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November 14, 1993

<u>VIA HAND DELIVERY</u>

The Honorable Jack B. Jacobs
Court of Chancery
1000 King Street
Wilmington, Delaware 19801

RE: <u>QVC Network, Inc. v. Paramount Communications Inc.</u>, C.A. No. 13208; <u>In re Paramount Communications Inc. Shareholders Litig.</u>, C.A. No. 13117

Dear Vice Chancellor Jacobs:

I have enclosed for your convenience four copies of each of the following documents which were served today by the Paramount Defendants in connection with the above-captioned action:

1. Brief of the Paramount Defendants in Opposition to the Motion of the Plaintiffs for a Preliminary Injunction;

2. Affidavit of Anne C. Foster and Volumes I-V of exhibits to the Affidavit;

3. Affidavit of Donald Oresman and the appendix thereto;

4. Affidavit of Benjamin L. Hooks;

5. Affidavit of Irving R. Fischer;

6. Affidavit of James A. Pattison;

7. Affidavit of Lester Pollack;

8. Affidavit of Felix G. Rohatyn;

9. Affidavit of George Weissman;

10. Appendix of Excerpts from Deposition Testimony; and

11. Motion to Exceed Page Limitations.

Respectfully submitted,

Anne C. Foster

Anne C. Foster

ACF/ksg
Enclosures

cc: David C. McBride, Esquire
Joseph A. Rosenthal, Esquire
Pamela S. Tikellis, Esquire
A. Gilchrist Sparks, III, Esquire
Karen L. Morris, Esquire
Register in Chancery

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

QVC NETWORK, INC., Plaintiff, v. PARAMOUNT COMMUNICATIONS INC., VIACOM INC., MARTIN S. DAVIS, GRACE J. FIPPINGER, IRVING R. FISCHER, BENJAMIN L. HOOKS, FRANZ J. LUTOLF, JAMES A. PATTISON, IRWIN SCHLOSS, SAMUEL J. SILBERMAN, LAWRENCE M. SMALL, and GEORGE WEISSMAN, Defendants.	)	C.A. No. 13208 CONFIDENTIAL - RESTRICTED FILED UNDER SEAL
In re PARAMOUNT COMMUNICATIONS INC. SHAREHOLDERS' LITIGATION	)	Consolidated Civ. Action No. 13117

BRIEF OF THE PARAMOUNT DEFENDANTS
IN OPPOSITION TO THE MOTION OF THE PLAINTIFFS
FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

An unsolicited bidder, QVC Network, Inc. ("QVC"), has brought this lawsuit to compel an auction of Paramount. QVC is one-fifth Paramount's size, produces a single "product" in the form of a continuous televised retail call-in shopping show, and is offering a two-step merger in which Paramount's hard assets will constitute 80% of the ongoing enterprise, which QVC's ever-changing block of controlling owners will run. QVC's offer is a classic 1980s financial play with an equity twist: QVC's highly conditional financing and the conditional investments of its partners are predicated upon the acquisition of Paramount, and then on leveraging Paramount's own assets. As a result, QVC's lawsuit is based upon the always dangerous and now defunct view that "the directors are obligated to evaluate competing bids solely on the basis of which bid provides the most immediate value to the stockholders." QVC Br. at 60. Since 49% of QVC's bid consists of a conditional and indefinite "back end" merger, however, roughly half of its "value" consists of stock of QVC.

Paramount is not "for sale," and certainly is not for auction to the bidder who seems to be offering the highest day-to-day market "price." Paramount has never been "for sale," and should not now be judicially auctioned because it has agreed to enter into a strategic merger with a unique merger partner that has a controlling stockholder.

After a five-year search, Paramount has agreed to merge with another outstanding media company, Viacom, in order to fulfill Paramount's decade-old strategic objective of becoming one of the world's leading sources of on-screen entertainment, books and educational materials. Paramount's merger agreement with Viacom has achieved for Paramount's stockholders immediate short-term stockholder value and continued long-term participation in a world class publishing and entertainment colossus. In doing so, however, the agreement has reserved to Paramount the right to terminate the merger if Paramount receives a proposal that its Board determines to be better for its stockholders.

QVC nevertheless seeks to force the Paramount Board to jettison its own independent judgment and to compel Paramount, as a matter of law, to disregard absolutely "[t]he impact of the bid on the corporate enterprise or other constituencies, the long term or intrinsic value of the corporation, [and] corporate 'policies' and 'plans'...." QVC Br. at 60. Paramount and its Board have rejected that view of the law, as have this Court and the Delaware Supreme Court.[1/] At every stage, the Paramount Board has discharged its fiduciary obligation to be directors: to plan and assess strategy, to evaluate options, and to protect the stockholders.

On September 12, the directors unanimously approved a merger with Viacom (in which nearly 90% of the consideration was equity in the surviving corporation) because it was a sound strategic move. During the period April 1 - September 8, Paramount stock traded in the range of 51 1/8 to 56 3/4. The Board recognized that to enter into a merger involving a change of control, an appropriate control premium should be obtained; the merger agreement valued each Paramount share at $69.14 (based on market levels) which represented a premium of approximately 30% over the pre-merger trading range. When QVC thereafter made its unsolicited bid, the directors did not ignore it, but reacted to it with care and with appropriate regard for Paramount's existing contractual obligations throughout an extremely fluid and dynamic situation.

1/ See, e.g., Paramount Communications, Inc. v. Time Inc., Del. Supr., 571 A.2d 1140, 1153-54 (1990) ("Paramount I"); Chrysogelos v. London, Del. Ch., C.A. No. 11910, slip op. at 13, Jacobs, V.C. (Mar. 25, 1992).

The Board's actions implementing Paramount's strategic vision while reacting to changing circumstances have not merely been consistent with this Court's precedent; they reflect the efficacy of the legal principles that the Delaware courts have meticulously applied in analogous situations. Leveraging off the QVC bid, Paramount has obtained more than $2 billion in further concessions from its chosen strategic merger partner, while remaining able to consider any better proposal. The amended merger agreement with Viacom called for each Paramount share to be exchanged for $42.50 in cash and $42.50 (at Viacom market price on the date of announcement) in equity securities, a greater than 50% premium over the pre-arbitrage value of a Paramount share. Paramount's investment advisor, Felix Rohatyn of Lazard Freres & Co., has advised the Paramount Board that this consideration is in the upper range of fairness. It must be emphasized that the Paramount Board remains free to consider and to accept any <u>bona fide</u> proposal to merge with or otherwise acquire Paramount, including the "$90 per share" offer QVC announced on Friday, if the Board concludes that the proposal is -- in its entirety -- better for the stockholders.

It is perverse to describe a deliberative process that has produced one higher proposal after another -- beyond what anyone could have expected -- as a breach of fiduciary duty. And it is obviously just wrong to label the Paramount-Viacom merger agreement a "lockup." QVC's arguments are predicated upon the following distortions of law and fact, none of which can withstand scrutiny:

(1) **QVC's Misuse of Revlon**

QVC has centered its legal argument upon a view of Revlon[2] that, to experienced directors and legal practitioners, approaches caricature. QVC's long argument boils down to the assertion that "Revlon duties" always apply to a transaction involving a change of control. QVC Br. at 57-75. Not surprisingly, QVC's argument relies upon snippets of language from cases (decided before Paramount I) that applied Revlon in circumstances involving competing all-cash tender offers or other liquidations of stockholders' interests. Having thus wrenched Paramount "into" Revlon, QVC then wrongly asserts that Revlon requires a legally-compelled auction to the bidder whose cash and stock offer -- multiplied out based on the last trade on the market -- adds up to the highest number.

QVC's view effects a per se prohibition of strategic stock-plus-cash mergers involving a "change in control" unless it is preceded by an auction. QVC's view thus precludes a strategic merger with any corporation that has a dominant stockholder, except through auction. More fundamentally, QVC is insisting -- and this is embedded in its view of the law -- that the stockholders' continuing stake in a combined enterprise can be tallied up from current market trading prices, without more. QVC's view thus makes nonsense of Revlon itself, since mergers involving an exchange of securities cannot be evaluated exclusively on the basis of a short-term financial snap-shot. The QVC position would simply deny to a Board any flexibility to evaluate the merits of proposals involving consideration other than cash.

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[2] Revlon, Inc. v. MacAndrews v. Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1986).

QVC's view, of course, is not the law. Although QVC attempts to dismantle Paramount I for page after page, that case still stands for the proposition that neither Unocal duties nor, certainly, Revlon duties, apply to the strategic merger Paramount entered into with Viacom on September 12. The Supreme Court, this Court and, in other forums, even QVC's counsel, have declared that a strategic merger that results in change of control does not trigger a "radically altered state" in which directors are required to auction the company. Moreover, there is a long line of Delaware authority that gives a Board broad flexibility to evaluate bids with a significant non-cash component.

(2) Paramount Has Never Been "Locked Up"

Under the merger agreement, Paramount has always remained free to entertain any bona fide proposal that can present a better alternative to stockholders. The only restrictions on that freedom in the merger agreement are (1) a negotiated "no-shop" clause that prohibits Paramount from soliciting proposals, and (2) a requirement that there be confirmation that the proposal is not subject to a material financing condition before negotiations begin. These restrictions are certainly reasonable in light of Viacom's reciprocal commitment to a $10 billion deal. QVC's complaints that Paramount adhered to these obligations ring hollow.

In addition, the Viacom agreement contains termination provisions that call for Viacom to receive a $100 million termination fee and a stock option for 19.9% of Paramount's shares at a price equal to the consideration provided in the original merger agreement signed in September.[3] QVC demands an injunction retroactively abolishing these provisions, which were, of course, agreed upon before QVC came on the scene. QVC ignores, however, that those provisions -- modeled after ones long and often approved by this Court -- were negotiated to benefit Paramount's stockholders, not QVC. They were designed specifically to encourage Viacom to consummate an agreement enormously profitable to Paramount's stockholders, and the evidence proves that Viacom insisted on these provisions as a condition of the deal. The record also establishes that those provisions benefited Paramount's stockholders not once but three times: first when Viacom agreed to a premium $8.2 billion merger and, twice more, when Viacom expressed its own commitment to this strategic merger by raising its proposal by a total of nearly $2 billion.

It is simply a sham argument to describe these standard-type provisions as a "lockup" when they neither deterred QVC from making an $80 per share merger offer nor discouraged Viacom from increasing its own price twice. Indeed, QVC's investment banker has testified that -- notwithstanding QVC's "lockup" allegations in this case -- QVC was able to finance its bid (including payment of the Viacom fee and option) in a "feasible and comfortable" manner, leaving "sufficient capital available to do what [Diller] would like to do with the company."[4] QVC's pro forma financial statements reflect this fact and Mr. Diller himself has confirmed it.[5] And, of course, if the Viacom merger is consummated, the termination fee will not be payable and the option will not be exercisable at all.

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[3] The affidavit of Felix Rohatyn describes the customary, prevalent and indispensable nature of terms of this sort, and makes clear that these terms are well within the accepted range.

[4] Senior Tr. at 90-94.

[5] PEx. 52; Diller Tr. at 63.

This Court has often recognized the necessity of allowing a Board to incentivize a merger partner to commit to an advantageous transaction.[6] The original agreement with Viacom indisputably was a valid exercise of business judgment under Paramount I, and its terms should not be second-guessed. That agreement also easily satisfies any enhanced scrutiny under Unocal. The terms of the September agreement fall well within the scope of "reasonable" as enunciated by major Delaware decisions over the past decade.[7] As a result, each of these terms has become customary; so customary, in fact, that QVC, its major investors, its investment advisor, and QVC's counsel have regularly employed them. Furthermore, while Viacom received reasonable terms in the event of termination, Paramount retained the right to exercise the Board's fiduciary duty to accept a more favorable transaction. As events unfolded, this flexibility was exercised to great effect.

(3) QVC's Cropped Picture of the Paramount Board's Deliberation

QVC's presentation of "facts" about the involvement of Paramount's directors and its management reads like the newspaper clippings QVC relies so heavily on. Packed with rumor, innuendo, gossip, hearsay, mistakes, and much nonsense, the QVC brief deliberately fails to convey what actually happened.

Paramount will not target each piece of unfair advocacy and correct it. Instead, Paramount will present a coherent description of the facts below, and in the eight affidavits

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6/ See, e.g., Yanow v. Scientific Leasing, Inc., Del. Ch., C.A. Nos. 9536 and 9561, slip op. at 12 n.6 (Feb. 5, 1988, revised, Feb. 8, 1988); In re J.P. Stevens & Co., Inc. Shareholder Litig., Del. Ch., 542 A.2d 770, 782-84 (1988).

7/ See Paramount I, 571 A.2d at 1151-52 (stock exchange agreement, dry-up agreement, no-shop provision); In Re Vitalink Communications Corp. Shareholders Litig., Del. Ch., C.A. No. 12085, Chandler, V.C. (Nov. 8, 1992) (termination fee and stock option); In Re J.P. Stevens, 542 A.2d at 783-84 (termination fee).

submitted herewith, along with the depositions of Paramount directors taken by QVC's attorneys. The most egregious record distortions are identified and rebutted in Exhibit A.

When one reviews the evidence, suggestions that Paramount's directors breached their duties disintegrate. This Board consists of eleven outside directors (out of fifteen), each prominent in a walk of life, each demonstrably capable of evaluating the material issues in a major complex transaction. The record shows that at six separate Board meetings in a two-month period the directors examined every material issue that QVC's sophisticated counsel has been able to identify, as well as many of the hypertechnical issues that only QVC's counsel would, purely for litigation purposes, contend are significant.

The directors were well advised by Felix Rohatyn, a prominent investment advisor, by counsel, and by their own experience. The directors did not, naturally, negotiate with Viacom face-to-face. They examined those negotiations in detail, and satisfied themselves that each step taken was in the stockholders' interest. The record of their deliberations is long and it is detailed. As a result of QVC's contentions, however, it has become important to review, and is presented below in some detail.

(4) QVC's Unfounded Claims About Management Entrenchment

QVC's contentions that the original Paramount-Viacom merger was a "defensive" tactic to secure management employment are wholly premised on a miscellaneous collection of gossip in an industry inundated with rumor, and are belied by the documentary record. Paramount and Viacom agreed to merge because their businesses are a perfect fit, as QVC's own investment advisor himself recognized when he was trying to arrange a Paramount-Viacom merger three years ago and again last January. In 1993, Paramount and Viacom spent much of the spring and summer trying to work out a deal, and finally succeeded in September. Negotiations terminated and resumed, first in early July and again in late August.

During the extended period of the negotiations, public and private rumors about possible transactions involving Paramount made the rounds. As it had done in the past, Paramount largely ignored the babble in the press and the private rumor mill. For its part, QVC never expressed interest in Paramount. This was only natural: QVC, a company one-fifth Paramount's size, was engaged in its own supposedly "strategic" merger with another home shopping company.

Similarly, QVC has burdened the record with untenable allegations that Paramount management is seeking to entrench itself at stockholders' expense. There is no credible proof for these boilerplate claims in this case. Thus, QVC is reduced to arguing that, for example, Mr. Davis and Mr. Redstone are "friends," while Mr. Davis and Mr. Diller are not, and to pretend that difficult negotiations over the "management issues" involved in merging two huge operations were really about Mr. Davis's job. In fact, an almost unprecedented feature of the Viacom merger agreement is the <u>absence</u> of <u>any</u> job security for any Paramount officer, as Mr. Diller himself has noted. While the parties' intention is to employ Paramount and Viacom management in the ongoing enterprise in order to ensure stability in its business operations, Paramount officers have received no employment contracts from Viacom and no guarantees <u>of any kind</u>. Indeed, it is undisputed that it was at Viacom's request, very early in the negotiations, that Davis agreed to remain CEO of the merged entity to ensure an appropriate transition.

(5) **In a Case Involving More Than One Merger Proposal, the Board's Business Judgment Should Not Be Minimized**

Instead, the record shows that Paramount agreed to combine with Viacom because it had been looking for years to combine with a major company engaged in its core businesses. The evidence confirms the Board's judgment: Paramount and Viacom can integrate neatly with a minimum of divestitures or regulatory problems; their business lines interact smoothly from production through distribution; their growth strategies coincide, from a new broadcast network to expansion into new cable channels; Paramount and Viacom can produce programming together, or each buy and distribute what the other makes. That is why QVC's financial advisors tried to merge them three years ago and again early this year.

As envisioned by the principals, the combined company would have significant operations in motion picture production, cable television networks and systems, television programming, educational and consumer publishing, television and radio broadcasting, theme parks and other entertainment facilities, interactive/multimedia products and motion picture theaters. Paramount Viacom International will have an array of world-class franchises, including, among many others:

- **From Paramount**: Paramount Pictures and Paramount Television in motion picture and television production;
- **From Viacom**: Viacom Entertainment, also in production;
- **From Viacom**: MTV, MTV Europe, Nickelodeon, Nick at Nite, VH-1, and Showtime in cable network programming;
- **From Paramount**: Simon & Schuster, Pocket Books and Prentice Hall in publishing;

- **From Viacom**: cable television systems, with more than 1.1 million subscribers;

- **From both**: television broadcasting, with 12 television stations which, in conjunction with a joint venture with Christ-Craft Inc., would form the basis for the creation of a fifth television network;

- **From Viacom**: radio broadcasting, with 14 stations;

- **From Paramount**: live entertainment, Madison Square Garden, the New York Knickerbockers Basketball Club of the NBA, and the New York Rangers Hockey Club of the NHL; and

- **From Paramount**: five theme parks, which welcome more than 12 million visitors annually.

The Paramount stockholders will hold a substantial percentage of the common equity of this combined enterprise.

QVC's proposal also involves a merger involving equity comprising 49% of the consideration. If QVC's proposal prevails, Paramount stockholders will own most of the equity of a corporation clearly controlled by Mr. Diller and his most recent lineup of investors. For this reason alone, QVC's demand that this case be treated as an "auction" considering only immediate "price" evaluations is simply wrong-headed.

Compared with Viacom, QVC brings only one line of business to a merger (a home shopping television program), few hard assets, and absolutely no strategic plans. In QVC's back end merger, Paramount stockholders will receive shares in a company that is still comprised predominantly of Paramount assets. That new company must achieve and sustain a dramatic increase in historic market multiples for it to sustain the stock price its $90 "value" depends on. Yet QVC's investment advisor, Allen & Co., expects a combined QVC-Paramount to earn 19 cents a share or less next year, leaving a price/earnings multiple of 300 to 1. Even then, QVC's own investment advisor recognizes that a substantial proportion of the "value" of the merger shares consists purely of market perception of one man, the so-called "Diller sizzle." That is why QVC stock has shot up from $12 to the $60s in the past year.

QVC's tender offer is also highly contingent. QVC has no debt financing commitments, and even its equity financing commitments are either highly conditional or non-binding. Further, last week QVC announced that its largest stockholder and co-offeror for Paramount was selling its 22% stake and dropping out.

The supposed "value" of QVC's back end merger -- half of the "$90" package -- is also materially affected, indeed it is defined, by the market price of QVC stock. That, in turn, depends in large part on market perception of QVC's prospects of actually acquiring Paramount. Moreover, QVC has not even committed to the back end merger, let alone established definite terms for it, and QVC can walk away entirely if it chooses. Although the "$90" offer is explicitly contingent on winning this case in all respects, QVC has not <u>bound</u> itself <u>actually</u> <u>to</u> <u>do</u> <u>anything</u> if that happens. The impression that QVC's Friday night offer is litigation grandstanding is a strong one.

Thus, it is simply <u>not</u> <u>credible</u> to say that QVC's latest proposal is a better alternative. It is, in the words of QVC's financial advisor, "a gamble" to rely on the "market" to make business judgments.[8]

The Paramount directors <u>must</u> consider the "back-end" merger inherent in both the Viacom agreement and the QVC proposal. <u>That</u> is their fiduciary duty, not to pretend that the "highest bidder" can be identified by an arithmetic exercise. Indeed, this Court has

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[8] Senior Tr. at 46-47, 51-52.

repeatedly recognized that directors must have the flexibility to develop and implement merger strategies with the long view in mind and to act reasonably.

STATEMENT OF FACTS

The merger agreement between Paramount and Viacom arose out of a decade of corporate management decisions guided by the strategic objective of creating a leading global entertainment and publishing company. The agreement followed more than three years of discussions between Paramount and Viacom. It was crafted by intense arms-length negotiations supervised by an independent and informed Board of Directors. The facts are summarized here; the evidence is contained in the submissions that accompany this brief.[9/]

A. The Paramount Board of Directors

The Paramount Board consists of 15 directors, 11 of whom are independent directors who are neither officers nor employees of the Company. These directors have most impressive credentials, and the record, as described below, amply demonstrates that these

9/ Paramount has filed the following material: (1) the affidavit of Donald Oresman, General Counsel of Paramount, describing the negotiations surrounding the Paramount/Viacom Merger Agreement; (2) the affidavit of James A. Pattison, an outside director of Paramount, describing Paramount's long-term business strategy and the actions of the Paramount Board of Directors; (3) the affidavit of George Weissman, an outside director of Paramount; (4) the affidavit of Benjamin L. Hooks, an outside director of Paramount; (5) the affidavit of Lester Pollack, an outside director of Paramount; (6) the affidavit of Irving Fischer, an outside director of Paramount; (7) the affidavit of Felix Rohatyn, a member of the firm of Lazard Freres & Co., describing the nature and effect of stock option and termination fee provisions in the Merger Agreement, as amended, and the work Lazard Freres has done on this transaction; and (8) the affidavit of Anne C. Foster submitting true and correct copies of the documents referenced in this memorandum. Citations to "PEx. __" refer to the exhibits submitted with Ms. Foster's Affidavit. Citations to "QEx. __" refer to the exhibits submitted with the affidavit of David C. McBride, counsel for plaintiff QVC Network, Inc.

directors guided and implemented Paramount's long-term business strategy to become a significant global competitor in the entertainment and publishing industries:

- Grace J. Fippinger, a former Vice President, Secretary and Treasurer of NYNEX Corporation, has been a Paramount director since 1980. Miss Fippinger joined New York Telephone in 1948 and became the first woman officer in the Bell System when she was elected Vice President, Secretary and Treasurer in 1974. Miss Fippinger is also a director of Pfizer, Inc., Connecticut Mutual Life Insurance Company and The Bear Stearns Companies, Inc.

- Irving R. Fischer, Chairman and Chief Executive Officer of HRH Construction Corporation, has been a Paramount director since 1984, and is a member of the Audit and Nominating Committees. Mr. Fischer is also Vice Chairman of the New York City Chapter of the National Multiple Sclerosis Society, a member of the New York City Holocaust Memorial Commission and an Adjunct Professor of Urban Planning at Columbia University.

- Benjamin L. Hooks, Senior Vice President of the Chapman Company, investment bankers, was elected a Paramount director in 1992. Mr. Hooks joined The Chapman Company in 1993, after having served as Executive Director of the National Association for the Advancement of Colored People ("NAACP") since 1977 and being active in civil rights matters for many years. Prior to that he served for five years as a member of the Federal Communications Commission beginning in 1972. A lawyer by profession, Mr. Hooks began his career in private practice and served as an assistant public defender and a Criminal Court Judge. He also serves as a director of Maxima Corporation.

- J. Hugh Liedtke, Chairman of Pennzoil Company, has been a Paramount director since 1987. Mr. Liedtke began his business career as an independent in the oil business in Texas in 1949, and from 1953 to 1988 he served as Chief Executive Officer of Pennzoil and its predecessor companies.

- Franz J. Lutolf, former General Manager and a member of the Executive Board of Swiss Bank Corporation, has been a Paramount director since 1985. Mr. Lutolf joined Swiss Bank Corporation in 1970 and was a general manager and member of the Executive Board from 1976 to 1988. From 1956 to 1970, he was associated with the International Bank for Reconstruction and Development (World Bank) in Washington, D.C. Mr. Lutolf is also a director of Grapha Holding AG, Hergiswil (Switzerland), Banco Santander (Suisse) S.A., Geneva, Diawa Securities Bank (Switzerland), Zurich, Cheak Coast Helarb European Acquisitions S.A., Luxembourg Internationale Nederlanden Bank (Switzerland), Zurich.

- James A. Pattison, Chairman and Chief Executive Officer of the Jim Pattison Group, is a prominent industrialist who has been a Paramount director since 1988. He is a member of Paramount's Executive and Audit Committees. The Jim Pattison Group is a diversified company with operations in communications, automotive services, food products, packaging and financial services. Mr. Pattison founded the company in 1961 and has been its Chief Executive Officer since then. Mr. Pattison is also a director of the Toronto-Dominion Bank, Canadian Pacific Ltd., and Toyota's Canadian subsidiary.

- Lester Pollack is a General Partner of Lazard Freres & Co., investment bankers, Chief Executive Officer of Center Partners, and Senior Managing Director of Corporate Partners, investment affiliates of Lazard Freres. Mr. Pollack was elected a Paramount director in 1985 and currently serves as Chairman of the Audit Committee and as a member of the Executive Committee. After practicing law, he served as a senior executive of Loews Corp. and, beginning in 1981, as a general partner in Odyssey Partners before joining Lazard Freres & Co. in 1986. Mr. Pollack also serves as a director of Loews Corp., CNA Financial Corp., Sunamerica Corp., Kaufman & Broad Home Corp., Parlex Corp., Transco Energy Company, Polaroid Corp., Continental Cablevision, Inc., and Tidewater Inc., and as a Trustee of New York University.

- Irwin Schloss, Senior Advisor, Marcus Schloss & Company, Inc., has been a Paramount director since 1961. He is a member of the Executive Committee and the Audit Committee. He has spent his career in investment banking, and he has headed his own company for more than 30 years.

- Samuel J. Silberman, Retired Chairman of Consolidated Cigar Corporation, has been a Paramount director for 25 years and is a Member of the Executive Committee and the Compensation Committee.

- Lawrence M. Small, President and Chief Operating Officer of the Federal National Mortgage Association ("Fannie Mae"), was elected a Paramount director in 1991, and is a member of the compensation committee. Before joining Fannie Mae in June 1991, Mr. Small served as Vice Chairman and Chairman of the Executive Committee of Citicorp/Citibank, where he had worked for twenty-seven years. Mr. Small is also a director of Fannie Mae and the Chubb Corporation and a trustee of Morehouse College and New York University Medical Center.

- George Weissman, retired Chairman and Consultant of Philip Morris Companies, Inc., has been a Paramount director since 1984. Mr. Weissman joined Philip Morris in 1952 and was elected Chairman and Chief Executive Officer in 1978. He served until July 1, 1984, when he became Chairman of the Executive Committee until May 1, 1987. Mr. Weissman is also a director of Avnet, Incorporated and is Chairman of Lincoln Center for the Performing Arts, Inc.[10]

B. Paramount's Ten-Year Strategy to Become a Significant Global Competitor in the Entertainment and Publishing Businesses

In 1989, Gulf+Western changed its name to Paramount Communications Inc., symbolizing one of the most extensive strategic business redefinitions in recent corporate history. By concentrating its financial and human resources on global communications, the Company had transformed itself from a conglomerate involved in a diverse mix of businesses into a focused entertainment and publishing enterprise.[11]

The restructuring of Paramount began under the management team led by Martin S. Davis, who was elected Chairman and Chief Executive Officer in 1983. During his first few years, Davis's statements and actions were guided by the concern that the Company's unique entertainment and publishing businesses were buried among capital intensive manufacturing entities, unpredictable commodity-based operations and a number of other low-profit or no-profit activities. The major divestiture program announced in August 1983 also demonstrated management's recognition that the Company's entertainment and publishing assets (and the prospects for expansion of those assets through new technology and new markets) would, over time, deliver superior returns to Paramount's stockholders.[12]

10/ PEx. 79 (Paramount 1993 Form 10-K at 6-7).

11/ Pattison Aff. ¶6; Weissman Aff. ¶4; Oresman Aff. ¶3.

12/ See, e.g., PEx. 39 (Letters to Shareholders, Gulf+Western Annual Reports for 1982-1993).

With the support of the Paramount Board, the management of Paramount launched a three-phase strategic restructuring plan between 1983 and 1989 that involved divestitures and planned divestitures of capital intensive operations, liquidation of its marketable securities portfolio, aggressive internal growth programs and acquisitions in entertainment and publishing.[13/]

As the 1980s ended, the reconfigured Paramount had emerged as a leading global producer and distributor of entertainment, with operations in motion pictures, television programming, cable and broadcast television, home video, theaters, sports, and special events. Paramount had also grown into one the world's leading book publishers, serving the educational, consumer and professional information markets in the United States and internationally.[14/]

Paramount recognized the need to increase its size and financial strength in order to compete successfully with other large, horizontally and vertically integrated entities in a rapidly evolving global marketplace.[15/] In 1989, in a bold attempt to implement its strategic objectives, Paramount pursued the acquisition of Time Inc., which had developed substantial cable television programming assets (Home Box Office, Inc. and Cinemax), had acquired numerous cable television franchises, and had continued a strong publishing

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13/ Pattison Aff. ¶4; Weissman Aff. ¶¶4-7; Pollack Aff. ¶¶6-9; Oresman Aff. ¶¶4-7.

14/ Revenues from publishing operations climbed to $1.6 billion in fiscal 1992 from less than $200 million in fiscal 1982. PEx. 40 (Paramount Annual Report for 1992 at 17); PEx. 40 (Gulf+Western Annual Report for 1982 at 6).

15/ PEx. 40 (Gulf+Western Annual Report for 1988 at 3); PEx. 40 (Gulf+Western Annual Report for 1989 at 1); Pattison Aff. ¶6.

operation.[16] Although this combination of entertainment and publishing assets made Time an ideal merger candidate, Paramount's offer proved incompatible with Time's own strategic vision. After successfully insisting on its strategic prerogatives despite Paramount's much higher all-cash offer, Time ultimately merged with Warner Communications.

Despite the Time setback, Paramount continued to explore opportunities to grow its asset base through suitable acquisitions,[17] joint ventures,[18] partnerships and mergers.[19] From 1989 to 1993, Paramount and its advisors evaluated potential mergers and acquisitions with numerous candidates, including Viacom, Tele-Communications, Inc. ("TCI"), Turner Broadcasting System, Inc. ("Turner"), Capital Cities/ABC Inc., General Electric Co.'s NBC unit, Chris-Craft, ElSevier, Bertelsmann and Thorn EMI.[20] In pursuing such possible

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16/ Pattison Aff. ¶5; Pattison Tr. at 38-39; Weissman Aff. ¶8; Pollack Aff. ¶10.

17/ In March 1990, for example, the Company further expanded its educational publishing capabilities with the acquisition of Computer Curriculum, one of the leading developers and marketers of state-of-the-art computer-based learning systems. PEx. 40 (Paramount Annual Report for 1990). With the 1991 acquisition of MacMillan Computer Publishing, Paramount became the leading publisher of personal computer and related technical books. PEx. 40 (Paramount Annual Report for 1992 at 3).

18/ For example, since 1983, in addition to adding theme parks and seven broadcast television stations, Paramount has increased its ownership to 50% in USA Networks, a leading advertiser-supported basic cable television network; formed Premier Advertiser Sales, a joint venture in television syndication barter advertising (now fully owned); and invested in overseas joint theater ventures through United Cinemas International, which includes 369 screens in nine countries. PEx. 40 (Paramount Annual Reports 1989-1992).

19/ Pattison Aff. ¶6 ("Paramount's attempt to combine with Time was unsuccessful, but the reasons that drove Paramount in 1989 did not go away. For Paramount to compete and succeed, we believed that Paramount had to grow into a global media giant.").

20/ Pattison Aff. ¶¶8-9. The plaintiff shareholders' allegation that there is no record of this is absolutely false. There certainly is a record, eight boxes worth. Counsel simply chose not to review it. PEx. 50.

deals, Paramount wanted to avoid the dangers of highly leveraged transactions that had undermined so many companies in the second half of the 1980s.[21] However, for a variety of reasons, none of these possibilities was capable of implementation.[22]

The Paramount Board has been an integral part of this strategic process. In May 1993, for example, a Board retreat at Lincoln Center examined Paramount's strategy and options from top to bottom.[23] This occurred at a time when management was exploring alternatives with Viacom, Turner and TCI, as well as other entities which would be "excellent strategic partners" because they "fit the strategic plan."[24] The strategy session was guided by a 300-page presentation describing an enormous range of alternatives.[25] This presentation identified 11 areas in which Paramount was "under-represented," five of which are Viacom strengths.[26]

21/ Pattison Aff. ¶7.

22/ Pattison Aff. ¶8; Pollack Aff. ¶12.

23/ PEx. 1 (four Board presentation books); Small Tr. at 94.

24/ Small Tr. at 242-43.

25/ PEx. 1. The Paramount Board reviewed:

- Paramount's business structure;
- Its financial situation;
- Its distribution channels;
- Market trends and consumer spending;
- The competition, company by company;
- An intensely self-critical analysis of five-year returns;
- Strategic goals and opportunities, with frank assessments of each; and
- Various other means of restructuring to enhance value.

26/ PEx. 1 at 47P50053.

Throughout this period, Paramount's "game plan" was fully supported by the Paramount Board of Directors, which was kept advised of the progress of Paramount's potential acquisitions and divestitures in Board presentations and discussions and through regular formal and informal communications with Paramount management[27/]:

For example, outside director James Pattison testified concerning his understanding of Paramount's long-term strategy:

> And our whole strategy was, build a major communications and media company.
>
> * * *
>
> Well, you must understand at least my state of mind was that we -- the company wasn't for sale. We weren't trying to sell the company. We weren't putting it up for auction. We were trying to go forward and merge this company to have a global media giant, if you like. That's our game -- that was our game plan. That's what we'd been driving at for the last two or three years, or since 1989 since we sold the Associate [finance company]."[28/]

Outside director Lawrence Small also testified in detail about Paramount's strategy:

> Over the years, Paramount has been engaged in extensive communications with a variety of entities in the businesses in which it operates to carry out its strategic vision. In some cases it has done transactions, in many cases it has [not] done [them]. <u>So the board over the years has been presented with a wide range of alternatives</u>.
>
> * * *
>
> <u>There has been a process that's been in place for a long time, consummated by the transaction to which the board agreed</u>. Obviously it wouldn't make much sense to be seeking to do something different from what you've already agreed to.
>
> * * *

27/ Pattison Aff. ¶¶8-9; Weissman Aff. ¶10-12; Pollack Aff. ¶12. <u>See, e.g.,</u> PEx. 51.

28/ Pattison Tr. at 38-39, 84-85.

> I've talked with [Davis] over ten years about the vision of creating a large media communications enterprise that could compete on a global scale . . . over that whole period of time discussing the different alternatives that he was dealing with.[29]

C. Paramount and Viacom

The merger agreement with Viacom that is the subject of this lawsuit arose out of extensive contacts between Paramount and Viacom over an extended period of time -- indeed, contacts that were nurtured by the current investment bankers to QVC.

1. With the Encouragement of QVC's Current Investment Bankers, and with the Support and Knowledge of the Paramount Board of Directors, Paramount and Viacom Have Actively Considered the Possibility of a Strategic Merger for More than Three Years

During the four years following Paramount's offer in 1989 to acquire Time, Mr. Davis and Sumner M. Redstone, Chairman of the Board of Directors of Viacom Inc., held discussions concerning the possibility of a business combination between Paramount and Viacom.[30] Both believed that the combination of Paramount and Viacom might constitute an excellent strategic fit, substantially improving the long-term business prospects of each company. As early as January 1990, Paramount and Viacom executed a confidentiality agreement permitting an exchange of information.[31]

29/ Small Tr. at 24-25, 37 (emphasis added). See also Liedtke Tr. at 37 ("The intention of our board and the intention of our management has been to try to take Paramount and make it grow, but do that by merger or acquisition. It has never wanted to sell out."); Pattison Aff. ¶38; Weissman Aff. ¶¶4-5, 23.

30/ Pattison Aff. ¶¶9-10; Weissman Aff. ¶11; Dauman Tr. at 10.

31/ PEx. 86.

In the summer of 1990, Allen & Co. (the investment banking firm currently advising QVC) attempted to arrange a merger between Paramount and Viacom. Allen & Co. prepared a detailed written presentation entitled "Project Lightbulb" concerning a Paramount/Viacom combination.[32] Allen & Co. recommended that Paramount acquire Viacom in a stock for stock merger, despite the fact that such a transaction would result in Mr. Redstone becoming the largest single stockholder of the combined company because of his dominant holdings of Viacom stock.[33] Interestingly, nothing in Allen & Co.'s "Project Lightbulb" presentation suggested what QVC is now claiming: that a merger involving stock consideration would have the effect of putting Paramount on the auction block.

In August 1990, Allen & Co. concluded that the long-term prospects for a Paramount/Viacom merger were solid because the company would have a "st[r]ong management team," would be a "major industry participant," would have a "diverse earnings base with strong earnings potential," and would have a "clean balance sheet."[34]

Although QVC now claims that the Paramount Board of Directors did not act in an informed manner, its own investment bankers, Enrique Senior and Herbert Allen, testified about their belief that Paramount and Viacom are a very good strategic "fit":

> Q. Isn't it true, Mr. Senior, that Allen & Company was suggesting to both parties in that transaction that a Paramount/Viacom merger would be, as you put it, a perfect fit?
>
> A. We told Sumner [Redstone] that he should do the deal, yes.
>
> Q. Why is that?

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[32] PEx. 44.

[33] Id. at 7318, 7332; Allen Tr. at 94-95.

[34] Id. at 7319.

A. Because we thought he was getting some terrific assets in Paramount that were very attractive for the price at the time.

Q. Did you talk to Mr. Redstone about the business match-ups between Paramount assets and Viacom assets?

A. Yes.

Q. Did you tell him that it was a perfect fit?

A. We told him it was a very good business fit.[35]

Significantly, the efforts of Allen & Company to interest Viacom and Paramount in a possible merger persisted into the winter or spring of <u>this</u> year when Mr. Allen suggested to Mr. Redstone that "he might want to revisit the Paramount/Viacom conversations."[36] Mr. Allen insists that he began working with QVC only after Mr. Redstone said no to him.[37] However, Mr. Allen still believes that Paramount "by itself is a strong industry participant," and that in combination with Viacom, Paramount would be even stronger.[38] For his part, Mr. Diller of QVC has been aware of "speculation about Paramount and Viacom going back years," and, in March 1993, he believed that Viacom was a potential merger candidate for Paramount: "I do recall Viacom being one of them."[39]

Significantly, the Paramount directors were aware of and encouraged the ongoing discussions between Paramount and Viacom about a strategic merger. For example:

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[35] Senior Tr. at 22-23; <u>see also</u> Allen Tr. at 92-93.

[36] Allen Tr. at 101.

[37] Allen Tr. at 104.

[38] Allen Tr. at 26 ("Yes, I believe they would be.").

[39] Diller Tr. at 9, 17.

- Mr. Small: "Oh, I would say I've known about it off and on over three years . . . [first learned about it] in conversations with the chief executive officer."[40]

- Mr. Liedtke: "[T]here have been discussions that I'm aware of going on for a very long time in my view. I know it's been discussed both formally and informally, and I've heard Mr. Davis sometimes express frustration and so on over a period of about three years. So, it's been a long time."[41]

- Mr. Pattison: He has talked to Mr. Davis at least once a week, sometimes once a day since he joined the Board in 1988. He recalled that he had talked with Mr. Davis about a possible Paramount/Viacom transaction on "regular basis" for two years.[42] By the time of the September 12 Merger Agreement, described below, Mr. Pattison believed: "We wanted to do this deal. We'd been talking about it, to my recollection, for two years; to finally put these two companies together to grow, build a business, and help move on with our strategic plan. And finally we were down to this after all this long talk, talking to all these different people all these many, however many years, whatever it was, and we are down now and here's what they told us was the best deal that they could do to get it done."[43]

2. In 1993, Paramount and Viacom Continued Their Discussions About a Possible Strategic Merger, with the Executive Committee of the Paramount Board of Directors Being Kept Apprised of the Status of the Talks

In April 1993, Robert Greenhill, then an investment banker with Morgan Stanley & Co. Inc. and currently Chief Executive Officer of Smith Barney Shearson, arranged a meeting among himself, Mr. Redstone and Mr. Davis. At the conclusion of the subsequent April 20, 1993 meeting, Mr. Redstone and Mr. Davis agreed to explore once again the

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40/ Small Tr. at 36.

41/ Liedtke Tr. at 47.

42/ Pattison Tr. at 9-10, 18.

43/ Pattison Tr. at 77-79; Weissman Aff. ¶11.

possibility of combining the two companies,[44] and, from April to late June 1993, the two companies engaged in preliminary discussions concerning a business combination.[45] Mr. Greenhill learned how strongly committed both were to a possible strategic merger:

> [E]very time in the case of Mr. Davis or Mr. Redstone we would talk about different companies as possible combinations, somehow the conversation always came back to the Paramount/Viacom combination . . . you don't normally see two strong executives have that kind of a focus . . . this has been a dream that they shared obviously for a long period of time.[46]

At the meeting of the Paramount Board of Directors on June 7-8, Mr. Davis advised the Board of the discussions with Viacom.[47] By the week of June 28, the discussions had progressed to a point where Mr. Redstone and Mr. Davis decided to explore intensively the possibility of a business combination.[48] On July 6, 1993, a meeting was held among various representatives of the parties and their respective financial and legal advisors, including Philippe P. Dauman (Viacom's General Counsel), Donald Oresman (Paramount's General Counsel), Mr. Greenhill, and Paramount's financial advisor, Felix Rohatyn of Lazard Freres & Co.[49]

Viacom's representatives at this meeting expressed a willingness to negotiate a transaction based upon consideration payable to Paramount's stockholders -- a mix of cash and stock in the combined enterprise -- valued that day at \$60.86 per share with a <u>cap</u> of \$65

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[44] Greenhill Tr. at 12.

[45] <u>See</u> Pattison Aff. ¶9; Weissman Aff. ¶12; Hooks Aff. ¶4; Fischer Aff. ¶4; Dauman Tr. at 45-47.

[46] Greenhill Tr. at 22.

[47] Silberman Tr. at 16; PEx. 3.

[48] Redstone Tr. at 35; Davis Tr. at 32; <u>see</u> Greenhill Tr. at 88.

[49] Oresman Aff. ¶17; Dauman Tr. at 77.

if the price of Viacom stock rose. However, Viacom conditioned this proposal upon Paramount's willingness to grant Viacom (1) an option to acquire from Paramount shares representing up to 20% of Paramount's then outstanding shares (23,683,439), at an exercise price equal to the market price of Paramount's common stock (then $54.75), and (2) a termination fee in an amount to be negotiated, plus expenses, all payable only if the transaction did not close. Viacom also proposed an option to acquire Paramount assets.[50] Discussions between Viacom and Paramount representatives lapsed on July 7, however, due to the inability of the parties to reach agreement on any of these significant terms, including, most particularly, price.[51] In particular, Paramount management had insisted that the consideration to be offered by Viacom had to begin with a "7."[52]

Paramount management immediately convened a meeting of the Executive Committee of the Paramount Board of Directors to advise them of the status of negotiations. All members of the Executive Committee, including the five outside director members (Miss Fippinger and Messrs. Pollack, Pattison, Schloss and Silberman), were present for the meeting

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50/ See Oresman Aff. ¶¶18, 24; Greenhill Tr. at 129; Dauman Tr. at 75-81.

51/ Oresman Aff. ¶19; Oresman Tr. at 30-31; Dauman Tr. at 87; Redstone Tr. at 82-83; Davis Tr. at 38-46.

52/ Oresman Aff. ¶19; see also Pattison Tr. at 112-13 ("[I]n my many discussions with Martin Davis, he was always pressing in this discussion that he wanted, 'something that started with a seven on the price' . . . he was telling me this is what he not only wanted; this what he had told the Viacom people; that it had to have a seven in front of it before he would support this to the Board. And so, and in addition to that, I - that was absolutely a very big part of the whole package, as well as the strategic fit between the two companies that we were looking for.").

on July 7.[53] After discussion, the Executive Committee concluded that Viacom's proposal was inadequate.[54]

3. The Paramount-Viacom Merger Involved Arm's Length, Complex and Difficult Negotiations Over Several Months, with Paramount Winning Concessions from Viacom

Between July 15 and August 20, there were no negotiations although there were occasional contacts between representatives of the parties.[55] Although the deal seemed "dead" to several representatives on both sides, Mr. Greenhill persisted in encouraging the parties to have further discussions.[56] On August 20, Mr. Greenhill contacted Mr. Redstone and Mr. Davis and arranged for them to meet that afternoon to attempt to restart talks. He succeeded.[57] On August 25, however, discussions broke off again primarily due to continuing disagreement over price and the termination provisions, including Viacom's request for a stock option and termination fee.[58] Shortly thereafter, negotiations began again and continued until agreement was reached.[59]

53/ PEx. 4.

54/ Id. See also Pattison Tr. at 16; Pattison Aff. ¶13; Pollack Aff. ¶14.

55/ Mr. Oresman met with his counterpart at Viacom, Mr. Dauman, on July 15 to revisit the termination of discussions the week before. On July 20, Paramount management met with its investment advisors at Lazard Freres to continue discussions about a possible merger with Viacom. See Oresman Aff. ¶20.

56/ Dauman Tr. at 156-59; Redstone Tr. at 89; Oresman Aff. ¶26; see Greenhill Tr. at 47, 62.

57/ Dauman Tr. at 156-57; Oresman Aff. ¶22.

58/ Pollack Aff. ¶15.

59/ Dauman Tr. at 163, 167, 171-72, 183; Oresman Aff. ¶¶22, 24-25.

QVC has utterly distorted the substance, intensity and subject matter of these negotiations. Each participant has testified to the difficult nature of the process. Mr. Rohatyn, Paramount's investment advisor from Lazard Freres, testified:

> I have a specific recollection of telling the board that we negotiated very hard on all aspects of this transaction, including the stock option, and that we felt that we had gone as far as we were able to in terms of the overall transaction; and that absent those elements [(e.g., stock option)], the transaction wouldn't have happened.[60]

Mr. Greenhill recalled that "Davis was absolutely rigid in the price he was demanding."[61] Mr. Redstone testified "It seemed that wherever we were Martin [Davis] wanted more. That was the history of the negotiations. One of the reasons they broke up at various points."[62]

The testimony on particular provisions bears this out. The Viacom side "had committed ourselves to not paying more than $61 a share,"[63] would not commit to a deal without a termination fee and a stock option,[64] wanted an asset option as well, and "would not go through a deal involving collars, period, over and out."[65]

It did not turn out that way.

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[60] Rohatyn Tr. at 35.

[61] Greenhill Tr. at 53.

[62] Redstone Tr. at 7; Dauman Tr. at 46.

[63] Redstone Tr. at 8.

[64] Redstone Tr. at 56-57; Greenhill Tr. at 170; Dauman Tr. at 49-51.

[65] Redstone Tr. at 55.

a. <u>Price</u>. QVC casually but repeatedly accuses Paramount's management and Board of Directors of accepting a "lowball bid" for Paramount shares by approving the Original Merger Agreement.[66] This accusation is belied by the record.

The estimated value ($69.14 based on market price) of the original Merger Agreement consideration constituted a 27%-28% premium over the July 1993 market price of Paramount common stock, which had already been inflated by rumors. It was a 26% premium over Paramount's April 1993 share price. As was explained to the Paramount directors on September 9 by the company's financial advisors, Lazard Freres, this premium was well within the range of premiums that had been paid in numerous comparable transactions.[67]

Before approving the Viacom Agreement, Paramount's Board of Directors obtained a written opinion from Lazard Freres that the consideration to be paid was fair to Paramount's stockholders from a financial point of view.[68] Mr. Rohatyn's presentation to the Board contained an extensive analysis of the entire financial picture.[69]

The negotiations supported the opinion of Lazard Freres. Mr. Redstone testified: "We had committed ourselves to not paying more than $61 a share, and I was

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66/ This assertion is made directly on several occasions (QVC Br. at 29), and indirectly on several others. QVC Br. at 9 (arguing that "price" was not an issue); at 94 (arguing that the option strike price was low because of the "lowball" merger consideration); at 33 (claiming that subsequent events show inadequate price); and at 60 (asserting that a "market check" was necessary). All of those assertions fail to mention the fact that the merger consideration was a very substantial premium over historical Paramount stock trading bands.

67/ PEx. 6 at 31.

68/ PEx. 15.

69/ PEx. 11; Pattison Aff. ¶21; Pollack Aff. ¶18.

trying to stay with that."[70] Paramount rejected $61 outright in July, with Lazard reporting to the Board's Executive Committee that $61 was inadequate.[71] At that time, the Viacom proposal also had a ceiling or "cap" of $65 per share.[72] Mr. Redstone recalled: "We got to 63 at some point . . . We got to 65 . . . I told Philippe [Dauman] that under no circumstances will we pay more than $67.50."[73] Paramount, however, continued to demand at least $70.[74] By late August, the gap was $65 to $70. Agreement was ultimately reached at $69.14. Given Paramount's $70 demand, Redstone regarded the ultimate deal as a capitulation.[75] Nevertheless, "that night Martin Davis came over and tried to get 37 cents more and I said no finally."[76]

QVC's allegations concerning a "lowball" price are all the more disingenuous when one considers that QVC's own financial advisors evaluated Paramount in the same $65

70/ Redstone Tr. at 8.

71/ PEx. 4.

72/ QVC's assault on the "price" largely proceeds out of disregard of the cap. Only by ignoring both the value of $60.86 proposal and the ceiling set at $65 can QVC argue that the ultimate agreement was not a major improvement. Undoubtedly, Viacom's share price had increased in the interim, but even with that increase, the July proposal would have been worth only $65. Instead of $9.10 in cash, Paramount shareholders would have received only $4.96, a $500 million difference.

73/ Redstone Tr. at 8.

74/ Oresman Aff. ¶19.

75/ Redstone Tr. at 7; see also Dauman Tr. at 194.

76/ Redstone Tr. at 10; see also id. at 131 ("Martin came over to the Carlyle and we had dinner. We discussed the fact that we were going to finally do this. We both expressed satisfaction that it was going to be a great company. I will never forget Martin saying, listen, Sumner, let's make the 69.14 69.50, something like that. He was trying to get another - I said, forget it, Martin, you're taking me beyond where you should have. I've gone far enough. Forget it.").

to \$70 range between May and September. In May 1993, Allen & Co. representatives met with Mr. Diller and QVC managers and made a presentation that evaluated a variety of merger or acquisition scenarios. Two of these scenarios -- scenarios 2 and 3 -- contemplated a cash and stock deal for Paramount with a market value of \$65 per share.[77]

b. Options. Mr. Greenhill recalled: "[W]e said we weren't going to do the transaction, period, unless there was . . . an inducement in terms of the stock option."[78] Mr. Redstone testified: "We made clear to them . . . that we would not do a deal unless we got options for 20 percent of the stock."[79] Mr. Dauman testified about the purpose of Viacom's option:

> The purpose of it would be to compensate us, in effect, if -- although we did not contemplate that the transaction would not take place, but to compensate us for providing this premium to Paramount shareholders and to -- and foregoing the other opportunities we had at Viacom.[80]

Viacom had actually sought two options, an asset option and a stock option. Paramount negotiators made short shrift of the asset option idea.[81] Regarding the stock option, Viacom sought an option for 20% of the stock at "market price."[82] Viacom's

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[77] PEx. 49 at 445, 447.

[78] Greenhill Tr. at 136.

[79] Redstone Tr. at 56.

[80] Dauman Tr. at 50; see also id. at 49; Redstone Tr. at 58-59 ("I felt that we had earned that option . . . virtually every important company at one time or another . . . had come to us to try to effectuate a deal. When we did this [deal with Paramount] we gave up all of that.").

[81] Rohatyn Aff. ¶4; Greenhill Tr. at 131-33.

[82] Oresman Tr. at 47.

insistence on a market price trigger lasted for "an extended period of time."[83/] And Viacom's insistence on some form of option was never withdrawn, regardless of QVC's unfounded allegations to the contrary.[84/] Mr. Redstone was absolutely firm: "Indeed I conveyed to Philippe during the ultimate stages that this was a deal breaker. I would not do this deal without them [the stock option and the termination fee]."[85/]

Paramount would not agree to an option at market. It insisted on a merger price trigger, which of course had a value of zero at the merger price.[86/] Paramount prevailed on the point "because there had been precedent in other transactions for that."[87/] As Mr. Redstone testified:

> I should point out that we did not end up with what we were insisting upon. We were looking for an option at market, and there's a big difference, maybe $20 a share. And we ended up with an option at the deal price. But, again, the Paramount stockholders have benefitted because they have their stock as a result of us has gone up in value by billions, not millions or hundreds of millions, several billion dollars as a result of our offer.[88/]

c. **The Termination Fee**. Viacom opened with steep demands:

> [Paramount] objected to our asking for 200 million and an option at the market price . . . we argued for those things that favored our case and they said there wasn't going to be any option at the market price, and if there was an option, the only option would be at the deal price . . . [a]nd if there was a break-up fee it wasn't going to be 200 million.[89/]

83/ Redstone Tr. at 79.

84/ Redstone Tr. at 98; Greenhill Tr. at 170; Rohatyn Tr. at 34.

85/ Redstone Tr. at 64.

86/ Greenhill Tr. at 135-36.

87/ Greenhill Tr. at 137.

88/ Redstone Tr. at 237-238.

89/ Greenhill Tr. at 135.

By July 7, Viacom's demand was down to $150 million plus expenses. As negotiations continued, the "expenses" component dropped away, and the fee itself settled at $100 million. Mr. Greenhill testified: "I think they got the better of that one. I think we could have gotten more break-up fees given the size of the transaction."[90/] At $100 million, the fee is identical to the amount used by QVC in its financial pro formas for their own "expenses."[91/]

d. **Management.** Mr. Greenhill recalled:

> Mr. Davis said that he -- from the first dinner meeting, he said that he wanted what was best for his shareholders. He didn't want any contract. He didn't want any particular management arrangements. Sumner from the beginning said he wanted Martin to be the chief executive.[92/]

Later discussions concerned the issue of subordinate management, a far more complex subject when two very large companies are merging.[93/] In the merger agreement, no Paramount employee, including Mr. Davis, obtained any employment rights or any other guarantees.[94/]

90/ Greenhill Tr. at 137. Paramount outside director James Pattison recalled that Paramount spent $82 million on its unsuccessful bid for Time Inc. in 1989. Pattison Tr. at 115; Pattison Aff. ¶28.

91/ PEx. 52.

92/ Greenhill Tr. at 35; Dauman Tr. at 29.

93/ Redstone Tr. at 21-22. QVC's attempt to lend a sinister meaning to Mr. Redstone's August 16th letter to Mr. Greenhill (QEx. 85) concerning "management issues" simply ignores the testimony that those issues involved a complex interaction of two large sets of personnel and assets. Greenhill Tr. at 37; Redstone Tr. at 27-29.

94/ PEx. 28 (September 12 merger agreement). Outside director Hugh Liedtke testified that any concerns about Mr. Davis and Paramount management were not plausible. Liedtke Tr. at 127 ("Mr. Davis, he has no contract or anything. This [that he will be CEO] is just the understanding, at least as I appreciate it."); see Pattison Aff. ¶30.

e. **The No-Shop Clause.** Viacom requested an absolute bar upon Paramount's consideration of any other offer. Mr. Greenhill testified:

> We tried to have them talk to nobody else and they wouldn't do that. This was negotiated -- it was a negotiated point in the agreement. They insisted on doing it.[95]

The final compromise was common sense itself: Paramount could negotiate only with third parties who made bona fide offers for transactions that could be completed as evidenced by the fact that there are no material financing contingencies.[96]

D. The Paramount Board of Directors Made An Informed Decision in Approving the September 12, 1993 Merger Agreement

1. The September 9 Meeting of the Paramount Board of Directors

QVC's relentless effort to portray the Paramount Board as uninformed at the September 9 and 12 meetings ignores years of presentations, deliberation and discussion that preceded those meetings and is wholly dependent on QVC's selection of snippets of deposition testimony scissored out of context. Fairly viewed, the whole record depicts the deliberations of a well-informed Board acting in good faith.[97]

By September 9, 1993, the Paramount Board had played an integral role in the implementation of Paramount's long-term business strategy for almost a decade and was well aware of the ongoing discussions between Paramount and Viacom and the potential benefits

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95/ Greenhill Tr. at 152.

96/ PEx. 28, §6.02.

97/ QVC's claims are also ironic when its own Board of Directors spent only one hour and seventeen minutes deciding whether to launch an unsolicited multi-billion dollar offer for Paramount. PEx. 76.

of a merger between the two companies. Further, the directors were fully familiar with the desirability of a Viacom transaction and, as a result of the June 7-8 Board meeting, with the possibility of such a transaction.[98] Moreover, Mr. Davis had spoken to the Board about Viacom for years.[99] In the week before the September 9 Board meeting, Mr. Davis personally called each of the directors to alert them to the fact that there would be a discussion of a potential merger with Viacom at the upcoming meeting.[100] Thus, even before the September 9 meeting began, the directors had received a substantial amount of information regarding Viacom and a possible Paramount-Viacom business combination.

At the September 9 meeting, the Board received an extensive review of Paramount's negotiations with Viacom, Viacom's business, and the possibility of the emergence of a more attractive merger partner. Mr. Davis initiated the Board's discussion by tracing the history of the discussions with Viacom going back approximately three years.[101] Davis recounted that senior management and its investment advisors at Lazard Freres had been actively engaged in ongoing negotiations with Viacom,[102] and summarized the current major issues, including price, price protection, recent market movement of the stock of both

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98/ See Silberman Tr. at 32; PEx. 3. Five of the outside directors had also been present for the July 7 meeting of the Executive Committee. PEx. 4.

99/ See Small Tr. 37; Liedtke Tr. at 47-48; Silberman Tr. at 32; Pattison Aff. ¶¶9-10, 12; Weissman Aff. ¶¶11-12.

100/ See Pattison Aff. ¶15; Weissman Aff. ¶13; see also Liedtke Tr. at 32; Small Tr. at 8.

101/ PExs. 8 and 36; Pattison Aff. ¶16.

102/ See Small Tr. at 57; Pattison Aff. ¶16.

corporations, options, termination fee, fiduciary out, management provisions, stockholder approval and tentative timetable.[103]

Mr. Davis made it clear that Mr. Redstone would be the controlling stockholder of the combined company and reviewed the management structure that was expected to result from the proposed merger, including Mr. Redstone's request that Mr. Davis serve as the Chief Executive Officer of the newly-merged entity.[104]

Mr. Davis informed the Board that in light of the enormous growth potential of a combined Paramount and Viacom, the merger with Viacom represented the most attractive opportunity available to Paramount and its stockholders, superior to any other potential merger acquisition.[105] Mr. Davis also emphasized the possibility that other offers for Paramount might be received should an agreement with Viacom be reached and that they would have to be evaluated on the merits by the Board.[106]

The Board's judgment was also informed by a 40 page written presentation by Lazard Freres which was reviewed in great detail at the meeting.[107] These materials described the history of significant negotiations day-by-day, and contained Viacom financials and valuations, business sector analyses, growth rates, analyst report summaries, stock price histories, comparable transactions, and estimated premiums.[108] This presentation included

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[103] PEx. 8; Pattison Aff. ¶¶17-20; Pollack Aff. ¶17.

[104] PEx. 8; Pattison Aff. ¶19; Pollack Aff. ¶17.

[105] Pattison Aff. ¶22.

[106] PEx. 8 at 4.

[107] PEx. 6; Pattison Aff. ¶21; Pollack Aff. ¶18.

[108] Small Tr. at 34.

extensive qualitative analyses of the businesses of Viacom and Paramount.[109/] Lazard Freres presented an analysis of selected comparable transactions, and discussed with the Board strategic considerations, including other possible mergers and acquisitions as well as the alternative for Paramount of continuing to expand internally.[110/]

[109/] PEx. 6. Lazard's analysis of Viacom and Paramount included, inter alia:

- a summary of the consolidated financial performance of each company for the past five years, and an analysis of the multiples at which Viacom's shares were trading in the market as of September 8, 1993;
- an analysis of the component business units of Paramount (entertainment and publishing), and Viacom (network, broadcasting, cable television and entertainment) and their respective contributions to each company's 1992 consolidated revenues and 1992 earnings;
- a profile of the significant stockholders of Viacom (particularly including Sumner Redstone);
- a summary of recent research reports on each company's stock prices;
- a graphic representation of the stock price performance of Viacom Class A Common Stock, Viacom Class B Common Stock and Paramount Common stock over approximately one-year and five-year time periods, as well as a similar comparison of these stocks with the S&P 400 Index and S&P Media Index over approximately one-year and five-year time periods.

[110/] PEx. 8 at 4; Pattison Aff. ¶22. The Lazard comparable transaction presentation included the following:

- an analysis of selected stock swaps over $1 billion since February 1988 and the various premiums offered to the target shareholders based on the closing price of the target company's stock one week and one month prior to the public announcement of the transaction. This analysis revealed an average premium of 33% to the stock price one month prior to such announcement and 29.3% to the stock price one week prior to such announcement, and a median premium of 30.1% to the stock price one month prior to such announcement;
- an analysis of selected all-cash offers over $1.0 billion since January 1988 that revealed significantly higher premiums to the target shareholders than those offered in stock swap transactions reviewed with the Board;

(continued...)

QVC asserts that none of the September 9 and 12 Board materials address the potential causes of the price increase in Viacom stock. QVC Br. at 20, 23. Not true. The September 9 Lazard presentation book makes several references to the price, trading history and majority ownership of both classes of Viacom stock.[111/] Moreover, Lazard Freres representatives addressed the issue of Redstone's stock repurchase program orally, and Paramount and its advisors were well aware of these open market purchases.[112/]

[110/](...continued)

- an analysis of selected acquisitions of certain companies in lines of business similar to those of Paramount since 1985; and

- an analysis of the multiples implied by various prices per share of Paramount Common Stock, including a discussion with the Board of the relationship of these multiples with the multiples implied in the acquisition transactions reviewed with the Board.

[111/] See PEx. 6 at 11 (noting increases in Viacom stock price, and Paramount's interests in obtaining collar and termination right in event of post-announcement drop in the price of Viacom stock); at 2 (depicting Viacom shareholder profile, listing National Investments, Inc. -- Mr. Redstone's company -- as majority owner); and at 20-23 (charting Viacom class A and Class B price movements from 8/28/92 to 9/3/93, and charting price movements from 1987 through 1993).

[112/] They were quantified and examined in detail (Rattner Tr. at 77-79, 91-92), discussed with Viacom (id. at 89-90), and discussed with the Paramount Board. Oresman Tr. at 74-76; Rohatyn Aff. ¶23; Pollack Aff. ¶18; Pattison Aff. ¶17; Hooks Aff. ¶8; Fischer Aff. ¶10. Further, Lazard Freres properly concluded that the stock purchases were immaterial to the merger transaction. By September 12, Viacom had been out of the market for several weeks. The stock price had been unaffected by their departure from the market. Greenhill Tr. at 109, 117; Redstone Tr. at 39-48, 154-55. It should be noted that while they were in the market, "they abided by Stock Exchange rules regarding these purchases in terms of times when stock could be bought and the fact that they can only be bought on upticks and so on." Rattner Tr. at 125-126. Mr. Greenhill testified that National Amusement's "whole stock buying program was very well known in the marketplace." When asked if Mr. Redstone's buying practices had any effect on the market price of the Viacom stock, he responded: "Nothing unusual, no. Again, so long as they were following a program where you didn't buy in upticks and did all the usual transactions, it was done in the manner in which it had been done
(continued...)

After the Lazard Freres presentation, management and Lazard Freres discussed the proposed merger with the Board and answered the Board's questions.[113] At the conclusion of the discussion, the Board members expressed their preliminary views about the merger, and encouraged management and its advisors to continue the discussions.[114]

During the discussion, the Board (1) specifically asked Mr. Davis whether he had negotiated the best price with Mr. Redstone[115]; (2) inquired as to the Company's unsuccessful efforts to negotiate a "collar"[116]; (3) the Board extensively discussed the increase in price of Viacom stock[117]; (4) and the Board considered the size of the stock options awarded to Viacom.[118]

From September 9 through September 11, 1993, members of the senior management of Viacom and of Paramount, assisted by their legal and financial advisors,

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[112](...continued)
for many months, I don't see why it would have any particular effect on the stock price." Greenhill Tr. at 103. QVC's attack on the credibility of Mr. Oresman's testimony that Mr. Redstone's stock repurchase program was discussed (Oresman Tr. at 74-76) is specious. Pattison Aff. ¶17; Hooks Aff. ¶8; Pollack Aff. ¶18; Fischer Aff. ¶10; Rohatyn Aff. ¶23. QVC argues that Mr. Oresman's testimony is not credible because, it claims, no other director testified that the subject was discussed. QVC Br. at 24. In reality, Mr. Silberman testified that he was aware that Mr. Redstone was purchasing Viacom stock, although he could not recall whether he learned this information at the September 9 or September 12 meetings. See Silberman Tr. at 58.

[113] See Pattison Tr. 63-65, 78, 98; Small Tr. 29, 50, 57-58; Silberman Tr. 51, 53, 62-63, 78; Pattison Aff. ¶24; Pollack Aff. ¶20; PEx. 8.

[114] PEx. 8 at 5; Pattison Aff. ¶24.

[115] See Silberman Tr. at 51; Small Tr. at 45.

[116] Silberman Tr. at 66; Pattison Tr. at 111; Liedtke Tr. at 77.

[117] Pattison Tr. at 63.

[118] Small Tr. at 51.

conducted due diligence and negotiated a merger agreement (the "Merger Agreement"). On September 11, the negotiations over the principal issues in the agreements were concluded during a meeting between Messrs. Dauman and Oresman and their respective legal advisors.

2. The September 12 Meeting of the Paramount Board of Directors and the Approval of the Paramount-Viacom Merger Agreement

The Paramount Board of Directors met to continue its deliberations on the afternoon of September 12. A written summary of the merger agreement was distributed to the Board.[119] Paramount's outside counsel then walked the Paramount directors through the principal terms of the proposed merger agreement and related agreements, including the stock option and termination fee.[120] Paramount's outside counsel then answered many questions from the directors concerning the proposed agreement.[121]

The key terms of the Merger Agreement were as follows:

- Paramount and Viacom would merge by exchanging each outstanding share of Paramount stock for 0.1 of a share of Class A Viacom common stock, 0.9 of a share of Class B Viacom common stock (Non-Voting),[122] and $9.10 in cash. Based on market prices, the transaction was valued at $8.2 billion;

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[119] See PEx. 9.

[120] See Pollack Aff. ¶22.

[121] See id.

[122] QVC's argument that Viacom may "squeeze out" the minority shareholders is fallacy built on fantasy. Viacom and Mr. Redstone have no plans and, indeed, no capacity to do what QVC is suggesting. Besides the $5 billion in Paramount common equity, there is several billion more in Viacom equity held by the public. If Mr. Redstone were to squeeze out all other ownership, such action would be strictly governed by the entire fairness rule, and shareholders would also have appraisal rights. Weinberger v. UOP, Inc., Del. Supr. 457 A.2d 701, 711 (1983). To the extent that QVC's concern is about a control premium, Paramount stockholders are receiving a substantial one in this transaction.

- Using market prices, each Paramount share was valued at $69.14, compared with $54.75 on July 20, $51.13 on April 1, and $45.00 on December 31, 1992.

- In the event the agreement was terminated under certain circumstances before completion of the merger, Paramount would be obligated to pay Viacom a $100 "termination" fee, which included expenses; and

- In the event Paramount paid Viacom the termination fee, Paramount was to grant Viacom an option to acquire approximately 20% of Paramount's common stock at an exercise price of $69.14 per share.[123/]

The Board was advised that Mr. Redstone would become Chairman of the Board of the new company, which would be called "Paramount Viacom International," and that, at Mr. Redstone's request, Mr. Davis would become Chief Executive Officer, but would have no new employment contract.[124/] Frank J. Biondi, Jr., President and Chief Executive Officer of Viacom and Stanley R. Jaffe, President and Chief Operating Officer of Paramount, would lead a transition team that would both manage the combined operations in the initial stages of the merger and be responsible for the smooth integrations of the senior management and the cultures of the two companies.[125/]

[123/] Pattison Aff. ¶27. This price could be paid with a subordinated note. QVC and the plaintiff shareholders conjure up an assortment of potential horrible consequences from this fact. These contentions ignore that the note is required to carry an interest rate appropriate to its rating, and must be marketable. PEx. 28 (merger agreement); PEx. 29 (option agreement); Rohatyn Tr. at 56; Rohatyn Aff. ¶12. From Paramount's viewpoint, such requirements make the note highly liquid and barely less manageable than cash. Rohatyn Tr. at 56. The note was the product of negotiations leading to the elimination of Viacom's demands for a "market price" option trigger, Greenhill Tr. at 170-72, and was described to the Board. Pattison Tr. at 91. All of QVC's imagined consequences arise out of (1) the unlikely event that Viacom will issue such a note rather than take its cash; (2) complete disregard of the marketability requirements that specifically prevent the allegedly dire results being described; and (3) disregard of the disincentive for Viacom to take actions that would adversely affect Paramount because the note would be issued in connection with Viacom's purchase of Paramount stock.

[124/] Pattison Aff. ¶¶29-30.

[125/] Pattison Aff. ¶30; Dauman Tr. at 42.

Paramount management reviewed with the Board their views about the terms of the proposed combination and their confidence in the excellent long-term strategic fit between the two companies.[126] The Paramount Board then received a detailed financial presentation from Lazard Freres and the opinion of Lazard Freres that the Merger Consideration was fair to Paramount's stockholders from a financial point of view.[127] The Board also discussed the possibility that other companies might be interested in Paramount.[128]

During the nearly three hour meeting,[129] the independent directors asked many questions on the salient issues arising out of the transaction,[130] including:

- Redstone's control of the combined entity[131];
- Redstone's age and contingencies in the event of his death[132];

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[126] See, e.g., Pattison Aff. ¶¶26, 31; Small Tr. at 191-92.

[127] See, e.g., PEx. 15 (fairness opinion); PEx. 11 (board book); Pollack Aff. ¶23; Pattison Aff. ¶¶26, 32; Weissman Aff. ¶17; Hooks Aff. ¶6; Fischer Aff. ¶7. This presentation included: key financial statistics (including the fact that the $69.14 per share price represented a premium of 29% to the stock price one month before the September 12 meeting), trading level analysis, strategic considerations, pro forma earnings effect) break-up value analysis for Paramount ($62 - $76 per share), discounted cash flow analysis, comparable transaction analysis, comparable public company analysis, valuation analysis of Viacom, and alternatives to the Proposed Merger. See PEx. 77 at 38-41.

[128] Small Tr. at 29, 47; Pattison Aff. ¶33; Weissman Aff. ¶19.

[129] Pattison Aff. ¶37.

[130] Pollack Aff. ¶24; Pattison Aff. ¶¶34-35; Hooks Aff. ¶7; Fischer Aff. ¶8.

[131] Pattison Tr. at 119; Pattison Aff. ¶35; Hooks Aff. ¶7; Fischer Aff. ¶9.

[132] Pattison Tr. at 120-22; Pattison Aff. ¶35. Paramount's Board was presented with and considered both the effect of Sumner Redstone's age upon the proposed merger as well as the change ramifications of his death. Oresman Tr. at 44, 45 ("Q: Did the Paramount people focus upon the circumstance of who would control this stock after Mr. Redstone's disability or retirement or death? A: It was . . . discussed by the

(continued...)

- a collar on Viacom stock[133];
- the ability of the holders of Viacom Class B Common Stock to obtain a premium[134];
- the right to terminate the Merger Agreement.[135]

At the conclusion of the meeting, the Board unanimously adopted the Merger Agreement and recommended its approval by the stockholders of Paramount.[136] The Viacom Board of Directors reviewed and approved the Merger Agreement the same day. In announcing the merger of Viacom and Paramount after execution of the September merger agreement, Mr. Davis stated:

> This merger furthers our strategic goal of expanding our opportunities as a worldwide purveyor of intellectual properties in the entertainment and communications industries to ensure sustained worldwide growth into the future. The combination also will provide Paramount stockholders with a continuing opportunity to maximize the long-term value of their holdings

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[132](...continued)
board. It was raised at . . . at least one board meeting. It was discussed at the board."); Silberman Tr. at 106-07 (trusts that would control stock).

[133] Pattison Tr. at 122; Pattison Aff. ¶34. A "collar" could not be obtained in negotiations. Id.; Redstone Tr. at 52-53; Greenhill Tr. at 61.

[134] Pattison Tr. at 122-23.

[135] Silberman Tr. at 72-73.

[136] Pattison Aff. ¶37; Pollack Aff. ¶24. QVC challenges "one director" on the ground that he participated at the September 12 meeting by phone and did not have a copy of the Board materials before him at the time. QVC does not even suggest that this "one director" was somehow rendered incapable of understanding the oral presentation by virtue of the fact that he did not then have the written materials before him. Moreover, when this director, Mr. Liedtke, Chairman and CEO of Pennzoil Corp., received the board materials the next day, he went so far as to review independently the materials presented to the Board on September 12 with financial analysts at Pennzoil. See Liedtke Tr. at 14-15.

through an interest in a vibrant ongoing enterprise with significant assets and limitless potential for growth.[137]

Finally, QVC attempts to criticize the time constraints inherent in this process.[138] Viacom, however, is a public company, with which Paramount had discussed a possible strategic merger for more than three years. Paramount already had "fairly complete information concerning Viacom's operations and so due diligence was not expected to take a long time."[139] Nor is there any mystery in the desire to have the agreement executed quickly.[140]

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[137] QEx. 21.

[138] QVC Br. at 18, 74.

[139] Silberman Tr. at 32; Oresman Tr. at 36-37 ("First of all you have leaks and second of all that we had been -- these two companies had been making goo-goo eyes at each other for a long time. We knew a lot about each other, both were public companies with very substantial filings and we felt the best thing to do was to move this thing quickly -- experience in life is there if things lie around they don't get done."). Paramount's activities and its Board's scrutiny may be usefully compared with QVC's Board oversight, which has required -- in total -- a couple of hours to approve a bid for Paramount, a hostile tender offer, commitments to invest billions in QVC preferred stock, a replacement of controlling ownership, and a second tender offer.

[140] Silberman Tr. at 80 ("Well, it was certainly clear that we were going to sign this as quickly as possible. I mean if all the terms were in place and everything had been agreed to, Lord knows, there was enough back and forth on this to nail it down, put it in writing; and get it completed.").

3. The Paramount Board of Directors Did Not Intend, nor was it the Effect of the Board's Decision, to Place Paramount on the "Auction Block": Any Stock for Stock Merger Involving Paramount and Viacom Would Have Resulted in Mr. Redstone Becoming the Controlling Stockholder of the New Entertainment Enterprise

By approving the Merger Agreement, the Paramount Board did not intend, nor was it the effect of the Board's decision, to place Paramount on the "auction block." Lazard Freres stressed that it did not view the transaction as a sale of Paramount:

> We viewed this as a merger in which control of the company was transferred because of the ownership of Mr. Redstone; but that the continuing equity interest of our shareholders was so great that it was essentially, it was a hybrid transaction. It was not a sale.[141/]
>
> * * *
>
> Q. With respect to the Paramount-Viacom transaction, what is it about the meshing of management that led you to consider the original September 12th agreement not to be a sale?
>
> A. I believe that on all counts that I mentioned, with the exception of voting control, that there was considerable continuity both in terms of the business relationships, the management continuity between both companies, and to the best of my recollection the board composition of the combined company.[142/]

And Paramount's directors repeatedly emphasized that their intent was to enter into a strategic merger with Viacom, and that Paramount was not for sale. For example, Mr. Small testified:

> All that runs counter to the whole concept that we had all along, which was that Viacom fit our whole strategic plan and that we weren't trying to put the company up for sale, we weren't trying to put the company up for auction, we weren't trying to bust up the company, we weren't looking for starting a

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141/ Rohatyn Tr. at 56.

142/ Id. at 62.

> feeding frenzy in the public. We were looking to merge strategically with Viacom.[143/]

The Board's intent not to sell the company was unaffected by the form of the Paramount-Viacom transaction:

> The objective of the company was to -- and the board and the management was to merge with Viacom in this particular case and make the company grow. Now, if one of the things necessary to cause that to happen involved have a big shareholder and it would happen regardless of which way you did it, so it does. But that's just a factor in a merger. . . . As you know better than I do, you can merge companies half a dozen different ways and you get different results. . . . It's the substance we're interested in and not the legal form.[144/]

As acknowledged by QVC's financial advisor, Allen & Co., even if the transaction had been structured so that Paramount acquired Viacom in a stock-for-stock merger, Mr. Redstone would still have become the largest single stockholder of the combined company.[145/]

E. **Paramount's Management and Board Have <u>Always Acted Strategically, Not Defensively</u>**

QVC has chosen to disregard the record of what Paramount management and the Paramount Board did for the better part of decade. Rather, according to QVC, reports of

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143/ Small Tr. at 114-15; <u>see</u> <u>also</u> <u>id</u>. at 198 ("The word that would be farthest away from the thinking of Paramount that I can think of would be auction or sale or up for grabs or anything of that nature."); Pattison Tr. at 236 ("[The Board] very much opposed to the auction process, because we had worked to try to develop a long-term strategy to build the company, and the company -- we had never considered the company was for sale, never considered an auction process that I'm aware of."); Liedtke Tr. at 88 ("I've tried to repeatedly indicate to you that the company is not up for sale, has never been up for sale, is not up for bid, is not up for auction, is not interested in that."); Pattison Aff. ¶38.

144/ Liedtke Tr. at 37-38.

145/ Allen Tr. at 94-95.

QVC's interest in Paramount provoked Paramount's management, and then the Board, to sell the company and to "lock up" a deal with a different partner.

None of these things happened. And what did happen was not driven by fear of a takeover by Barry Diller or QVC.

1. **Rumors**

QVC's attempt to create an atmosphere of defensiveness begins, and largely ends, with gossip and rumor. Time and again, QVC refers to an alleged animosity between Mr. Diller and Mr. Davis, as if that were enough to throw Paramount into Unocal scrutiny. More often, QVC refers to press reports containing assertions about QVC's interest in acquiring Paramount, as if rumors were not published every day.[146]

More than any other industry, the media/entertainment world is rife with gossip and rumors. Hollywood created the gossip columnist, and today's gossip is not confined to movie stars but readily embraces corporate executives and transactions as well. Paramount has been the subject of idle speculation, rumors and press reports for years, perhaps more than any other company over so extended a period of time. Such banter, however, does not trigger Revlon and place a company on the auction block.

Barry Diller is only the most recent in a long list of names rumored to be "interested" in acquiring Paramount. This year, the press also reported interest on the part of Ted Turner, TCI, and "anyone from a Baby Bell to a network."[147]

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[146] QVC Br. at 7-8.

[147] See, e.g., The Los Angeles Times, June 26, 1993 (Paramount's stock soared to a "52-week high amid speculation that . . . [Paramount] is being targeted for a merger or acquisition by . . . Tele-Communications Inc. and cable mogul Ted Turner."); The Reuters Business Report, January 21, 1993 ("There's takeover speculation anyone
(continued...)

According to QVC's own investment banker, Allen & Co., rumors and press reports about possible acquisitions are commonplace, and in the media business are ubiquitous. Mr. Diller, for example, has been aware of "speculation about Paramount and Viacom going back years."[148] According to Mr. Senior, "everybody in our business" experiences them.[149] Part of the reason for the glut of rumors about Paramount, undoubtedly, has been its own exploration of strategic merger possibilities. Part of the reason also is the relentless marketing efforts of intermediaries in that business, especially Allen & Co. itself. In the past year, QVC's investment advisor discussed Paramount as an acquisition with at least four other potential clients, including Viacom, before hitting upon QVC.

> In the course of our business we have ongoing relationships with a lot of people that are interested in the entertainment and media business. Those people have asked us over time to look at companies that are involved in the entertainment and media business. In doing so we have reviewed for them, as we do on an ongoing basis, Paramount, Universal, all the other companies. And four cases I can think of we reviewed Paramount for them as well as other companies.[150]

Paramount's directors have also been aware, this year as always, of the many rumors concerning Paramount. "There were a lot of people interested in Paramount, and have

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[147](...continued) ranging from a Baby Bell to a network might make a bid, an analyst said".). From 1983 to 1993, there were hundreds of articles that reported on Paramount as a potential takeover target. Oresman Aff. ¶¶32-33 and the accompanying Appendix of Analysts' Reports and Press Articles ("Rumors Appendix"). The Rumors Appendix contains a sampling of 44 analysts reports and 60 press articles about Paramount during the stewardship of Mr. Davis.

[148] Diller Tr. at 9.

[149] Senior Tr. at 19-20.

[150] Senior Tr. at 10-11.

been for some time."[151] It was "common knowledge" that "Ted Turner, TCI . . . were interested in some kind of discussion with Paramount . . . Barry Diller's name came up along with a lot of others."[152] For that matter, at the September 12, 1993 Board Meeting, the directors even discussed a "list of other potential acquirors of [Paramount]."[153] Moreover, "it was not unusual that a whole list of people were discussed" because "Paramount talked to a lot of people and considered a lot of potential merger candidates" in the course of its exploration of strategic alternatives.[154] Paramount, however, did not react impetuously to mere rumors. Accordingly, when rumors surfaced about a possible Diller bid, they were given "no substance" by Martin Davis, or by Donald Oresman or by the Board.[155]

Instead, the Paramount directors and management have conducted the Company's affairs with attention to only one constituency -- the Company's owners -- <u>not</u> CBS, Turner, Icahn, GE, the Japanese, the Baby Bells, KKR, MCA, TCI, Geffen, Diller or anyone else potentially lurking in the shadows.

151/ Pattison Tr. at 25.

152/ <u>Id</u>. at 24-26.

153/ Pattison Tr. at 29; PEx. 11. This list was drawn up by Lazard Freres largely from rumors in the press. However, no participant believed that a bid from anyone other than Viacom was likely. Greenhill Tr. at 74; Oresman Tr. at 35; Pattison Tr. at 87, 118; Pattison Aff. ¶33.

154/ Silberman Tr. at 16.

155/ Oresman Tr. at 35; Pattison Tr. at 89, 118.

2. QVC Rumors and Paramount's Reaction

Press reports of interest by QVC/Diller in acquiring Paramount waxed and waned during the first half of 1993. They made good press: an ex-employee trying to buy out his former company against all odds. And they still do: QVC's brief is loaded with that kind of innuendo and uses that kind of press as "evidence." QVC's "proof," however, does not correspond, however, to the objective reality.

By early 1993, Mr. Redstone and Mr. Davis had already recognized many of the strategic advantages of a merger, as had Allen & Co. In April, May and June 1993, as it had for several years, Paramount management explored various strategic options, and the Paramount Board attended a strategy retreat in May 1993.[156] Throughout this period, rumors about QVC, Turner, TCI and others were reported by analysts and the press. In late June and early July, discussions between Paramount and Viacom intensified. On July 6 and 7, proposals were renewed, but discussions terminated over a variety of issues. Rumors about QVC continued, but nothing happened.

On July 21, Mr. Davis invited Mr. Diller to lunch. Although QVC's brief makes much of this lunch, Mr. Diller's sworn testimony was that he denied to Mr. Davis at that lunch having a present interest in Paramount. Euphemistically describing his own remarks as "tactical," Diller testified: "I said to Mr. Davis in answer to his questions about QVC's intentions that, quote, when and if I had anything to say to him about QVC's intentions, I would call him and he would hear it from me directly."[157] Mr. Davis's testimony confirmed this point:

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[156] PEx. 1.

[157] Diller Tr. at 36-37.

> I asked Barry about his interest. He said at this time, at that time they had none. He said often people were looking at us in his view and if there was any interest, he would let me know. At the time I also told him first to keep in mind that we were not for sale.[158/]

Mr. Davis took Mr. Diller "at his word."[159/] As of July 21, 1993, there were good reasons for doing so. On July 12, just days before the lunch, QVC had proposed to merge QVC and its rival shopping channel, the Home Shopping Network.[160/] A reasonable person could discount the likelihood that QVC would abandon its own chosen merger partner to flirt with a company 10 times the size of Home Shopping Network and three times the size of Home Shopping Network and QVC combined.

F. When the Paramount-Viacom Merger was Announced on September 12, QVC Was Neither Prepared Nor Committed to Make a Serious Offer to Acquire Paramount

As Mr. Diller himself testified, on September 12, 1993, QVC was not prepared to make a proposal to acquire Paramount. More importantly, QVC was not inclined to do so.

1. QVC's Business and Stockholders

Formed seven years ago, QVC is an "electronic retailer" that merchandises a variety of private-brand or generic products to consumers through a televised "home-shopping" program. Consumers watching their televisions at home view salespersons conducting live demonstrations of products in a "friendly sales environment."[161/] Viewers

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158/ Davis Tr. at 57 (emphasis added).

159/ Id. at 59. Needless to say, Mr. Davis never heard from Mr. Diller again, directly or otherwise, until after the Paramount/Viacom merger was announced.

160/ PEx. 33.

161/ PEx. 32.

call an "800" telephone number on the screen to place orders. QVC sells, among other things, simulated gemstone jewelry called "Diamonique," apparel and accessories, housewares, electronics, toys and cosmetics. QVC markets its products through program segments that feature themes such as "Look Your Best" or "Beautify Your Home," or that attempt to capitalize on celebrity marketing such as the "Joan Rivers Classics Collection" and the "Marie Osmond Doll Collection."[162/]

As of September 12, QVC's major stockholders were Liberty Media Corporation ("Liberty Media") with 21.7% of QVC's stock, Comcast Corporation ("Comcast") with 11.2%, Time Warner Inc. with 7.4%, and Mr. Diller with 12.7%. Liberty Media in turn is controlled by John Malone, Chairman of TCI, and Liberty Media has announced a merger with TCI, which in turn is merging with Bell Atlantic Corporation.[163/] As described in the QVC's 1993 10-K filing with the Securities and Exchange Commission, Comcast and Liberty Media also formed a control group with Mr. Diller.[164/] (On November 11, however, the day before QVC filed its brief, QVC announced a major realignment of its ownership that will take place over the next 18 months, with BellSouth Corporation replacing Liberty Media as the largest QVC stockholder.)

162/ Id.

163/ QVC has also stated that the interest of these large shareholders who also have seats on the QVC Board of Directors "may not always coincide with the interests of other QVC shareholders or the Company." PEx. 32 at 10.

164/ PEx. 32.

2. QVC's Lack of Preparation and Commitment

There were several reasons why QVC was neither prepared nor committed to making a bid to acquire Paramount as of September 12, 1993.

First, although discovery in this case has revealed that QVC and its investment bankers, Allen & Co., had begun to analyze the possibility of a QVC-Paramount combination in the spring of 1993, the work had been kept very confidential[165/] and was limited to analysis.[166/] Significantly, the possibility of a deal was not even discussed at any formal QVC Board meeting until September 17, almost a week after the Paramount/Viacom merger was announced on September 12.[167/]

Second, Liberty Media, QVC's largest stockholder, was opposed to a hostile acquisition of any kind with anyone as a matter of policy,[168/] and was engaged in discussions with Paramount about a range of possible initiatives.[169/] Without financial backing from the Liberty/TCI/Malone ownership group, QVC was not in a position to acquire Paramount or any other \$8 to \$10 billion company.

Third, instead of pursuing Paramount, QVC had proposed a merger with its rival, Home Shopping Network, itself a \$1.09 billion revenue company, on July 12, 1993,[170/] and, as of September 12, QVC was still pursuing that strategic merger.[171/]

165/ Senior Tr. at 26-29; Allen Tr. at 106-07 (the work for Mr. Diller was kept confidential because "it was the business of Diller and not the rest of the world").

166/ Senior Tr. at 26-32.

167/ Diller Tr. at 86; Senior Tr. at 97.

168/ PEx. 45.

169/ Malone Tr. at 27-28; P.Ex. 81.

170/ PEx. 35.

Fourth, as of September 12, when the Paramount/Viacom merger was announced, QVC had no financing, no concrete plans, and no commitments from its then-controlling owners for a possible QVC-Paramount transaction. Mr. Diller confirmed that, as of September 12, QVC had no financing arrangements in place with respect to any possible transaction involving Paramount.[172] Discovery has shown that it was only after another week of scrambling to line up support among its backers that QVC made an unsolicited proposal to Paramount. During that period, Mr. Diller's investment banker, Herbert Allen, spoke to Comcast and Liberty Media as "prospective" investors, discussing a "broad range of topics."[173] Mr. Diller entered into direct negotiations with Comcast and Liberty Media over fundamental questions of "price" and "control" relating to their possible preferred stock investment in QVC to enable it to make a proposal to Paramount.[174] When asked why such issues were still being negotiated after the Paramount/Viacom merger was announced, Mr. Allen testified: "In general those are the questions people usually ask when they are about to buy securities. Especially in a large number."[175]

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[171](...continued)
[171] Senior Tr. at 126-28; PEx. 33.

[172] Diller Tr. at 41-42.

[173] Allen Tr. at 79-80.

[174] According to Mr. Allen, these terms included "price" and "control of QVC or if not control of, emphasis -- I am not sure what the right word would be, but how the people would be positioned with regard to Diller." Allen Tr. at 82. By price, Mr. Allen meant the "conversion price," or the price at which Comcast and Liberty could convert their preferred stock into common QVC stock. Id. at 82-83. Mr. Allen considers conversion price to be a significant term, and Allen & Co. term sheets show that the conversion price changed as the negotiations proceeded among QVC, Comcast and Liberty Media after the Paramount/Viacom merger was announced. PEx. 47 at 3050; PEx. 47 (9/28/93 commitment letter attaching 9/20/93 term sheet). [174]

[175] Allen Tr. at 82.

It is no wonder, in light of this record, that on the Monday following the announcement of the Paramount/Viacom Merger Agreement, a QVC spokesman said QVC was still working to complete its merger with the Home Shopping Network and that "any other plans regarding QVC were merely speculative."[176/]

3. On September 20, QVC Tried to Put Paramount on the Auction Block by "Offering" a Multi-Billion Dollar Deal Without Financing

By September 20, QVC had changed course. On that day, Mr. Diller wrote to Mr. Davis proposing a merger with Paramount and stating simply that he had been "assured" by his investment bankers that financing would be available.[177/] Pursuant to the QVC proposal, each of Paramount's outstanding common shares would be converted into .893 shares of QVC common stock and $30 in cash, which, based on the September 20 closing price for QVC stock, had a nominal value of approximately $9.5 billion, or $80 per Paramount share.[178/] QVC's offer was premised upon the financial support of Liberty Media and Comcast, each of which would commit to purchase $500 million of QVC convertible preferred stock,[179/] but the remaining billions in financing were unaccounted for.

On September 26, without referencing any commitment letters from lenders guaranteeing financing, or providing any details whatsoever, Mr. Diller wrote a letter to Mr. Davis simply asserting that there was "no question as to the financing" of QVC's proposal.

176/ PEx. 38 (Reuters, 9/13/93) (emphasis added). The Court may contrast this statement with QVC's current assertion that its interest in bidding for Paramount was apparent at that time.

177/ PEx. 48.

178/ Id.

179/ Id.

Common sense and the terms of the Viacom agreement, however, required more. As it turned out, QVC did not even begin its search for bank financing until after it made its "offer"; and that search was still ongoing on September 27, the date on which the Paramount Board met to discuss the QVC proposal.[180/]

G. The Paramount Board of Directors Reacted to Subsequent Events in Good Faith and in an Informed Manner

After QVC made its proposal on September 20, Paramount's Board of Directors responded reasonably.

1. On September 27, the Paramount Board Properly Decided That QVC Should Provide Satisfactory Evidence of Its Financing

The Paramount Board met on September 27, 1993, and did not find the financial assurances in Mr. Diller's letter of September 26 to be adequate. (In contrast to Mr. Diller's September 26 letter, Viacom had produced fully underwritten commitments for the total amount of funding necessary to close the merger with Paramount.)[181/]

Under its Merger Agreement with Viacom, Paramount could explore QVC's proposal if there were no "material contingencies relating to financing."[182/] However, as of

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[180/] PEx. 56. Despite having made a purportedly credible $10 billion offer, QVC wanted to save money on commitment fees, and was still shopping for the lowest cost, minimally adequate bank letters. Id.

[181/] See PEx. 75.

[182/] PEx. 28 (§6.02); Oresman Tr. at 95-96. Viacom's General Counsel, Mr. Dauman, explained the basis for this condition in the Merger Agreement: "The reason why we were justified [in permitting Paramount to consider only offers with no material financing contingencies], is that we went through extensive negotiation, committed ourselves in entering into a transaction with Paramount to providing value to the Paramount shareholders, had undertaken significant expense and seriousness in going (continued...)

September 27, QVC did not have any financing commitments in place; nor had it provided any evidence of such commitments beyond Mr. Diller's "naked assertion" that financing a multi-billion dollar transaction would be no problem for him.[183/]

When this matter was discussed at the Paramount Board meeting on September 27, several outside directors expressed concern about the adequacy of Mr. Diller's representations. Outside director Hugh Liedtke told his fellow directors:

> I had 20 guys out in West Texas I could bring up to New York and swear they had 10 billion dollars available anytime they wanted, and I thought they ought to have letters from the bank. That's the one thing that's non-controversial.[184/]

Thus, the Paramount Board determined on September 27 that it would consider the QVC proposal "when there was satisfactory evidence of financing."[185/] During the meeting, Mr. Davis advised the Board that there was nothing preventing the Board from considering the QVC proposal once this condition was met.[186/]

182/(...continued)

forward with it, and felt it was not appropriate for the board to consider an offer given the existence of an executed merger agreement that was fully negotiated between the parties on the basis of a letter that only required a 29 cent postage stamp which is all that the original QVC proposal consisted of" (Dauman Tr. at 235-36) (emphasis added).

183/ Oresman Tr. at 87 (a "prudent person would reasonably require that there be some evidence given the magnitude of the dollars involved, given the size of the company that QVC is, I think it was perfectly appropriate to get some evidence beyond a naked assertion").

184/ Liedtke Tr. at 120; see also Pattison Aff., ¶43-44; Weissman Aff., ¶21; Silberman Tr. at 113-16.

185/ PEx. 20 at 2.

186/ PEx. 19.

Although the Board decided to defer consideration of the QVC proposal, Paramount's investment bankers, Lazard Freres, made a presentation to the directors concerning QVC's business and analyzing the technical aspects of QVC's proposal. The Board was given substantial information about QVC, including a "financial summary, multiple analysis, ownership profile, summary of operations, summary of recent research reports and stock price performance."[187]

The statement released by Mr. Davis following the Board meeting on September 27 fully reflected the decision of the Paramount directors at the meeting.[188] As Mr. Davis pointed out, Paramount and Viacom had a signed merger agreement, and the Paramount Board had previously determined that Viacom was the "best strategic fit" for Paramount, providing long-term "growth for our shareholders."[189] At the same time, Mr. Davis stated that the Paramount Board would consider the QVC offer if and when there was satisfactory evidence of financing and would conduct itself "in a thoughtful, responsible, and deliberate manner."[190]

187/ PEx. 20 at 2; PEx. 18; Pattison Aff. ¶44.

188/ Silberman Tr. at 145.

189/ QEx. 28.

190/ Id. Mr. Davis's statement noted the need to address "business concerns" about QVC's proposal once adequate financing was in place. See also Silberman Tr. at 146.

2. QVC Failed to Provide Satisfactory Evidence of Its Financing Until October 5, 1993

On September 28, the day after the Paramount Board met, QVC finally obtained an executed letter from Comcast and Liberty Media providing for commitments to purchase $500 million of convertible preferred stock in QVC.[191/] Even these commitments were preliminary and conditioned on the "negotiation of the definitive terms of such securities and related documentation and consummation of the combination of QVC and Paramount" in accordance with QVC's September 20 merger proposal.[192/]

On September 30, QVC obtained six senior bank financing commitment letters.[193/] The bank commitment letters were also subject to numerous conditions, including each bank's satisfactory completion of its business and legal due diligence and the absence of any "competing transactions" by or on behalf of QVC and Paramount at the time of the financing.[194/] Finally, on October 5, Herbert Allen, QVC's investment banker, delivered the financing commitment letters to Mr. Rohatyn of Lazard Freres.[195/]

191/ PEx. 47.

192/ Id. Significantly, the commitments were not conditioned on the elimination of the stock option and termination provisions of the Merger Agreement between Viacom and Paramount. See Roberts Tr. at 123 (similar testimony as to amended commitment letter dated October 15, 1993).

193/ PEx. 58.

194/ Id. Like the preferred stock investment commitment letter signed by Comcast and Liberty Media, the six bank financing commitment letters were not conditioned on the removal of the Viacom stock option and termination fee provisions.

195/ Allen Tr. at 84-85.

3. On October 11, the Paramount Board Received Further Information Concerning QVC's Proposal and Determined That Paramount Should Explore the QVC Proposal

On October 11, the Paramount Board met to review the financing documents provided by QVC.[196] Although the letters were conditional and required clarification in a number of respects, the Board determined that they were satisfactory and, on motion of outside director Samuel Silberman, authorized Paramount management to enter into discussions with QVC.[197]

At the same meeting, Mr. Davis advised the Board that Paramount had retained the firm of Booz Allen & Hamilton to assist in the evaluation of QVC's proposal by analyzing and comparing the incremental earnings potential from a Paramount-Viacom merger and a Paramount-QVC merger.[198] The purpose of the Booz Allen work was to give the

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[196] PEx. 22; Pattison Aff. ¶45.

[197] PEx. 22 at 2; Silberman Tr. at 120; Pattison Aff. ¶46. Events just two days after the Paramount Board meeting proved that the commitment letter of Comcast and Liberty Media was very conditional. On October 13, QVC's strategic and financial plans began to unravel when Mr. Malone announced that TCI (which controlled Liberty Media) would merge with Bell Atlantic in a $33 billion transaction. Mr. Diller of QVC was entirely unaware of his partner's plans and was described as "stunned." See PEx. 59 (New York magazine, November 11, 1993). For his part, Mr. Malone thereafter considered QVC's Paramount proposal to be of only "peripheral interest." Malone Tr. at 16. He told Bell Atlantic: "Basically, that from our perspective, the QVC investment by Liberty Media, which would ultimately end up as part of the Bell Atlantic merger, subject to many regulatory approvals, was not, in my judgment, a strategically critical asset and, therefore, not -- not of great concern one way or the other to Bell Atlantic." Id. at 46. Within a month, TCI and Liberty -- whose cable assets were described as "material" to QVC's business in its 14d-1 -- had agreed to sell their stakes in QVC entirely. PEx. 60.

[198] PEx. 22; Pattison Aff. ¶45.

Paramount Board a "professional assessment of the strategic fit of Paramount/Viacom and Paramount/QVC."[199]

4. QVC Engages in Gamesmanship, First Failing to Provide Adequate or Timely Information About Its Merger Proposal, Then Professing to Want Negotiations After Secretly Having Already Approved a Hostile Tender Offer

On October 13, Paramount's General Counsel sent QVC's counsel, Mr. Lipton, a request for additional business information regarding the QVC proposal and requested that QVC enter into a confidentiality agreement with Paramount.[200] Paramount's request called for, among other things, a draft QVC merger agreement, QVC's current business plan and projections, QVC's business plan and projections for a combined QVC-Paramount entity, QVC's plans for the use of Paramount's assets, and QVC's best estimate of the time it would take QVC to obtain regulatory approvals.[201]

QVC did not respond that Paramount was acting in bad faith or that its questions were unreasonable.[202] Nevertheless, QVC waited until October 20, seven days after Paramount's request for additional information, to deliver some responses and a packet

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[199] PEx. 21; Wolf Tr. at 42-45; PEx. 25. Outside director Hugh Liedtke was pleased by management's retention of Booz Allen. He testified: "[W]e've used Booz Allen and very satisfactorily. They're an extremely well-known firm and very good one, I might add . . . ." Liedtke Tr. at 112.

[200] PEx. 41.

[201] Id.

[202] QVC's investment banker, Herbert Allen, testified that Paramount's question about QVC's business plans for a combined QVC-Paramount entity was "very reasonable." Allen Tr. at 135. Indeed, the questions were asked to provide the Paramount Board with facts about the QVC merger proposal that would allow the Board to make an informed decision.

of financial information to Paramount.[203] Certain of QVC's responses were plainly inadequate. For example, although asked for a description of its business plan for the combined Paramount-QVC entity, QVC provided only pro forma financial statements, with no description of QVC's actual business plans for a combined QVC-Paramount entity.[204] Similarly, in response to Paramount's request for a best estimate of the length of time required for regulatory approvals, QVC blithely advised: "We are prepared to submit all regulatory filings promptly, and do not anticipate any significant delays to obtaining any required regulatory approvals."[205] QVC also assured Paramount that it did not believe there were any significant regulatory issues arising from a QVC-Paramount transaction,[206] but within a month Liberty Media, a QVC affiliate, would agree to divest its interest in QVC pursuant to a FTC consent decree.

QVC's pro forma financial statements were significant, however, in that they assumed that QVC could merge with Paramount without the elimination of the Viacom stock

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203/ PEx. 42. Although dated October 19, QVC's letter and materials were delivered on October 20. QVC has unfairly sought to place some sort of blame for the delay on Paramount. The facts are simple. QVC first proposed a confidentiality agreement with Paramount in a letter dated Friday, October 15. However, this QVC letter did not arrive at Paramount until Monday, October 18, at the earliest. On Tuesday, October 19, a Paramount attorney, Mr. Doppelt, left two voice mail messages for QVC's General Counsel regarding a proposed change in the form of letter QVC had sent. QVC's General Counsel did not respond until October 20, at which time he and Mr. Doppelt reached agreement as to the proposed change in the wording. Later that same day, a revised copy of the agreement was executed and delivered to QVC's General Counsel by hand.

204/ Id.

205/ Id. (emphasis added).

206/ Id.

option or $100 million termination fee.[207] When asked about QVC's assumptions in his deposition, QVC's investment banker, Enrique Senior, testified that QVC's proposal could be "financed comfortably" without removing the Viacom stock option or the termination fee.[208] Mr. Diller agrees.[209]

However, before Paramount had any opportunity to study any of the materials provided by QVC on October 20, QVC's counsel, Mr. Lipton, sent a letter on the same day to Paramount's General Counsel, Donald Oresman, stating that QVC wanted to begin negotiating (either that day, the next day or the day after) the terms of the draft merger agreement which it had just provided.[210] By return letter of same date, Mr. Oresman acknowledged receipt of the voluminous materials that QVC had forwarded and stated that Paramount would "be in touch" with QVC once Paramount had completed its review of the QVC information.[211]

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[207] Id. QVC also assumed that its own fees and expenses would be $100 million. Id.

[208] Senior Tr. at 93. Mr. Malone similarly testified: "The only discussion that I was a party to on that subject was early on, and it involved a discussion about what might end up being negotiated as part of a friendly transaction. And that in a friendly transaction, there would have to be some kind of consideration paid to Viacom in view of its -- its contracts with Paramount." Malone Tr. at 24. Mr. Roberts of Comcast testified that, notwithstanding QVC's position before this Court, the QVC tender offer is likewise not conditioned upon removal of the Viacom stock option or termination fee. Roberts Tr. at 123.

[209] Diller Tr. at 62-64.

[210] PEx. 72.

[211] PEx. 73.

Mr. Lipton then responded the same day accusing Paramount and its Board of engaging in delaying tactics and violating their legal obligations.[212] Mr. Oresman responded to this accusatory missive in another October 20 letter stating:

> You delivered today (October 20th) some information in response to our request of October 13.
>
> Within hours of delivering the information, you sent a letter that you were prepared to begin discussions today.
>
> You then followed it by another letter a few hours later in the day suggesting that we have been stalling.
>
> You took a week to respond to our reasonable requests for information. Now you expect us to respond in minutes.
>
> As I wrote you earlier today, we will review the material and when we have completed that review we will be in touch with you.[213]

It now appears that on October 20 Mr. Lipton was seeking tactically to provide "cover" for a hostile tender offer that the QVC Board of Directors had <u>already</u> approved earlier the same day. Although Mr. Lipton professed the desire of QVC to meet immediately to negotiate a merger agreement, he did not disclose that the QVC Board and he had met that morning, for about an hour, and had approved the commencement of a hostile tender offer and this litigation in which QVC accuses Paramount of delay.[214] In fact, discovery has

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[212] QEx. 44.

[213] QEx. 74.

[214] PEx. 67; Allen Tr. at 59-60. Although QVC has tried to attack Paramount's document retention practices, QVC has a few unorthodox practices of its own, including not preparing, apparently for tactical purposes, minutes of Board meetings, sometimes by calling the meetings "informal" (Senior Tr. at 98-103), and sometimes, as in the case of the October 20 meeting, by simply not doing it. QVC has yet to produce minutes for that meeting. The record reflects that, over the past two months, the QVC board has spent approximately two hours, in total, evaluating and approving QVC's hostile bid for Paramount.

revealed that QVC was planning to launch its hostile tender offer even <u>before</u> it responded to Paramount's information requests. On October 18, QVC's General Counsel, Neil Grabell, circulated a questionnaire to QVC's officers and directors, seeking information required in connection with the filing of QVC's tender offer documents.[215]

On October 21, QVC announced what it had secretly approved the day before: its intention to launch an unsolicited tender offer to purchase 51% of the outstanding stock of Paramount at $80 per share.[216] QVC simultaneously filed this lawsuit.

5. On October 24, the Paramount Board Reasonably Approved a Revised and Improved Merger

Because of the QVC offer, Viacom proposed to raise its offer by a resounding <u>$1.3 billion</u>. Moreover, Viacom augmented the cash portion of its offer from $9.10 to $40 per share. Viacom's new offer, however, was accompanied by unacceptable conditions and restrictions. Paramount negotiated intensely for two days, at the end of which it emerged with an enormous increase in value, in cash, <u>plus</u> new concessions from Viacom that gave Paramount greater flexibility to accept a better alternative. These successful negotiations unfolded as follows:

a. Viacom's New Offer

Late in the day on October 22, Viacom, fully cognizant that it had no lock on acquiring Paramount, offered orally to improve its offer to a value of $80 per share, 43% in a cash tender offer and the remainder in securities. In return, Viacom insisted on the following conditions: (1) that Paramount agree to redeem its Rights Plan as to Viacom's offer, but no

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[215] PEx. 64.

[216] <u>See</u> PEx. 35 at 4.

other; (2) that Viacom have the ability to terminate its obligation to complete the merger if the minimum conditions for its tender offer were not met; (3) that the "no shop" provision of the original merger agreement be made more restrictive by prohibiting Paramount from having discussions with any other suitor unless that party made a "clearly superior" offer; and (4) that the option and breakup fees be continued. Moreover, Viacom threatened that if agreement were not reached before Monday, October 25, the new offer would be withdrawn. While Paramount considered the Viacom proposal structurally flawed, it wanted to bind Viacom to its offer of higher consideration.[217/]

Paramount communicated several objections to Viacom that same night, chief among them that Paramount could not commit in advance to redeem its rights plan for Viacom alone. In the course of this discussion, it was decided that Viacom would propose a draft amended merger agreement in order to facilitate further discussions.[218/] Paramount received Viacom's draft the following morning.

b. Negotiations

Paramount and its advisors met at Paramount's offices at 9:00 a.m. on Saturday to review the draft and found it unacceptable. It contained the same structural conditions that Viacom had presented orally the previous evening.[219/] Paramount and its advisors

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217/ See generally Dauman Tr. at 231-32; Oresman Tr. at 127-28.

218/ See generally Dauman Tr. at 286, 323; Oresman Tr. at 107; Oresman Aff. ¶3.

219/ It was those conditions that led Mr. Oresman to outline concerns in notes (QEx. 92) that QVC has taken out of all context. QVC Br. at 41-42. The notes describe why Viacom's October 23 proposals were rejected, and why Paramount retained unilateral control over its shareholders' Rights Plan in the event of a better proposal than Viacom's. With Paramount in control of its "pill," a "coercive" tender offer cannot succeed in the face of a better alternative. QVC's sophisticated counsel knows this
(continued...)

concluded that these conditions were unacceptable and would require Paramount to walk away from the amended deal.

Paramount communicated its position to Viacom by telephone late in the afternoon, emphasizing that the Paramount Rights Plan would stay in place for all bidders until Paramount, in its sole discretion and in the exercise of its fiduciary duty, elected to redeem it, and that Viacom could not retain the power to terminate the merger if Viacom's minimum condition for the tender offer was unmet. Other points discussed were: (i) increased merger consideration; (ii) permission for Viacom to commence a tender offer; (iii) whether Paramount's Board would recommend such a tender offer to its stockholders; and (iv) the Paramount Board's ability to terminate the agreement in the exercise of its fiduciary duty prior to holding a stockholders' meeting. No agreement was reached.

c. Concessions

Late in the evening, however, the negotiations continued: "We [Viacom] wanted basically to have the [Paramount] board remove the poison pill in respect of our offer because we thought clearly we had the superior offer. There was a long discussion on that which went on all night."[220] Paramount, however, insisted on control over deployment of the pill and prevailed:

> Finally we ended up with a compromise where they would keep it with respect to both offers and they would remove the pill in respect to our offer unless

[219](...continued)
quite well. The misleading reference to Mr. Oresman's notes is very difficult to excuse.

[220] Greenhill Tr. at 202.

> there was . . . a materially superior offer outstanding from somebody else. But that was a long negotiation.[221/]

Paramount also secured the express right to withdraw or modify its recommendation of the Viacom merger in the exercise of its fiduciary duties.[222/]

Once Viacom's concession removed this fundamental roadblock, both parties agreed to meet to negotiate the remaining terms. These negotiations continued without interruption until the special Board meeting on October 24, and yielded an uninterrupted string of gains for the Paramount stockholder.[223/] The basic improvements of the Merger Agreement for Paramount, which were not accompanied by any material concessions, were significantly greater consideration and enhanced flexibility to terminate the agreement, among other circumstances, in response to a better alternative. The October 24th amendment to the Merger Agreement was a no-lose situation for Paramount.

221/ Greenhill Tr. at 203. See also Redstone Tr. at 208 ("I do know there were modifications made in those provisions (poison pill) at the request of Paramount.").

222/ The allegations in the QVC complaint that the option provisions in the amended agreement were enhanced are in error, based on a misreading of the Stock Option Amendment. See Complaint at ¶52. In reality, the only significant changes to the option were (i) modifying the triggering mechanism to make the option exercisable in the context of a competing tender offer; and (ii) restricting the option price to the Viacom tender offer price.

223/ The assertion of QVC that, even if the Merger Agreement is terminated, Paramount must redeem the Rights Plan for Viacom under any circumstances is flat-out wrong. Section 3.13 of the Merger Agreement unambiguously provides that Paramount must, even if under certain circumstances the Merger Agreement has been terminated, amend the Rights Plan to enable Viacom to consummate its tender offer unless the Paramount Board believes that such action would, in light of a better alternative, be inconsistent with its fiduciary duty. See Point IV infra.

d. <u>The October 24 Meeting of the Board</u>

A special meeting of the Board was called for October 24. All directors participated, in person or (for only two) by telephone.

At the meeting, the Board reviewed and considered (i) the chain of events since September 12, particularly the QVC proposal of September 20 and hostile tender offer, and (ii) presentations from the Board's advisors with respect to the proposed Amended Merger Agreement and the Viacom offer, as well as the QVC proposal and hostile offer.[224/]

The Company's financial advisors opined that the Viacom tender offer and related second step merger, taken together, were fair financially to the Company's stockholders.[225/] The financial advisers also informed the Board that the Viacom offer had value <u>at least</u> equivalent to the QVC offer (a fact that is not disputed by QVC), and that "the Viacom proposal, as amended, was superior to the QVC proposal.[226/] This latter conclusion was based partly on Mr. Rohatyn's view that Viacom stock was more stable than QVC common stock,[227/] which had enjoyed a remarkable and perhaps unsupportable run up in the previous twelve months.

Michael Wolf, a representative of Booz Allen & Hamilton, addressed the Board regarding the incremental growth potential that would be created by mergers of Paramount with either Viacom or QVC. He advised the Board that his firm had concluded that a Viacom merger would create more than $3 billion more in incremental revenue and growth

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224/ Pattison Aff. ¶¶47-50; Pollack Aff. ¶¶27-28.

225/ Rohatyn Aff. ¶20; Rattner Tr. at 156-57; PEx. 26; Pattison Aff. ¶50.

226/ Rattner Tr. at 156.

227/ Rohatyn Tr. at 123.

potential than a QVC merger.[228] The Booz Allen presentation lasted 30 to 40 minutes, during which the directors asked numerous questions.[229]

A number of directors questioned that the Viacom offer was proposed with respect to only 43% of the Company's outstanding stock, while the QVC offer was to be extended to 51%.[230] During the course of this discussion, representatives of Viacom advised the Board that Viacom was fully prepared to go to 51% to meet the Board's concerns.[231] The Board also discussed the Rights Plan: "The pill and how the pill works and what the rights of the directors are was fully explained to the directors several times during this period."[232] As Mr. Pattison explained: "My understanding, as I have testified, was that [the October 24th agreement] gave the Board, the new revised deal, more flexibility, the ability to take a higher opportunity if we thought it was in our best interests of our owners. And the Board had the ability to do that with the changes that had been negotiated."[233]

Paramount outside director, Lawrence Small, testified that the Board discussed differences between the Viacom merger and the QVC proposal:

> What we discussed then is the differences -- the -- differences in the structure of the two offers. Obviously amounts of cash, the nature of the securities that were available.

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[228] PEx. 25.

[229] Wolf Tr. at 104-110; see Liedtke Tr. at 33-34 ("We discussed the report of Booz Allen & Hamilton dated October 22, 1993 in detail."); Pattison Aff. ¶52.

[230] PEx. 26; Pattison Aff. ¶51.

[231] Id.; see also Rohatyn Tr. at 119.

[232] Rohatyn Tr. at 107; see Pattison Aff. ¶49; Weissman Aff. ¶22; Pollack Aff. ¶28.

[233] Pattison Tr. at 203.

> And then more than anything, where did the offer stand in relation to the long-standing strategic plan of the company, and the quality of the array of assets and how they would fit together, and did -- how did the two transactions stack up against what has been a long-standing plan.[234]

After continued discussion of the Company's alternatives, the Board unanimously approved the Amended Agreement as the best alternative available to promote the interests of the stockholders and the Company's long term business policy.[235]

6. Paramount's Actions Elicit Further Proposals

On November 5, Viacom requested an amendment to the merger agreement that had the single purpose and effect of adding $5 in cash to its tender offer and $5 in preferred stock to the "back end" merger. On November 6, the Paramount Board unanimously accepted these increases.[236]

At 5:29 p.m. on November 12, the Friday before this brief was due, QVC announced an amended and highly conditional tender offer comprised of $90 in cash for up to 51% of Paramount's shares, and equity securities in a back-end merger.[237]

H. Paramount and its Board Have In All Instances Been Guided by the Best Interests of the Stockholders

Paramount and Viacom agreed to merge because their businesses interact well and hold great promise for the future. In dealing with Viacom, and in reacting to QVC's

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[234] Small Tr. at 160.

[235] PEx. 26.

[236] PEx. 27; Pattison Aff. ¶55.

[237] PEx. 54. See discussion infra in Section H.3.a.

actions, the Board has been guided by the requirements that they act, that they exercise business judgment, and that they represent the real interests of the stockholders. QVC's request for relief, by contrast, reduces to the assertion that business judgment should abdicate in favor of snapshot financial arithmetic.

1. The Board Has Focused on Assessing Strategic Size

It has been clear to the Board that Viacom, a substantially larger and far more established and diversified company than QVC, is better positioned to accommodate Paramount's business plans. Viacom is simply larger, and it has more and better lures of business. This was the conclusion reached by Paramount's outside directors:

> [T]he whole thing [the QVC offer] kind of raised questions in my mind . . . [T]he problem I have . . . is how do the PCI shareholders come out? How does QVC, this tiny blob of a company, come out after taking on all this debt? I can see how the big owners, how they front for them, but I don't see any synergism.[238/]
>
> The difference that I see between the two deals . . . the Viacom deal currently is $5 higher, roughly, but in addition to that, the synergism between the two companies is very, very marked . . .[239/]

Mr. Small testified:

> I was very impressed by the difference in size that would be available in the Viacom versus the QVC transaction that would benefit shareholders, that there was so much more of an expense base to consolidate that when brought to the bottom line and multiplied by a very reasonable earnings multiple it would make the -- it would give so much more shareholder value.[240/]

Mr. Pattison testified:

238/ Liedtke Tr. at 15-17.

239/ Liedtke Tr. at 65-66.

240/ Small Tr. at 99. Size was a key consideration to the other outside directors as well. See Hooks Aff. ¶10; Fischer Aff. ¶8.

> [B]ecause there was a stock component in this transaction, that the long-term strategic plan that we had was much sounder with the assets of Viacom to go forward. Cash, cash is cash, but when you got the back-end of the transaction, it was important that the underlying assets and the growth opportunities and the synergy that goes between those two assets going together were really a very important part of at least my thinking.[241/]

When it comes to the long-term goals and business strategy developed by Paramount's Board of Directors, there is simply no comparison between Viacom and QVC.[242/] In approving a merger with Viacom, Paramount's Board considered, among other things: (i) the need to reach a "critical mass" in order to compete successfully in the entertainment and telecommunications industries, where many of the major players are rapidly consolidating; (ii) the complementary "fit" between the diverse and valuable assets held by Viacom and Paramount; and (iii) the ability of Paramount's shareholders to realize long-term value through continued participation in the merged entity.[243/] These advantages would either be dramatically reduced or eliminated in a QVC-Paramount combination.

In its presentations to Paramount's Board, Lazard emphasized the "importance of size in film production," noting that the increasing costs of film production are also increasing the financial risks associated therewith.[244/] Paramount, however, is the smallest, in terms of revenues, of the six major studio owners.[245/] Furthermore, recent joint ventures and mergers between regional Bell companies and entertainment and cable companies show

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241/ Pattison Tr. at 153-54.

242/ QVC's own advisor acknowledged that strategic "fit" is "one of the things you look at whenever you buy something." Senior Tr. at 59.

243/ See generally PExs. 5-16.

244/ PEx. 6.

245/ Hooks Aff. ¶10.

that the major players in the telecommunications industry are consolidating. Thus, in order to become and remain a global competitor, Paramount must increase both its size and financial strength. Viacom has a total asset value of approximately $4.5 billion and an equity value of approximately $7.6 billion.[246] The merger of Viacom with Paramount will be a merger of equals that will result in a company which ranks among the largest companies in the entertainment business.

By contrast, a QVC-Paramount merger would be like a mouse swallowing an elephant. Paramount's asset value is more than eight times that of QVC. Indeed, QVC is only about half the size of Paramount's subsidiary publishing businesses. As a result, only about a fifth of the assets of a QVC-Paramount entity would be contributed by QVC.[247] After divestitures due to regulatory problems, new inclinations, or conflicts resulting from its new owners, a combined QVC-Paramount may well be smaller than Paramount is now.

2. **Business Fit Is Also a Key Issue**

In May 1993, the directors examined Paramount's strategy in detail. As described above, the directors have supported attempts to find a merger partner whose businesses can create synergies that spawn growth and profits. Paramount's proven television and movie production ability and substantial film libraries will combine with Viacom's programming assets and distribution channels to enable this programming to be distributed internationally through Viacom's cable systems, networks and television stations.[248] Viacom's Showtime, The Movie Channel and Flix pay cable networks are particularly well-

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[246] PEx. 11; QEx. 55.

[247] Id.

[248] PEx. 11.

suited to capitalize on Paramount's filmed and live entertainment assets.[249] The company will also benefit from the combined talents of Paramount's and Viacom's creative and managerial resources.[250]

Furthermore, the proprietary franchise assets of Paramount Viacom, including Paramount Pictures, MTV Networks, Paramount Publishing and Paramount Parks all target the same demographic group -- those under 24 years old. This group is critical to Paramount Viacom's future participation in the important growth area of interactive multimedia. Viacom's Icom subsidiary is in the forefront of interactive video, and the resulting products are expected to be hugely popular among Paramount Viacom's young computer-literate demographic audience.[251] Paramount Publishing's products, especially its children's, educational, trade and reference publications, are expected to be integral to the development of this future technology, and it too can access Viacom's distribution net or capitalize on Viacom's intellectual properties.[252]

The combination of Paramount's and Viacom's entertainment assets will not only result in "enormous marketing efficiencies," but will also create merchandising and retail opportunities.[253] Paramount Viacom will be able to exploit the brand names and proprietary characters now owned by each company through motion picture and television production, Paramount's Theme Parks and entry into retail marketing, which neither company

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249/ Id.

250/ Id.

251/ PEx. 71.

252/ Id.

253/ PEx. 71; PEx. 25.

has sufficient "inventory" to try alone.[254] These marketing efforts will be greatly enhanced through the use of Viacom's 14 radio stations, seven of which are in the top 10 radio markets in the United States.

On the other hand, none of these strategic advantages will be available if Paramount merges with QVC. QVC functions solely as a retail shopping channel. It does not have any entertainment programming assets or intellectual trademark properties to contribute to a combined company, and its shopping programs are targeted at a completely different demographic group than Paramount's younger audience. This much was clear to QVC's own investment advisors when they analyzed a potential QVC-Paramount merger. In a May 1993 presentation, Allen & Co. listed the business segments that a combined QVC-Paramount company would have.[255] When questioned about this presentation, Mr. Senior testified:

> Q. Am I right that of the 9 lines of business noted on that page that the only one to which QVC would contribute was, is in effect the cable programming network and specifically that it would contribute QVC itself? All the rest of these are contributions from Paramount?
>
> A. That's right. That's right. Yes.[256]

What QVC had, at least momentarily, were ties to a major cable systems operator, TCI,[257] which is now being compelled to divest of its interest in QVC by the

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[254] PEx. 11.

[255] PEx. 49 ("Project Colors" Presentation). The presentation uses the code name "Violet" to refer to QVC and "Purple" to refer to Paramount.

[256] Senior Tr. at 193. See also Allen Tr. at 40-42.

[257] As noted earlier, while the current nominal shareholder in QVC is Liberty, that company will soon be merged into TCI as a precursor to the Bell Atlantic-TCI merger.

FTC. Before this, QVC's "substantial cable partners" had been hailed by Allen & Co. as a major "positive"[258] and an "attractive part"[259] of a QVC-Paramount merger. Indeed, as Mr. Senior testified, "you can't remove the cable shareholders from the potential for QVC."[260] That, however, is precisely what QVC has now done.

3. **Evaluation of the Post-Merger Stock is a Major Issue**

With or without Paramount, QVC has a future clouded by uncertainty.

QVC's "offer" is so conditional as to be ephemeral. And the fact remains that QVC is a small, overvalued company with precious few tangible assets and an extremely volatile share price that has fluctuated enormously in the last year. The meteoric rise in QVC's stock price (from $12 into the $60 range) is attributable, in large part, to the reputation of the company's new Chief Executive Officer -- what some analysts have referred to as the "Diller sizzle." Paramount's Board of Directors, however, can hardly be faulted for preferring the steak to the sizzle.

a. **QVC's Highly Conditional "Offers"**

The highly conditional nature of QVC's offers poses the risk that Paramount's stockholders sacrifice the unique opportunities presented by a Paramount Viacom entity for a deal that never gets done.

QVC's October tender offer was conditioned on, among other things:

- QVC "being satisfied, in its sole discretion, that, following consummation of the offer, QVC will have the ability to effectuate a second-step merger . . .";

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[258] PEx. 49.

[259] Senior Tr. at 57.

[260] Senior Tr. at 72.

- QVC "being satisfied its sole discretion" that it has obtained sufficient financing to consummate the offer;

- QVC "being satisfied," again in "its sole discretion," that all material FCC license transfer approvals have been obtained "on terms satisfactory to QVC"; and

- Paramount not having entered into any agreements having the effect of diminishing the expected economic value to QVC of the acquisition of Paramount.

Exhibit 35 (QVC 14(d)(1)). QVC's latest offer on Friday also contains these conditions, with the further disclaimer that the terms of the "back end" merger are not "final" at all:

> QVC has not made a final decision with respect to the actual form, timing or terms of the Revised QVC Second Step Merger . . . .[261/]

It is hard to know what to call these "offers," inasmuch as QVC has reserved for itself the unilateral right to make "changes to the material terms of the offer," including changing "the number of shares to be purchased, the purchase price and the proposed second-step merger consideration."[262/] In essence, what QVC has sought is a commitment from Paramount's Board of Directors and stockholders to wait for QVC to get its house in order so that QVC can buy Paramount at some undetermined point in the future for a price to be named later. What it seeks in this Court is a court order to that effect.

261/ PEx. 54.

262/ Id. Even putting aside QVC's requirement that the so-called lockups be enjoined or invalidated, QVC's proposal is conditioned upon its "being satisfied, in its sole discretion, that": (1) QVC will have to have the ability to effectuate a second-step merger, (2) QVC has obtained sufficient financing to consummate the offer, (3) all material FCC license transfer approvals have been obtained satisfactory to QVC" and the further condition of QVC being satisfied that Paramount has not entered into any agreement having the effect of diminishing the expected economic value to QVC of the acquisition of Paramount. QVC does not have bank financing commitments for its tender offer. Moreover, even QVC's equity financing commitments are either non-binding or subject to a host of conditions. See id.

b. "Value" is More Than Arithmetic

As of October 24, 1993, the cash portions of the Amended Viacom Merger Agreement and QVC's offer were equivalent. Accordingly, the value attributed to the securities contained in the second step of each proposal absolutely determined the relative short-term and long-term value of each offer. After QVC's latest offer, merger security "value" remains 20 times the cash differential. Even though half of the consideration payable under the QVC offer is cash, the remaining equity exchange would place 67% of the outstanding shares of QVC-Paramount in the hands of Paramount stockholders. Paramount would be largely buying into itself, and giving back its premium for an investment in a stock.

As QVC's own investment advisors have testified, the determination of the relative values of post-merger stock in a Paramount-Viacom entity and a QVC-Paramount entity is a complicated matter of judgment.[263/] It cannot be done by multiplying exchange rates by stock market prices.[264/] Analysis only starts there. When asked why he thought the market price of QVC's stock had experienced a recent decline, Mr. Senior said, "I never guess at what the market does." When asked why, Mr. Senior explained, "I am not a guesser. I don't gamble."[265/] The Paramount Board is entitled -- required -- to make that kind of long-term judgment, as it has been doing.

263/ Senior Tr. at 51.

264/ Id. at 51-52. Indeed, such arithmetic fails to account for the influence of this lawsuit itself on market prices, id. at 50, and is therefore fundamentally tautological, especially where a small company is trying to acquire a big one.

265/ Id. at 45-46.

Q. So if you were going to value this company, either way, QVC/Paramount or Viacom/Paramount you would engage in a detailed analysis concerning their financials, and long-range business prospects rather than just rely on this multiplication? . . . .

A. Yes. You would do all those things.[266]

c. **Price Volatility**

The margin for error inherent in predicting short-term values is much greater with respect to QVC's common stock than the securities being offered by Viacom. One reason for this is that QVC's common stock is far more volatile than Viacom stock. Just in the last year, the price of QVC common stock -- now around $60 -- has fluctuated within a $50 dollar range from $12 a year ago.

In explaining his skepticism about the QVC bid, Mr. Liedtke testified:

> It had gone in two months from 20 to 40 and it had gone from 20 to 60 in twelve months, while Paramount and Viacom seemed to be slowly increasing. But then it was of interest to me that -- and I looked it up as a result of that to see what the capital structure of QVC is, and it's got all of these owners in it who have big blocks of stock, and my guess is that there's very little float in. So I'm very suspicious that there's a lot of hot air in that stock.[267]

The unpredictability of QVC's stock price is further exacerbated by the company's relatively thin asset base. QVC's net asset value is approximately $750 million; Viacom's total asset value of approximately $4.5 billion is six times that.[268] QVC's multiples are high, especially the multiple of net income. Thus, much of QVC's stock price is not grounded in asset value but, instead, based on expectations of future revenues.

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[266] Senior Tr. at 52.

[267] Liedtke Tr. at 15.

[268] PEx. 11.

QVC's investment advisor prepared pro forma financials for a combined QVC-Paramount. They showed that, to maintain its share price, QVC would trade at 300 times net income (of 19 cents per share) in 1994 and 70 times net income in 1995. QVC would pay $200 million or more per year in debt interest in 1999, even if it used its cash to pay down the debt rather than pursue Mr. Diller's ideas.

d. "Heartbeat" Deal: Concerns about the "Diller Sizzle"

On September 12, 1993, Lazard told the Board that Viacom's assets "lend themselves to a relatively straightforward valuation."[269] The value of QVC, by contrast, is largely based on an intangible -- market confidence in Barry Diller. Indeed, when pressed to identify the strategic benefits of a QVC-Paramount merger, Messrs. Senior and Allen could only identify two: (i) Mr. Diller's managerial talents; and (ii) the potential for "interactivity."[270] The "Diller factor" increases QVC's multiples by a "significant number".[271]

As Herbert Allen testified, "a great deal of the logic of the proposed merger between QVC and Paramount centers on Barry Diller's talents."[272] Mr. Allen went so far as to describe Mr. Diller as "a major or the major factor."[273] Mr. Diller, for his part, does not disagree:

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[269] PEx. 11.

[270] This concept is addressed in the following section.

[271] Senior Tr. at 168.

[272] Allen Tr. at 43.

[273] Id.

> I don't say I would be indispensable. I do think, without an endless amount of ego, what I am is a manager of entertainment, I hope now retailer related assets, where I have an awful lot of experience. So I do think I have an awful lot to bring to the future table. Particularly of Paramount which I managed for exactly ten years as the chief executive officer and participated in building it strategically into an extremely strong company and for which I think I could play a central and key role to its future.[274/]

The prospect of investing $5 billion in stockholder assets in the future performance of a single individual was not entirely appealing to some of Paramount's Board members. As Mr. Liedtke explained:

> He [Diller] is considered to be it over at QVC, and as a personal matter, I don't like that because that's a <u>heartbeat</u> deal. . . . [I]f something happens to Mr. Diller, well, whether you like him or not, he does seem to have talent, but then you've got a real problem. . . . I do think he's a one-man show, and I don't particularly like that.[275/]

QVC's investment advisors were neither willing nor able to quantify the impact that Mr. Diller's "stewardship" would have on the stock price of a combined QVC-Paramount entity:

> Q. Did anybody at any of the formal or informal board meetings ask any questions concerning the value of the combined QVC/Paramount to the public stockholders, current public stockholders of QVC?
>
> * * *
>
> A. We thought the QVC stock would do very well over time under the type of transaction that we were talking and under the stewardship of Mr. Diller.
>
> Q. Define "very well".

274/ Diller Tr. at 152-53.

275/ Liedtke Tr. at 123 (emphasis added). It should be noted that there seems to be little incentive for Mr. Diller to stay at QVC. In an unusual arrangement, he has already been granted options for 6,000,000 shares of QVC worth between $185 to $440 million upon exercise, and Mr. Diller himself can <u>accelerate</u> the exercise date by <u>quitting</u> his job at QVC. <u>See</u> PEx. 32 at 5.

A. We did not specifically come up with numbers.[276/]

QVC and Diller have not come up with any plans for Paramount either. QVC's Schedule 14d-1 indicates no strategy, other than to conduct a "further review."[277/] And, on October 20, QVC provided no response to Paramount's "very reasonable" question[278/] about QVC's future plans for a combined QVC-Paramount entity.

e. "Interactivity": QVC's Nebulous and Now Forgotten Plans for Paramount Assets

The only element of "fit" other than Mr. Diller identified by QVC's advisors was "interactivity," which Mr. Senior defined as "a term used in the media business now that has to do with being able to have a, in essence, two-way communication between the purveyor of a program and the consumer."[279/] Put another way:

Q. At the moment QVC's product is a television show and then the interactivity is a phone call; isn't that right?

A. That's correct.

* * *

Q. Is there anything else besides the 800 phone number?

A. Not right now.[280/]

276/ Senior Tr. at 111-112.

277/ PEx. 35 at 29.

278/ Allen Tr. at 135.

279/ Senior Tr. at 68.

280/ Senior Tr. at 69-71. This is not completely true. As Mr. Diller pointed out, QVC can also interact with its audience "through our catalogues they can mail us." Diller Tr. at 151.

Mr. Senior conceded that "if you are asking -- what you are asking is the future of interactivity an 800 number? No. It is going to be many other things."[281] He had difficulty, however, explaining what these many other things are:

> What QVC brings to the issue of interactivity beyond its cable shareholders, <u>which are a major portion of what it does bring into it,</u>[282] is their - the fact they are working in it, part of interactivity has to do with the sophisticated delivery systems which in their case have to do with being able to ship and bill customers. And the knowledge and fact they are working in it.[283]

Mr. Allen was even less clear on QVC's interactivity prospects than his colleague, Mr. Senior:

> Q. Are there any other uses [besides the "800" number] of interactivity at QVC at the present time you know of?
>
> A. I don't know. I know they are preparing for it. They have a computer system that is preparing for it.
>
> Q. For other uses?
>
> A. For broad use inside the company.
>
> Q. Have you now told me everything you know about the current use of interactivity at QVC?
>
> A. Maybe even more.[284]

281/ Senior Tr. at 73.

282/ As noted earlier, QVC's primary cable partner is on the verge of total divestiture due to an investigation by the FTC.

283/ Senior Tr. at 72-73 (emphasis added).

284/ Allen Tr. at 141-42. Allen Tr. at 146. Mr. Allen did note that "jet engines" were talked about "100 years before they were used," and that it was "surprising how long sometimes something takes from the beginning of it to the end of it, to the time it is used." <u>Id.</u> at 144. When asked if Paramount's shareholders should wait another 90 years for "interactivity," Mr. Allen responded: "If that is their mood." <u>Id.</u>

f. The Strength of Paramount Viacom International

In contrast to a QVC acquisition, the Paramount-Viacom merger has immediate, tangible strategic benefits -- many of which were evaluated for the Board of Directors at the various meetings. Just a few of Paramount Viacom's concrete plans include (1) a "Global Network Strategy" to package Viacom's franchise networks (MTV, Nickelodeon, USA and VH-1) with new general entertainment channels programmed with product from the Paramount Viacom library for favorable positioning in worldwide distribution; (2) the creation of new basic cable networks -- to take maximum advantage of the marketing and packaging expertise of Viacom and the combined programming library of Paramount-Viacom; and (3) the establishment of a new family filmed entertainment label -- leveraging off the strong brand identification of Nickelodeon.[285/]

These plans are ready for action in a very fast-paced industry, now. Paramount Viacom is not a financial ploy centered on one man; its value goes beyond market arithmetic. Unlike QVC's leveraged and fundamentally conditional and speculative offer, the merger of Paramount and Viacom "is about positioning and leveraging of strong franchises to create growth opportunities."[286/] That is the very definition of business judgment.

285/ PEx. 78.

286/ Id.

ARGUMENT

POINT I

REVLON IS INAPPLICABLE HERE

QVC's argument that the Paramount Board's decision to consider a merger agreement with Viacom thrust it into the role of auctioneer under Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1986) is predicated entirely on the erroneous assumption that every corporate transaction resulting in a change of control triggers Revlon. But as QVC's own counsel has observed: "The Supreme Court's opinion [in Paramount I"] thus seemed to have rejected the proposition that the Revlon trigger turns on, or is even informed by, the existence of a change in control." T. Mirvis, What Triggers Revlon? The Sequel, 1990 M & A and Corporate Governance Law Reporter 713, 715 (emphasis added) (PEx. 80).[287]

Recognizing the futility of its claims under the legal principles that do govern this case, QVC argues for an invalid interpretation of Revlon under which Paramount I, Unocal and all of the presumptions of the business judgment rule are completely swept away. As authority, QVC revisits 1980s cases involving cash tender offers, bust-ups, leveraged buyouts and liquidation auctions. QVC takes us back to the future, without mentioning that we have been there before and cleared all this up.

An unbroken string of recent Delaware cases construing Revlon places it beyond reasonable controversy (i) that the Revlon standard is inapplicable here, see Point A, infra; (ii) that QVC's contentions about the scope of Revlon are untenable and dysfunctional;

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[287] Accord B. Reder, The Obligation of a Director of a Delaware Corporation to Act as an Auctioneer, 44 Bus. Law. 275, 280 (1989) ("Revlon is not a change-in-control case; it is a break-up case.") (PEx. 70).

and (iii) that even Revlon does not require an auction, or the abdication of the board's responsibilities to act, see Point C.

A. This is a Merger, Not a "Sale" or "Break-Up"

This case meets none of the criteria necessary to compel the Board to auction Paramount to the highest financial bidder without regard to corporate strategy, policy, or long-term values. Even though Paramount's actions would survive even Revlon scrutiny (see Point B), such scrutiny is reserved, for sound policy reasons, only for cases where a corporation abandons a business strategy to pursue either the sale or break-up of the company. Thus, Revlon is pertinent where a company consciously decides to put itself up for sale or to break itself up, but then encumbers that sale with defensive measures that preclude a fair and effective auction. That is not this case.

First, Paramount has not abandoned its corporate strategy, it has implemented it. See supra Statement of Facts, Sections B and C; infra Points II and III. The Paramount-Viacom transaction is not a dissolution or break-up of Paramount; Paramount shareholders will have a significant continuing equity interest in the surviving corporation, Paramount Viacom International. In the original merger agreement, that stake was 85% of the consideration. Today, that stake is roughly half of a much larger pie.

Second, it is the Paramount Board, not QVC, which has a statutory mandate "to set a corporate course of action." Paramount Communications, Inc. v. Time Inc., Del. Ch., C.A. Nos. 10866, 10670, 10935, Allen, C. (July 14, 1989), aff'd, Del. Supr., 571 A.2d 1140 (1990). Paramount chose to merge with Viacom; it did not choose to put Paramount up "for sale." Pattison Tr. at 38-39; Ivanhoe Partners v. Newmont Mining Corp., Del. Ch., 533 A.2d 585, 603 (1987) (Revlon did not apply because "[a]t no time did Newmont's directors resolve to sell the company."). QVC's authorities apply Revlon only to cash tender offers, or similar liquidations set in motion by directors.[288]

Third, even if the Viacom merger and the specific terms challenged by QVC were to be considered defensive measures implemented by Paramount in response to the QVC proposal, Delaware courts have made unmistakably clear that "[u]nder our law, the validity of 'defensive measures' is addressed under a Unocal analysis, not under the narrower Revlon case." Paramount, slip op. at 63 (emphasis added).

These three basic concepts, as applied by the Delaware courts, establish conclusively that Revlon does not apply to these facts. In Paramount I, the court described the two primary circumstances -- neither of which is present here -- that may implicate Revlon duties:

> The first, and clearer one, is when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company. . . . [The second situation is] where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company. Thus, in Revlon, when the board responded to Pantry Pride's offer by contemplating a 'bust-up' sale of assets in a leveraged acquisition, we imposed upon the board a duty to maximize immediate shareholder value and an obligation to auction the company fairly. If, however, the board's reaction to a hostile tender offer is found to constitute only a defensive response and not an abandonment of the corporation's continued existence, Revlon duties are not triggered, though Unocal duties attach.

571 A.2d at 1150 (citations omitted) (emphasis added); accord In re Wheelabrator Technologies, Inc., Del. Ch., C.A. No. 11495, slip op. at 15, Jacobs, V.C. (Sept. 1, 1992) ("Paramount expressly rejects the proposition that Revlon duties automatically arise whenever a corporate transaction might be construed as putting a corporation either 'in play' or 'up for

[288] QVC Br. at 62-64.

sale.'"); Herd v. Major Realty Corp., Del. Ch., C.A. No. 10707, slip op. at 19, Chandler, V.C. (Dec. 21, 1990) ("the [Revlon] duty arises in the more narrow context where 'the dissolution or break-up of the corporate entity is inevitable'") (citation omitted).

In Paramount, the merger of Time and Warner was not a company "sell[ing] itself", and later defensive measures were not a "bidding process" or a "breakup of the company." Id. at 75-76. Here, as there, the original Viacom merger anticipated an exchange of equity with a small cash component. The current Viacom agreement, entered into after QVC attempted to start a "bidding process" with its tender offer, anticipates that half of the consideration will be equity.

Indeed, QVC's brief is a lengthy detour around the established rule that a merger agreement negotiated at arm's-length between two independent corporations -- such as the September merger agreement between Paramount and Viacom -- is "subject only to a business judgment rule analysis." Paramount I, 571 A.2d at 1142. Accord Stroud v. Grace, Del. Supr., 606 A.2d 75, 83 (1992); Van De Walle v. Unimation, Inc., Del. Ch., C.A. No. 7046, slip op. at 23, Jacobs, V.C. (Mar. 6, 1991) ("Because in substance and in form the merger was a bona fide arm's-length transaction negotiated with a third party, the business judgment rule is the appropriate standard for evaluating its legality and the claims against the defendants."); Citron v. E.I. Du Pont de Nemours & Co., Del. Ch., 584 A.2d 490, 499 (Jacobs, V.C.) (1990); Lewis v. Leaseway Transp. Corp., Del. Ch., C.A. No. 8720, slip op. at 11-12, Chandler, V.C. (May 16, 1990); Rosenblatt v. Getty Oil Co., Del. Supr., 493 A.2d 929, 937-38 (1985) (when a merger results from arms' length bargaining "the directors' actions are more appropriately measured by business judgment standards."); TW Servs., Inc. v. SWT Acquisition Corp., Del. Ch., C.A. No. 10427, slip op. at 34, Allen, C. (Mar. 2, 1989) ("The exercise of the board's power under . . . [GCL § 251] is, where there is no interested merger involved, subject to a traditional business judgment review, not the proportionality review of Unocal.") (emphasis added). QVC's categorical assertion that "[n]o case has ever held that Revlon is not triggered where control of the corporation is changing hands" is demonstrably false. QVC Br. at 63 (emphasis in original). Lewis v. Leaseway, slip op. at 18 (business judgment rule applied to board's approval of change of control effected where management group holding 8% of stock purchased company's outstanding shares through merger agreement and tender offer); TW Servs., Inc. v. SWT Acq. Corp., Del. Ch., C.A. No. 10427, Allen, C. (March 2, 1989)(applying business judgment rule to board's consideration of tender offer proposal for all of company's shares by holder of 19.09% of company's shares). See also Van De Walle, slip op. at 20-22 (applying business judgment rule to board's approval of change of control effected by tender offer).

Under Delaware law, however, a board's business judgment must consider unfolding events after a merger agreement is reached. As this record shows, that is in the stockholders' interest. QVC, however, turns this sound rule upside down by alleging that improvements by Viacom in the original merger agreement that increased stockholder value by $2 billion have thrust Paramount into a Revlon situation. Such a rule cannot survive a reading of Paramount I, which approved defensive measures (as opposed to substantial improvements) as a proper response to an unsolicited offer. Further, the risk of Revlon scrutiny -- and an auction -- should not be an intimidating factor for a board deciding what to do about a $2 billion increase in consideration from its already-chosen strategic partner.

Furthermore, QVC's back door into Revlon has already been closed and locked. As this Court noted in Chrysogelos v. London, Del. Ch., C.A. No. 11910, Jacobs, V.C. (March 25, 1992), a bidder cannot put a company "in play" and trigger Revlon duties simply by making a bid for the company:

> [A]s fiduciaries [the defendant directors] had no absolute duty to accept an unsolicited takeover proposal or to place the company on the auction block in response to a takeover proposal. The circumstances that trigger a duty under Revlon and its progeny to auction a corporation are quite specific and limited. . . . Moreover, our courts have recognized that shareholders have no contractual right to receive takeover bids, and that the shareholders' ability to gain premiums is subject to the good faith business judgment of the board of directors in structuring defensive tactics. Acting pursuant to that authority, a board may reject (or resist) an acquisition proposal in favor of a preexisting transaction that it, in a good-faith informed exercise of its business judgment, has determined will enhance corporate profitability.

Slip op. at 13 (quotations and citations omitted).

B. QVC's "Change of Voting Control" Argument is Untenable

In a further departure from established precedent, QVC contends that Revlon applies to any merger with a company having a dominant shareholder who will exercise voting control over the combined entity. QVC's selective authorities themselves confirm, however, that Revlon duties attach in the "change of control" context only where the board resolves to discontinue the company's business plans and undertakes to auction the company. See, e.g., Revlon, 506 A.2d at 182-85; Barkan v. Amsted Indus., Inc., Del. Supr., 567 A.2d 1279, 1286 (1989) ("When it becomes clear that the auction will result in a change of corporate control, the board must act in a neutral manner to encourage the highest possible price for the shareholders.") (citation omitted); Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., 559 A.2d 1261, 1285 (1989) ("Revlon requires that there be the most scrupulous adherence to ordinary principles of fairness in the sense that stockholder interests are enhanced, rather than diminished, in the conduct of an auction for the sale of corporate control.") (emphasis added). Here, there simply is no auction.

Similarly, in Macmillan, upon which QVC heavily relies, the Supreme Court emphasized the limited applicability of Revlon duties:

> Clearly not every offer or transaction affecting the corporate structure invokes the Revlon duties. A refusal to entertain offers may comport with a valid exercise of business judgment. Circumstances may dictate that an offer be rebuffed, given the nature and timing of the offer; its legality, feasibility and effect on the corporation and the stockholders; the alternatives available and their effect on the various constituencies, particularly the stockholders; the company's longterm strategic plans; and any special factors bearing on stockholder and public interests.

559 A.2d at 1285 n.35 (citations omitted)(emphasis added).

Since then, Paramount I and its progeny have made it abundantly clear that selling voting control is not a Revlon trigger without more. Like the relief it seeks, QVC's argument is unacceptably simplistic and fails to account for precedent requiring an examination of corporate strategy, decisions, the nature of a merger agreement, the nature of competing interests, post-merger ownership, and long-range values and prospects. All of these bear importantly on reactions to unsolicited bids; all of them are embraced by the case law. All of them are significant here; none of them argues in favor of applying Revlon.

This Court has previously rejected as "problematic" a variant of the same "change of control" argument asserted here by QVC, and it did so based on the same case law as QVC presents again. In Wheelabrator, Del. Ch., C.A. No. 11495, Jacobs, V.C. (Sept. 1, 1992), this Court noted the apparent inconsistency between Paramount I's formulation of Revlon and Barkan's earlier "change of control" language, insofar as "Barkan appears not to fit within Paramount's [two] categories" that trigger Revlon. Id. at 15. This Court observed, without deciding, that Paramount I may have overruled Barkan sub silentio, and then dismissed plaintiffs' claims because (i) the board had not triggered Revlon duties under Paramount I, and (ii) even assuming such duties were triggered under Barkan, the claim failed because plaintiffs had not alleged facts suggesting that the board was so uninformed about the company's value that their failure to conduct a market survey before agreeing to a merger violated their fiduciary duties. Id. at 17.[289] This Court concluded that Revlon duties were not triggered by a merger where the acquired company "continues as a corporate entity and its public shareholders remained shareholders (albeit minority owners)" of the merged entity; see also Id. at 16 n.13. (merger does not involve sale of company where there are "continuing interests of the shareholders, meshing of managements, representations and boards").[290]

QVC's erroneous view of Revlon springs most centrally from its groundless assumption that a merger agreement transferring voting control (for a large premium) is an announcement of the "sale" of the company. Mergers involve continuing equity interests for the shareholders, as well as continuity of businesses and management, and do not constitute a sale of the company or a Revlon event. See supra Part A. The record here is absolutely clear that Paramount's stockholders will continue to have a large equity stake. The merger also contemplates preserving the assets of those complementary companies and building a stronger, more global competitor. Rohatyn Tr. at 56 ("We viewed this as a merger in which control of the company was transferred because of the ownership of Mr. Redstone; but that the continuing equity interest of our shareholders was so great that it was essentially, it was a hybrid transaction. It was not a sale."). (emphasis added).

Moreover, it cannot be the law that Paramount is thrust into Revlon because its chosen strategic partner happens to have a controlling owner. Such a rule is unfair to

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[289] Barkan expressly states that "Revlon does not demand that every change in control of a Delaware corporation be preceded by a heated bidding contest." Barkan, 567 A.2d at 1286.

[290] See also Rohatyn Tr. at 58, 62; Rohatyn Aff. ¶ 15.

Paramount, and would have bizarre economic consequences generally because it would establish two sets of merger rules: one for the companies with no centralized controlling interests and one for controlled corporations. Those two sets of rules would not govern those companies, but would define the fiduciary duties of their merger partners, thrusting them into Revlon if they contemplate a merger. This make no sense.

QVC's approach would also mean that a company with a controlling shareholder can never enter into a strategic merger except by bidding at auction. By virtue of Mr. Redstone's ownership of 85% of Viacom's voting stock in a huge company, a merger with Viacom would nearly always involve a transfer of voting control. If that change in control, by itself, compels the company being acquired to seek only short-term maximum value, a strategic merger (and the full benefit of Delaware law) is foreclosed to any company with a majority individual or corporate owner.[291]

QVC's view of the law is obviously tailored to its self interest in acquiring Paramount notwithstanding Paramount's choice to merge elsewhere. QVC's Revlon theories

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291/ In a further effort to dodge the clear restrictions placed on Revlon's applicability by the Supreme Court in Paramount I, QVC totally mischaracterizes the Supreme Court's recent decision in Cede & Co. v. Technicolor, Del. Supr., C.A. Nos. 336, 1991 and 337, 1991, Horsey, J. (Oct. 22, 1993). Technicolor does not even address the circumstances to which Revlon applies. The core issue in Technicolor was "whether the Technicolor board's decision . . . to approve the plan of merger with MAF was protected by the business judgment rule or should be subject to judicial review for its entire fairness." Slip op. at 29. In affirming the Chancery Court's findings that the board had failed to reach an informed decision in approving the sale of the company, the Supreme Court's use of Revlon in passing when describing the Chancery Court's use of Revlon to "illuminate" the scope of the board's duty of care. Id. at 65. The Supreme Court's observation that the director defendants in that case had "the burden of establishing that the price offered was the highest value reasonably available under the circumstances" was made in the context of a discussion of the directors' duties under the "entire fairness standard," which QVC has not claimed has any bearing here. Id. at 39.

are not only inconsistent with the law, but inconsistent with its attorneys' publications about the law. But the law is clear: the business judgment rule applies to a strategic merger; enhanced scrutiny under Unocal applies to defensive measures taken to protect that merger; and Revlon is reserved for cases of liquidations (by cash tender offers or otherwise) of the stockholders' equity interests.

C. Even Under Revlon, an Auction is Not Required

One irony of QVC's brief is that the exception, Revlon, swallows the rule, Unocal. Thus QVC ignores the facts that even under Revlon directors need not sell to the bidder displaying the short-term financial "high hand", and that Revlon does not even require an auction format at all. Revlon does not reduce directors to bean counters, and cannot be construed as prohibiting the exercise of business judgment. For good reason, the courts of Delaware have refused to interpret any of the enhanced business judgment rule standards to permit an unsolicited bid to force the auction of a company to the highest financial bidder.[292/]

Accordingly, Revlon does not require an auction whenever a corporation is sold. See, e.g., Braunschweiger v. American Home Shield Corp., Del. Ch., C.A. No. 10755, slip op. at 16-17, Allen, C. (Oct. 26, 1989); In re J.P. Stevens & Co., Inc. Shareholders Litig.,

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[292/] One central presumption that QVC is making -- that an auction would maximize offers -- is bad business as well as bad law. Felix Rohatyn testified that, had Paramount "shopped" itself, it would have suppressed its own value while making its intended strategic merger more unlikely. Rohatyn Tr. at 47 ("shopping Paramount . . . would have had a negative impact on the value potentially of Paramount and would have been likely to kill off any possibilities of coming to an agreement with Viacom"); Rohatyn Aff. ¶ 15. This is one reason why QVC's obsession with an "auction" has never been in the shareholders' interest, as the sequence of increasing proposals to Paramount conclusively shows. This is also one reason why the Delaware courts have not accepted a mandatory "auction" rule, and why the application of Revlon has been limited to exceptional circumstances.

Del. Ch., 542 A.2d 770, 782 (1988); Barkan, 567 A.2d at 1286; Freedman v. Restaurant Assocs. Indus., Inc., Del. Ch., C.A. No. 9212, slip op. at 12-13, Allen, C. (Sept. 19, 1990, revised Sept. 21, 1990) ("Freedman II"). In Freedman, the Court stated that "[a]lthough a board of directors may fulfill its obligation to make an informed and reasonable business judgment in a sale context by conducting an auction, e.g., RJR Nabisco, and that may often be the most prudent way to proceed, an auction is not always necessary." Freedman, slip op. at 13. Indeed, assuming that the Board had determined that a "sale" to "just anyone" was in the best interests of the shareholders (and the Paramount Board has clearly not made that determination), Revlon simply requires "that directors take reasonable steps designed to assure that they have probed for alternatives and have a reasonable basis to conclude that the choice that they make is the best available alternative." Braunschweiger, slip op. at 17 (emphasis added); accord In re Fort Howard Corp. Shareholder Litig., Del. Ch., C.A. No. 9991, slip op. at 25, Allen, C. (Aug. 8, 1988).

The inevitable and untenable conclusion of QVC's proposed reading of Revlon is that in every merger involving a change of control, the board is constrained to accept not the best offer for the shareholders under the circumstances, but simply the highest so-called "bid" -- even when long-term shareholder value is the major consideration. In QVC's view, a board is required not only (a) to accept the most cash from just anyone, but (b) also accept their very long-term back end, merger, and (c) to accept and blindly follow short-term market-driven "value's" for that back end.

Thus, QVC would supplant real judgment with a simplistic comparison of "bid prices" calculated by multiplying today's stock price by the exchange rate. This view has been rejected as unsound by all of the parties' investment advisors.[293] This view is also utterly irreconcilable with the fiduciary duties of the board. Paramount I, 571 A.2d at 1153. No Delaware court has ever applied Revlon in such a fashion, and no Delaware court has ever so subjugated a board's business judgment to the vagaries of day-to-day market forces.

The Delaware courts have long permitted, and have indeed required, boards of directors to consider and evaluate the relative non-cash components and aspects of competing offers. In the seminal case of Robinson v. Pittsburgh Oil Ref. Corp., Del. Ch., 126 A. 46 (1924), on which QVC purports to rely, a prospective purchaser sought to enjoin the sale of the defendant's assets to a rival who had made a competing bid. Id. at 47. This Court refused to second-guess the Board's decision to reject the higher cash bid, which did not include any assumption of liabilities, in favor of a lower cash bid that included assumption of liabilities:

> This being the nature and character of the two bids the directors had before them for consideration, it is apparent that a choice between them involved something more than the simple process of deciding between the flat offers of two sums of money tendered by rival bidders for the same identical thing.

Id. at 49. See also Simkins Indus. Inc. v. Fibreboard, Del. Ch., C.A. No. 5369, Marvel, C. (July 28, 1977) (finding it proper for board to accept lower bid that was more certain as to its terms); Smith v. Good Music Station, Del. Ch, 129 A.2d 242 (1957) (upholding decision to accept a lower, but unconditional, bid).

More recently, this Court expressly rejected the argument that the sale of a corporate asset to a purchaser offering a lower price necessarily evidenced a breach of fiduciary duty, even in a cash sale situation:

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[293] Senior Tr. at 50-52.

> Plaintiffs' claim can therefore be understood to assert that no person of ordinary, sound business judgment would have agreed to sell Londontown for $178 million in the face of Burlington's $190 million proposal. . . . The monetary difference is insignificant, alone, and especially in light of factors not addressed by the complaint, i.e., timing, structure and certainty of financing, that could account for the board's acceptance of the lower offer. This Court has long recognized that the highest bid is not necessarily the best bid.

Caruana v. Saligman, Del. Ch., C.A. No. 11135, slip op. at 10, Chandler, V.C. (Dec. 21, 1990) (emphasis added) (citation omitted). As Chancellor Allen noted in Freedman v. Restaurant Assocs. Indus., Inc., Del. Ch., C.A. No. 9212, Allen, C. (Oct. 16, 1987) ("Freedman I"):

> A fiduciary is entitled to, indeed required to, consider all of the factors surrounding alternative possible transactions. Thus, for example, the likelihood that one of the alternatives may be less likely to close supplies a rational basis for preferring another proposal, even though it may be at a lower price.

Slip op. at 22. See also Fort Howard, slip op. at 35 (disinterested board might legitimately prefer a deal at a lower price to one that is not all cash and not capable of closing as quickly); Citron v. Fairchild Camera and Instrument Corp., Del. Ch., C.A. No. 6085, Allen, C. (May 19, 1988) (same), aff'd, Del. Supr., 569 A.2d 53 (1989) (affirming application of business judgment rule to board's decision to accept unconditional "cash on the barrel head" offer over uncertain conditional offer).[294]

Equally clear, Delaware law does not require the Paramount board to focus solely on current market price in assessing the relative values of the equity components of the

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[294] Thomas v. Kempner, Del. Ch., C.A. No. 4138, Marvel, C. (Mar. 7, 1973), cited by QVC, is clearly inapposite. In that case, the Board was required to choose between two all cash offers, and the Court held that the Board was under a duty to accept the higher offer. Slip op. at 5. Here, however, the Board is not choosing simply between two cash offers, and is thus required to consider all other factors surrounding both alternatives. Freedman, slip op. at 22.

Viacom and QVC offers. Indeed, Delaware courts have repeatedly downplayed the role of speculative or short-term market value in assessing the valuation of stock. See Citron, 584 A.2d at 507 n.22; Rosenblatt, 493 A.2d at 936-40 (court upheld as fair valuation under Delaware block method assigning 5% of total value to market value); Fliegler v. Lawrence, Del. Supr., 361 A.2d 218, 223 (1976) (market value not a reliable indicator of true value of stock where it is clearly inflated).[295/]

Thus, it is not surprising that the cases cited by QVC in attempting to impose Revlon duties on Paramount all involved competing all-cash tender offers or other liquidations of shareholders' interests.[296/]

In other words, the consideration in the competing bids was fungible. Here it is not. This crucial distinction from the present transaction underscores the danger of imposing Revlon duties on the Paramount board's strategic decision to merge with Viacom.

[295/] Delaware courts have also repeatedly disparaged such highly-conditional or ephemeral offers, particularly when they comprise the second-step of a two-step tender offer where the front-end consideration consists of cash. See Gilbert v. El Paso Co., Del. Supr., 575 A.2d 1131, 1135, 1145-46, 1148 (1990) (upholding board action against highly-conditional Burlington offer which could be terminated "upon the occurrence of any one of a number of specified events"); Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7899, slip op. at 11-12, Walsh, V.C. (Feb. 12, 1985) ("Mesa's refusal to commit itself to the terms of the second-step clearly justified the belief by Phillips management and directors that Mesa . . . did not have the best interest of Phillips and all its shareholders in mind"); Unocal Corporation v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946, 955-56 (1985) (directors entitled to consider "the risk of nonconsummation, and the quality of securities being offered in" respect of Mesa's second-step proposal); Citron v. Fairchild Camera & Instrument, Del. Supr., 569 A.2d 53, 63, 66 (1989) (upholding board's acceptance of lower Schlumberger offer and noting with approval the "overriding, and eminently reasonable, concern of the directors regarding the "indefinite nature" of Gould's higher competing proposal).

[296/] QVC Br. at 62-64.

In QVC's cases, unlike the present one, the existing equity interests in the target were eliminated and the corporate entity ceased to exist. There were no long-term interests to safeguard. Half of the consideration was not a back end merger. Half the deal was not buying into Barry Diller's sizzle. Under the circumstances in those cases, Revlon quite properly charged the board with a duty to obtain the highest possible short-term price, i.e., fungible cash, because the long-term simply no longer mattered. In TW Servs., Inc., Chancellor Allen explained:

> In the setting of a sale of a company for cash, the board's duty to shareholders is inconsistent with acts not designed to maximize present share value . . . . [i]n such a setting there is no long run . . . . The rationale . . . that recognizes the appropriateness of sacrificing achievable share value today in the hope of greater long term value, is not present when all of the current shareholders will be removed from the field by the contemplated transaction.

Slip op. at 19-20. In these circumstances, however, pretending that short-term values tell the story is simply fiction.

POINT II

THE SEPTEMBER MERGER AGREEMENT SHOULD NOT BE INVALIDATED

In September 1993, when Paramount announced its long sought-after and studied combination with Viacom, which had added (at that time) more than $2 billion to the value of Paramount's shares, there was no QVC tender offer for Paramount. Nor had any other company advanced an acquisition proposal. Paramount had explored numerous options with many other companies. It chose Viacom. In such circumstances, as described more fully in Section A below, the Paramount Board's decision to approve a merger to carry out its business plan is clearly protected by the business judgment rule. As set forth in Section B, the Board's decision to approve the September Agreement also easily satisfies the business judgment rule as enhanced by the Unocal standard.

A. Paramount's Decision to Execute the September Merger Agreement With Viacom Was Protected by the Business Judgment Rule

Generally speaking, the business judgment rule "posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be attributed to a rational business purpose." Technicolor, slip op. at 38 (citation omitted). The presumption afforded by the business judgment rule is overcome only if the plaintiffs prove facts sufficient to establish that in reaching its decision, the board breached "one of the triads of [its] fiduciary duty -- good faith, loyalty or due care." Id.; see also Yanow v. Scientific Leasing, Inc., Del. Ch., C.A. Nos. 9536 and 9561, slip op. at 24, Jacobs, V.C. (July 31, 1991) ("Yanow") ("Because a majority of the directors were disinterested, acted in good faith, and were properly informed, the business judgment rule shields them from liability.") A board acts on an informed basis when, prior to making a business decision, it considers "all material information reasonably available" to it. Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). [297/] "If the

[297/] The reason for such deference is perfectly clear:

> Because businessmen and women are correctly perceived as possessing skills, information and judgment not possessed by reviewing courts and because there is great social utility in encouraging the allocation of assets and the evaluation and assumption of economic risk by those with such skill and information, courts have long been reluctant to second-guess such decisions when they appear to have been made in good faith . . . . In order to prevent second-guessing on what might be close questions concerning the appropriateness of the process by which a business decision was made, the law has set a high standard.

(continued...)

proponent fails to meet [its] burden of establishing facts rebutting the presumption, the business judgment rule, as a substantive rule of law, will attach to protect the directors and the decisions they make." Citron v. Fairchild, 569 A.2d at 64. Accord Technicolor, slip op. at 38.

1. **Unocal Does Not Apply to the September Merger Agreement**

As a fall-back to its Revlon argument, however, QVC half-heartedly seeks to place this case in general, and the terms of the September Agreement in particular, within the scope of the intermediate scrutiny set forth in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985).[298]

In Unocal, which involved the adoption of a defensive measure during a hostile contest for control, the Delaware Supreme Court held that when a board employs a "defensive mechanism" in response to a threat to corporate policy, the initial burden of showing that the business judgment rule applies falls upon the directors. Unocal, 493 A.2d at 954-55.

The intermediate level of scrutiny announced in Unocal applies only when a board adopts a "'defensive measure taken in response to some threat to corporate control and policy and effectiveness which touches upon issues of control.'" In re Sea-Land Corp. Shareholder Litig., Del. Ch., C.A. No. 8453, slip op. at 23, Jacobs, V.C. (March 26, 1993) (quoting Gilbert v. El Paso Co., Del. Supr. 575 A.2d 1131, 1144 (1990) (citation omitted)); see also Henley Group, Inc. v. Santa Fe Southern Pac. Corp., Del. Ch., C.A. No. 9569, slip op. at 34, Jacobs, V.C. (March 11, 1988) (applying Unocal after determining that a PIK

[297](...continued)
Solash v. Telex Corp., Del. Ch., C.A. Nos. 9518, 9528, 9525, slip op. at 19, Allen, C. (Jan. 19, 1988).

[298] QVC Br. at 98-103.

debenture "was adopted as a response to a perceived takeover threat"); AC Acquisitions Corp. v. Anderson Clayton & Co., Del. Ch., 519 A.2d 103, 111 (1986) (defensive "measure must be found reasonable in relation to the threat posed by the change in control that instigates the action") (emphasis added).

This case presents the precise situation faced by the Court in Paramount I. There, the Delaware Supreme Court affirmed the Chancery Court's determination that the initial Time-Warner agreement, which (like the original merger agreement here) had been made prior to any hostile bid, was governed by the business judgment rule.[299] Paramount I, 571 A.2d at 1151-52. Thus, the Court found that Unocal applied only to actions taken by Time after, and in defense against, the Paramount offer. Id.; see also Doskocil Cos., Inc. v. Griggy, Del. Ch., C.A. Nos. 10095, 10106, 10107, 10108, 10116, slip op. at 15, Berger, V.C. (Aug. 18, 1988) (board's decision to issue preferred stock with "put provision" after there had been a stated interest in acquiring company was not done in response to perceived takeover threat where the plan had been under consideration long before an acquisition was being considered).

[299] In reaching this determination, the Supreme Court emphasized that the various measures contained in the agreement -- including the Share Exchange Agreement (which would allow Warner to acquire 11% of Time's common stock) and a "no-shop" clause -- predated any takeover threat and were adopted for a rational business purpose. Paramount I, 571 A.2d at 1151 n.15. Similarly, in the instant case, the termination fee and stock option pre-dated events in October that QVC has claimed triggered Unocal. Further, those terms cannot be classified as "defensive measures" by the Paramount Board where such provisions were demanded by Viacom and included in the Merger Agreement in order to close an otherwise unattainable merger agreement.

2. Neither Rumors Nor Exploration of Strategic Alternatives Place a Board Under Unocal

To contend -- as QVC has done in various combinations in its brief -- that a company can be put up "for sale" by a hostile bidder, by a potential hostile bidder, by rumors in the press, by private gossip, by the "tactical" remarks of Barry Diller over lunch, or by the manipulative statements of a QVC Board member, is to mock the law. QVC's contentions also have a self-prophetic quality: QVC bootstraps its own rumored interest into a Unocal "threat" even though it did not actually do anything until after the Paramount-Viacom merger was announced.

This is obviously not the law, and it should not become the law simply because QVC wants to own Paramount. Instead, QVC may propose a quality transaction to Paramount and (because Paramount has negotiated with Viacom so effectively) Paramount is free to consider it and to accept it on its merits. But QVC may not retroactively squeeze itself into Unocal, and may not characterize terms in the September merger agreement as unreasonable defensive measures. Paramount I, 571 A.2d at 1152 (distinguishing initial strategic merger from later post-bid transaction to which Unocal applied).

B. The Decision of Paramount's Disinterested, Fully Informed Board to Enter into the September Merger Agreement was a Valid Exercise of Business Judgment

Plaintiffs have failed to carry their heavy burden of showing Paramount Board action motivated by a desire to entrench itself or that was otherwise outside the protection of the business judgment rule. The unanimous decision of the Board -- which is composed of an overwhelming majority of independent and distinguished outside directors -- approved the September merger agreement because it would permit Paramount to become part of a vast global entertainment and publishing company and would enhance stockholder value. Every relevant precedent from this Court and the Delaware Supreme Court is directed toward protecting precisely the type of strategic board decision at issue here.

1. The Paramount Board Was Disinterested and at All Times Acted in Good Faith

The business judgment rule provides directors with broad discretion to formulate corporate policies, including consideration of possible merger transactions and the steps it deems appropriate to effectuate such a transaction. See, e.g., J.P. Stevens, 542 A.2d at 780-83. Thus, as the Delaware Supreme Court has stated, "unless it is shown by a preponderance of the evidence that the directors' decisions were primarily based on perpetuating themselves in office, or some other breach of fiduciary duty," a court will not substitute its judgment for that of the board. Unocal, 493 A.2d at 958. Moreover, "[u]nsupported allegations are insufficient to establish an entrenchment motive." Tomczak v. Morton Thiokol, Inc., Del. Ch., C.A. No. 7861, slip op. at 30, Hartnett, V.C. (Apr. 5, 1990) (citation omitted).

Plaintiffs' charge of entrenchment is unfounded in law and fact. It rests exclusively on Mr. Davis' nonbinding understanding with Viacom that he will hold a significant executive position in Paramount Viacom International if the merger is consummated. Mr. Davis has not, however, even secured any contractual right in this regard. As Viacom's financial advisor testified:

> "from the first dinner meeting, [Mr. Davis] said that he wanted what was best for his shareholders. He didn't want any contract. He didn't want any particular management arrangements."[300/]

[300/] Greenhill Tr. at 35; see also id. at 177 ("One of the first things in the first meeting, Martin made it clear he didn't want any deals . . . and there never was any discussion of any special arrangement with Martin at all."); Dauman Tr. at 297 ("[I]t was a (continued...)

In any event, plaintiffs' conjecture about "entrenchment" is laid to rest by the undisputed fact that Mr. Davis advised the Paramount Board prior to its vote on the proposed merger of his informal understanding with Viacom. See 8 Del. C. § 144(a)(1) (providing business judgment protection to approval of an "interested transaction" where director self-interest is disclosed to and approved by a majority of disinterested directors); Technicolor, slip op. at 46 ("This Court has never held that one director's colorable interest in a challenged transaction is sufficient, without more, to deprive a board of the protection of the business judgment rule presumption of loyalty. Provided that the terms of section 144 are met, self-interest, alone, is not a disqualifying factor even for a director."); Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 383 (2d Cir. 1980). Further, because independent, outside directors comprise a majority of the Board, the presumption that the Board's actions were in good faith is even stronger. Polk v. Good, Del. Supr., 507 A.2d 531, 537 (1986); Tomczak, slip op. at 23. Thus, since plaintiffs have failed to show that a majority of the Paramount Board was "on both sides of the transaction or expected to derive any personal benefit from it in the sense of self-dealing," the Paramount Board's actions are conclusively protected by the business judgment rule. Tomczak, slip op. at 23-24 (rejecting charges of entrenchment where eight of the ten directors who approved challenged transaction were outside directors); accord Aronson, 473 A.2d at 812.

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[300](...continued)

remarkable aspect of this whole process in that in our internal deliberations at Viacom, we had anticipated there might be a request for employment agreements at some point. And it was never requested. It was never a subject of negotiation.") (emphasis added); Davis Tr. at 24-25.

2. The Paramount Board Was Fully Informed

"[T]he party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one." Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 872 (1985). As the Delaware Supreme Court very recently stated, "[i]n a merger or sale, we have stated that the director's duty of care requires a director, before voting on a proposed plan of merger or sale, to inform himself and his fellow directors of all material information that is reasonably available to them." Technicolor, slip op. at 59 (citations omitted).

The Delaware courts have repeatedly affirmed that the standard for determining whether directors are liable for breaching their duty of care to inform themselves is "predicated on concepts of gross negligence." Van Gorkom, 488 A.2d at 873; accord Moran v. Household Int'l, Inc., Del. Supr., 500 A.2d 1346, 1356 (1985). In the context of corporate transactions, "gross negligence means 'reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are 'without the bounds of reason.'" Tomczak, slip op. at 32 (quoting Allaun v. Consolidated Oil Co., Del. Ch., 147 A. 257, 261 (1929) (citation omitted)).

It cannot seriously be contended that the Paramount Board acted other than with the utmost care as it exhaustively studied and considered each material issue raised by the fluid events culminating in the adoption of the September and October merger agreements. The Board solicited and received advice from its legal and financial advisors at each stage of the process, and met in regular and specially convened meetings to review the issues. See supra Sections C, D and G. This deliberate and measured conduct conclusively establishes the due care applied by the Board to ensure that it remained fully informed as circumstances developed. See Tomczak, slip op. at 33-34.

3. The September Merger Agreement Implemented a Sensible and Considered Corporate Strategy

QVC does not assert that the proposed Viacom merger is an undesirable "long-term business strategy" or lacks synergies. Nor could it: QVC's own investment advisor has long tried to arrange the same merger. The facts surrounding this choice of merger partner are compelling and undisputed. The Viacom deal represents solid business judgment. See generally Paramount I. As the Delaware Supreme Court noted:

> Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.

Paramount I, 571 A.2d at 1154.

4. The Termination Fee and Option Are Plainly Valid Components of the Viacom Merger Agreement Under the Business Judgment Rule

Plaintiffs challenge as illegal Paramount's agreement to include a termination fee and a stock option in the September merger agreement. Under the business judgment rule, that agreement and its constituent parts are plainly valid. See Paramount I, 571 A.2d at 1151-52 (analyzing initial Time/Warner merger agreement, containing share exchange agreement and no-shop clause, under the business judgment rule); J.P. Stevens, 542 A.2d at 782 (analyzing merger agreement, containing "topping fee" and reimbursement fee under business judgment rule); see also Lewis v. Leaseway, slip op. at 12.

C. The Board's Approval of the September Agreement Also Satisfied the Unocal Standard

The termination provisions also satisfy a Unocal test. Delaware courts have consistently upheld stock options and termination fees where, as here, they were adopted in furtherance of the stockholders' interests and where they have not precluded other alternatives.

1. Delaware Encourages the Granting of Termination Fees and Stock Options Where, as Here, They Serve to Promote Stockholder Interests

Despite QVC's hyperbole regarding the supposed evils of termination fees and stock options, the Delaware courts have acknowledged the critical salutary role that these provisions often play in furthering stockholder interests in the merger context by attracting potential bidders. See, e.g., Sea-Land Corp., slip op. at 28-29; Yanow v. Scientific Leasing, Inc., C.A. Nos. 9536 and 9561, slip op. at 11-12, Jacobs, V.C. (Feb. 5, 1988, revised Feb. 8, 1988) ("Yanow I"); J.P. Stevens, 542 A.2d at 782; Revlon, 506 A.2d at 183; Macmillan, 559 A.2d at 1285. Nor can it be disputed that termination fees and stock options are commonplace features in merger agreements, both independently and in tandem. See, e.g., J.P. Stevens, 542 A.2d at 783; Lewis v. Leaseway, slip op. at 6; In re Vitalink Communications Corp. Shareholders Litig., Del. Ch., C.A. No. 12085, slip op. at 13-14, Chandler, V.C. (Nov. 8, 1991), aff'd, sub. nom., Grimes v. John P. McCarthy Profit Sharing Plan, Del. Supr., 610 A.2d 725, cert. denied, 113 S. Ct. 179 (1992); Yanow I, slip op. at 6-7. Further, as discussed in detail below, numerous courts have upheld their validity under circumstances similar to those that confronted Paramount. See, e.g., J.P. Stevens, 542 A.2d at 783; Yanow I, slip op. at 16.

Plaintiffs seek to challenge the termination fee and stock option on the ground that they give Viacom an advantage. Assuming, arguendo, that the fee and option have had a material effect -- which they do not -- this argument is entirely misdirected. Delaware law holds that a corporation's directors are entitled to enter into agreements that have the effect of favoring the holder of termination fees or rights if it will further the stockholders' interests. See J.P. Stevens, 542 A.2d at 782.

Termination fees and options have a positive effect upon stockholders' interests for three reasons. First, without them, a potential acquiror who signs a merger agreement requiring stockholder approval would be committing to a transaction with no reciprocal commitment. Absent some right to something when the contract is signed, few acquirors would lock themselves into a contract that is completely executory, if not totally optional, for its counterpart. Second, mergers are expensive to pursue, and acquirors are reluctant to do so without expense protection if they fall through. Third, options represent a means of providing a bilateral commitment, immediately in effect, to the agreed-upon price. Thus, if an acquiror who agrees to a deal is outbid eventually, the acquiror at least retains a fraction of the benefit of the originally agreed upon price. All of these factors recommend sensible use of fees and options to partially solidify a deal, to encourage attractive offers, and to avoid the inherently "something for nothing" nature of merger agreements that do not contain them.

In Yanow I, plaintiffs sought to enjoin an all-cash tender offer by LINC Acquisition Corp. for the target company on the grounds that, inter alia, the board of the target company had breached its fiduciary duty by, inter alia, approving an acquisition agreement containing a 16% stock option and an expense reimbursement provision. In denying the injunction, this Court recognized the beneficial impact that such provisions can have in inducing advantageous transactions and maximizing shareholder value:

> The LINC [stock] option is not a "lock up" option that would operate to preclude higher bids. That option, if exercised, would result in LINC owning only 16% of SLI and would involve only a minimal cost to a higher bidder . . . . The grant of the option was necessary to induce LINC to make an offer at a premium over market price and, as such, is the type of arrangement that has met with judicial approval. Similarly, the expense reimbursement provision was necessary to induce LINC to bid, since LINC would otherwise have been unwilling to outlay considerable sums for acquisition-related expenses that would be nonrecoverable if a higher bidder succeeded in acquiring SLI. The reimbursement clause, which becomes applicable only if SLI breaches the agreement or if a third party acquires SLI, is also reasonable.

Yanow I, slip op. at 12; see also Hecco Ventures v. Sea-Land Corp., Del. Ch., C.A. No. 8486, slip op. at 9-12, Jacobs, V.C. (May 19, 1986) (approving stock option that would give bidder approximately 21.72% of Sea-Land's outstanding stock).

Similarly, in J.P. Stevens, Chancellor Allen faced a situation with certain parallels to this case. In Stevens, a bidder, West Point-Pepperell, Inc. ("West Point"), sought to enjoin a tender offer by Odyssey Partners ("Odyssey") for the target company on the grounds that, inter alia, the target's board breached its fiduciary duty to shareholders by approving a "topping fee" totalling $.40 per share and a $17 million termination fee contained in the Odyssey merger agreement which allegedly placed extensive impediments in the way of the West Point proposals. 542 A.2d at 781-84.

The Court held that under the circumstances, the topping fee arrangement was justified and in no way inconsistent with the board's duty to seek the best available transaction for its stockholders:

> [E]ven though the topping fee provision clearly does have the effect of favoring Odyssey in the bidding and may preclude West Point from offering a price that it might otherwise offer, that provision is not, in my opinion, inconsistent with the board's duty to seek the best available transaction for the shareholders and to seek no other purpose.
>
> * * *
>
> Certainly, the decision to accede to the topping fee in these circumstances does not fall so far afield of the expected range of responses to warrant an inference that the Special Committee must have been motivated by a concern other than maximizing the value of shareholders' interests.

Id. at 782-83 (footnote omitted).

With respect to the termination fee, the Court reached a similar conclusion:

> [S]imilar considerations govern the other contractual impediment to West Point's higher bid - the break-up fee. As to that $17 million termination fee, I can perceive no basis at this time to conclude that, in agreeing to it, the board (or the Special Committee) breached a duty to seek to achieve the best available deal for the shareholders. Such agreements are reasonably conventional and are, of course, not invalid per se. Revlon at p. 183. They may, of course, be struck down when they are the product of disloyal action (see Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986)), or, conceivably, if they are the product of a grossly negligent process. Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986). But if, as appears to be the case here, such a provision is negotiated in good faith by a board with no apparent conflict, that is well-advised and follows a responsible, deliberate procedure, I am at a loss as to know what basis exists for declaring such a provision a violation of shareholders' rights. The only colorable argument offered (other than the factual argument that the Special Committee was operating in bad faith) is that, where an auction for the Company is on-going, the board has a duty - not to exercise its judgment as to what is in the shareholders' interest with respect to a proposal made to it - but to steadfastly refuse to agree to such a provision, since to do so will create an impediment of some size to other bidders.
>
> To create such an impediment is offensive to the level playing field metaphor but to what principle of law does it necessarily give offense? Assuming a properly motivated, independent board acting deliberately, in my opinion, it gives offense to no right of shareholders.

Id. at 783-84.

Despite the spin that QVC attempts to place on the decision in Revlon, that case also stands for the proposition that termination and option provisions are enforceable. See Revlon, 506 A.2d at 176 ("lock-ups and related agreements are permitted under Delaware law where their adoption is untainted by director interest or other breaches of fiduciary duty"). It is only where such provisions have a "destructive effect on the auction process" -- a process that is not even going on here -- that the court might question their validity. Id. at 183-184. As the court observed in Vitalink, the chief concern with regard to termination fees and stock options is whether such provisions "constitute a real impediment to an offer by a third party." Vitalink, slip op. at 13-14 (emphasis added); see also City Capital Assocs. Ltd. Partnership v. Interco, Inc., Del. Ch., 551 A.2d 787, 801, appeal dismissed, Del. Supr., 556 A.2d 1070 (1988) (upholding a defensive measure that was not a "show stopper" insofar as the offer was concerned).

2. The Actions of Paramount's Board and Management Were Reasonable Under Unocal

Paramount used its discretion to grant a termination fee and option to Viacom in a sensible, value-enhancing manner. Paramount obtained reasonable terms, far below Viacom's demands, and well within the range of sound business judgment. The Board unanimously approved them. Further, the notion that the fee and option "locked up" Paramount is belied by the record and, most notably, by QVC's conduct itself.

(a) The Fee and Option Were Set at Reasonable Levels

After careful deliberations by and vigorous discussion among Paramount's senior management, the Board, and its legal and financial advisors, it became evident that Viacom would not enter into this strategic merger absent (1) the inclusion in any merger agreement of reasonable protection against the costs it would incur if the merger were not consummated and (2) the granting of an immediate stake in Paramount via a stock option. This was precisely the situation referred to by the Revlon Court when it noted the critical role that stock options often play. Revlon, 506 A.2d at 183 (a bidder "might only enter the bidding for the target company if it receives some form of compensation to cover the risks and costs involved"). See also Sea-Land, slip op. at 27 n.19 (stock option "reasonably calculated to induce a higher, firm bid . . . not a fiduciary duty violation"); Yanow I, slip op. at 12 n.6 (option and expense reimbursement provision necessary to induce bidder to make an offer at a premium over market price).

Moreover, the fee and option granted to Viacom are clearly reasonable in light of the role Viacom has played in advancing Paramount's stockholders' interests and the size of the consideration offered. Certainly Viacom, as Paramount's chosen strategic partner and the entity that made the initial offer which led to the enormous benefits now available to Paramount's stockholders, is entitled to reasonable compensation in the event that its merger with Paramount is not consummated. QVC ignores the fact that the fee represents only 1% o the total value of the Viacom tender offer, which is well within the range of such fees that courts have found enforceable. Similarly, Viacom's option to acquire 19.9% of Paramount's common stock for $69.14 per share of the original merger price is likewise unremarkable when compared with similar provisions in other transactions.

The following list of cases upholding stock options, termination fees and related provisions demonstrates the legality and customary nature of the provisions challenged by QVC[301/]:

301/ See also Rohatyn Aff. ¶ 13 & Ex. 1 (demonstrating that the stock option and termination fee granted to Viacom are consistent with provisions in comparably sized merger transactions).

Case Authority	**Description of Terms**
Yanow v. Scientific Leasing, Inc., Del. Ch., C.A. Nos. 9536 and 9561, Jacobs, V.C. (Feb. 5, 1985, revised Feb. 8, 1988)	Stock option for approximately 16.6% of target's stock and expense reimbursement provision
Hecco Ventures v. Sea-Land Corp., Del. Ch., C.A. No. 8486, Jacobs, V.C. (May 19, 1986)	Stock option for approximately 21.7% of target's stock
Lewis v. Leaseway Transp. Corp., C.A. No. 8720, Chandler, V.C. (May 16, 1990)	Stock option for 18% of target; stock and termination fee equally approximately 2% of transaction's value.
In re Vitalink Communications Corp. Shareholders Litig., Del. Ch., C.A. No. 12085, Chandler, V.C. (Nov. 8, 1991)	Stock option for 19.9% of target's stock and termination fee equalling approximately 1.9% of transaction's value
Roberts v. General Instrument Corp., Del. Ch., C.A. No. 11639, Allen, C. (Aug. 13, 1990)	Termination fee equalling 2% of transaction
In re J.P. Stevens & Co., Inc. Shareholders Litig., Del. Ch., 542 A.2d 770 (1988)	"Topping fee" of $.40 per share and termination fee of $17 million (together equalling approximately 2.2% of total deal price)
In re Fort Howard Corp. Shareholders Litig., Del. Ch., C.A. No. 9991, Allen, C. (Aug. 8, 1988)	"Topping fee" and expense reimbursement provision of up to $67 million
In re Formica Corp. Shareholders Litig., Del Ch., C.A. No. 10598, Jacobs, V.C. (Mar. 22, 1989)	Termination fee of $5 million and reimbursement provision up to $5.5 million
Cottle v. Storer Communication, Inc., 849 F.2d 570 (11th Cir. 1988)	Termination fees equalling just over 1% of acquisition price
Gray v. Zondervan Corp., 712 F. Supp. 1275 (W.D. Mich. 1988)	Stock option, "topping fee" of 2.2 million and $5 million reimbursement fee.
Samjens Partners I v. Burlington Indus., Inc., 663 F. Supp. 614 (S.D.N.Y. 1987)	Termination fee equalling 2% of target's value
Keyser v. Commonwealth Nat'l Fin. Corp., 644 F. Supp. 1130 (M.D. Pa. 1986)	Stock option for 24.9% of target's stock
Beebe v. Pacific Realty Trust, 578 F. Supp. 1128 (D. Or. 1984)	Termination fee equalling 1% of transaction

(b) The Fee and Option Were Necessary to Facilitate a Favorable Transaction

The evidentiary record leaves no dispute that the merger with Viacom would not have been agreed upon without the fee and option provisions.

(c) Paramount Successfully Minimized the Fee and Option in Arm's Length Bargaining

Further, the evidence demonstrates that Viacom representatives insisted upon termination provisions granting to Viacom (a) options to acquire 20% of the outstanding shares at the then market price, (b) options to purchase certain assets of Paramount at below market value, (c) a "termination fee" in the amount of $150 million, [(d) a provision calling for payment of Viacom's expenses. Paramount insisted on minimizing or eliminating these provisions. Negotiations between Paramount and Viacom ended on several occasions -- July 7, 1993 and August 25, 1993 -- in part because Viacom insisted on all of these conditions.

Paramount's hard bargaining paid off. First, the termination fee was reduced from $150 million to $100 million. In a $10 billion transaction, $100 million (1%) approximates the out-of-pocket expenses incurred through merger. Indeed, QVC estimates its own expenses at the same $100 million level. PEx. 52. Clearly, the termination fee is a fair liquidated amount to cover expenses, payable only if the Paramount-Viacom merger does not close.

Second, Paramount rejected Viacom's separate demand for payment of its expenses and prevailed.

Third, at Paramount's insistence, the option strike price was increased from $54.75 (the market price when Viacom demanded the option) to $69.14, the Viacom offer value on the day the merger agreement was signed. The option was thus some 25% "out of the money" compared to the pre-merger, pre-premium price before Viacom came on the scene. Paramount's stockholders were not harmed by this. Instead, their share values increased substantially.

Fourth, the asset option was eliminated completely.

(d) The Fee and Option Did Not Preclude Further Bids

The fee and option simply are not "lock-ups". QVC cannot establish that they preclude a bid for Paramount; QVC itself has made three such bids and can make another one if it so chooses. The undeniable net effect of this process -- which could not have started without the option and fee provisions -- was an enormous increase in value to Paramount stockholders.

QVC's allegations about "lock-ups" are uniquely untenable because in its pro forma financials submitted along with its proposal to merge with Paramount prior to announcing a tender offer, QVC included as one of its "purchase assumptions" a "Viacom Breakup Fee and Option Buyout" of $357,000,000. QVC's bid financials thus demonstrate that the fee and option are not real impediments -- let alone absolute bars -- to a third party bid.[302] QVC is making offers "feasibly and comfortably."[303] It has financed them with equity infusions that provide investors with their own options.

(e) The Board Agreed To The Termination Fee And The Stock Option After Careful Deliberation And In Order To Further The Interests Of Paramount's Stockholders

Both the merger agreement and its individual terms were subjected to a deliberative process and vigorous discussion by the Paramount Board. All directors were fully apprised of the meaning and effect of the termination provisions and, most importantly, their significance to the success of the overall merger negotiations.[304] Paramount repeatedly consulted with its legal and financial advisors in order to evaluate the inclusion of a fee and an option in the merger agreement. See Roberts, slip op. at 20-21 (upholding merger agreement containing termination fee where board had sought fairness opinion as to terms of offer); In re Formica Corp., slip op. at 19-20 (in upholding merger agreement providing for

[302] Greenhill Tr. at 131.

The differential in the marginal effect of the option on QVC's and Viacom's costs in making a bid is simply not legally relevant. Under any standard of review -- the business judgment rule, Unocal or Revlon, -- mere inequality of effect is not enough to state a claim, even where a defensive measure is aimed at a known competing bidder. The alleged "lock up" must actually be a "lock up", i.e., an obstacle that shuts down the possibility of further proposals. Paramount also notes that the fee and option in this instance were agreed to before there was any other bidder. Dauman Tr. at 51-52.

[303] Senior Tr. at 91, 93-94. This is also inconsistent with QVC's assertion that Viacom's ability to pay for the option with a debt instrument renders the option illegal. The same legal standards apply to the option. Despite QVC's arguments, the effect of this provision is, both in theory and practice, negligible. The note is required by contract to be liquid; if it is not Viacom must pay cash. Its effect is insignificant. Rohatyn Aff. ¶ 23. As in Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir), cert. denied, 464 U.S. 1018 (1983), this payment approach is not unreasonable.

[304] See supra, Statement of Facts, Sections C and D.

providing for termination fee and reimbursement of expenses, this Court noted that the committee had carefully reviewed its investment advisors' "study of break-up fees and expenses agreed to in other transactions").

After substantial arms-length negotiations with Viacom, the Board concluded that it was necessary, fair and customary to accede to Viacom's demand for a termination fee and a stake in the agreed-upon "price" via an option.

POINT III

THE ACTIONS OF THE BOARD AFTER QVC'S UNSOLICITED OFFER WERE REASONABLE, AND ARE ENTITLED TO THE PROTECTION OF THE BUSINESS JUDGMENT RULE, EVEN UNDER UNOCAL

In light of the foregoing analysis, the actions of the Board after the announcement of QVC's hostile tender offer are reasonable a fortiori, even if examined under the heightened scrutiny of the Unocal test. They should not be invalidated nunc pro tunc based on QVC's anachronistic contentions concerning the current perceived value of the option ($400 million) as opposed to its value in September (zero).

As far as QVC's contentions concerning events after QVC announced its offer, the decisions of this Court make clear that Unocal governs director actions that respond to an unsolicited bid and that in some way seek to block that bid. Nothing that the Board did since the announcement of QVC's proposal -- obtaining $2 billion in additional consideration for the stockholders and increased flexibility for the Board to accept a still better proposal -- can be fairly described as defensive. Indeed, nothing the Board did is reactive to QVC; it is Viacom that reacted to the QVC proposal by -- as Paramount hoped -- raising its offer. For this reason, this lawsuit is distinguishable, dispositively so, from every case QVC cites in an effort to argue that Paramount has fallen short of the Unocal standard, all of which involve a target company's enactment of defensive measures that materially impede a third party bidder after that bidder made a bona fide acquisition proposal.

A. Pursuit of the Pre-existing Transaction with Viacom -- And Compliance With The Merger -- Were Proper

Before addressing the particular allegations QVC raises, the Supreme Court's decision in Paramount I -- the controlling Supreme Court precedent that most closely parallels the facts of this action -- merits discussion. For obvious reasons, Paramount is keenly aware of this decision and has shaped its conduct in accordance with its teachings.

In Paramount I, Time Inc. and Warner Communications agreed on a stock-for-stock merger which included several defensive measures, including an automatic share exchange agreement, a "no-shop" clause, and "dry-up" agreements with several banks. Paramount I, 571 A.2d at 1146-47. Thereafter, Paramount announced an all-cash, all-shares tender offer for Time at $175 per share, which Time rejected as inadequate. Id. at 1147. However, in response to the Paramount offer, Time dramatically altered the form of its transaction with Warner to an outright cash and securities acquisition of Warner by Time. Id. at 1148. Paramount raised its offer to $200 per share, which Time again rejected. Id. at 1149. Paramount then brought suit to enjoin Time's tender offer for Warner. Id.

The Delaware Supreme Court affirmed Chancellor Allen's ruling that the actions taken by the Time board did not violate the business judgment rule. In its decision, the Supreme Court noted that "[t]wo key predicates underpin [its] analysis." Id. at 1150. First, "Delaware law imposes on a board of directors the duty to manage the business and affairs of the corporation. . . [which] includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability." Id. Second, assuming Revlon duties are not triggered -- as they are not here -- a board is not under any "per se duty to maximize shareholder value in the short term, even in the context of a takeover." Id. In other words, a board need not "jettison" strategic corporate plans to maximize immediate shareholder gains. Id.

The underlying facts of Paramount I have significant parallels here, most notably a third party attempting to dislodge the strategic pairing of two other companies by launching a competing tender offer. However, unlike Paramount's offer for Time, the QVC offer is highly conditional. A fortiori, the same result affirmed by the Supreme Court in Paramount I must obtain here -- QVC has no right to require the Paramount Board to abandon or delay its long-term business plans, and the business judgment of a disinterested board of directors pursuing a long-term strategic coupling should not be judicially overridden.

In language precisely relevant to the October merger agreement at issue here, the Delaware Supreme Court also made the following determinations:

(a) "[W]e do not find in Time's recasting of its merger agreement with Warner . . . a basis to conclude that Time has either abandoned its strategic plan or made a sale of Time inevitable";

(b) "Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy";

(c) The restructured agreement "was not aimed at 'cramming down' on its shareholders a management-sponsored alternative, but rather had as its goal the carrying forward of a pre-existing transaction in an altered form" and, therefore, was reasonable; and

(d) Unocal does not authorize the court to "substitut[e] its judgment as to what is a 'better' deal for that of a corporation's board of directors."

Id. at 1151, 1154-55 (emphases added).[305/]

These holdings apply with even greater force here, and cannot be meaningfully distinguished by plaintiffs.

B. The Board's Alleged Refusal to "Talk" with QVC Until November 1 Was Proper

QVC takes issue with two actions by Paramount. First, as discussed below, QVC complains that Paramount never "talked" to QVC. Second, QVC alleges that the October amendment to the merger agreement was unreasonable. Even assuming the applicability of Unocal to the Board's actions after the announcement of QVC's unsolicited proposal, both of these contentions are nevertheless without merit.

1. Paramount Was Not Obligated to "Talk" to QVC

The law of Delaware imposes no obligation on a board acting in good faith to negotiate with unsolicited tender offerors. See, e.g., Paramount I, 571 A.2d at 1154 ("Time's board was under no obligation to negotiate with Paramount."); Pogostin v. Rice, Del. Supr., 480 A.2d 619, 627 (1984) (requiring board to negotiate with unsolicited offerors "would rob corporate boards of all discretion, forcing them to choose between any tender offer or merger proposal above market"); Lewis v. Honeywell, Inc., Del. Ch., C.A. No. 8651, slip op. at 7, Jacobs, V.C. (July 28, 1987); BNS, Inc. v. Koppers Co., Inc., 683 F. Supp. 458, 476 (D. Del. 1988) (noting absence of any Delaware authority imposing a duty to negotiate with unsolicited bidder).

[305/] The Supreme Court also affirmed Chancellor Allen's determination that because the revised agreement "was defense motivated" and "designed" to counter the Paramount offer, the transaction would be analyzed pursuant to Unocal (not Revlon). Paramount I, 571 A.2d at 1152.

This rule has particular force when a board "had valid grounds, based upon a reasonable investigation," to conclude that a tender offer "was not a bona fide offer, but rather, was designed to put the company 'in play'. . . ." Formica Corp., slip op. at 22-35; see also TW Servs., Inc., slip op. at 33-35 (rejecting bidder's argument that unsolicited offer can thrust company charting long-term course into Revlon mode); Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1013 (E.D. Wis.) ("I find no support in the case law that a company must negotiate with a tender offeror. This is especially true where, as here, the offeror has not approached the company prior to commencing the offer and related litigation"), aff'd, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989) (emphasis added); Desert Partners, L.P. v. USG Corp., 686 F. Supp. 1289, 1300 (N.D. Ill. 1988) ("Delaware law does not require a board of directors to . . . assist a potential acquiror to formulate an adequate takeover bid."). Indeed, as the Supreme Court has held, interfering with the decision not to negotiate with a hostile bidder "would rob corporate boards of all discretion . . . . [t]he ultimate loss would, of course, be upon the shareholders." Pogostin, 480 A.2d at 627.

2. Demanding QVC Financials Before "Talking" to QVC Was Proper

Paramount's original merger agreement with Viacom is dated September 12, 1993. It was evaluated as of that date and signed on that date. There was no QVC offer on that date, nor any other offer besides the offer from Viacom that Paramount had negotiated. Once the original merger agreement was in effect, Paramount's valid contractual obligations to Viacom had to be considered in evaluating the later QVC bid.

The September merger agreement did not prohibit Paramount from pursuing a later unsolicited offer if it chose to, but it did restrict that right to bona fide situations.

Section 6.02 of the September merger agreement expressly prohibits Paramount from "furnishing information to, or entering into discussions or negotiations with, any person or entity that makes an unsolicited written, bona fide proposal . . . to acquire such party" unless (1) the proposal is "not subject to any material contingencies relating to financing," and (2) such action is "necessary for the Board of Directors of such party to comply with its fiduciary duties to stockholders under applicable law. . . . " (emphasis added)[306].

Thus, the Board's insistence that QVC provide proof of the financial bona fides of its offer was mandated by Paramount's contractual obligations. Even absent those obligations, the Board's course of action was nothing more than good business practice.

If the Board had furnished information to or entered into discussions or negotiations with QVC prior to receiving satisfactory proof of QVC's financing, Paramount would have been in breach of the agreement. Under Section 8.01(b) of the agreement, Viacom could terminate upon breach.[307]

Thereafter, events and QVC's own conduct made "talk" futile. On October 21, one day after it provided Paramount with the critical information Paramount requested and needed to evaluate intelligently the QVC proposal (and disdaining Paramount's assurance that it would review the information and respond to QVC), QVC commenced its hostile tender offer for Paramount. On the same day, QVC commenced this action against Paramount, Viacom and certain members of Paramount's Board. These strategic maneuvers, on their face, bespeak QVC's own unwillingness to engage in good faith discussions.

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[306] PEx. 28 at 33.

[307] PEx. 28 at 46.

On the next day, Viacom expressed its commitment to this merger by offering roughly \$1.5 billion more, and increasing the cash component of it to match the conditional QVC tender offer.

C. **The Board Satisfied the Unocal Test When They Approved the October Merger Agreement Amendment**

Three days after QVC announced its tender offer for Paramount, Paramount successfully completed negotiated amendments to the September merger agreement, including a remarkable increase to \$80 per share (using market price for the "back end") in the consideration to Paramount's stockholders -- 16% more than in the earlier agreement and an amount superficially equalling, but in reality surpassing, the QVC bid. These improvements in the terms of the deal conclusively establish that Paramount breached no fiduciary duty.

Thus, the Paramount Board used the QVC bid to obtain concessions from Viacom -- Paramount's selected strategic partner -- which returned with a proposal topping the QVC alternative even from a short-term financial viewpoint. As in Paramount I, and Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980), the Paramount Board had already decided, before any expression of interest from QVC, that a merger with Viacom was the best means to achieve its long-term strategic goals. On October 24, Paramount simply improved the shareholders' position, while simultaneously obtaining more flexibility to accept a superior third party offer.

1. **Assuming There Was a "Threat" to Corporate Policy, the Board Was Entitled to Respond**

The Unocal standard does not prohibit defensive responses to an external threat, including unsolicited offers for control. See, e.g., Paramount I, 571 A.2d at 1152;

Unocal, 493 A.2d at 955-56. Instead, even powerful responses are entitled to deference under the business judgment rule if they are commensurate with the threat being posed. Id.

In Paramount I, the Supreme Court described the Unocal test as follows:

> In Unocal, we held that before the business judgment rule is applied to a board's adoption of a defensive measure, the burden will lie with the board to prove (a) reasonable grounds for believing that a danger to corporate policy and effectiveness existed; and (b) that the defensive measure adopted was reasonable in relation to the threat posed. Directors satisfy the first part of the Unocal test by demonstrating good faith and reasonable investigation. We have repeatedly stated that the refusal to entertain an offer may comport with a valid exercise of a board's business judgment.

571 A.2d at 1152 (citations omitted)(emphasis added).

The Supreme Court also carefully noted that the Unocal standard is a flexible one, adaptable to the facts of each case.

> The usefulness of Unocal as an analytical tool is precisely its flexibility in the face of a variety of fact scenarios. Unocal is not intended as an abstract standard; neither is it a structured and mechanistic procedure of appraisal. Thus, we have said that directors may consider, when evaluating the threat posed by a takeover bid, the "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders . . . the risk of nonconsummation, and the quality of securities being offered in the exchange. The open-ended analysis mandated by Unocal is not intended to lead to a simple mathematical exercise: that is, of comparing the discounted value of Time-Warner's expected trading price at some future date with Paramount's offer and determining which is the higher. Indeed, in our view, precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders. To engage in such an exercise is a distortion of the Unocal process and, in particular, the application of the second part of Unocal's test . . . .

Paramount I, 571 A.2d at 1153 (quoting Unocal, 493 A.2d at 955).

So long as a board acts in good faith and deliberately, its decisions will be undisturbed by the courts unless they are found to be both defensive and unreasonable in relation to the threat posed by the competing offer. Roberts, slip op. at 17-18 ("discrimination in favor of the party acquiring rights under the merger agreement" is not prohibited under Unocal/Macmillan standard if "the circumstances afforded a disinterested and well motivated director a basis reasonably to conclude that if the transactions contemplated by the merger agreement close, they will represent the best available alternative for the corporation and its shareholders").

By definition, the mere fact that a board's actions involve an element that may fairly be described as "reactive" to a third party bid does not remove the analysis of the board's conduct from the Unocal framework:

> Here . . . the revised transaction, even though "reactive" in important respects, has its origin and central purpose in bona fide strategic business planning, and not in questions of corporate control. Compare AC Acquisition Corp., supra (recapitalization had its genesis in a threat to corporate control posed by the imminent termination of trusts that had exercised effective control for years); Robert M. Bass Group v. Evans, supra (recapitalization under consideration prior to acquisition proposal would have shifted control to management group of a substantial portion of corporation's assets). To be sure, Time's management and its board had, at all times, one eye on the takeover market, considered that market in all they did, and took steps to afford themselves the conventional defenses. But I do not regard that fact as darkly as do plaintiffs. It is inevitable today for businessmen to be mindful of this factor. At this stage, I do not regard the record as establishing, as was done in AC Acquisitions, Bass, Interco or Pillsbury, that there is a reasonable likelihood that such concern provided the primary motivation for the corporate transaction.

Paramount, slip op. at 73 (emphasis added).[308]

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[308] Every recent decision of the Delaware Supreme Court dealing with responses to tender offers reminds that it is the board of directors' authority to manage the business and affairs of the corporation, and that boards must be active, not passive, in protecting stockholders from harm to their interests. See, e.g., Technicolor, slip op. at 36-37; Unocal, 493 A.2d at 954; Revlon, 506 A.2d at 179; Moran, 500 A.2d at 1350, 1357; Pogostin, 480 A.2d at 627; Polk, 507 A.2d at 536-37; Ivanhoe Partners, 535 A.2d at 1341-42.

2. The Paramount Board Prudently Reacted to QVC's Offer

In response to the QVC offers, the Board did not interpose defenses, nor adopt terms unfavorable to QVC. Instead, the Board extracted valuable concessions from Viacom in exchange for simply allowing Viacom to commence a tender offer to respond to QVC's own, a step that had been prohibited under the September merger agreement. These concessions included:

- an increase in short-term consideration (cash and stock) paid to shareholders to approximately $80 per share, 16% above the earlier agreement, at least matching the QVC bid;
- an increase in the cash consideration for each share from $9.10 to approximately $40, a 350% improvement;
- an improvement in the equity component of the transaction to include preferred stock valued at $5 per share; and
- an enhancement of Paramount's flexibility to terminate the merger agreement, among other circumstances, in order to accept a better alternative.

Most importantly, the October amendment was the continuation of Paramount's long-planned business combination, which neither discriminates against QVC nor blocks a takeover of Paramount. The Paramount-Viacom combination had from its outset, and still has, one primary goal -- to enhance Paramount's profitability. Faced with the QVC offer, the Board successfully negotiated extraordinarily attractive amendments to the September merger agreement, accepting for the stockholders a new Viacom proposal that topped QVC's. Thus, the Board's decision to complete the merger with Viacom was more than reasonable.

In negotiating these lucrative amendments, Paramount could not force Viacom to surrender the termination fee and option that it had been granted earlier in the September merger agreement. Furthermore, the fee and option were entirely reasonable and commensurate with the size of the merger and the risks incurred by Viacom at the time they were granted.

QVC's argument boils down to the idea that Paramount should have held up the Viacom deal and the $1.5 billion amendment as a bargaining chip to renegotiate the termination fee and stock option agreement. This argument defeats itself. The default scenario in such negotiations, obviously, is the original, less attractive deal (lose $2 billion) or outright termination (lose fee and option cost as well as deal). To add to this lose-lose scenario, there were no rational grounds on which to defend any insistence on taking back rights already validly granted by contract to Viacom. Therefore, the Board was both unwilling and unable to eviscerate the termination provisions nunc pro tunc. Any other course of conduct would have subjected it to potentially enormous damages for failure to accept Viacom's new and better proposal, when QVC's highly uncertain and conditional offer was the only alternative.

QVC's objection to permitting Viacom to commence a tender offer is also self-serving. QVC had announced its own tender offer for 51% of Paramount's stock. Absent action, that tender offer would leapfrog the Viacom merger, and there would be no merger. Permitting Viacom to commence its own tender offer, at $1.5 billion higher financial consideration, was more positive for the shareholders on every level -- value, long-term prospects, likelihood and speed of consummation -- than just letting QVC take over Paramount by means of a two-tier tender offer.

As in Paramount I, in InterNorth the court upheld the actions of a board in a strikingly similar scenario. InterNorth, 634 F.2d at 704. InterNorth announced a tender offer for Crouse-Hinds three days after Crouse-Hinds and Belden Corporation had announced plans to merge. Like QVC's offer for Paramount, InterNorth's offer was expressly conditioned upon the abandonment or rejection of the previously announced merger. Thereafter, in an effort to protect its merger and the business plan which brought it about, Crouse-Hinds and Belden entered into a modification of the merger agreement pursuant to which Crouse-Hinds would make a tender offer for approximately 40% of Belden's common stock. Id. at 692-95.

InterNorth attacked the modification of the merger agreement and the Crouse-Hinds tender offer for control of Belden on the grounds that it was designed to entrench Crouse-Hinds management in office and frustrate shareholder choice. Id. at 701. The Second Circuit held that the Crouse-Hinds tender offer should be reviewed pursuant to the business judgment rule, even though it was clearly adopted in reaction to InterNorth's hostile offer. Id. at 701-704. The court found that the Crouse-Hinds directors had entered into the original merger agreement in good faith and in pursuit of a rational business plan and that the InterNorth proposal was expressly conditioned on its abandonment or rejection. Id. at 703. On that basis, the court found the tender offer to be a reasonable response to the InterNorth offer and in furtherance of the business plan embodied in the prior merger agreement with Belden. Id. at 703-04.

In addition, the court held, "we know of no support for the district court's view . . . that the Crouse-Hinds directors were required to 'reconsider' the merger agreement that had been entered into and that they were contractually bound to recommend to shareholders." 634 F.2d at 703 (citation omitted).

POINT IV

THE PARAMOUNT BOARD IS ENTITLED TO MANAGE THE SHAREHOLDER RIGHTS PLAN

Prior to this litigation, QVC's counsel has argued fervently that boards of directors have the "absolute right" to reject unsolicited takeover bids, even without providing stockholders any alternative to such a bid. Martin Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101, 113-14 (1979) (PEx. 83); see also Martin Lipton, Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook and Fischel, 55 N.Y.U. L. Rev. 1231, 1232-35 (1980) (PEx. 82) (asserting that courts should permit corporate boards to maintain defensive mechanisms where board determines that tender offer is not in the best long-term interests of the shareholders). Moreover, Mr. Lipton has for years pressed the proposition that "[h]opefully" the Delaware courts "will make it clear that a board of directors does not have to redeem a pill and either auction the company to the highest bidder or restructure by turning equity into debt." See Laurie Cohen, "Lipton Asserts Corporate Boards Can Simply Reject Hostile Offers," Wall Street Journal, Nov. 4, 1988 (PEx. 85). A priori, a board should certainly be empowered to use a rights plan to preserve a strategic merger from being attacked by what is in essence a last-minute hostile financial acquiror.

Perhaps not surprisingly, QVC's argument that Paramount is required to redeem its Shareholder Rights Plan for QVC on the same terms as it will for Viacom is half-hearted. Plaintiffs offer no authority for their novel and insupportable position, which is irreconcilable with the underlying purpose of the Plan in the first place.

Delaware law is clear that a board's actions with respect to managing shareholder rights plans are governed by the business judgment rule. See, e.g., Nomad Acquisition Corp. v. Damon Corp., Del. Ch., C.A. Nos. 10173 and 10189, slip op. at 11-16, Hartnett, V.C. (Sept. 16, 1988, revised Sept. 20, 1988); Grand Metropolitan PLC v. Pillsbury Co., Del. Ch., C.A. Nos. 10319 and 10323, slip op. at 1-3, Duffy, J. (Retired) (Nov. 7, 1988, revised Nov. 9, 1988); BNS, 683 F. Supp. at 474 (applying Delaware law). If a board, in the exercise of its informed judgment, believes in good faith that its management of a shareholder rights plan advances shareholders' interests, that determination is entitled to deference. Id. Neither QVC nor its counsel can or will argue with that proposition.

Moreover, because QVC's request with respect to Paramount's Shareholder Rights Plan seeks mandatory injunctive relief, such relief may "not be granted unless [QVC] satisfies the standards applicable to a grant of summary judgment." TW Servs., Inc., slip op. at 16; see also Nomad Acquisition Corp., slip op. at 11 (declining to order a target board to dismantle shareholder rights plan and recognizing that "[w]here a preliminary mandatory injunction is sought, the plaintiffs have an even greater burden because the legal right sought to be protected must be clearly established"). Plaintiffs cannot meet this exacting standard.

QVC incorrectly argues that on October 24, Paramount did not improve its ability to respond to a potentially superior alternative, but instead made matters worse by amending its Shareholders Rights Plan. QVC argues that this amendment (§ 3.13(c) of the Amended and Restated Agreement and Plan of Merger) gives Viacom greater rights against Paramount's pill if Paramount or Viacom terminates the merger agreement. QVC then states that Mr. Davis misled the Board by not telling them about this sinister change.

The complete and irrefutable answer to this argument is that it simply is not true. QVC, whether deliberately or not, misreads the document. Paramount is obligated under Section 3.13 of the merger agreement, even if, under certain circumstances, the Merger has been terminated, to take all necessary steps to amend the Rights Plan so as to enable

Viacom to consummate its tender offer unless there exists a competing takeover proposal and the Board determines that amending the Rights Plan would be inconsistent with the Board's satisfaction of its fiduciary duties. In connection with any such determination, the Board must conclude that the competing proposal represents a better alternative than the Viacom offer taking into account all circumstances then existing, including, without limitation, legal and regulatory issues and financing contingencies.

Thus, the Paramount Shareholder Rights Plan was not concocted as a defensive tactic to thwart a bona fide proposal from QVC or anyone else, and it does not have that effect. Nothing in the Shareholder Rights Plan forecloses a third party from making a proposal, nor prevents Paramount's Board from receiving and evaluating a proposal that might be a better alternative to the merger with Viacom. Because the Shareholder Rights Plan presents "no material impediments to [Paramount's] receiving and entertaining a competing proposal by a third party," it is valid. In re Wheelabrator Technologies Inc. Shareholders Litig., Del. Ch., C.A. No. 11495, Jacobs, V.C. (Sept. 6, 1990).

POINT V

AN INJUNCTION WILL ONLY HURT THE SHAREHOLDERS

As demonstrated herein, plaintiffs have plainly failed to make the required merits showing to warrant injunctive relief. Moreover, there is no showing that plaintiffs will suffer irreparable harm justifying the issuance of an injunction and, indeed, if the Viacom tender offer and merger are enjoined, it is the shareholders of Paramount who will be irreparably harmed. Solash, slip op. at 3.

A. QVC Faces No Imminent Irreparable Harm

QVC claims that it will be irreparably injured if a preliminary injunction is denied because it will lose an opportunity to acquire Paramount. This claim must fail, as it has in many previous decisions of this Court and the Supreme Court.

First, any alleged "injury" to QVC is speculative at best. QVC's offer is highly conditional, and whether such conditions ever could be satisfied is conjecture. Moreover, QVC retains the right -- in its sole discretion -- to alter at any time all material terms of its offer. Thus, it is unclear when, if ever, QVC might consummate its offer. Such a highly conditional offer is too remote to give rise to an imminent threat of irreparable harm. See e.g., Nomad Acquisition Corp., slip op. at 20 ("For this court to grant [a preliminary injunction], any prospective irreparable harm to Nomad must be 'imminent,' 'unspeculative,' and 'genuine.'") (citation omitted); Tate & Lyle PLC v. Staley Continental, Inc., Del. Ch., C.A. No. 9813, slip op. at 19, Hartnett, V.C. (May 9, 1988) ("The showing of irreparable harm requires more than the mere threat or possibility of injury.") (citation omitted); Yanow I, slip op. at 15-16.

Second, the fact that Paramount's Board did not halt its long-planned transaction simply because QVC at the last minute announced new-found plans of its own cannot give rise to irreparable harm. Delaware law does not require a company to derail its ongoing plans to accommodate the wishes of a hostile acquiror. See Paramount I, 571 A.2d at 1154 (directors not obliged to abandon long-term corporate plan because it becomes subject to a premium bid). See City Capital Assocs., 551 A.2d at 801 (potential acquiror "has no right to demand that its chosen target remain in status quo while its offer is formulated, gradually increased and, perhaps, accepted"); In re RJR Nabisco, Del. Ch., C.A. No. 10389, slip op. at 45-48, Allen, C. (Jan. 31, 1989) (board's decision to approve tender offer without asking competing bidder for a higher bid was based on reasonable assessment of risks associated with delaying consummation of current offer). See also UIS, Inc. v. Walbro Corp., Del. Ch., C.A. No. 9323, slip op. at 8, Allen, C. (Oct. 6, 1987) ("[I]t is well established that a tender offeror has no right to freeze the business he seeks to acquire while his offer goes forward."); GM Sub Corp. v. Liggett Group, Inc., Del. Ch., C.A. No. 6155, slip op. at 5, Brown, V.C. (Apr. 25, 1980) ("Thus, at this stage the record can be construed as an application by GM Sub to freeze the assets of Liggett to those as they existed as of the time the tender offer was announced so that GM Sub will be guaranteed the opportunity to acquire the complete package it sought rather than one of equal or greater value, but in a different form. So stated, I am not aware at this time of any precedent that would support such an application.").

B. The Real Issue is Harm to the Paramount Stockholders

Harm to the stockholders is the most significant issue in evaluating hardships in the context of a preliminary injunction motion. In Freedman I, this Court held that:

> To grant the remedy now would surely deprive tendering shareholders of a currently available option to sell their stock at a price more than 50% higher than the price of Restaurant's stock prior to the announcement of the proposed management buyout . . . . Even were I persuaded that plaintiffs had established a probability of success on their claims, I would be rather reluctant to enjoin the closing of the tender offer where no misrepresentation is claimed and the financial benefit sought to be achieved is speculative.

Slip op. at 29-30.

Similarly, in Hecco Ventures, this Court stated:

> On the other hand, to impose such a restraint might cause irreparable harm, by creating a risk that the CSX offer, due to market changes occasioned by a court-ordered delay, might not go forward. Under the circumstances of this case, to interfere with or to deny Sea-land's shareholders the opportunity to receive $28 per share for their shares would be a disservice which I decline to inflict upon them.

Slip op. at 14 (citation omitted). Accord In re Wheelabrator Technologies, Inc. Shareholders Litig., Del. Ch., C.A. No. 11495, slip op. at 2, Jacobs, V.C. (Sept. 27, 1990) ("A preliminary injunction would deprive WTI's shareholders of the benefits of the merger transaction without offering them any realistic prospect of a superior alternative, or, for that matter, any alternative.").

C. Enjoining the Viacom Offer Will Cost the Stockholders Money, Will Undermine Business Plans, and Will Inure to the Strategic Business Advantage of QVC and its Backers Who Are Competitors in the Media Business

If the Viacom tender offer and the merger are enjoined, Paramount and its stockholders will suffer substantial, permanent harm:

(1) Delay in a $10 billion transaction costs $50-$100 million per month, nearly $2 million a day at a conservative 6% discount rate.

(2) Both Paramount and Viacom are enormous businesses, which have been and will be diverted from other opportunities for as long as this "contest" (which QVC has unilaterally declared to be a contest) goes on.

(3) Paramount and Viacom have plans. Among those plans are:

- Global Network Strategy -- packaging franchise networks MTV, Nickelodeon, USA and VH-1 with new general entertainment channels programmed with the Paramount Viacom library for favorable positioning in worldwide distribution, including Asia, Europe and Latin America.

- Creation of new basic cable networks -- exploiting the content and marketing/packaging expertise of Viacom and the combined library of Paramount Viacom.

- Creation of a fifth television network.

- Establish new family filmed entertainment label -- strong brand identification of Nickelodeon -- with an emphasis on family movies.

- Theming based on Nickelodeon and MTV at Paramount's five regional theme parks

  - Strategy of using brand name and label identification already proven in parks -- attendance gains 3x normal in 1993

  - Renn & Stimpy, Beavis & Butthead characters

  - MTV & Star Trek -- separate gate.

- Commence retail operations -- Paramount Viacom merchandise will be of sufficient magnitude and appeal to justify store openings.

- MTV-sponsored concerts at the Madison Square Garden's Paramount theater -- including "unplugged" series and The MTV Music Awards.

- Creation of a "Rock Plex" at Madison Square Garden and Paramount Parks -- featuring live commentary and interviews, pre- and post-concerts, exhibits, food and merchandise.[309/]

These plans are of immediate importance. Some of them are underway now, including the fifth network. At best, delay will stall these plans; at worst, some of the strategic opportunities that led Paramount to agree to this merger will be lost.

(4) Competitors are not standing still. Indeed, QVC's investors are the competition.

309/ QEx. 37.

It is intrusive enough that QVC and its backers have tied up both companies and, in discovery, accessed their secrets. But the Court should not permit this to continue any longer than it absolutely has to.

QVC and its backers gain by tying up Paramount and Viacom because QVC' backers compete with Paramount and Viacom. They do not gain by the creation of a Paramount Viacom International. Cox competes for viewers with both Paramount and Viacom. Advance competes with Paramount Publishing. BellSouth is perched to compete with every media company.

Further delay is in their interest. This is a fast-moving industry with ever-shifting coalitions of alliances. Delaying this deal can only help Barry Diller, his new company, and his latest alliance to get a competitive edge in the market. This does not help Paramount's stockholders.

(5) In this environment, the Court should not take Viacom for granted. Delay escalates uncertainty, as representations or warranties become stale and the potential for losing this deal grows.

(6) The Court should also look at QVC's tender offer in detail. QVC reserves so many rights to back out of the offer and the merger it has announced that it is difficult to take its proposal seriously. <u>See</u> PExs. 35, 54. QVC also states that the back end merger is completely indefinite. <u>Id</u>. There is real risk that if Viacom is enjoined, the Paramount stockholders will get nothing from QVC.

But in that case, QVC and its backers -- competitors of Paramount -- will have succeeded anyway.

Dated: November 14, 1993

Charles F. Richards, Jr., by Anne C. Foster

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PAGE NO.	SPECIOUS ALLEGATIONS CONTAINED IN QVC'S BRIEF	THE TRUTH
19	"At the September 9 meeting, the directors were given a small Lazard book . . . No other written document was presented to the directors at the meeting."	In fact, the Board was also given a 113-page packet of materials which included Paramount's First Quarter 1994 Review.
20	"Despite the fact that the Lazard book contained a price history of Viacom stock, it contained no information — not a footnote, not even a word — about Sumner Redstone's open market purchases of Viacom stock and their impact on the stated price of the deal they were being asked to approve."	In fact, as a guide for their oral presentation to the Board, Lazard and Paramount officials relied upon a three-page document entitled "Outline of Combined Management/Banker Presentation." This document, which was produced to QVC, contains specific entries indicating that the proposed merger price appeared fair notwithstanding Redstone's prior trading activity, that Redstone had not traded in the period since August 20 and that all trades had been conducted in accordance with Rule 10b-18 of the Securities Exchange Act of 1934. PEx. 71.
88	"One critical subject on which information was withheld from the Board was Redstone's stock purchases of Viacom."	Felix Rohatyn, the senior partner at Lazard who led the investment banker presentation to the Board, has affirmed: "Lazard discussed the National Amusements stock purchase program with the Paramount Board at the September 9 and 12 Board meetings." Rohatyn Aff. ¶ 20. Lester Pollack, a general partner at Lazard and a member of the Paramount Board, has also affirmed that Redstone's purchases were discussed at the September 9 Board meeting: "The Lazard presentation included analyses of trading prices of Viacom stock from August 1992 through the present, and specifically included a discussion of the trading activities of National Amusement, Inc. in Viacom stock that had taken place prior to August 20, 1993." Pollack Aff. ¶ 18. In addition, Donald Oresman, Executive Vice President and General Counsel of Paramount, testified that Redstone's trades were discussed at the September 9 Board meeting: "I am absolutely clear in my mind that the subject came up." Oresman Dep. 75:16-18. See also Irving R. Fischer Aff. ¶ 10 and Benjamin L. Hooks Aff. ¶ 8.

PAGE NO.	SPECIOUS ALLEGATIONS CONTAINED IN QVC'S BRIEF	THE TRUTH
20	"The <u>only</u> document placed before the Paramount board on September 12 was a short book prepared by Lazard."	In fact, on September 12, 1993, the Board was also given: (1) a Fairness Opinion prepared by Lazard; (2) a four-page Business Overview prepared by management which summarized the strategic fit between Viacom and Paramount; (3) analysts reports on Viacom; and (4) a 179-page appendix which included high and low asset valuations of Viacom's holdings and comprehensive analyses of other mergers in the entertainment field, including Matsushita/MCA (1990), Sony/Columbia Pictures (1989), Time/Warner (1989), Turner/MGM (1985) and Murdoch/Fox (1985).
20	"The directors were not provided with copies of the merger agreement or the stock option agreement. Nor were they given written summaries of those agreements."	In fact, on September 12, 1993, the Board was given a ten-page document entitled "Proposed Merger of Paramount Communications, Inc. and Viacom, Inc. — Principal Terms of Merger Agreement, Stock Option Agreement and Voting Agreement." The material terms of the agreements were expressly set forth in this document. PEx. 9.
20	"Indeed, the Lazard book did not disclose the amount ($100 million) of the break-up fee."	In fact, the summary of the Principal Terms of the Merger Agreement contains a separate section entitled "Termination", which clearly provides that Paramount will pay Viacom $100 million if Paramount's board of directors recommends a competing transaction to its stockholders.
20	"There was nothing in writing about the lockup option . . . "	In fact, the first two items of the document entitled "Principal Terms of the Stock Option Agreement" provide unambiguously:
22	"Likewise, one critical provision of the lockup stock option—the provision allowing Viacom to pay most of the purchase price for the lockup stock option not with cash, but with a subordinated note—was apparently <u>not</u> explained to the Paramount board."	Option: Paramount will grant Viacom an option to purchase up to 19.99% of the shares of its common stock (the "Option") Exercise Price: $69.14 per share payable either in cash or <u>with a note from Viacom substantially in the form of its existing senior subordinated debt</u>.

PAGE NO.	SPECIOUS ALLEGATIONS CONTAINED IN QVC'S BRIEF	THE TRUTH
91	"No financial advisor for Paramount offered an analysis of the comparative merits of the QVC and Viacom offers."	In fact, on October 24, 1993, the Board was given: (1) two comprehensive reports prepared by Booz Allen & Hamilton indicating that a Viacom/Paramount merger would yield $3 billion more in incremental shareholder value than a QVC/Paramount merger; (2) a Smith Barney Shearson summary of the terms of the revised Viacom proposal; (3) separate summaries prepared by Lazard of the terms of Viacom's new proposal and QVC's proposal, including an analysis of QVC's debt to earnings ratio and capacity to increase its offer without violating debt covenants; and (4) a one-page summary prepared by management comparing the offer by Viacom and QVC.[1/]

1/ Attached hereto are memoranda listing the documents that were distributed at the September 12, 1993 and October 24, 1993 Paramount Board Meetings. Copies of these memoranda, as well as the referenced documents, were produced to QVC. The referenced documents have been attached as exhibits to the affidavit of Anne C. Foster, filed herewith.

Paramount Communications Inc.

To: Files

Date: 9/14/93

From: Earl H. Doppelt

Copies:

Subject: September 12, 1993 Board Meeting

The following materials were distributed to the Paramount Communications Board of Directors at the September 12, 1993 Board meeting:

1) September 12, 1993 Lazard Engagement Letter
2) September 12, 1993 Lazard Indemnity Letter
3) September 12 Lazard Fairness Opinion Letter
4) September 12, 1993 STB description of the principal terms of merger agreement, stock option agreement and voting agreement
5) Sumner M. Redstone biography
6) Four page document entitled Business Overview (prepared by Lazard)
7) September 12, 1993 Lazard Presentation Book
8) Miscellaneous Viacom analyst reports
9) September 12, 1993 draft press release

E. H. D.

HANDOUTS AT 10/24/93 PCI BOARD MEETING

Booz Allen & Hamilton Report and Summary Report - distributed by Michael Wolf

Minutes of 10/11/93 PCI board meeting -- distributed by Donald Oresman

Summary sheet of terms of Viacom merger agreement, QVC tender offer and Viacom revised proposal -- distributed by Donald Oresman

Distributed by Lazard Freres:

- Smith Barney Shearson summary of the Viacom offer
- Summary of QVC's new proposal
- Summary of Viacom's new proposal
- Overview of Viacom's *revised* new proposal

Letter to PCI board dated 10/22/93 re Macmillan -- distributed by Donald Oresman