recall the events of October 29th, 1982?,” which was the day of the board meeting.

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And Simone said, “Yes, I do and I had a statement that I would like to read into the record.” And I thought well this is not going as well as I hoped. So, he then read a statement into the record that described the board meeting in terms that were stunning. He said the entire transaction was a shock to every person in the room, that he had protested he knew lots of people would like to buy Technicolor, that he had been told to sit down and shut up, that he didn't know half the people in the room, that no one introduced themselves to him, that, all of the sudden, after he was told to sit down and shut up, someone--he didn't know who--called for a vote and everyone raised his hands and said, yes, except I, Charles Simone, said, “I oppose this transaction,” at which point the doors at the end of the room burst open and Perelman walked into the room looking like a mafia chieftain or something, I don't know. And said, with his hands in the air, “We have won, we have won, and to celebrate this great victory I invite you all to lunch at Le Cirque.”

And this took quite a while, I mean it was a big legal thing. So, Gary said, “no further questions.” So I said, “Well, you know, it's getting on to eleven o'clock. Why don't we break for lunch?” And ran across the city of New York and called Steve Rothschild who

had not been involved in the case for a couple of years and said, “You're not going to believe this. Here's what happened. What should I do?” And there's a little pause and he said, “I think you should cross-examine.” So I ran back across to Bergdorf and went back to the missile silo and cross-examined Simone. And it turned out there was a lot to cross-examine him about. He had had lots and lots of documents with him when he was drafting his statement, which he wouldn't give me.

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The minutes recorded that he had voted against the deal. The minutes of the next meeting recorded that he had voted to approve the minutes of the preceding deal. And his explanations were, to be charitable, not terribly logical. He also testified at some point that he had won the French Legion of Honor medal for, along with Henry Kissinger, obtaining the end of the war in Vietnam.

Rohrbacher: So you proceeded to cross-examine Mr. Simone?

Allingham: Yes, and there was a lot to cross-examine about. The minutes of the October 29 meeting recorded that he had voted for the transaction. The minutes of the next meeting recorded that he had voted to approve the minutes of October 29 meeting. He testified that he had reviewed the proxy statement and he saw that it was unanimous vote, but he had decided he was going to bring that up at the shareholder meeting, not correct the minutes or the proxy.

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A lot of things. And then he also testified about some stuff that was a little crazier like either off the record or on the record, I can't remember. But I think it was on the record, he testified that he had been awarded the French Legion of Honor medal for helping to end the war in Vietnam. He had had a lot of documents with him as he prepared his written statement which he would not give to me. And when we concluded the first session of the deposition I said to Gary, you know, he's got to give you these documents because this written statement he has read into the record. And Gary called me the next day and said ok, you can have a new deposition of Charles, but it has to be at his house in Cold Spring Harbor on Long Island. So we all trooped up to Cold Spring Harbor, and the great story about that deposition was that we got there at, I don't know, ten o'clock in the morning, and the door opened and a beautiful, gracious -- Simone I think was eighty-- his wife opened the door and said, “Please come in. Welcome to our home.” We sat down--I still remember--this beautiful Chippendale dining room table and Mrs. Simone said, “Would anyone like some coffee, tea, or a bloody Mary?” And one of the lawyers who shall remain nameless said “I'd like a bloody mary. And keep 'em coming.”

Dent: That was a lawyer from your firm but I don’t think we should say who.

Rohrbacher: There was no video to record the crunching of the celery. And so that second deposition was taken before the fraud action was filed?

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Allingham: I think so, yes.

Rohrbacher: And so again, you weren't quite there yet, but what was Cinerama's reaction to the Simone deposition?

Dent: Well, we have to remember that Charles Simone was French, so he came about this slightly a little differently. It is undisputed and, in fact, Mort Kamerman testified in his deposition or trial or both that the Simone situation was a dramatic thing. That one thing he remembered in his deposition that occurred at the October 29th meeting was Charles Simone. So it was not, it was relatively undisputed that Charles Simone had raised an issue at the trial.

Allingham: At the board meeting.

Dent: I'm sorry, at the board meeting, yes. Thank you. So Charles Simone was one of the directors who knew nothing about any of the purpose of this meeting until the 29th. There were a couple of other directors. And a couple directors Solomon, Kamerman, obviously was involved in negotiating with Ron Perelman and he brought Solomon in. But there were several directors who knew nothing about it, at least, directly. And Simone was one of the directors who knew nothing, so he came to the meeting not knowing nothing about this what ultimately became the proposal that was now submitted and approved by the board.

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At that meeting people, everyone essentially said Charles Simone raised questions about should we sell this to the first buyer? I know people who might be interested, I think we may be able to get more money. So he sort of like, it was... he sort of envisioned the Revlon, wait a minute, shouldn't we shop the company and get more money? Charles Simone, from Cinerama's perspective, and from discussions with Charles, who by the way, died. He didn't come to the trial. He was ill and died during the post-trial briefing. It was right after the trial. And we tried to get Chancellor to go hear him in New York or set up a video conference and neither one of those proposals was successful.

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But Charles--our view was Charles died believing he was opposed to the transaction. Whether he believed he voted against it, I don't know. But he was opposed to it in principle because he thought, wait a minute, we haven't, we don't know--this guy, you've told me that this guy who I've never heard of who is a licorice seller, that's all he can pay. But I know people and he named some people you know, that might be interested. We knew from discovery that Goldman Sachs had put together a list of proposed other alternative acquirors. That was never produced in discovery. We didn't get it for whatever reason that was withdrawn from the board books and nobody could recall exactly who was on that list. But the testimony was Goldman Sachs at least had other names and there were people in case the board wanted to think about shopping if there were other people out there.

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So when you couple that with Charles Simone's--the fact that everyone agreed that Charles Simone said wait a minute, shouldn't we shop, you know, shouldn't we look at other people? We thought there was enough there that we believed it. And nobody knew for sure that was at the trial for the testimony regarding how the vote was conducted was very--almost every director had a different view on how it was done. I think all the directors and Meredith Brown all said Charles either voted in favor or didn't vote against. But how it was done, whether it was by paper or by hand or voice, there was no sort of consensus. And so when you put that all together, we thought there was a real legitimate issue here about whether or not Charles voted against it. And the reason that was so important--and it's laid out in the opinions--but the reason it's so important was there was a supermajority provision in the Technicolor charter that required, as I recall, two thirds vote for a merger[]
if it was unanimously approved by the board. And, if it was not unanimously approved, there was even a supermajority, a ninety percent requirement. And even with the lock shares that the company agreed to sell to Perelman and the directors agreed to sell their shares to Perelman, even with all those shares, he only got about eighty-nine percent of the shares. And, so if, in fact, Charlie Simone voted against, under the Technicolor charter, the transaction was void because they didn't get the ninety percent that would have been required in the situation where the board was not unanimous. So it was a critical fact and we believed Charlie.
Allingham: So from our perspective, by the end of the second deposition, I thought that the Simone testimony was a non-factor. I was a hundred, well, ninety percent convinced that I could persuade the Chancellor that this... Not that he was lying, because that requires knowledge of the falseness of his testimony, but that he was … just had a false recollection and that for whatever reason.

[]
And I thought... It's a fine balance, but there was a lot of crazy stuff in the deposition, and we put a little of it in to give the Chancellor a little flavor. But, when you combine that with the testimony of every other director and, very importantly, the testimony of Meredith Brown, who was a very highly respected M&A lawyer at Debevoise, who represented Technicolor in the transaction, who said you know, the vote was unanimous. I thought it was gonna be a non-issue.

Dent: Certainly, by the time, when Charlie was unable to testify at trial, I mean that seriously undermined our confidence. If we would have been able to put him up, we felt like we had a real fighting shot. We knew when he didn't testify at trial, when you have all these directors and Meredith Brown, who was a terrific witness, testifying that, at the end of the meeting, notwithstanding how dramatic it was, at the end of the meeting, Charlie came around, which is essentially what everyone said, we knew that we were not going to succeed on that.

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Dent: But I think your question went to what we were thinking when we directed the complaint, and we certainly saw that. When you couple that with sort of the testimony with regard to Mort Kamerman's testimony and he didn't remember anything. But what we did get out of all the other discoveries was that he negotiated the price, he did it on his own, he didn't have any input from Goldman Sachs at the time. He asked for twenty-five when Ron said 20, so without any reference to any sort of--he didn't ask the bank or he didn't get a banker yet and he didn't get a banker to go in and tell them here's where we should end up sort of, I think. When you couple that and a lot of other evidence, we really thought we had a good liability case, even if we didn't succeed on the void ab initio argument.

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Also, Tom mentioned the depositions. The other deposition I would add at least I thought was pretty important was I think Art Ryan. Cause we really thought Art Ryan's testimony really bolstered a lot of what we were saying about Kamerman being sort of difficult and running the show and not letting anybody--just having--it was his way or the highway sort of thing. And there was a huge rift between Ryan and Kamerman. So Ryan's testimony was very helpful. We also thought the testimony from Ryan really demonstrated that there really was--he really had an interest that was undisclosed in the, you know, in the proxy with regard to information he was getting from the back channel that would lead you to conclude--lead him to think he had a chance of running Technicolor after the fact, which he did.

[]
So we also thought Ryan's deposition was pretty important. Ryan did not end up testifying at trial so we had to rely on the deposition so I think it wasn't as important, but it was certainly important to us in sort of structuring our case--Sullivan, Kamerman and Ryan and so on.

Rohrbacher: In the briefs, Simone's son was also deposed.

Dent: He testified at trial.

Rohrbacher: He testified at trial? How did that come about? What was that?

Allingham: Well, as Arthur said, they, when Charles got sick, they tried to have the Court travel to Cold Spring Harbor to take his testimony, and then as a fallback, take video. I always thought that was a tactically ill-advised sequence. I think if you just asked for video you might have gotten video.

Dent: Well we asked for them both in the same motion thinking there's no way he's going to New York, but the Court will feel bad saying “no” so they'll give us the video.

Allingham: So, in any case, Winston testified about a conversation he had with his father allegedly immediately after the board meeting from a payphone on the street in Manhattan outside of [00:19:23] Debevoise’s offices at 53 and 3rd. And, I think, it was the only, maybe Rod Ward did maybe two witnesses. I honestly can't remember if he did Ron Perelman or not, but he did do Winston Simone's cross. And the direct testimony, at one point, Gary or whoever put him on said, “Let me just ask you this Mr. Simone, did your father sound like he was very excited?” or words to that effect. And Winston said, “Extremely excited. He was so excited.” And so Rod asked him, “How could you tell he was excited?” And he said, “Well, he was speaking very loudly.” And Rod said, “Have you ever been at the corner of 53rd and 3rd at noon on a weekday in New York City?” And he said, “It's kind of loud.” And I think the chancellor admitted the testimony and when he admitted the testimony we felt very good about the Simone issue, because, I thought, he was admitting the testimony so there would be no appeal point.

Rohrbacher: And both of you mentioned Meredith Brown in positive terms. And he does show up throughout the opinion, block quotes of his testimony. Meredith Brown came in, he was at Debevoise. He was the deal lawyer for Technicolor. And again, at the time, he was writing on a slate that had not yet been written because this was before all the

big cases were decided. You know, in your views, how did he handle the process, which admittedly was not what we normally see today, but what about Meredith Brown?

[]
Allingham: Well, two things. I thought that one of the strongest points during the trial for our side was Meredith Brown's testimony. He was eloquent about the state of the law as eminent practitioners, like he was, understood it at time of the board meeting, at the time of the deal. And he said I don't think that the fundamental nature of the duties of the board of directors have changed, but case law has fleshed it out. Revlon says that, except in unusual circumstances, if you're selling a company, you should shop around. That was not, in Meredith's view, the law at the time and he said I advised the board that they need to be fully informed about the value of the company, but I told them that they did not need to shop the company if they felt otherwise well informed. And he explained why he thought that had been the law and why that was the understanding of the corporate bar at the time and he was very strong about that.

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Now, having said that, he was not retained very far in advance of the board meeting. This deal was put together quite quickly and quite quickly relative to what we think of now. So some of the flaws in the process that were articulated by the Court were not aspects of the process that Meredith Brown had anything to do with.

Dent: He was a good witness. Terrific witness for your side, no question about it. He wanted--he was pressing Mort Kamerman to shop the company. He wanted Mort Kamerman to shop the company. But, as Tom said, ultimately, it's up to the board. If the board feels like it has enough information, they can proceed and they did. But it's clear from his notes. He had a notepad. I remember we got, that was a discovery thing, we got the original, it was like under cover of darkness one night. I think we met Gary, met you, or Peter met you out on the street one night got the original copy of it. And that was clear, he was pressing Kamerman to shop the company, but Kamerman didn't want to shop the company and Kamerman, and it was Kamerman's way.

Rohrbacher: And, so, after the depositions are taken, things change. You had mentioned the unanimity requirement. But, also, is it fair to say that Peter Sieglaff, who was in Van Gorkom, Van Gorkom had been decided by that time.

Dent: It was 1985.

Rohrbacher: So, a year later, was there a conscious effort, do you think, to pattern this in a Van Gorkom sort of way for the Court, the fiduciary action?

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Dent: I think it's probably fair to say we compared it, the case, to Van Gorkom and we believed that this case was -- the facts were stronger a case than Van Gorkom. So we had that roadmap and it sort of helped sort of... It helped sort of us outline where we wanted to go. But the facts were the facts, right? So we had directors who came to a meeting not knowing what it was about. We had Mort Kamerman negotiating price before talking to anybody else. We had Sullivan conducting insider trading as soon as he knew the first time he met with Perelman about a potential transaction. We had Sullivan trying to angle to get sort of a finder's fee, at least that's how we saw it. There were enough facts there. And we had a meeting that took place in, like, two hours where the company wasn't shopped and the legal adviser said he thought... he would like to see it shopped and it wasn't.

[]
We had Goldman Sachs prepare LBO analyses at a number that was higher than the $23. Kamerman didn't want to do an LBO and just tamped that down, from our perspective. So we had a lot of those facts. Some of those facts were similar to the Van Gorkom situation. I will tell you we were all concerned. Although Van Gorkom, in a way, sort of gave us a roadmap, it also gave us a lot of pause. Cause what happened with Van Gorkom, 102(b)(7) and the, you know, a lot of people were really, really concerned after Van Gorkom. That was the first time where the court had imposed liability on directors. And there was this hue and cry in Delaware, even as a new associate, a young associate, I was feeling that.

Allingham: Imposed liability on non-self-interested directors.

Dent: Right. And so our fear was that, even though we had what we thought was a case that was as good as, if not better than, TransUnion v. Van Gorkom, the fear was gonna be the court was gonna say we can't do this again so soon. And so, no matter how good our case was, we feared that there was going to be this real reluctance to, you know, to do this again 'cause there was such a negative reaction around the country from that decision, which again, ultimately lead to 102(b)(7) statutory provision.

[]
Allingham: And I think it's hard to argue with the notion that Van Gorkom sort of loomed over this case as it ping ponged back and forth between the Chancery Court and the Supreme Court.

Rohrbacher: And did that play a part in your press for self-interest? Talking about all the directors being self-interested, or was that a different aspect?

Dent: No, I don't think. We were concerned about that, but that's not why. We made those arguments because we felt strongly about it. We really did think we had three or four directors who were motivated by self-interest. And I know Tom and I will strongly disagree about that. But Kamerman, he had a promised seat on the MAF board, which ultimately did pan out. He thought he was, he got, from our perspective, an enhanced contract. He got an enhanced golden parachute from MacAndrews, from Perelman. We thought Ryan was clearly getting back channel from Martin Davis, who was from, you know, information from him that he was aware of from Perelman, “You know, stick with this, you're the guy, Perelman's going to end up giving you the... you're going to end up winning this over Kamerman.” That's how we saw it and that's how it, in fact, played out. We had Sullivan and his interest, his insider trading, you know, he was desperate to get something out of this. He pushed to get the finder’s fee. Again, this is how we saw it. So we saw several directors that we thought were really motivated by factors other than the strength of a deal, which happened to Thompson very quickly and was something that some directors didn't even know about beforehand. So we saw them as independent bases, and we weren't pressing those because out of the fear that they weren't going to find breach of duty of care again. We thought it – there were independent reasons why this transaction was flawed.

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Rohrbacher: And one of hopefully near the end of the questions before you appeared on the scene, why wasn't the fraud action filed as a class action? Today we would expect a merger challenge like that to be a class action.

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Dent: I don't know why it wasn't originally. I know that, once I was there there was an effort, and at that time I talked to Eric and we talked a little bit about this before when we were talking before this, before today. I know there was an effort to find a class action plaintiff, someone. I know the reason why we didn't, our client, we didn't file as a class action on behalf of our folks. We thought because we had filed an appraisal action we would not be deemed an adequate class representative. And we thought we weren't going to take the chance of getting kicked out on that basis. We did look, as a young associate, I remember having this conversation with Gary and Peter. There was another lawyer in town, who I won't mention, but another firm in town that we talked to about trying to find someone. They thought they might have someone. We wanted to find someone who had been a stockholder, but didn't seek appraisal.

[]
And didn't end up coming up with a plaintiff. I don't know how much effort was put into it, but I know that it was discussed and I know that we talked to somebody here. Did anyone reach out to the sort of big players? I don't know the answer to that, but there was discussion about it. But that's why we didn't choose to bring it as a class action on behalf of the people we already represented.

Allingham: From our perspective, it was interesting. It seemed to us that the threat of a class action was much better for Arthur's client than the class action. Because once the class action was filed, it'd be much harder to settle individually with Cinerama. You know, we had talked way back in 1983 of the settlement of $31-32 a share range.

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You know, paying 31 or 2 dollars a share to 4.6 percent of the shares is one thing. Paying a $9 premium over a deal that was 120 percent premium over the market to everybody would have been totally prohibitive. And so the danger, from our perspective, was that some class action would get filed, which would make it impossible to settle with Cinerama and would open us up to the very real possibility of having to pay a premium to everybody. And, once in 1988, the company was sold to Carlton PLC for, I forget, $750 million, or something like that, which was a $640 million increment over the deal price. You know, that was a huge risk. So you know, we didn't understand why, if I had been in Gary or Arthur's shoes I think I might have said look, you know, fish or cut bait.

Either settle with us or we're going to lose control of this litigation. You're going to have to pay everybody. But they never said those words.

[]
Dent: Yeah, and why we didn't is beyond me. That would have been a Gary-Peter conversation, and I was junior at that point.

Allingham: But I will tell you, you really didn't have to say it. I mean, we understood what the situation was.

Dent: It's interesting though because I know, Blake, earlier you asked about the settlement discussions. And I believe there were only ever two settlement discussions. There was the one early on and then there was the one after the Supreme Court reversed Chancellor Allen in the liability action before it went back for on remand. There was that conversation and it went nowhere, so apparently at that point you weren't too concerned about the threat. Apparently,[] that ship had sailed maybe.

Allingham: I think that was because you and me had just fundamentally different views of the meaning of Cede II.

Dent: Yeah

Allingham: You know, I think... We thought that… we didn't like that opinion. There were a lot of things not to like about that opinion. But we did think that it left us with a narrow path to a really good victory, so I thought that the possibility of proving entire fairness was still wide open. And I think Arthur and Gary thought it was basically--I thought that you might even have argued that it was, you know stare decisis.

Dent: Well we didn't. We had argued it was the law of the case and Cede II, just as Horsey said, when we said before if they approve liability to get residual damage, what we meant to say was, if you then clear the hurdle of if there's ultimately no finding entire fairness. So that's not what we were saying at the time. But we truly believed that, given the fact, given what we had established, given the factual record--and we can get into more in detail--but we really did think after Cede II, we didn't think we could lose. We didn't think we... Our fear was that you were going to seek to reopen the record to get in expert evidence with regard to what the price someone else might have been willing to come in and pay. That sort of a thing. We thought, in the absence of that evidence, we didn't think you could establish entire fairness. But, we were really, really surprised when, after, on remand, the Chancellor stuck to his guns and found the transaction was entirely fair. That was a big surprise for us, I gotta tell ya.

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Allingham: I was pretty sure that the Supreme Court would not have remanded the way they did if the issue of entire fairness wasn't still open. And, by that time, we had tried the case in front of the Chancellor and I used to take a pretty organic view of trials. I thought that the Chancellor wasn't all that fond of either side, but I thought that there were terrible, terrible credibility issues on valuation on Cinerama's side. And I thought that we, because I thought our price was quite rich, I thought it was a needle that needed to be threaded, but I thought that we could do it.

Dent: I also think that... my sense was there was not a great dynamic between the Chancellor and Gary. I never really got the sense that the Chancellor was all that found of Gary, and Gary is, he can be off putting at times. And I think he sort of got under the Chancellor's skin and I don't think that helped us.

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Allingham: I never thought that Gary and the Chancellor got along very well, but I never thought that was driving any decision of the Chancellor. I thought it was much more, you know, the really stunning credibility problems that the two industry experts on your side had, which we can talk about.

Rohrbacher: Let's go back a little to get to that spot. So you had mentioned Cede I, Chancellor Allen first said you have to choose appraisal or the fiduciary action. Interlocutory appeal, Supreme Court said you can do 'em both at the same time. So, and you had mentioned the fifteen-month time between that decision and trial. Did that decision change how you litigated the case? Were there dispositive motions, anything like that to stop the trial? You couldn't obviously for appraisal, but the fiduciary piece, I guess, could have been subject to motion.

Allingham: We thought about a motion to dismiss and we concluded we had no chance and it was a waste of time. And I know that's probably not the fashionable strategy, but I told our client I thought it was a waste of time.

Rohrbacher: And there were no re-depositions so you just went to expert discovery and getting ready for trial?

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Allingham: There was a reason why there were no depositions. You had an argument that it had to be on the existing record. And I think you had that argument because you didn't want us to put in new expert testimony.

Dent: No, I think that was later. That was for the second trial. I think we're still now back at the first trial.

Rohrbacher: I'm still talking about the first trial. But once the nature of the case changed, you didn't go back and do any new fact discovery?

Dent: Right. Your original expert died, didn't he?

Allingham: I think that was before the first trial.

Dent: Right, but it was within that fifteen-month window, wasn't it? I mean didn't you have to change experts within the last year?

Allingham: Within the last three months, I think it was.

Dent: Professor Walter, was that it?

Allingham: Yeah, James Walter, who was a professor at Wharton just dropped dead on the tennis court, so I got this awful call from his wife saying I had been going through my husband's papers and I see that he was working for you, so I just want to tell you that he had a heart attack and died.

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But again, from my perspective it was, well this is very interesting, this is my first big, corporate trial and now I have to go out and get a new expert a couple months before. This was after I had to offer my condolences, of course. So I went out to Chicago and we hired two experts because if you hire an expert you sort of work through what the results gonna be and identifying and you don't use them if the result is not helpful. But I didn't have time for that. So we hired two. Interestingly, working entirely independently, they both arrived at values equivalent of seventy-five cents of each other: thirteen and change.

Rohrbacher: So, come to the trial. Now, again, this is mostly about the fiduciary action,but Cinerama was claiming the fair price of Technicolor was somewhere in the 62.75 range?

Allingham: Right

Rohrbacher: How did that affect as you marched it toward trial?

Dent: I think it had a significant negative impact on the way the Court assessed our case. A big part of that was we were valuing the Perelman plan, Tom's side was valuing--at that stage--as Kamerman plan. And the difference, as you will recall, is as part of his plan to get financing run from unidentified certain assets to be sold, which he said he anticipated would bring in about $50 million, which was pushing about fifty percent of the price. So he was really going to be focusing on the core, you know, the film duplicating and the video cassette. So that was really what was going to be driving the big part of the company going forward. And our evaluation of those, when you added in the $50 million, I'm assuming that you're going to have that as part of the plan, drove a number that was, you know, that got us to $62.

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But, I think looking back on it, when you look at a public company, it's one thing to say, you know, this company's undervalued by twenty percent. It's another thing to say it's undervalued by three hundred percent.

Allingham: Six hundred percent.

Dent: So I think it had, you know, a big negative impact. Now, remember this was an appraisal, and so the Court's putting on blinders. But, at the same time, we're trying the liability case. And, by the time we went to trial, as Tom said, the company had been sold again. Perelman sold it to Carrollton Communication--Carlton PLC, in, I think 1988, for I think the number was 760 million, which was roughly six times roughly what Perelman paid for it. And it was really, from our perspective, essentially the same company. I mean obviously it had different management things, but they were still doing film, they were still doing video cassette. I don't think they'd taken on anything new.

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I don't recall exactly what. But so we were able to demonstrate that, in the five years after the fact, although it's not part of the appraisal case, it is part of the liability case the company sold for six times what Perelman paid for it. We actually thought that at least that was a fact that might convince the Court that sixty-two dollars doesn't seem so outlandish. But, I think going into it, as an associate, it wasn't my call. But that bothered me. That number always seemed too high. You know, I listened to our experts and understood how they got there. And I sort of, I didn't drink the Kool-Aid like Gary did, but I did understand how they got there and I thought you could make that good case. But, stepping back, my sense was it was too high.

Allingham: When we got the expert report, which it was the damage calculation for the fraud case and it was the appraisal report basically. I mean, they didn't characterize it that way, but that's what it was. I had thought it was possibly the best gift we could have gotten. And there were three reasons for that: one was 62.75 versus $9 to $11 price, it was just, for a public company, it was just off the charts. The second and equally important part of it was that number came from an elaborate statistical econometric model with multiple, multivariate regressions and all kinds of very, very complicated stuff. That was unnecessary. I mean, if you wanted to do a DCF, you could do a DCF. You could do it using the company's projections.

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And John Torkelson, who was the Cinerama expert, didn't do that. He constructed his own set of projections that flowed from this black box. The third piece of it which was also important was that critical inputs to the black box came from two industry experts that Cinerama hired, both of whom--well, one of them had testified before Congress a month before the deal directly contrary to what he said in his testimony. And we had the congressional testimony. And the other expert--a guy from Variety Magazine was in there--he was well regarded industry expert, had contributed a chapter to a book that was directly contrary to what he said to generate the Torkelson input. So we were looking at this 62.75 number, looking at it relative to nine to eleven, looking at it relative to the extraordinarily complicated model that had generated it, and then thinking about the cross examinations of those two industry experts that I was sure even I could do well.

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You know, we thought this is a homerun. And you think about cases, I think I said earlier I try to think about cases organically. If you can get the court to doubt some really big fact from the other side then you're a long way there toward getting him to believe what you want him to believe.

Rohrbacher: And you see the Chancellor's reliance on the deal, as you mentioned earlier, his reliance on the price that he found first come through in all of his fiduciary opinions.

Dent: Yeah that's the thing that's always nagged at me. Because when you go back and you read the decision on remand following Cede II and the Chancellor really does, in my opinion, find the transaction entirely fair, in large part, in reference to what he thought was a very fair price. And, before that, the Supreme Court had said, because of what we're doing in Cede II, the appraisal appeal--which we had appealed at the same time--was moot.

Allingham: Was moot, right.

Dent: And then the Supreme Court then affirmed him on the entire fairness and, as a consequence, they said now, the appeal's no longer moot. So then we had another, how many more years? Another twelve years of litigating on the appraisal and, ultimately, the Supreme Court found the fair value to be significantly higher than the value that the Chancellor had found. So you really have to say well does that entire fairness finding on remand really withstand analysis because the fundamental underpinning of that has now been knocked out.

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But that's really sort of an academic question at this stage.

Allingham: It is an academic question, but I think it's an interesting one. I think that the ultimate finding of value--and we argued this in a motion to reargue after the Supreme Court's last decision--I think that the Supreme Court's clear intent... Chancellor Chandler had found the value to be 21 something.

Dent: 21.60 or something.

Allingham: 30 or 60 or something. And I think that the Supreme Court intended to make a little tweak in the value and nudge it upward a little bit. I think they would have been shocked, before the fact, if they had learned that it bumped the value up twenty-percent. It was a tweak to the cost of capital I think or something.

Dent: But there was also a discount rate, too, because I think discount rate was determined to be the law of the case and that changed it.

Allingham: But I don't think they thought it was going to be a big deal, and it turned out it was a significant deal. In fact, it pushed the valuation above the deal price. This is all conjecture--I don't really know this.

Dent: I was going to say this might surprise you to hear me say I don't agree. Different point of view.

Rohrbacher: So, why was the trial 47 days long?

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Allingham: Undisciplined novice counsel on this--on the Technicolor side. I think, actually, I think in a nicer way that is... Most of us didn't try cases in those days. It was a very unusual occurrence for trials to occur at all in Chancery, I think. And I don't know about Arthur, but it was my first. When I started at Morris Nichols, I did a lot of personal injury work my first year and I did a bunch of trials, but they were nothing like this. And I don't think I tried a case. I tried one case after that. So this was 19--11 years--after I graduated from law school. So I had not tried very many cases. I don't think Gary had tried very many cases, but I don't know. But I think Pete and Bob Payson certainly had done more than I had, but none of us were particularly experienced in trying cases. And the Chancellor was not, I don't believe, experienced in trying cases. So we all came into it--this is all, again, just my opinion--but we came into with the Chancery Court's customer service mindset. You know, we'll do whatever the parties and the lawyers think need to be done and we'll get it done right and we'll do a great job. And I think Bill Allen was the epitome of that kind of a model of, look, I'm not going to brook any nonsense, but if I think you're sincerely and in good faith asking for something, I'll try to give it to you. And, from our perspective, the case had been fought very, very hard and fought on the facts very, very hard. And there were a lot of issues and two separate actions being tried at the same time with at least six or maybe seven experts with some very lengthy cross-examination. I mean the Torkelsen cross-examination, at trial took, I don't even remember, three or four days?

Dent: I was going to say a week, yeah.

Allingham: A very long time. And it was because there was – you were cross-examining him on the nature of multivariate regressions. You're cross-examining on, I don't even remember anymore, but all kinds of econometric models that none of us really had known anything about until this report came in. So I was trying to educate the Chancellor, the Chancellor was trying to absorb what was going on, and he was disinclined to cut us short.

Dent: It's funny nowadays, when you have a new trial and you're trying to schedule, one of the first things you do is you get the scheduling order and the court puts in the date the trial's going to start, what time, and how many days you get. It's usually if you get five you're lucky.

Allingham: Right.

Dent: Maybe you get two weeks, if you're really, really lucky, if you get the right judge. I have not, in preparation for this, I didn't go back and look, but I'm guessing that the

pretrial order. There was never any schedule in place that said how long the trial was going to be. I'm guessing it was open ended. It's unheard of today.

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Rohrbacher: You just kept going until it was done?

Dent: Well there was a break.

Allingham: There was a break. But, even at forty-seven days, we cut a lot of witnesses. Art Ryan was one of the ones. He was sick. But you know, I guess if I had said Art, you have to testify, he could have dragged himself across country. But we were looking for ways to cut it short.

Dent: I said this to Tom, I kidded Tom before about this. We, all along, believed that Art Ryan didn't testify because he and Mort Kamerman couldn't be in the same building together at the same time. I do have some recollection at the time he said he was sick, but we thought there was no way you could put them in the same building together ‘cause they really didn't like each other.

Rohrbacher: And Mr. Golden from Goldman Sachs didn't?

Allingham: He did not testify, correct.

Rohrbacher: Was he cut, or... there's a lot in the briefs about his absence from the Cinerama side.

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Allingham: I think... Look, you have to pick a witness from your investment bank, and you often have a choice between the person who did the most work and the person who was the leader of the team. And, in this case, the guy who testified--a guy named Richard Sapp--was the person who did the most work. And Golden just didn't--he couldn't recall anything about the deal. I'm sure he could have educated himself, but it would have been reconstructed knowledge. So he was never on the--I don't think he was on the witness list. If he was, we took him off quickly.

Rohrbacher: From the Technicolor side, was there a lot of worry about the Carlton sale and the effect of the $780 million being out there?

Allingham: The answer: sure. It was a hugely different company in that a lot of assets had been sold in either a home run or a black hole business. One Hour Photo had been

disposed of. But the single biggest driver of that huge price was video cassette duplicating, which had exploded like a neutron bomb. And in a way that not even Steve Roberts, the industry expert, who--

Dent: We made that argument. We said that was happening, and I think Technicolor's argument--you had a couple of arguments--one of which was there was no evidence to support it and Robert's testimony at Congress suggested otherwise. One of the other arguments was that it could have been video disc and that could have been taken off, because that was around the same time frame. And we all know video disc went nowhere. But, in the appraisal, again, you're putting on blinders. And so we felt really strongly about video. By the time we got to trial, we knew had happened with video. But you were trying to put yourself in the position you were years before. And you know?

Allingham: And the congressional testimony did not suggest that something different might happen.

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The guy who testified that video cassette duplicating was going to explode testified before Congress that the rental market was a ravaging steamroller threatening to eradicate video duplicating businesses. And his first explanation for that at trial was well, I wasn't under oath, which the Chancellor did not--

Rohrbacher: Did not appreciate?

Allingham: Did not get excited about.

Rohrbacher: So what were your strongest moments at trial and what was the other side’s strongest moment?

Allingham: Our strongest moment on the direct testimony side was, I think, unquestionably Meredith Brown for the reasons we've talked about. From the cross-examination side, it was the two industry experts, both of whom were badly, badly damaged on cross.

Dent: I thought--I agree that from your side Meredith Brown was probably your best witness. At the time, I thought Gary's cross of Kamerman was great and demonstrated that Kamerman was--he was a terrible witness, I thought, because all of the sudden he had all this information, this knowledge that he didn't have. He had none in his depositions. And he did come across as arrogant and so I thought that went well. I

thought Gary's cross of Dr. Kloppenstein who--was he your video or your--I think he was your video expert...

Allingham: Yeah.

Dent: Was great. But as, you know, you really didn't need him.

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All of our case was cross. We weren't putting anyone on other than our experts, so...

Allingham: I agree the cross of Kamerman was good. I didn't care about the cross of Kloppenstein because we had already--

Dent: Right

Allingham: --killed Steve Roberts. And I was happy with his congressional testimony, which was contemporaneous.

Rohrbacher: So Chancellor Allen's 1991 fiduciary opinion comes out. What's your reaction? I mean, you appealed, but did you think the case was over? How did you--

Dent: Well, he decided the appraisal first.

Rohrbacher: Right.

Dent: So once the appraisal decision came out--and we waited another, it was months. We were waiting for the other shoe to drop. We knew that when he found his price was 21 whatever--21 and some change--

Allingham: 21.60, I think.

Dent: Yeah. We knew then that he was going to find liability. So that was not a surprise. That didn't surprise at all. We were disappointed, but we wanted to get that decision so we could appeal them both. We knew we were going to lose, so we weren't at all surprised. I don't know if so much surprised as we were disappointed in the fair value. We really didn't see how you could get that company, you know, if you valued the Perelman plan, we didn't see how you could get to that number. But he didn't value the Perelman plan in his appraisal, he valued the Kamerman plan. We thought we were right on value because under the statute--the statute says you value the company on date of merger. We thought that this was really pretty clear and we thought you had to

at least give us the benefit of the planned asset of divestitures that Perelman, one of the banks that he's going to do. So we thought we'd get that. And so we were really disappointed when the number came in where it did. But it came in where it did largely because we thought he got the law wrong. And the Supreme Court agreed with us on that ultimately, but--

Rohrbacher: So we were talking, tell me the story about the last day of trial?

Allingham: So Arthur said it and it's true. This is very Delaware. We finished the 47th day of trial and I had promised David Margules, who was the senior associate on the case, that he and his wife and my wife and I would go to dinner. So, I take them out to dinner. So we walked into the restaurant and sat down and were having a couple of cocktails and the door opens and in walked Gary Greenberg, Arthur Dent, and Silvia Shapiro, and Pete Seiglaff.

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And they sat down at a table that was ten feet away, which was maybe a little uncomfortable, but fine. But I think everyone was glad the trial was over and had a few cocktails. And Gary got up at some point and walked over the table and I introduced him to my wife. And I said this is Gary Greenberg, you've heard so much about. And Gary looked at my then wife and said we all love Tom, even though he is a no-good lying son of a bitch. And you asked me and I've never been sure if that was a joke or not. It was a long trial.

Rohrbacher: So trial's done, you've been insulted. Cinerama appeals. What was the oral argument like?

Dent: Well, Gary made it from our side, so I'll let Gary speak to the argument. I had a reaction... well go ahead Tom.

Allingham: Well, I'll tell you two things. One was it was the shortest of my prepared remarks I ever got through. I said, your honor, I'm Tom, Tom Allingham, and with me at counsel table is … . And Justice Moore interrupted me and said you wrote an article about our opinion in Weinberger, which has been proved to be wrong, isn't that correct? And I never got back to my argument that I had written out. Not surprisingly, our evaluation of the argument was that we were going to lose. It was very hostile to our side led by Justice Moore and Justice Horsey, the authors of Weinberger on Justice Moore's part and Van Gorkom on Justice Horsey's part. And they seemed to have some real irritation or hostility with the Chancellor's treatment of those cases in the opinion.

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So we were pretty confident that we were heading back to the Chancery Court, but I have to say I did not expect a lot of what came out in the Supreme Court's opinion.

Dent: Yeah, I do remember that argument was so different than from the argument in the next go around because then when it came back on appeal after the remand, that was the one where there wasn't a single question. And it always struck me as what are the contrasts? But I do think they were... I'd like to think they were reacting to sort of a lot of the facts that even the Chancellor found with regard to directors not knowing about what beforehand and Kamerman negotiating a price and those kinds of things, which we played up on. And I think that was the kind of thing that we sort of envisioned Justice Moore being offended by and I think it had that sort of result.

Rohrbacher: So you weren't surprised or were either of you surprised when the Supreme Court's opinion came out?

Allingham: I don't think you guys were surprised, were you? We weren't.

Dent: We were cautiously optimistic. We really thought the argument went well. But you know, you never really want to be the appellant. You'd rather be the appellee. So we were optimistic again, hopeful. I don't think we envisioned them finding that the appraisal was moot and you know, we sort of envisioned all in one. That to me was a surprise like, wait a minute, that means the appraisal they didn't even address. And we thought that Perelman/Kamerman evaluation dichotomy was so important to all of us on the, in the litigation, we wanted to have that resolved. And that left that open, and that bothered us.

Allingham: And we weren't surprised at the outcome, but we were furious is not too strong a word, at the... I don't like to say this, but I'll say it since we're in an archive situation, I thought that the conversion of assumed facts into findings of fact by the Chancellor was intellectually dishonest and I thought it was the underpinning of a lot of what happened thereafter, including Arthur's, I think, rightful optimism about the ultimate resolution of the case. It made it impossible for that case to resolve. And it was not... you know the Chancellor did not make those findings, and to adopt findings that aren't made I thought was wrong.

Rohrbacher: The Supreme Court found he had done everything else wrong, but that one doubled down on how right he was. And much of the Supreme Court's opinion deals with the reasonable person standard and whether that was right or wrong. That didn't really have much of an effect in the case going forward, did it?

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Dent: I don't think it did, no.

Allingham: And I don't think the findings of self-interest would have been changed by the whatever it is, the subjective standard. I don't think it would have mattered.

Dent: I think we, from our perspective, we would have come out the same way whichever standard you would apply. We believe we would have demonstrated that the directors that we thought were being disloyal were disloyal.

Allingham: We spent probably too much at trial or in the briefs arguing about that standard. We were arguing a reasonable director standard just because we thought the alternative was just cumbersome and, as a policy matter unwieldy. But it wouldn't have mattered.

Rohrbacher: The Supreme Court took the parties and the Chancellor to task for not addressing Section 144 or the requirement of director unanimity, but neither of those really played a part in your views?

Allingham: Well, no. An interested director can vote as long as the interest is disclosed so we didn't see, and I don't think that Gary and Arthur saw, any impact of the self-interest issue on the unanimity issue. And, once the Simone issue was resolved, the unanimity charter provision didn't really apply. And Section 144 didn't apply. The parties didn't brief it and the Chancellor didn't address it because, on its face, it wasn't applicable.

Rohrbacher: The one thing that the Chancellor did do that the Supreme Court criticized was using the Barnes case and the quote from the Supreme Court is criticism for finding "authority for its requirement of proof of injury in a seventy-year old decision that none of the parties had relied on or felt pertinent." So neither of you, I guess had cited it, but… .

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Allingham: I certainly thought it was pertinent, but we cited lots of cases that were like it, and it's an opinion from Learned Hand, who's hardly chopped liver. And I don't think that it's unusual for a trial court to send a clerk off to find support for a proposition that the Court thinks is relevant to his analysis. So, I thought the criticism was, again, unfair. And it was one of the things that led me to think there was animosity between the two courts and that it was going to be part of my job on remand to try to tamp that down so that I

got as much of a claim--I wanted to win obviously, on remand. But so that the terms and which of the remanded opinion were as plain vanilla as possible. Yet another failure on my part.

Dent: I always thought what the Supreme Court was saying on that was though, that, you shouldn't have gone to New York law. This was a Delaware law issue. We don't defer to New York. This is Delaware and that's a very different rule applied in the traditional negligence context and it really has no application in the corporate fiduciary situation. So I never really thought they were being so critical of the fact that he found a case that we didn't cite, so much as they were being critical of him going to New York to begin with and finding something that was so, I think, so inconsistent with Delaware law, and then basically saying, ok, that case says now that you have proven that these people were asleep at the switch, you still now have to go on, you have the burden of proving damage and your harm. And I think that's what they were saying. It's just not consistent with Delaware law. Whether it was or wasn't, they didn't think you should be deferring to New York on that. That's how I read it. But I do think, when you look at it, when you read it, it does seem to suggest that they were offended by him relying on something that nobody cited. I don't think that's what they meant.

Rohrbacher: So what happened? Well, obviously there was a remand. What were your approaches to the remand?

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Dent: Well, I'll tell you we were afraid that Tom was going to win and want to introduce additional evidence, have new evidence to try to meet his burden of demonstrating the transaction was entirely fair. Because we thought, under this record, you've got these directors, you've got now a finding from the Supreme Court that these directors breached their duty of care, you've got a finding that Kamerman sort of set the price on his own, you've got a finding that some of these directors didn't know. All the things that went to sort of the due care thing. And you've got a mooted appraisal, so you don't have a number without somebody coming and testifying about what entire fairness, what the number should be. We thought… we were very confident. We didn't think that the defendants could establish entire fairness. The other thing was we understood the Chancellor had said, we argued all along that there was a lock up here. When you read the post-trial decision, our interpretation was Chancellor Allen was saying it was a structural lock up. We thought that, with that fact, and you know, there was a no shop. They didn't shop it, they had no fiduciary out. We thought this was a--we thought we were going to win. And I think that was the context in which Barry Schwartz and Jim Cotter got together for lunch to have a settlement conversation.

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And I don't know they came about, but I think you may have been in it?

Allingham: I think I called Gary and said the parties wanted, my guys wanted to have a meeting. But going into the meeting, I was asked is there, what do you think? Is there a path to the end zone? I said I think there is. I do not think that the Court will ignore the appraisal valuations. I think we can still reference them. And I still think, I don't think they can back off the 62.75 number because it's out there now and I think they're wedded to it. And so I think all the credibility issues that I thought drove the first opinion I think are going to be in play in the second opinion. I'm not telling you this is an easy task but I don't think that we are fighting a losing battle here and I think from the other side, Jim Cotter was hearing something very different from that. And so the report I got back was that they weren't even close, they weren't even the same zip code.

Dent: Yeah, my recollection of what I heard at the time was, I think it was Barry Schwartz who went out and met with Jim Cotter. And the message that I heard was Barry said to Jim, you think you won this, but you haven't, we'll give you a dollar. A dollar. A dollar over the deal price. And I think what I heard was Cotter said something along the lines of well, then, you're going to pay for lunch. That was the last of the settlement discussions, I believe, that ever occurred.

Rohrbacher: So Chancellor Allen finds it entirely fair. That was your hope and you never thought that would be a possibility.

Dent: We were stunned to put it mildly. At that point, I mean, the only fear we had was that Chancellor Allen was just so wedded to the other side's case that he was going to ignore all reason. But we were very confident that when he applied the law we were going to win. And then we lost. We were just stunned.

Rohrbacher: And how about... So then you appealed again. And that was the appeal you said there were no questions?

Dent: My recollection is there was not a single question.

Allingham: There were no questions, that's correct. We went through, you know, we had whatever we had. I think we had twenty minutes each or they were reasonably long arguments. And I went through my entire argument and I was done in eighteen minutes and I said thanks. Not a question from the bench. I've never had that happen before or since, after having been eviscerated the first time around.

Rohrbacher: But then the Supreme Court affirms.

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Dent: We, yeah. And obviously we never completely. I still can't understand how that could be. I mean, the Supreme Court did certain things in that opinion that we thought... So the way we read the Chancellor's opinion on remand, was he said, well remember when I said there was a structural lock up? What I really meant was it was locked up because the price was so good. So that was inconsistent with--we really were optimistic that the Supreme Court would say no, that's not. It was a lock up and you know, there was no... the 23 dollars or the 21.60 or whatever number he found was no longer relevant. We thought we... we didn't think that they could affirm it, but they did.

Rohrbacher: Were you more surprised by the Chancery opinion on remand or the Supreme Court affirmance?

Dent: We were as disappointed in each. I don't know if we were more surprised.

Rohrbacher: ‘Cause Allen, you had a sense--

Dent: I think probably more surprised in the Supreme Court, because we really thought from the tone of Justice Horsey's opinion in Cede II and the arguments, we really believed the arguments. So I guess we were more surprised by the Supreme Court, but again, equally disappointed too.

Rohrbacher: So the fiduciary case is effectively over at this point. The appraisal case then--

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Dent: So this was an interesting thing, and I know Tom will remember this. So we had filed. We had brought the two actions; we had appealed them together. The Supreme Court had said that, as a consequence of what they did in Cede II, the appraisal was moot. So then we were sort of procedurally what do we do now? So we then asked the Supreme Court then to proceed with the appeal. And Justice Holland called us over. You remember that, Tom? We went over and he said you know, we have a little bit of a problem here. We made a mistake. Because when Cede II was over, we issued a mandate and sent it back to the court. We no longer have jurisdiction. You're going to go back to Bill Allen and tell him the Supreme Court wants him to enter a new judgment in the appraisal so you can appeal anew. So we did, but in the course of that, we actually asked him collectively to make a number of changes. Do you remember that?

Allingham: Yep.

Dent: There were certain issues that we had come up and identified things that were wrong. So there was a new judgment entered but it reflected some additional or corrective stuff that the parties sort of worked together to get into a new judgment. And then we appealed from the new judgment. We went over to see Chancellor Allen and he very graciously did what we asked him to do. Our fear was he was going to say I'm not doing that. And then now what?

Rohrbacher: Your thirty days had passed.

Dent: Right.

Rohrbacher: So he issues the new judgment.

Dent: And now the timing to me gets a little fuzzy because… so then we appeal that, that gets overturned; they reverse it. And I haven't gone back to look at that because we were really focusing on Cede II, but they did reverse it. They reversed it, I think, in large part because of the Perelman plan. And so it goes back. And then, at some point, two things happen: Chancellor Allen announces he's leaving at the end of his term and he assigns the case to Bill Chandler. And, at some point, we had the fire in our building. And that was in 1997. And then we had a whole room, the Technicolor room in that building and it was--and the fire was in the tower section of the building and there was no fire in our shop on the third floor, but they used so much water to put out that fire, and they dislodged asbestos and it all floated down and then it became friable. And so we couldn't get into the building and we couldn't get into that room for over a year. And we had to keep writing to the Chancellor explaining why we weren't able to go forward.

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So, finally, we were able to go forward and then there was back and forth about Chancellor Chandler wanted to appoint a master but he was going to appoint... what's the guy's name? University of Delaware valuation guy?

Allingham: Puglisi.

Dent: Yeah, Don Puglisi, thank you. And then we argued he couldn't do that because there were legal issues and he was not law trained in that. And there was a motion. And anyway, long story short, at some point we realized that Rule 63 came into play because there were credibility issues. Bill Chandler wanted to decide the case based on the record, and, once we started researching, we discovered that you couldn't do that

because there were credibility issues. And anyway, we ended up with a whole new trial on the appraisal at some point.

Rohrbacher: So you had the nine day, part two appraisal trial?

Dent: Right.

Rohrbacher: And again Chandler found 21.98, which was still less than the 23.

Dent: And then there, we did some letters, both sides, to him, and he changed -- that number whittled down as a result of some corrections and things.

Allingham: I wasn't really very worried in the appraisal trial. We had, in the earlier expert reports, done kind of fall back just in case you decide you want to evaluate Perelman plan, here's a rough-cut Perelman plan valuation. And it was in 18-19 dollar range. And I had the same views about credibility that I had on all the other appraisal issues. So I thought, you know, we were going to be at 19 bucks. It's going to be somewhere in the eighteen, nineteen to twenty-three range. That's what I really thought.

Rohrbacher: You were happy to go back with Torkelson and Robertson and put them back on?

Allingham: Yeah.

Dent: And we got to the 28 and change I think, largely, from recollection, did it and then the overall number, in large part, because there were a couple law of the case rulings that we argued all along should have been the law of the case. And, before the second trial, Chancellor Chandler ruled against us. And so we put on our case, but then in the briefing, the Supreme Court we argued that, for example, the discount rate was the law of the case, it shouldn't have been, it hadn't been appealed earlier, so it became the law of the case issue.

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Allingham: And a ruling that I thought was just, in addition to their not understanding the impact, was wrong. Discount rates relate to the entity being valued. Since we were now valuing the Perelman plan, you had to go back and look at the discount rate for the Perelman plan company, which is what we had done, not the Kamerman plan.

Dent: And then the big issue then, and this is you know, not part of the valuation per se, but the other big issue on the law of the case was interest and that was really what

made a huge difference. It didn't affect the price, but it affected the overall value because Bill Allen's appraisal was the first appraisal in Delaware where the court awarded compound interest. And he awarded it at 10.32 percent compounded for 20 some years. And so we argued all along that it had never been appealed and it became law of the case when it wasn't appealed. And the Supreme Court agreed. And that made of the I think Ron Perelman wrote a $52 million dollar check, 46 million of which was interest.

Allingham: Yeah, almost all of it was interest.

Rohrbacher: So looking back, how did you feel about the way the case ended? You obviously you won a number of the legal issues, you end up with a $52 million check, most of which was interest, and you went through three different chancellors, different changing seats on the Supreme Court, some opinions very strongly in one favor, and then the other favor. What are your concluding thoughts?

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Allingham: Well, we weren't a hundred percent satisfied with the final decision and the judgment, but, on balance, we proved entire fairness, we proved that the transaction was entirely fair, which meant no director liability. That was really a big thing. And that was something nobody there had done before. So we felt very good about that. We had twice valued the company at below the deal price and appraisals, and we felt very good about that. We thought that the Supreme Court had just made a mistake, but that was just our guess, but that's what everybody on our side thought. So we thought--and it was 22 years of... you know it was 46 million at 52 or whatever, in terms of interest. But it was 22 years that we were holding the six million dollars. So you know, that's what interest is for and although 10.32 was high, in some of the periods during that 22 years it was probably low during other periods. So, on balance, we thought it was a good result. My client was pleased with the result. And I'll give you an interesting footnote: Ronald Perelman had nothing to do with structuring the Technicolor transaction or any of the flaws that were identified in that process, but thirty years later, when he made the judgment to consider taking McAndrews and Forbes Worldwide private, he was the first going private buyer who was ever willing to setup a pristine process in order to try and take advantage of the business judgment rule in a clearly self-interested transaction. Nobody had been willing to do it because nobody ever knew if they would get the protections. And he, I remember conversations, and he said if you think we can do it, we'll give it a try. So given a chance, he was willing to structure, same guy, willing to structure a transaction in the cleanest possible way.

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Dent: We never accepted that this was entirely fair, but obviously it was deemed to be so by the courts. I think we ultimately felt vindicated in the appraisal, so I think there's. It's one of those rare cases where both sides can see some vindication, can find vindication. Our client was thrilled with the ultimate award thanks to the compound interest award and vindicated that our number was. I mean, a big part of it in the last dozen years, a big part of the case, after the liability case was over, a big part of it really was principle. We were determined to establish this was worth more than 23 dollars, notwithstanding the fact that we had argued 62.75. We truly believed it was worth substantially more than that. We felt like we were vindicated there, but, for a long time, it was hard to get over them finding that finding entire fairness in the transaction that we were so committed, you know, we just felt was just not a fair transaction.

Allingham: And the last thing I'm going to say is that I've tried dozens and dozens of cases since that trial, and I've never had a trial that was as well done. I mean, it was really great. It could have been shorter, but the quality of the advocacy on the other side was just super, really great; it was fun.

Dent: Yeah that was my first trial. I mean, I didn't put on witnesses. I made a couple of arguments, but I, basically, sat there and then would go back and do research, but, to me, it was remarkable to be in a trial at that level and seeing the caliber of the advocates. I mean, you know, that was, when you're that junior and seeing that for such a long trial, it was very remarkable. You know, not all cases are tried like that, that level.

Rohrbacher: Well, thank you very much for your time.

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