

ROWE: We're here with Herbert M. Wachtell, the head of the litigation department, the senior litigation partner of Wachtell, Lipton, and one of the founders of the firm. And we're going to discuss three of the landmark Delaware decisions that Mr. Wachtell argued and was the chief of the team. Starting with Revlon, how do you recall the origin of our firm's involvement and the development of the strategy?

WACHTELL: Largely I don't... I know we were retained. I recall there was a massive search for a white knight and we finally came up with Forstmann Little. I had to refresh my recollection on that. And the strategy was to be very, very, very careful in board meetings. Our firm worked on takeover defenses and the like with a very integrated team of corporate lawyers and litigators and anybody else who was required, obviously, tax or so on. And Marty Lipton was heading the corporate side of the Revlon defense as I recall and was being excruciatingly careful as to how the board was handled and the problems on the matter. And there were stages along the way. There was the bond issue, which I refreshed myself on, and then, ultimately, there came the real choice before the board of whether to go with the Forstmann Little offer, which had a no-shop clause and which required a breakup fee in the terms of a very favorable share of those two divisions. I have no recollection of this; this has all refreshed my recollection because I read over the transcript of argument before Judge Walsh at that time in the Chancery.

ROWE: Going into the case did you have any kind of premonition of how much of a landmark Revlon would represent? It's probably by its name the most easily recognized decision in Delaware law in the merger and acquisition field. Did you see that coming?

WACHTELL: Not at all. Not at all. The issue that the court eventually went on and made it a landmark decision was if you are in a takeover mode you have to treat people fairly, you have to treat everybody fairly, you have to treat everything reasonably at the highest price, etc., etc. Frankly that was being done in Revlon. Ironically--and I'm going to be impolitically correct now--I think the Revlon doctrine to that effect is perfectly sound. I've always thought that Revlon on its own facts was wrongly decided.

ROWE: And was that because of the noteholder issue or the noteholder issue and other aspects of the record and how the courts saw what had happened inside the Revlon boardroom?

WACHTELL: I'm glad we started with a case that I lost. But I only argued it at the Chancery, I did not argue it in the Supreme Court, unlike Time Warner and QVC, where I did. And the Chancery argument - very little allusion to the [0:00:03:54] noteholder issue. It was mentioned by the judges as I recall, because I read the transcript at one point. But the real argument in Chancery was this was a board that was faced with a choice and Revlon had been playing this game--whatever, I guess it was called Pantry Price [0:00:04:17], but Pantry Pride was playing the game. I should not dump all over Pantry Pride which became Revlon because they've been a client of our firm now for many years. But they were playing a game - whatever anyone else offers we'll up it by twenty-five cents. And this put the board in a very very difficult situation. And ultimately, Forstmann Little said enough, we're not going to be a stalking horse and we're prepared to make a very major rise but there has to be a no-shop clause or we have a breakup fee. And the things that seemed to... Judge Walsh, vice chancellor, gave me a very rough time on argument which eventually led to what became my pivotal argument. Which if you read the record, well there was no negotiation was there? Well, Your Honor, yes there was. I was getting a very hard time from him. And but there was no particular emphasis. At one point they mentioned the bondholders but that was not the thrust of what seemed to be troubling him. And eventually I decided--maybe I decided in advance but certainly was accentuated by the fact that I was not in a winning mode based on the judge's demeanor and questions, and the like--I decided to make a very very strong argument. And I can actually read it to you now and then I came back, and then came back to hit it again periodically:

"But the irony is usually, Your Honor, when people come in after the fact and say well here I am, I'm really prepared to do more if only the board had left the auction open, this is usually rejected by the courts which say the board is entitled to deal.) But usually it is rejected in the context of the disappointed suitor comes in and says I'm willing to do better if only they had left the auction open. What do we have here? They come and say even now we are willing to do worse."

And then I hammered that scene that they had never said they were going up, they had refused to go up and basically they were seeking to enjoin, as I recall, Forstmann Little and go forward with the deal with an offer which was worse than the offer on the table. And there, suddenly, the judge was silent. I did not get--I do not believe, I can look again--I don't think I got any kickback on that argument because it was sort of unanswerable. It was effectively an unanswerable argument. And when I made the argument I knew that in terms of the courtroom I would probably win, but in terms of the matter, that was not sure, because that argument was so powerful I did not see but how Perelman, Pantry Pride that could do other than to raise their offer and raise it very substantially because they were considerably below the Forstmann Little offer. And I have a very vivid recollection having thought that and knowing that. I got into my car, I was driving to Wilmington in those days. I got into my car to drive back to New York. And by the time I arrived in New York, Pantry Pride indeed had made a massive raise and it was now a twenty-five cent raise; it was a topping bid, too. It was a lot of money. Well, maybe it was a lot because it was already under, but it was a major, major raise.

Now, theoretically that should have made no difference in the outcome of a litigation because theoretically you view the board action as of the time that the board acts. But that was not the reality. And I think that the fact highly beneficial to the shareholders. They get a lot more money. But I think it had a risk that we weren't going to win the litigation. So it was a rough call.

ROWE: And what about the aspect of Revlon that deals with whether the board can consider the interests of constituencies other than stockholders? Had you seen that as an issue that was even open under Delaware law prior to the decision?

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WACHTELL: Not really. And again, if the Delaware court feels that that's a valid doctrine it'd be very hard for me to quarrel with it though. I think from a broader view is that there are many constituents and there should be many constituents in a way that the board has to look to, and I think that view has gained more currency over the years. But on the facts of the particular case, I think it was incorrect. Because it wasn't just a matter did they or did they not have a legal obligation to the bondholders, but those

bonds had just been issued and the evidence was that the overwhelming majority of them were still held by people who only days before had been shareholders. And as a practical matter there were conditions to the Forstmann Little offer, in a litigation out, that there was going to be litigation on the bondholders. On the facts of that particular case--and there was some waiver required, I don't remember particularly but I saw a reference to that--

ROWE: Covenants.

WACHTELL: Yeah. On the facts of that case, even if there was no general obligation to bondholders, that should have not have been the holding of the case on the particular facts of that case. That's why I say I really don't have a quarrel with the doctrines of Revlon, but I did not think the case was correctly decided on its own particular facts.

ROWE: One of the things that I remember from that period was how quickly these cases were litigated and how little time--at least in some cases there was--to develop a full record. Was Revlon a case where you felt that... And I'm not suggesting this one way the other, I'm just remembering. And I looked at some of the dates. The short period of time between some of the actual events and the hearings. Did you feel as a litigator and a very experienced distinguished litigator in many forums, how much impact if at all did the very accelerated nature of these cases like Revlon have?

WACHTELL: It certainly put a huge burden on the preparation of the person's briefs, the preparation of reply briefs, the preparation of oral argument or the like. But it was part of the game so to speak. You expected it. These were preliminary injunction motions. Preliminary injunction motions should come on very quickly and should be decided quickly. So I don't--I remember feeling great pressure to get everything done and get it done superbly but I don't think I ever felt that anything was neglected because of time constraints.

ROWE: Anything else about Revlon that you recall or that you would like to explore?

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WACHTELL: Perelman's number two guys sent me a bottle of champagne at a restaurant a few weeks later. [laughter]

ROWE: Well as I say, in a sense both Time Warner and QVC are cases that were dealing with the aftermath of Revlon, where people had to decide what triggered Revlon and what it meant if Revlon was triggered. So why don't we talk a bit about Time Warner which at its time was one of the most heavily contested and most heavily covered in the news media cases. Although QVC Paramount most certainly gave it a run for its money. What did you think the best argument we had, our side, in Time Warner was, or if you had more than one?

WACHTELL: I think it'd be more than one.

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I think the best argument we had--but there's more than one - was just the one that shows up in the opinions, the way the matter ended up, essentially it was not Revlon, because the company was still going to be publicly held broad array of stockholders, combined companies, so on and so forth. And therefore it was not a sale of Time Warner. If anything, I remember we argued if you look at it, it was a sale of Warner more than ... . It was peculiar because I remember if you went back, Warner was never... Warner did not want to say it was being sold. On the other hand, one of the arguments I was making, as I recall, was the sequence of arguments was I didn't argue first for our side of the case. Bob Joffe of Cravath argued first for Time. I was arguing for Warner. So I'm sort of saying there, here we are. No one has accused us of any bad faith, breach of fiduciary duty, anything else. We had no conceivable reason to think that the Time board was guilty of any-- and what, you're going to leave us stranded? And now we're in Revlon mode and someone's going to come take us over? We had a no-outs deal precisely because we were not prepared to put ourselves in that situation. I remember that was one of the arguments I saw that happened at the end. So the key argument was that this isn't Revlon at all, that this was a diffused body of stockholders. And when I went back--and actually months ago I found the transcript lying around my office and I actually read it. And paradoxically I won the QVC case on my Time Warner argument, because I said this is not the case, for example, if you had a company that's controlled by a single person taking over Time or whatever it was. And then the other--we had so

many arguments on the thing. We had the argument that the condition of the offer was conditioned all in the wrong duration and such.

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But I think the key key key argument was that Time--you know this deal was entered into, had nothing to do with Paramount, and who said that these people have to freeze their corporate life because Paramount would choose to take over Time, and to make it more convenient for Paramount to take over Time? And that was a very cogent argument, extremely cogent argument. And there were two things I remember vividly stick in my mind about the Paramount argument, the Paramount case--and then I can tell you an anecdote. I recall waking up at the DuPont Hotel in Wilmington that morning for some reason--you can go back and check, I think it was a Tuesday--this is Chancery Court now. This was Chancery Court. And I believe I had the Times delivered to my room. And I picked it up and on the front page of the Times there was a story about the argument. And it proceeded to quote John Coffee from Columbia Law School to the effect that I did not have a prayer of winning, which was a wonderful way to wake up and walk into a courtroom. But of course John Coffee did not know something when he opined that I knew. And as I say, I did not argue first, Bob Joffe argued first. But early on, as I recall, in my argument... You talk about the speed of the proceedings... Our partner, Peter Hein had taken a deposition of Marvin Davis who was the chair and CEO of Paramount. And Peter who was a brilliant lawyer asked Marvin Davis--I can't give you word for word: "Well, if this deal really goes forward, what are you going to do?" And Davis answered along the line, "Oh well, we will review our options." That may not be word for word but it's pretty close.

And I became ready to hammer that because if they were reviewing their options it meant (a), their argument that they were being foreclosed went by the wayside, maybe they could take over the combined company. And secondly, where was their irreparable injury? And somewhere very early on in the argument--but no one knew this testimony because the depositions had been sealed, they were confidential. I don't know if sealed is the right word but the depositions were not public. I started reading this testimony and started hammering this testimony that it showed they were not foreclosed, it showed that the whole case had to go away with no conceivable [0:19:50] preliminary injunction. I sort of remember the

courtroom erupting. Maybe it was arb lawyers but there was a totally--it got through to people that this was a totally different case than they expected it to be. And that tied very much in with the theory of there's no foreclosure here, it isn't a single person acquiring the company--it's a bunch of stockholders out there, ok, it's a larger company.

ROWE: It's not an end of life transaction.

WACHTELL: No. This isn't Revlon. This isn't Revlon at all.

ROWE: Do you remember at all some of the response from the other side, was it that Peter's question had been unclear?

WACHTELL: No [laughter]

ROWE: That was an interesting way to try to deal with that.

WACHTELL: No, I don't remember that.

ROWE: So what did you make of the argument in Time Warner that somehow the shareholders had been deprived of the opportunity to vote?

WACHTELL: That was tricky. That always deterred me because... The original structure of the deal as I recall called for, under the stock exchange regulations, called for a vote. Do I have it right?

ROWE: Yes.

WACHTELL: Now you remind me. I remember I went down--Marty and I or somebody went down to the stock exchange to try to talk them out of it. That really wasn't necessary. And there were fairly substantial arguments why in the particular situation a vote should not be necessary. And we could not persuade them. But then when I guess Paramount came along with their offer, conditional as it was, delayed as it was, everything else, it was structured so there would be no vote. And that was to my mind a flashpoint where we could run into real problems. And indeed I got questioned very closely on that in the Supreme Court argument as I recall, about, you know is this proper to take the vote away? Why? And we had answers that were

our best answers that I could come up were along the line of there were so much false propaganda out there we couldn't hold their own, we needed a cooling off period and Warner goes and sits and waits for a cooling off period. But that was a tricky argument.

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And then the Delaware doctrine of independent legal significance that if you do something one way and you have a vote, that doesn't mean if you do it another way you have to have a vote. And that resonated because that is such a fundamental precept of Delaware corporate law, litigation law—the doctrine of independent legal significance--you don't spill over from one theory to another.

ROWE: One of the things that I think comes across in the Supreme Court opinion as opposed perhaps to the Chancery Court opinion is a strong sense that Delaware companies, when they're pursuing a strategic merger transaction, ought to be able to do that without in effect taking on the special duties they might have if Revlon applied. And so the decision when it came out eventually about six months after the argument, I mean, they said how they were going to decide it, but they didn't write and issue the decision for several months, was viewed as sort of a major statement by Delaware trying to give strategic transactions more protection and by inference--at least from some critics--giving management and boards more leeway to--as the court said, pursue long term strategic goals and long term business plans as opposed to short term plans. Did you see this as a major framework for the argument in either?

WACHTELL: You know, you're reminding me. I have to look at my argument. This came up during the argument.

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WACHTELL: I went into a very risky argument as I recall it. Or it seemed risky because it was... It would take a lot of space. And you never know when you're arguing, particularly before a Supreme Court with multiple judges, someone's going to break in with a question. So it's always a problem. I had the same thought on QVC--we'll get to it later. But I made an argument which I thought was a very very strong argument that the other side was attempting to take--whether it was Revlon or Unocal or so on--and

turn it into a rigid mechanistic formula of money and dollars, which would totally defeat the base fundamental concept of reasonable business judgment of a board.

But in order to develop that argument what I had to do is take their experts' testimony, who had done a comparison of dollars between the dollars that were then on the table and a projection into the future of what the Time could be worth long term. And it was billed on the other side as being a conservative estimate. But they used I think a twenty-five percent discount rate. And I developed an argument--and fortunately I didn't get interrupted--twenty-five percent discount rate is the kind of discount rate an arbitrageur uses for short term. This isn't a long term rate. So what they are telling you is that Delaware law and reasonable business judgment should be rigidly confined for short term by using this discount rate, that that should control the reasonable business judgment of the board.

And then I read this the other day so I flagged it: and it's interesting because it goes to a lot of what goes on in this country:

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Page 86. "I think a board, as this quote has indicated (after I went through this whole mathematical analysis, which somehow I don't think I got interrupted on. No, I didn't. If you go back... Well, no, Moore asked me, can't you take short term speculation? [laugh])

"Mr. Wachtell, I think a board, as this court has indicated, should indeed take into account (among other things) the interest of short term speculators. They are stockholders where they acquire stock. But I do not think that you can put it, Your Honor, at a specific percentage."

And then the next thing I said:

"And I do not think that we can survive as an economy, as a nation, or as corporations if boards are compelled to look to short term values."

It was like a peroration. It's something our firm, I, Marty, strongly believed and it was my opportunity to put it on the record.

ROWE: And the Supreme Court, despite Justice Moore's somewhat tart questions to you on that page, that was the direction the Supreme Court was ready to move?

WACHTELL: Yeah.

ROWE: Did you feel--and this connects to a sense that some commentators looking at this period of Delaware law have expressed, that there had been a little bit of a change in the view of the takeover activity, the tremendous takeover activity fueled by, well, in part by Drexel Burnham and the availability of financing for transactions that would end the existence of many traditional historical American corporations. Did you feel that the receptiveness maybe of the court of 1989 was different than it was when you had been before them five years earlier and the takeover wave--well, you can't say it was just beginning--it hadn't driven through as much of American industry by then?

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WACHTELL: I think to a certain extent, yes. I think that the Delaware court was waking up to the fact of the evils of everything being quickshot and takeover and so on. There's this very humorous passage that got a lot of note as I recall in this argument. I think it was Justice Holland. I don't think I flagged it. But he started throwing these softball questions: "Haven't we previously held X, haven't we previously held we can look at the long term? Haven't we previously done this?" And I finally said "I think you should talk to my adversary." And you know, there was big laughter in the courtroom and on the TV screens. But yes, I think the answer is yes. I think they recognized you had to put some brakes on.

ROWE: And let's go back for a moment to Chancellor Allen and the Court of Chancery case and opinion. Because he took a somewhat different approach from the one ultimately... He ruled in favor of Time and Warner but he was very precise about saying that the issue was whether or not the resulting company would have either a control shareholder or it was going to come to the end of its existence, there'd be no control premium possible. What he said was as long as--as you said earlier--as long as there's a public corporation and that corporation can be sold in the future, that--

WACHTELL: And it just has been [0:31:44]

ROWE: --And it just has been. It's a historical irony that we're having this discussion today perhaps. But he was very precise, if you will, about locating the reason why Revlon didn't apply, on a definition of what a change of control means. And the Supreme Court swept with a broader brush.

WACHTELL: I think they did that but then they said, I think, additional things. I'm trying to recall--and I don't know, I haven't gone over all the briefs or anything. I don't know, for example, this twenty-five percent discount rate... I'm not sure it was even argued before Chancellor Allen... You know, it's my experience as a litigator, you start off with a case, there's a complaint, there's an answer, there's depositions, there's motions, there's preliminary motions, that by the time you get into a supreme court or a court of appeals, invariably the emphasis of the arguments bear no relationship or not necessarily that much relationship to what was argued previously. This is a development process during the litigation. I think your own attitudes change, your own concepts change of where you should go. I think the arguments before a Chancellor, even if you thought of it or chose to argue it, are different than you might have answered in the Supreme Court. You figure a Chancellor keep it simple, he's bound by precedent, he doesn't have as much leeway, don't go further than you have to go; whereas in the Supreme Court you can afford to open up.

ROWE: Well you get the sense reading the Supreme Court transcript that the justices from, really--not that they didn't ask you very tough questions--but that they were leaning towards affirmance.

WACHTELL: I guess so. I'm trying to remember. You know you always have your heart in your mouth, you never know.

ROWE: That's true. They can be very tough on one side and then they turn out to be tougher on you when you get up.

WACHTELL: Yeah, you never know. Did I think when I was arguing? I think I was just thinking about making my argument, making the best arguments, time constraints. I don't think I was thinking. And I have to tell you, my experience has been--I have been in some situations where I have walked

out of the court and told the client, look, we lost this one and then I got an unanimous decision from the court of appeals in my favor. You never know. I just don't remember. Maybe I was optimistic.

ROWE: Were you more optimistic, for example than when you left the Revlon argument?

WACHTELL: Oh yeah. But I didn't argue Revlon in the Supreme Court. Oh yeah. Well, actually, you don't know. Because I think but for the raise I think I would have won Revlon before Vice Chancellor Walsh. I think the argument that they're here with an inferior offer asking for an injunction, I think that argument, notwithstanding skepticism and everything else I said, I think that argument would have carried the day. And the reason it didn't carry the day, even though as I say, theoretically, nothing that happened after the board meeting should make a difference as to the reasonableness of the board conduct, the fact that Perelman had raised... I think he even mentions it in his opinion: let him feel free to go with his previous disposition.

ROWE: Time Warner and as we'll get to QVC/Paramount, both of them--both cases involved very well known media companies, very glamorous businesses. There was an enormous amount of press coverage in both cases. Did you feel that the participants, the corporate folks involved had to in effect play to the media as well as the court, and did you ever feel that there was a tension between those two needs?

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WACHTELL: I did not personally feel that there was any tension whatsoever. I had never argued before a televised court proceeding prior to Time Warner. When I walked into court I did not know how I was going to react. And once I got up on my feet and started arguing and so on, I was oblivious to it. It was no different than arguing anywhere else. On the other hand, as I recall, it was a stockholder lawyer who... I think he was playing to--maybe he would have done it anyway--but he was playing to the camera perhaps a little bit, as I recall. He came up... what was the great line? We were playing to the aura of Time Warner and the fantastic company and he sort of said "well, bathing suit issue of..." you know, Sports Illustrated. [laughter]

ROWE: The Time culture argument. And he said "it's really People magazine and Sports Illustrated culture."

WACHTELL: Now would he have really argued that if there was no television going on, I don't know.

ROWE: Have you seen--there have been some studies done that actually track the stock prices of the companies involved in real time as you and the other lawyers are arguing?

WACHTELL: Well that's what I was saying to you in terms of the Chancery Court. Later on or maybe then, I don't know if Bill Allen--Chancellor Allen put in you can't leave the courtroom rule in Time Warner. I just don't remember. I know since then--and maybe he did, too, but I knew there were certain cases--we argued a lot of takeover cases -- where when something exciting would happen in the courtroom, the arb lawyers would run for the doors. So the answer is yes.

ROWE: And of course if it's televised they're watching it on their screens.

WACHTELL: And I was telling you an anecdote before that we talk about how widespread this was. Unfortunately one of our founding partners, George Katz, had died. Recently, not too long before the Time Warner matter. You know, totally unrelated. And the wife of one of our other partners insisted that George's widow go with them on a vacation. And the two of them went--it was Mary Sterling, who was a great adventurer-- ended up being on some ice floe up in northern Canada looking at seals or whales or whatever it was--spent the day out on the ice or awning or whatever it was. And then I'm told came back to this little Eskimo village. The television was on and they watched me arguing in Delaware. So yes, the coverage was ubiquitous.

ROWE: And there was tremendous public excitement about it. And then for three or four years afterwards, the volume of takeover cases in Delaware seemed to decline until QVC/Paramount.

WACHTELL: Yes.

ROWE: I remember when QVC/Paramount became a big contested takeover. It was like the eighties are back because it was several years later.

WACHTELL: I remember, tell me if I'm wrong, you and I worked on it together.

ROWE: Yes, absolutely.

WACHTELL: Vividly. I didn't like your first brief. [laughter]

ROWE: [laughter] Well how *did* you feel QVC should be litigated? You obviously had a very strong sense.

WACHTELL: Yeah I had a very very strong view of how QVC should be litigated. And I called it the dog that didn't bark. I looked at the minutes, such as they were--which they were very skeletal--of the Paramount board. And they were very skeletal. And I basically approached the case--I think you and I talked about it--and I sat back and said if I had been running that board meeting, how would the board meeting be conducted, what should the board have known? And there were all sorts of facts that the board should have been aware of. It was that between the time they turned down a previous offer and the time the offer they were accepting, Redstone had been buying up shares of stock so it made the new offer look like a great offer when actually it was inferior to the previous offer. That they should know that. That they should know about the lockup, that they should know about the no-shop clause, and so on and so on, like five or six critical things, at least, that a reasonable board should know before they decide to accept the Redstone offer. Oh, there were options, a whole bunch of things.

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And I insisted that I would take the first deposition of a board member and that hopefully that would be the prototype of everybody else that was taking the continuing depositions. And my whole sequence of questions was as the first guy: "Well at the first board meeting were you told X. Did anybody ask? No. No, I don't remember that." And on and on and on. Just a pattern. And then a perfect pattern continued in every other director because in fact they *hadn't* been advised and nobody *had* asked. And that became the brief--particularly I think in the Supreme Court--it was the dog that didn't bark. We

had no affirmative facts. We had the facts of when a raise came or when... But what did we have to show when the board didn't act reasonably? And we had no affirmative evidence that they didn't act reasonably, it was just what we created. You should have been told this and you weren't and nobody bothered to ask. And that was powerful powerful powerful I think in winning that case in the Supreme Court.

ROWE: And it was a very clear question that Sumner Redstone is going to have control. That was what should be emphasized. There was no factual dispute about that. So I think we wanted to argue it as a cold undisputed fact, like a summary judgment motion but without any of the testimony. And you wanted to go in for the jugular and these people... But anyway, why don't we go back on the--cause I actually wanted to approach this a little bit, though, not from the standpoint of our internal brief writing. Back on that.

WACHTELL: I mean it made the intense pressure of what we do so much fun that you had the different points of view and you battle them out.

ROWE: Yes, and everybody has their say and... So one of the thoughts that some observers have had about what was going on inside the Paramount boardroom was that they were in effect operating under a mistake of law. They believed that they had no legal responsibility--or their advisors believed they had no legal responsibility -- to answer any of the questions that you refer to or to provide the board with information because in their mind they were operating, frankly, under an unreconstructed Time Warner approach to life to where if you're doing a strategic deal you don't have to pay attention to somebody who comes along and wants to buy.

WACHTELL: I think it was more arrogance. Maybe. I think you had Sumner Redstone arrogance.

ROWE: Do you remember some of the--I think you did good work--

WACHTELL: You know, there was even a memorandum.

ROWE: Donald Oresman's memorandum?

WACHTELL: Yeah, you know, which really laid out what was wrong with what they were doing, which they never produced in discovery, but we got it because Lazard had it and Lazard produced it in discovery. And he was obviously unhappy with what was going on in the boardroom from that memorandum.

ROWE: So in that case you had a number of public statements by Mr. Redstone and Mr. Davis: "the marriage that shall never be torn asunder," "it'll take a nuclear--" I'm sure I'm getting these wrong, but "it'll take a nuclear war."

WACHTELL: No, that's what I'm saying: I think there was a lot of arrogance.

ROWE: Do you think those out of court statements--well, sort of possibly intended for the media -- nonetheless hurt that side?

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WACHTELL: Well it certainly showed, if you're in a Revlon--not Revlon--in a... Unocal mode, you know, whatever it is--that they didn't feel that they had to pay much attention to it. I think that's what I guess I'm saying. I think it was bad lawyering, also. Because there was no reason to think that Time Warner should control this.

ROWE: Well, their argument was that as long as the stockholders continue to have a significant ongoing equity interest that the fact that voting control has changed is not something that was mentioned, for example, in the words of the Revlon decision.

WACHTELL: Yeah, but I was hammering the fact that the board had not negotiated for any protection for the minority that was going to be left in. So Redstone had full power to get rid of them at any price he wanted any which way. He had a majority, he could merge, you know? He could merge them out at ten cents.

ROWE: But their answer was that would be subject to entire fairness and the Delaware court could remedy that.

WACHTELL: I don't know how much the public statement--the public statement certainly did not help them--I don't think they were determinative.

ROWE: So one thing that comes out very clearly is that QVC/Paramount was a rare instance, at least in that period--not the only instance, but a rare instance where our firm was the plaintiff and breaking up--essentially trying to overbid an existing deal.

WACHTELL: Yes.

ROWE: How did you feel? Was it more fun to be a plaintiff?

WACHTELL: [pause] No. It was very hairy in Chancery Court. I mean we were arguing in Chancery, and as I recall they were going to close at midnight. So being a plaintiff in that posture was not relaxing or fun at all. And I think that's when we got a temporary restraining order or preliminary injunction or something or other. No, that was hairy. In fact they were arguing, well, it's not a fait accompli,[0:49:45]plea, the board could do something, and we were making a mockery of that, what do you mean you delegated to management the power to pull the pill and do everything else? You're going to close at midnight, what do you mean the board is going to intervene? But it was touch and go. I mean, who knew that the Vice Chancellor was going to go with us?

ROWE: Did you feel there was a particular legal argument or piece of evidence that you thought really hit the Vice Chancellor's decision-making and helped us over the top?

WACHTELL: I don't remember. I remember how I argued in the Supreme Court but I don't remember what I did in Chancery. And I haven't gone back to read it.

ROWE: Sure. Well one of the things that I noted when I was reviewing some of the materials was--

WACHTELL: Maybe you can refresh me.

ROWE: Well--and I'm not suggesting this was crucial, but it was an interesting thing that Paramount did, that they were a little bit cagey about what advice they were asking for from Lazard and they brought in Booz Allen to do a report. Do you remember that?

WACHTELL: Yes.

ROWE: Do you think that was important?

WACHTELL: Well, I remembered two things--and maybe my memory is wrong or maybe I'm conflating cases--but I remember arguing either in the Delaware Supreme Court or in Chancery in some matter in the chancellor or in some matter or other, and somebody had brought in Booz Allen or the equivalent of Booz Allen and the judge asked me "Well what do you think about this?" And I said, "Ah ha" and proceeded to quote the statute from Delaware which says "the board is entitled to rely upon..." and it didn't include people like Booz Allen. [laughter] And I was prepared for it. And I said to myself, wow, I'm sure glad you remembered to prepare for that one. We certainly hammered the fact that they never said that the offer was superior, etc, etc. That Lazard never gave an opinion that the Paramount--that the Viacom offer was superior.

ROWE: There was a lot of talk as I recall about an offer could be inadequate simply because somebody might later offer more as opposed to being sort of absolutely inadequate. But we may be getting into the minutiae--

WACHTELL: Yeah, the other thing. It goes back to what you asked me before, being a plaintiff. You know, I don't want to say frustrating, but what was very troublesome about what we were doing throughout the matter, not just at the time of argument, was they had a head start with us, I guess in terms of Hart Scott.

ROWE: Yes, that's right.

WACHTELL: And we couldn't catch up. So we needed an injunction. And we would say as long as nothing happened they won because they could close and we couldn't.

ROWE: Do you recall any difficulty in thinking about what the shape of relief you would be asking for in that case or how the injunction would be shaped?

WACHTELL: I'm sure we debated it.

ROWE: Because one part of it was that on the one hand, the likelihood of a court saying you have to sit down and negotiate with QVC, that wasn't something we asked for.

WACHTELL: Well they had already ostensibly recognized that but then defied it. If you recall, one third of the way along the sequence of things, I guess they woke up a little bit and said well, we have a fiduciary duty to talk, but then they didn't. No, I'm sure there had to be a debate on the scope of injunctive relief we should asked for. It had the effect of--and to my mind, it had to be as narrow as possible to be effective so you didn't give a judge more of a burden than the judge needed. Although that's always my--the reason that I'm not remembering this specifically for this matter, but that's always my thing: don't go overboard.

ROWE: And interestingly enough it included--

WACHTELL: We knocked out the--he knocked out the option.

ROWE: The option and the pill. The idea was if you pulled the pill for an offer here you had to pull it for an offer above that.

[0:54:42]

WACHTELL: Well that's when--I don't know if you want to talk about the argument before the Supreme Court?

ROWE: Sure.

WACHTELL: When I sat down to prepare the argument for the Supreme Court I had a concept in mind that I wanted to argue. And again, just as I was saying, arguing a twenty-five percent discount on a long drawn out thing is very scary but maybe we'll get interrupted. I had a thought of how to open the argument to the Supreme Court that I thought was fantastic and also scary as hell because it was going to take a lot of time to develop and

maybe never get--you know if somebody gets impatient, maybe not even get to do it. And as I recall it was something along the line of: The Delaware Supreme Court is an interesting body. It's a fine court, it's always been a fine court, and it is very much caught up with Delaware, with Delaware corporate principles, with its own majest, and it's entitled to be--I'm not saying that in a negative sense. But if you can argue and play to that attitude of the Delaware Supreme Court, I think you're always ahead of the game (and particularly if you come from New York. You know, you're not a Delaware lawyer). And the concept I came up with--and I eventually used it--and I think to great effect, but it was scary. And I haven't read the transcript, was something along the line--there are three different prisms of this court's jurisprudence through which you can view this case. And they lose on all three. And it was... I guess either Revlon, Unocal, Household--proper use of a pill and whatever the name is--informed board.

ROWE: Van Gorkom.

WACHTELL: Van Gorkom. And then I proceeded hopefully somewhat pithily, to spell out each one. This is my opening. And that's scary as hell. And it worked. To my recollection I did not get interrupted and it sort of laid the foundation then of the whole argument. I thought it was an incredibly effective way to start the argument. But it was scary.

ROWE: It actually raises a question that I meant to ask about all three of these cases but now that we're on the third, if you remember about any of them--were any of these cases situations where you thought either at the Chancery Court level or at the Supreme Court--at least for the ones you argued at the Supreme Court--that the oral argument was critical in the sense that the panel came in undecided?

WACHTELL: Didn't know. Don't know.

ROWE: So each one of them was a situation where you didn't have a strong feeling as to which way the three judges were going to go?

WACHTELL: I didn't argue Revlon at the Supreme Court.

ROWE: Right.

WACHTELL: I had a strong feeling--not before I walked into court but during the Revlon argument in Chancery that I was in trouble. I did not--again, going back, I guess I did not feel I was in serious trouble in Time Warner. And I don't really recall that much of the courts. As I said, I didn't go back to read the transcripts, so QVC is dimmer in my recollection. Don't know. And of course in one we were... Well in both... In Revlon we were appellant, in Time Warner, QVC, we were appellee [0:58:53] in each. In one we were beating off an injunction, the other one we obtained an injunction. I don't know.

ROWE: A lot of time was spent on the QVC appeal about whether or not Viacom had vested rights in the option. Do you remember that argument? I mean it wasn't your argument.

WACHTELL: No, I don't recall. I don't recall. I mean, obviously that was an issue and I know the Chancellor--I guess the Chancellor a little bit surprised us by giving us that victory. I don't know if you recall that. I think we were a little bit surprised that he went that far to knock out the option. No, I do not recall extended argument of that. But as I say, I haven't reread the transcripts so I'm kind of cold on it.

ROWE: Are there things... We talked a little bit about some of the evidence in QVC. Was there anything that happened in terms of surprises that you recall other than the Oresman memo surfacing in Lazard's files and the directors who hadn't been advised on the subjects that you asked about?

WACHTELL: Maybe you can refresh me if there was. I don't recall any other surprises so to speak.

ROWE: Well there was--and again, I'm not saying this was critical, but there was a major theme of course about management and management's preferences. And that was again, a theme you see in all three cases. In Revlon there was a feeling that even though a company was being broken up that the board preferred Forstmann Little to Pantry Pride. There was certainly a lot of emphasis on the so-called Time culture in Time Warner. And there was a feeling also with respect to Mr. Davis that he had a strong preference as to how management should be arranged.

WACHTELL: Well, one of the things... There was testimony from Redstone-- you're now reminding me--which I thought was damning for their side.

[1:01:41]

And it was that, there were for three or four years... Or this was actually damning testimony, that for three or four years he had been courting Davis and had gotten nowhere. And then he sat down that spring and had negotiations and wanted to talk to Davis about price. And Davis essentially said I don't want to talk about price, we gotta talk about who's going to run the company. And that was damning.

ROWE: Well the whole management issue--

WACHTELL: Well his role. What's my role. Am I going to run the company. Yeah.

ROWE: Am I going to run the company? And once that was solved--

WACHTELL: Everything fell into place, yeah. Price was inconsequential. The purchasing of the stock, I thought, was just a home run. I don't know how much weight the court gave to it. Because if you actually looked at the two offers which were a combination of stock and cash, the second offer in the fall was inferior. In other words, in terms of number of shares and amount of cash, it was worse than the one that had been rejected back in the spring. And the only difference was that the stock had gone up like thirty percent. And the reason the stock had gone up thirty percent was Redstone had been buying, heavily. That to my mind was absolute dynamite. It was not... I don't think the board... It was not in the Lazard book that was given to the board, whether it was mentioned to the board, it would have had to be fleetingly and without any significance. But to me... I don't remember the courts giving that much weight to that. I don't remember. I'll have to read the opinion.

ROWE: It was heavily argued but sometimes when it's uncertain from the record--and as you say, it's a preliminary injunction record and by the time you get... you may recall that at the Court of Chancery level, the Vice Chancellor felt that the Paramount board had—I'll be colloquial here had sort

of done ok in the early stages and it was only... I forget the date... But there was a particular date. And he said after that--

WACHTELL: I had forgotten that. Yeah, and we won so you don't get too dismayed at winning. But I wasn't happy that he gave them a reasonably clean bill of health because, for example, how could you possibly say that, when this offer was really worse than the offer you had rejected except for the fact that he had brought up stock?

ROWE: Right.

WACHTELL: So you reminded me, I've got that. I wasn't happy with that little fillip [1:04:57] in the opinion.

ROWE: In Time Warner it wasn't so much the Warner side of the argument but the Time side, if you will, spent a lot of intellectual capital on the notion of there being a Time culture which one of the purposes of the transaction was to preserve. How did you feel that played with the court or played into the wider legal issues?

WACHTELL: The reason I'm hesitating is I had a very strong feeling on that subject and was an episode that occurred during the deposition process that very much centered upon that. But I don't think I'm comfortable talking about it.

ROWE: Very good. There's a history in these interviews of the interviewee at least once saying I know the answer but I'm not going to tell you.

WACHTELL: I thought that Time culture was critical and I made my views on that known to Time.

ROWE: Very good. Any other thoughts on your career as a premiere litigator of Delaware takeover cases?

WACHTELL: Not really. I mean, I litigated others. I'm not sure I could... What's the film people? The instant cameras?

OFF CAM: Kodak. Polaroid.

WACHTELL: Polaroid. I litigated Polaroid. I litigated... I tried to get the Delaware court to intervene and stop what was going on down in Texas on --

ROWE: Texaco/Pennzoil

WACHTELL: In Texaco/Pennzoil. I couldn't persuade them to enjoin Texas. [laughter] Because we saw a disaster looming in that matter and we were right. And you know, I had other takeover ones, off hand I just can't think of them. But I had other takeover matters in Delaware besides these three.

ROWE: Do you remember after the QVC argument--I think that was a closed courtroom as a... and I may be wrong about this, but I remember Barbara Robbins coming out... Some of us were waiting at a nearby building. And she gave the thumbs up sign indicating we thought we won.

WACHTELL: Yeah, I think I remember that.

ROWE: You were being interviewed by... there were TV cameras all around the old courthouse exit on Rodney Square. And you weren't in a position to do that but she--

WACHTELL: Oh and I wasn't about to say very much either. I didn't want to get anybody's nose out of joint. I have a picture in my office but I didn't say very much.

ROWE: [laugh]

WACHTELL: Yeah. You remind me that I remember that.

ROWE: Very good. Well thank you for--

WACHTELL: Well it's a lot of reminiscing. It's very interesting. It was a fascinating time. Present time is very different, maybe just as fascinating but just in different directions.

ROWE: Well we're still trying to figure out what some of these decisions mean thirty years later.

WACHTELL: Yeah, they were seminal, no question about it. Especially Revlon as I say was certainly a seminal decision. Which I have no quarrel with the doctrines. The decision... Well, I've already said my say on that.

ROWE: Well people--when Revlon first came down, people thought the word auction as used in the opinion meant an auction on the courthouse steps and it did take a number of years for the Delaware courts to settle down into a much looser, broader interpretation of what was required under Revlon.

[1:09:16]

WACHTELL: Look, the Delaware courts I think have acted spectacularly at that time and since. I'm a big fan of Delaware courts and Delaware courtrooms. And certainly in this series of cases. And Van Gorkom and obviously Unocal. It's a seminal group of cases that are fundamentally very very sound.

ROWE: And the Household case all within eighteen months.

WACHTELL: And Household. Yeah, Household up on the, George Katz argued Household. Yeah. Were they all?

ROWE: Well not QVC.

WACHTELL: Not QVC.

ROWE: And Time Warner is three years later. But Van Gorkom, Unocal, Revlon and Household are all within--

WACHTELL: Well that is amazing. I had not realized that they were that tightly put together. It's an amazing body of law.

ROWE: Very good. Well thank you for your time and for being so entertaining, as well as informative.

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