

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

OPTIMA INTERNATIONAL OF MIAMI, INC.,
 CVI GVF (LUX) MASTER S.A.R.L.,
 EAGLEROCK MASTER FUND, LLC, and
 WILFRID AUBREY INTERNATIONAL LIMITED,

Plaintiffs,

v

WCI STEEL, INC., LEONARD M. ANTHONY,
 JACK W. SIGHTS, TIMOTHY J. BERNLOHR,
 EUGENE I. DAVIS, WILLIAM HOCEVAR,
 LAWRENCE I. McBREARTY, JAMES L.
 WAREHAM, SEVERSTAL WARREN
 ACQUISITION CORP., and OAO SEVERSTAL,

Defendants.

Civil Action
 No. 3833-VCL

- - -

Chancery Courtroom No. 12B
 New Castle County Courthouse
 500 North King Street
 Wilmington, Delaware
 Friday, June 27, 2008
 11:14 a.m.

- - -

BEFORE: HON. STEPHEN P. LAMB, Vice Chancellor.

- - -

ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION and RULING OF THE COURT

- - -

 CHANCERY COURT REPORTERS
 New Castle County Courthouse
 500 North King Street - Suite 11400
 Wilmington, Delaware 19801-3768
 (302) 255-0524

1 APPEARANCES:

2 WILLIAM M. LAFFERTY, ESQ.

3 KENNETH J. NACHBAR, ESQ.

4 SAMUEL T. HIRZEL, ESQ.

5 KARL G. RANDALL, ESQ.

6 Morris, Nichols, Arsht & Tunnell LLP

-and-

7 ROBERT C. MICHELETTO, ESQ.

8 BRONSON J. BIGELOW, ESQ.

9 of the New York Bar

10 Jones Day

11 for Plaintiff Optima International of Miami,
12 Inc.

13 MICHAEL D. GOLDMAN, ESQ.

14 Potter, Anderson & Corroon LLP

15 for Plaintiffs CVI GVF (Lux) Master S.a.r.l.,

16 EagleRock Master Fund, LP, and Wilfrid Aubrey

17 International Limited

18 GREGORY P. WILLIAMS, ESQ.

19 RUDOLF KOCH, ESQ.

20 HARRY TASHJIAN, IV, ESQ.

21 Richards, Layton & Finger, P.A.

-and-

22 JOEL G. CHEFITZ, ESQ.

23 of the Illinois Bar

24 McDermott, Will & Emery LLP

-and-

SCOTT A. FAUST, ESQ.

DENNIS J. WHITE, ESQ.

THOMAS O. BEAN, ESQ.

of the Massachusetts Bar

McDermott, Will & Emery LLP

-and-

PHILLIP A. GERACI, ESQ.

MARK A. BECKMAN, ESQ.

of the New York Bar

Kaye Scholer LLP

for Defendants WCI Steel, Inc., Leonard M.

Anthony, Jack W. Sights, Timothy J. Bernlohr,

Eugene I. Davis, William Hocesvar, Lawrence I.

McBrearty, and James L. Wareham

1 APPEARANCES: (Continued)

2 ROBERT S. SAUNDERS, ESQ.

3 RONALD N. BROWN, III, ESQ.

4 LINDA E. BEEBE, ESQ.

5 TIMOTHY S. KEARNS, ESQ.

6 Skadden, Arps, Slate, Meagher & Flom LLP
7 for Defendants Severstal Warren Acquisition
8 Corp. and OAO Severstal
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

- - -

1 THE COURT: Good morning, everyone.

2 ALL COUNSEL: Good morning.

3 THE COURT: Mr. Lafferty.

4 MR. LAFFERTY: Good morning, Your
5 Honor.

6 May it please the Court. I'm here on
7 behalf of Optima International of Miami, along with my
8 colleagues from Morris Nichols, Mr. Nachbar,
9 Mr. Hirzel, and Mr. Randall, and my co-counsel from
10 Jones Day, Mr. Micheletto and Mr. Bigelow, and a
11 representative of our client, Robert Powell, who's
12 also at counsel table.

13 I will be making the main presentation
14 on behalf of the plaintiffs here today, and I believe
15 Mr. Goldman has also reserved the right to say a few
16 words at the conclusion of my presentation.

17 THE COURT: All right. Well, let me
18 say before you get going that I recognize the urgency
19 of getting this matter decided promptly. And it is my
20 intention -- and, in fact, I wish I had another week
21 to do it, but I don't. And so it's my intention that
22 at the end of the hearing today that I will take a
23 recess and, after some period of time, I will come
24 back and I will give you my ruling in this matter from

1 the bench. And I do that so that whoever is -- ends
2 up being the losing party will have an opportunity
3 this afternoon to file an appeal, if they wish to take
4 an appeal.

5 And I have -- I should add I've
6 alerted the Supreme Court to the fact that this
7 hearing is taking place and that it's possible that an
8 emergency appeal will be filed this afternoon. And
9 once the appeal is filed, and if it happens
10 immediately, that's fine -- I will certify the matter
11 under Supreme Court Rule 42.

12 All right.

13 MR. LAFFERTY: Your Honor, thank you
14 for that. And thank you for hearing us on the -- this
15 rushed application for preliminary injunction.

16 Your Honor has the voluminous sets of
17 briefs and -- and affidavits and deposition testimony
18 and -- and affidavits of documents. And I'm not going
19 to try to reiterate all the facts that are set forth
20 in those papers or the law, for that matter, because I
21 think the law is fairly undisputed in this case.

22 But I want to try to frame the
23 issue -- address the critical issues in the case. At
24 the scheduling conference on June 17th Your Honor --

1 Your Honor zeroed in on what we submit is one of those
2 critical issues. At page 4 of Mr. Williams' letter
3 opposing expedition, the defendants stated that before
4 the April 25th bid date, Severstal reached an
5 agreement with the union for a new CBA and the union
6 agreed to provide Severstal's bid with its exclusive
7 support. And during the conference Your Honor asked
8 defendants' counsel the following question regarding
9 that statement: You said, "Do I understand that the
10 Steelworkers Union takes the position that this, what
11 might have been thought as a fairly innocuous
12 provision," which is the successorship clause in the
13 CBA, "gives it the right to enter into exclusive
14 dealing arrangements with potential bidders?"

15 Mr. Williams deferred the answer to
16 his co-counsel who initially tried to deflect it and
17 said, "I don't really understand why it matters what
18 the union thought. What matters is what the board
19 thought."

20 And Your Honor very clearly and
21 correctly said, "It bears very directly on what the
22 board of directors did here."

23 And defendants' counsel ultimately
24 conceded that, in fact, the union did take the

1 position that it had the right to dictate exclusivity
2 here, stating that the union did make it known to the
3 company, and I believe to Optima, that they were
4 pledging their exclusive support to Severstal and
5 would not support an Optima bid.

6 Your Honor ultimately listened to all
7 that and scheduled this proceeding. We moved and did
8 expedited discovery, and we've created a very good
9 record.

10 But the fact is, it's all come back
11 full circle. Your Honor was exactly right at the
12 scheduling conference. It was precisely the board's
13 torpor, if not supine response to the union's attempt
14 to hijack its auction process by improperly usurping
15 power to grant exclusivity to one favored bidder,
16 Severstal, that -- and that effect, I feel, tied the
17 board's hands behind backs in the auction and
18 ultimately tainted the process and led the board to
19 breach its Revlon duties to maximize value.

20 THE COURT: Well, but that -- you
21 know, it's with some irony you make this argument,
22 since your client sought the same exclusivity
23 arrangement with the union. But leaving that aside
24 ...

1 MR. LAFFERTY: Your Honor, that did
2 happen.

3 THE COURT: It's a fact of life. So
4 what's the legal analysis?

5 MR. LAFFERTY: Your Honor, I think the
6 legal analysis is, we start, frankly, with -- with --
7 with 141(a) and -- and that's -- it's -- again, the
8 law under 141(a) is clear. 141(a) says the business
9 and affairs are to be managed by or under the
10 direction of the board, except as provided under the
11 chapter in the charter. Here, there's no limitation
12 on board authority in the charter. And -- and -- and
13 particularly, as in Quickturn, you know, the board in
14 the area of change in control or M and A deals has
15 particular responsibility and cannot shirk that
16 oversight duty through -- and our -- our assertion
17 would be a -- a misreading or turning a blind eye to a
18 misreading of this provision in the collective
19 bargaining agreement. We submit that the board doing
20 that was a de facto abdication of their
21 responsibilities.

22 By its terms, the successorship
23 provision requires the buyer to have recognized and
24 concluded a collective bargaining agreement with the

1 union prior to closing. But from what source in that
2 collective bargaining agreement did the union derive
3 power to -- to exclude any bidder? The answer is
4 none. No rational reading of the successorship
5 provision confers upon the union the right to deal
6 exclusively with any prospective bidder, nor does
7 anything in it purport to preclude the board from
8 recommending a superior -- superior bid to its
9 shareholders. Indeed, the defendants really don't
10 dispute that point.

11 THE COURT: Well, they -- I'm sure
12 they don't dispute that they could have recommended a
13 superior bid to their shareholders. But the question
14 isn't whether they had the power to do that or not.
15 The question is what risks were attendant to doing so.

16 MR. LAFFERTY: I -- I agree with that.
17 And I intend to -- I think that is the second related
18 issue. I think there are two issues here. One is the
19 141(a) question given the board's response to what was
20 just a facially-invalid reading of the -- of the
21 successorship provision which was to not challenge the
22 union. And the second issue is as it relates to
23 Revlon and the board's what we would call the
24 risk/reward calculus. And I'm going to turn to both

1 of those.

2 The -- the union here took what was
3 modest authority under the successorship provision,
4 and they used it to wield untoward power in this
5 critical area of corporate governance. And we submit
6 that that was incorrect. Indeed, at least in part of
7 the evils in the union deeming itself the arbiter to
8 grant exclusivity is that it removed that power from
9 the board; and it necessarily meant that any bidder
10 that didn't have the support of the union would be
11 excluded. That's what the word "exclusive" means,
12 excluding or having the power to exclude others. And
13 by ceding to that, the board, in effect, we submit,
14 abandoned its duties to the stockholders.

15 The defendants, you know, themselves
16 concede that the union was opposed to Optima, that
17 Severstal got the union's exclusive support. And
18 there's really no dispute that Optima tried repeatedly
19 in good faith to negotiate with the union, and that
20 the union support had, for Severstal, had little to do
21 with the terms of this particular collective
22 bargaining agreement. And we believe it was based on
23 the fact that Optima had gotten a black mark in the
24 bidding for another related steel company, Sparrows

1 Point, because we refused to get out of the way and
2 clear the field, as -- as the documents indicate, at
3 the union's urging when they -- they favored Severstal
4 in that bidding situation as well.

5 And, you know, when Severstal received
6 its exclusivity commitment from the union with respect
7 to WCI, it pressed the advantage touting its --
8 touting that in its final -- its final bid that was
9 submitted on -- on April 25th, stating that the union
10 fully and exclusively supported the union. And as it
11 turns out, we found out in discovery that they had
12 that -- they had that exclusive support well before
13 they submitted that bid on the 25th of April.

14 In the documentary evidence we found
15 out that -- about the union and Severstal
16 collaboration going back to a -- an April 1st
17 presentation at a special committee meeting. The
18 investment bankers here gave the board a book that
19 very clearly said that Severstal received the verbal
20 confirmation from the union that it would support a
21 Severstal offer. And -- and shortly after that, when
22 the initial bids came in in early April, on the 3rd,
23 the investment banker -- Severstal was advised by a
24 representative of -- of the -- of the banker that its

1 bid was low and it was 10 to 15 percent low. And
2 within an hour after that call, after -- after Moelis
3 leaked our bid to Severstal, the union kicked into
4 high gear.

5 What did they do? Bloom sends an
6 e-mail to various Severstal executives that says, "We
7 are getting a lot of pressure from WCI to make our
8 deal with Optima and move forward [and] to allow them
9 to buy the company.

10 "We would obviously rather do it with
11 you ..." they said. "... we will find it ... hard to
12 hold them off beyond the end of the week." And that's
13 at Exhibit 37 to the Randall affidavit.

14 And in the weeks leading up to
15 Severstal's formal declaration of exclusivity on the
16 25th of April, we thought we were negotiating in good
17 faith with the union towards getting a collective
18 bargaining agreement. But we found out that it was
19 all a ruse. An internal e-mail -- in an internal
20 e-mail to Mr. Anthony, the investment banker for the
21 special committee, noted that Bloom, from the union,
22 "appears to be 'staging' the timing of his responses
23 to help Severstal naturally catch up." It's exactly
24 what went on here. The union behind the scenes

1 co-opted this process. That's at Exhibit 41.

2 But if the fiduciary duties are to
3 have any meaning here, when the union unilaterally
4 ended the auction process before it even seriously
5 began by its formal declaration on the 25th of April,
6 the directors should have insisted that the union
7 retract this exclusive dealing arrangement, but they
8 didn't. The board was supine. And instead of
9 standing up to the union, the evidence shows that the
10 board meekly acquiesced to the union's claimed power
11 grab. Remarkably, the record -- record indicates that
12 no one from WCI ever challenged the purported right to
13 exclusivity. And defendants, indeed, according to
14 their own brief, accepted this as a "simple
15 recognition of facts."

16 The board could have done a number of
17 things. It could have challenged it. Could have --
18 could have stood up to them, could have demanded an
19 opinion of counsel, could have gone to court, could
20 have instituted -- could have instituted an
21 arbitration proceeding. It -- it -- it just didn't
22 stand up at all and take a position with the union on
23 this point. And there's no record on that at all
24 here.

1 And the chain of events that came
2 thereafter is clear. After tying their hands behind
3 their back, given their -- their -- their -- you know,
4 ceding to the union's reading of this provision in
5 breach of their duties under Revlon, the directors ran
6 a flawed auction process in which they leaked our bids
7 to Severstal on several occasions to persuade
8 Severstal to go up so that they would narrow the gap
9 to the -- to the narrowest amount possible, and then
10 they turned a blind eye to Optima and our indication
11 that we were willing to raise our bid.

12 Now, we, after learning on
13 April 25th that -- that they had this exclusive
14 dealing arrangement, we decided not to bid. So what
15 do they do? They come to us and they say "Please,
16 please. Come" -- "stay in the game. Submit a
17 blockbuster bid and we'll go toe to toe. Submit a
18 blockbuster bid." They told us, "Come in at 150 and
19 we're going to go toe to toe and we're going to go" --
20 you know, "we're going to go at it with the union."

21 We do that. We naively maybe do that.

22 THE COURT: And what does your bid say
23 about the union when you come back with your 150 bid?

24 MR. LAFFERTY: Well, Your Honor, I

1 don't have it -- the language handy, but we
2 basically -- when we came back with the 150, we said
3 we're prepared to negotiate and to try to come to an
4 agreement with the union. Obviously we didn't have
5 one at that point.

6 THE COURT: Right. Well, your bid was
7 conditioned upon getting an agreement with the union,
8 wasn't it?

9 MR. LAFFERTY: Your Honor, I'd have to
10 get the exact -- the exact language of it; but I
11 believe the answer is probably yes. I -- I don't know
12 whether it was a condition as much as it was we said
13 we were going to do it, because in their bid
14 procedures letter, they specifically asked for, you
15 know, a statement about how they would deal with the
16 union. I don't know whether -- to say it was a
17 condition, I'm not a hundred percent sure.

18 THE COURT: And in that did you take
19 responsibility for securing the approval of the union?

20 MR. LAFFERTY: Did we take --

21 THE COURT: Which exhibit is it?
22 We'll just briefly look it.

23 MR. LAFFERTY: Maybe someone will help
24 me find it.

1 It is Exhibit Tab 58 to the Randall
2 affidavit. It's a May 1st letter.

3 And what it says is -- it's paragraph
4 8 on page 2. "We have had significant discussions
5 with the United Steelworkers Union ... regarding the
6 negotiation of the labor agreements and have devoted
7 substantial resources to agreeing to terms. In
8 consideration of your agreement with Section 9 below,
9 we will seek to resume our discussions with USW and
10 will be prepared to continue to devote substantial
11 resources to agreeing to terms."

12 THE COURT: And what did you do
13 thereafter about that?

14 MR. LAFFERTY: I believe the record
15 shows that we did try to contact the union to engage
16 in discussions again, but we were basically shut out.
17 They didn't -- they didn't engage us at all at that
18 point because they had already -- they had already
19 given their support to Severstal.

20 Now, the -- the evidence that the
21 defendants cite -- or the sole evidence, I should say,
22 is that -- that -- or their effort to get -- in their
23 answering brief they say that they were working to get
24 the union back to the table is a single e-mail which

1 reports that they had told the union that they could
2 not proceed with the Severstal proposal because of
3 their duty to shareholders. And we submit that's --
4 that's really -- that's a truism. It's not really a
5 threat. It's not really taking action. It's not
6 going toe to toe as they promised to do. This
7 statement we believe was more a signal to Severstal
8 and the union that Severstal's bid had to come up. It
9 had to get close enough to Optima's bid to make it
10 respectful so that the board could save face and get
11 out of this process in a way -- and that the
12 shareholders may actually -- may actually approve.

13 Perhaps more tellingly, on the day
14 that they received Optima's blockbuster bid, WCI
15 didn't contact the union, despite its promise to go
16 toe to toe. Instead, it contacted Severstal in an
17 attempt to -- and this is from their brief at page
18 16 -- "to use Optima's higher proposal to extract a
19 better price."

20 And an internal Severstal e-mail on
21 May 1 recounts a conversation in which Mr. Anthony,
22 the CEO of WCI, in which Severstal raised its bid by
23 \$25 million. At that point the state of play was we
24 were at 150, they were at 101, Severstal was at 101.

1 And they raised its bid by \$25 million to
2 \$126 million. It says, "We talked to Len Anthony ...
3 told him 126 [million], no go shop, 51 percent
4 commitment from 2 largest holders, lower offer if
5 shopped. He said slightly low but thought he could
6 sell it, take" -- "[talking] to ... special committee
7 in the am, not talking to [the] bankers ahead of time
8 ..." and "we agreed to do [the] same ..." That's
9 Exhibit 61.

10 And whether or not Severstal was given
11 Optima's precise figure on that day is -- is, frankly,
12 immaterial, although we do believe it happened, and we
13 believe it happened on other occasions, examples at
14 Exhibit 39 in the Randall affidavit.

15 But ultimately we know that they went
16 to Severstal with our \$150 million bid a week later
17 and said, "You got to bid 150. You got to bid 150 and
18 we can end the process."

19 And -- and what was the reaction of
20 Severstal to that? Was "Why? Why would we bid 150?
21 Why would we ever go" -- at that point they had
22 incremented up to 136. "Why would we go above 136?
23 We have exclusive union support. It's take it or
24 leave it." That was the reaction they got. And

1 that's how they used the exclusivity arrangement as a
2 club with these guys, with the WCI board.

3 Now, we believe that once -- once --
4 once it was in the wood with this exclusivity
5 arrangement, what -- what the board tried to do was,
6 they tried to get Severstal to an acceptable price.
7 And I think this is vividly, vividly indicated in the
8 testimony from WCI's investment banker, Mr. Henkels
9 from Moelis. Moelis never asked Optima to increase
10 its \$150 million bid, even though Optima had informed
11 Moelis that it might be willing to do so. That's at
12 66. Moelis never told Optima that Severstal at WCI's
13 urging raised its bid several times. They didn't call
14 us up and say, "Hey, you know, the other bidder is
15 getting close. You might want to think about making a
16 preemptive." They didn't do that.

17 And even after receiving our
18 May 15th letter in which we said that we'd be willing
19 to raise significantly, Moelis didn't contact us to
20 find out what our higher bid might be.

21 THE COURT: All right. Well, by
22 May 15th -- we need to sort of go through these things
23 sequentially. But on May 14, as I understand the
24 record, the board of directors of WSI approved or

1 authorized a merger agreement at \$136 million; is
2 that -- am I correct?

3 MR. LAFFERTY: They approved the form
4 of the merger agreement, but the merger agreement was
5 not signed, that is correct.

6 THE COURT: It wasn't signed by whom?

7 MR. LAFFERTY: Either -- I don't
8 believe by -- it wasn't executed by either party,
9 as -- as far as I'm aware.

10 THE COURT: Do you know why?

11 MR. LAFFERTY: Well, I -- I believe by
12 the -- because they didn't have the consents. What --
13 what I understand the record to be -- and I'd have to
14 garner the actual cites -- was that one of the two
15 stockholders that they went to was -- had problems and
16 was either not going to sign a consent or was holding
17 out or wanted changes to the form of the consent and
18 may have been a combination of things. So they didn't
19 have the consents in hand.

20 THE COURT: Why wouldn't they -- if
21 the board authorized the management to sign the merger
22 agreement, why wouldn't they sign it?

23 MR. LAFFERTY: Again, I think there
24 was just some fluidity in the situation with the

1 documentary record and they didn't have -- they didn't
2 have -- they didn't have the votes. So they sat on
3 it. And then they got word of our letter.

4 THE COURT: They got word of your
5 letter, as I understand things, anyway, they got it
6 sometime before they met on the morning of the 16th.

7 MR. LAFFERTY: Correct. Correct.
8 Correct.

9 THE COURT: And when they got word of
10 your letter, they used it to extract an increase in
11 price from -- from Severstal; is that right?

12 MR. LAFFERTY: They -- they did use it
13 to extract an increase for an additional \$4 million.
14 And what they swapped out, what they gave them was a
15 choice. They said, "Get rid of the 24-hour written
16 consent period in favor of a duly-noted stockholder
17 meeting," which would be, you know, 20 days at least
18 hence, "or increase your price." And they said,
19 "There's no way we're giving it up" -- "giving up
20 24-hour approval. In fact, not only do we want not 24
21 hours, we want immediate approval."

22 And that's what they got. For
23 4 million bucks the board traded whatever window of a
24 fiduciary out they would have had, and they -- and --

1 and totally locked up. The deal was done.

2 THE COURT: So an unusual feature of
3 this case is that for whatever reason -- and I'll ask
4 you and perhaps I'll ask the other side -- this
5 company was in a position to act by written consent,
6 or its stockholders were, anyway, to authorize a
7 merger agreement without a meeting.

8 MR. LAFFERTY: That's correct.

9 THE COURT: Now, is there -- it sort
10 of rings I suppose -- somehow it rings the Uni -- or
11 Omnicare bell when you put together authorization by
12 the board with a commitment to get shareholder
13 approval like that. Is that -- what's your argument
14 on that score?

15 MR. LAFFERTY: Your Honor, I -- I do
16 think it's -- it's two things. It does -- I -- it
17 does have an Omnicare problem, because what I
18 understand Omnicare to be is, the board needs to have
19 an effective fiduciary out. And, you know, what the
20 board did here was, they -- you know, having already
21 run a flawed auction process, having not contacted us
22 to see what our highest bid would be --

23 THE COURT: All right.

24 MR. LAFFERTY: -- they then shut it

1 down.

2 THE COURT: That happened on the
3 morning of the 16th; right?

4 MR. LAFFERTY: I understand. But they
5 had enough time to call Severstal to increase. Why
6 wouldn't they pick up the phone and call us?

7 THE COURT: Well, I'm going to ask
8 them that question; but you're not contending, are
9 you, that the board exceeded its lawful authority, as
10 was found to be true in Omnicare, by agreeing to
11 authorize a merger on the condition that it secure
12 written consents from a majority of its shareholders
13 immediately thereafter as a condition? If they
14 couldn't get the majority of consents, I guess they
15 would be terminable by the other side. Is that -- is
16 that --

17 MR. LAFFERTY: No. We're not saying
18 that you could never do that. We are saying that
19 under the facts of this case, you could not do it. So
20 we're not saying that was -- it's per se wrong to
21 approve a merger agreement in this context by written
22 consent; but we are saying that under the facts of
23 this case, it was a breach of fiduciary duty for the
24 board to do so. That's our position.

1 THE COURT: Even though -- I mean, it
2 really -- is it really a breach by them to have done
3 that -- do they have to have known when they did that
4 that a majority of shareholders would, in fact, vote
5 in favor of it immediately afterward? And if you know
6 that, I mean, if that's your state of knowledge, that
7 you know that at least 50 percent of your shares are
8 going to be voted in favor of this transaction
9 immediately thereafter, in what sense can it be a
10 breach of your fiduciary duty to authorize the
11 transaction without -- without -- without -- without
12 some window shopping or, you know, fiduciary out
13 period afterward?

14 MR. LAFFERTY: One is, I don't know
15 what the board knew about whether they would or would
16 not get consents. I mean, I think we -- we -- again,
17 whether we have a record on it or not, I believe they
18 at least knew that Harbinger was going to approve.
19 Whether they knew on the 16th for sure whether UBS
20 would do it --

21 THE COURT: Was UBS deposed?

22 MR. LAFFERTY: They were not, no, Your
23 Honor. We -- obviously, we had basically three
24 days --

1 THE COURT: You had a lot to do.

2 MR. LAFFERTY: No; I understand. I
3 understand. It's -- there is a limited record in
4 terms of what -- what was put together. No one from
5 the union, for example, was deposed here. There are a
6 lot of other depositions that -- that could have --
7 could have certainly been taken if we, you know, had a
8 slight more time. And that's not -- not anyone's
9 fault.

10 THE COURT: No, no. I understand.
11 But, I mean, look, there are only two shareholders who
12 acted to authorize this transaction and you haven't
13 deposed one of them. So we don't know anything about
14 UBS's involvement in this transaction.

15 MR. LAFFERTY: But, I mean, I guess
16 our take is -- and -- and it's like Omnicare, it's
17 like what I call the -- I guess it's the ARCO case,
18 McMullen versus Beran. (Continuing) -- it's not
19 unprecedented for a court to set aside the will of a
20 majority of the shares in a circumstance like this
21 where the agreement that they're agreeing to resulted
22 from a breach of fiduciary duty of the board. And
23 that's -- that's basically our -- our position.

24 THE COURT: Well, I was just trying to

1 figure out which breach you're talking about. And you
2 did, I think -- you're making an argument that given
3 the way this transaction -- this auction was
4 conducted, that it was a breach of fiduciary duty at
5 least --

6 MR. LAFFERTY: At least.

7 THE COURT: -- a Revlon breach for the
8 board to have acted to authorize a form of merger
9 agreement which contemplated the briefest of fiduciary
10 outs and was dependent essentially on its immediate
11 authorization by the shareholders.

12 MR. LAFFERTY: That's -- that is
13 correct.

14 The -- just going back to sort of -- a
15 little bit of chronology in here. But it -- it's --
16 the Moelis testimony was really -- you know, it was
17 really rather stunning. I mean, Mr. Henkels said that
18 very clearly -- there were a couple things. One was,
19 it was a question of narrowing the gap. It wasn't
20 maximizing value. It was narrowing the gap.

21 He also said that it was a -- and I
22 want to get his exact words --

23 THE COURT: But why isn't that
24 maximizing value? If you only have one bidder who,

1 without some extraordinary effort on your part or
2 somebody else's part, if you only have one bidder
3 who's got the blessing of the union -- well, you get
4 that bidder to the highest level that bidder is
5 prepared to go, why isn't that value-maximizing
6 activity?

7 MR. LAFFERTY: Well, one, because we
8 were out there and we had an offer on the table that
9 was already \$10 million higher and we had already told
10 the board we were prepared to significantly raise.

11 THE COURT: Well, that -- look, your
12 best and final offer that you reiterated on the 14th,
13 I think, and maybe even on the 15th, was conditioned
14 on union approval which you didn't have.

15 MR. LAFFERTY: But -- but, Your
16 Honor -- and that's precisely the evil that we started
17 with with the board's position vis-a-vis the union
18 and -- and Severstal's position vis-a-vis the
19 exclusivity.

20 Your Honor, I mean, basically what --
21 what I think is comes down to was, when the board --
22 and, again, the fact is, they -- they never once from
23 April -- or from May 1st through the time they
24 approved the deal on the 16th, called us and said,

1 "You know, come on. Give us your best number."
2 And -- and this is why I want to get the testimony
3 from Moelis. It's very -- very important.

4 What -- what they said was that it was
5 a risk/reward equation, and what they said is precise
6 testimony from page 60, "Is there a number which would
7 greatly exceed where they currently are and where the
8 other bidder is which would allow us either to
9 negotiate up the other bid or take the risk?"

10 But critically neither Moelis or the
11 board ever took out steps to find out one of the
12 critical factual inputs into that risk/reward
13 calculus. How high were we willing to go? They
14 simply had no reasonable -- they had no -- there can
15 be no reasonable assessment without information, and
16 the directors never apprised themselves of this
17 important, and maybe the most important factor, which
18 was how high would we -- what price would we pay.

19 Now, they say they had a sound basis
20 to -- to believe that they secured the best deal; but
21 when you don't pick up and phone and ask, how can you
22 make that decision? It's a balancing. It's almost
23 like if you put it on the scales, you've got Severstal
24 over here with union support. That's way down.

1 What's going to balance it out? What's going to tip
2 the scale? Was it going to be 150? Apparently not.
3 Was it 172 that we came in with on the 16th? Could it
4 be higher? We're never going to know. They never
5 asked the question.

6 And -- and it's illustrated in the
7 board's reaction when they find out about it on the
8 16th. Mr. Davis and Mr. McBrearty, two special
9 committee members, testified their first reaction was
10 "Let's sue them. They breached the standstill
11 provision" -- "in the" -- "in their confidentiality
12 agreement." And very vivid testimony from Mr. Davis.
13 He said he reacted -- he thought -- he viewed it with
14 anger and disgust. And one of the advisors for the
15 company, you know, a lawyer, once when he was
16 forwarding on the materials, said, "It gets worse."

17 I mean, that's not -- that's not a
18 board that's -- that's -- that's fulfilling its Revlon
19 obligations to get the best price. At that point they
20 should have been happy to have received the bid.
21 Instead, they buried their hands in the sand and they
22 looked the other way and they approved the deal,
23 immediate approval of the deal with Severstal.

24 THE COURT: Can you talk to me about,

1 sort of, the alternative deal structure idea, sort of,
2 that -- you must have got -- you got to a point
3 sometime in the beginning of May, after making your
4 \$150 million bid and after having discussion with the
5 union -- with union representatives that eventually
6 went nowhere, that at some point in there you got to
7 the point of saying, "Oh, we'll do a transaction that
8 doesn't require" -- "that isn't covered by the CBA."
9 I mean, it's an area that I don't -- I've had trouble
10 getting a whole lot out of.

11 MR. LAFFERTY: And, Your Honor,
12 what -- what we had proposed -- and there was
13 discussion, I think, from the other side of a more
14 complicated structure. We had proposed an offer
15 directly to the stockholders. And -- and we believed,
16 because neither the stockholders or Optima are parties
17 to the collective bargaining agreement, that it didn't
18 conflict the successorship provision at all.

19 THE COURT: And you believe that.
20 Now, what's -- so you mean just make a tender offer,
21 basically.

22 MR. LAFFERTY: Correct. And we were
23 prepared to buy a hundred percent. And -- and -- and,
24 again, we -- we got back from them about --

1 THE COURT: How far down the road did
2 you get in discussions with the company or its bankers
3 about --

4 MR. LAFFERTY: Not -- not very.

5 THE COURT: -- or its lawyers about
6 whether there was an available structure that somebody
7 felt would actually work under the CBA.

8 MR. LAFFERTY: Not -- not very far. I
9 mean, we had a meeting with them on the 7th, I think,
10 by telephone. Various people attended. And there was
11 discussion about it at that meeting. They proposed
12 another structure that involved us buying up the
13 49 percent with a put right and other things.

14 And our response to that was "Why?"
15 Why would we do -- I mean, why would we -- it was just
16 a very convoluted structure. We said, "Let us make an
17 offer. Release us from the standstill and let us make
18 an offer."

19 And the response ultimately was, you
20 know, "We think that might conflict issues under the
21 collective bargaining agreement, such as if we made an
22 agreement with you to release you from your
23 standstill."

24 I think they thought that somehow

1 would be a violation.

2 Now, how they -- they never explained
3 how under any reasonable reading of the CBA that that
4 could be the case.

5 THE COURT: Well, look, the question
6 is how much risk is associated with that kind of --
7 with -- with pursuing a course of conduct like that
8 and with the likelihood that somebody is going to sue
9 you, claiming that it is a violation of the CBA
10 agreement. I mean -- CBA. I guess that's what's
11 going on, isn't it?

12 MR. LAFFERTY: I believe that's the
13 defendants' position, that there's always a risk that
14 somebody could sue you.

15 Again, we don't think it's
16 particularly defensible; but, again, you know, they --
17 they've -- they've taken a different view, and we
18 believe they should have stood up on this point and
19 had -- and should have been heard.

20 THE COURT: Well, is it -- is it
21 part -- is it really part of the basis of your
22 application today, this area that I just raised, or is
23 it more of a side -- side issue?

24 MR. LAFFERTY: Well, I think it -- I

1 think it is part of the application because,
2 obviously, it does bear, also, on the relief we seek
3 because we are seeking to be officially released from
4 the standstill. We are -- we did request to be
5 released.

6 There seems to be some factual
7 disconnect on whether or not we made a request on --
8 on the 7th of May. But at least -- at least -- I'm
9 not sure if my friends dispute that or not. Their
10 papers questioned whether or not that happened. They
11 suggest that the only request was made on the
12 16th when we made our -- our \$172 million bid.

13 But the fact is, we believe the
14 request was made. They -- they didn't accede to it.
15 They didn't agree to it. We don't believe the
16 standstill is serving any legitimate purpose at this
17 point, because we're prepared to buy all the shares
18 for a much higher price, and we would -- and so it
19 does bear -- it also goes, I believe, to the issue of
20 irreparable injury and the balance of -- I guess more
21 to the balance of harms, which is, they say, you know,
22 they're the only game in town. And we say "That's not
23 true. You got a \$32 million offer that factors into."

24 And we're -- we've reaffirmed it again

1 yesterday in a reply affidavit from Mr. Korf, from my
2 client, that we're willing to buy a hundred percent at
3 the 172 number. We also are willing to provide
4 interim financing for the company, which, again, a
5 subject that we -- we say was discussed previously, or
6 at least that we offered in a general sense, to which
7 they never came back to us after the May 7th meeting
8 and said, "Well, what do you mean? Could we" --
9 "could we flesh it out? Could we get some details?"

10 Again, had they picked up the phone
11 and called us in that period, we would have talked to
12 them about it.

13 They've also, you know -- you know,
14 sort of -- I am, I guess, jumping ahead to this
15 balancing point. They also put in an affidavit from
16 Mr. Anthony. They -- they claim, you know, "We're
17 going to go out of business if we don't do this
18 business by" -- "by the ..."

19 We believe that's way overstated, and
20 we pointed all -- all the reasons out in the reply
21 brief that we filed yesterday.

22 Importantly, one of the things that
23 Mr. Anthony says was that they made a request for some
24 additional funding under a credit agreement that

1 they -- that they had just amended in April so that
2 they could get a clean audit opinion. And they made
3 this funding request and speculates in there about how
4 the lenders may not -- may not fund and, therefore,
5 "If we don't get that money, we may go out of
6 business."

7 Well, I'm told -- and we said in our
8 papers yesterday -- that at least the plaintiff
9 shareholders have agreed or will agree to -- to fund
10 that commitment. And even if they won't, Optima's
11 prepared to do so as set forth on the terms -- for
12 the -- you know -- on the basis set forth in the Korf
13 affidavit.

14 So, you know, we believe that the
15 balance of hardships here tips decidedly in favor of
16 our side on the injunction application.

17 Your Honor, I -- I think I'll stand on
18 the points -- I mean, I could touch on the other
19 factors, irreparable injury. Again, we think it's --
20 it's obvious here that the shareholders are being
21 harmed for reasons that they're never going to know
22 how high this bidding could have gone. The board
23 didn't do its job.

24 My friends say money damages,

1 appraisal remedy. You know, that's just not -- that's
2 not acceptable. And if that were the rule, that the
3 Court, you know, finds that money damages would be
4 adequate in every one of these bidder situations, then
5 we would never have had an injunction in these cases.
6 And certainly cases like Revlon, Mills, Holly Farms,
7 Omnicare, Topps, you know, it just is not the law here
8 that -- that -- that money damages is going to suffice
9 in this instance.

10 And as to my client, Optima, you know,
11 Your Honor, if we lose this, we're going to lose an
12 opportunity at a -- at a -- at a unique -- unique
13 acquisition and to a competitor of ours. And I
14 believe that the Delaware case law is very clear on
15 that, that that is irreparable harm in this context.

16 There are a number of other issues
17 that my colleagues raise in terms of other defenses.
18 And I guess I'm prepared to address some of the others
19 if Your Honor wants to hear about laches and
20 preemption and ratification. I don't know whether
21 Your Honor has particular questions on those --

22 THE COURT: Well --

23 MR. LAFFERTY: -- those items.

24 THE COURT: -- I do have a question

1 that I suppose relates to the ratification issue.

2 MR. LAFFERTY: Sure.

3 THE COURT: Are there other cases that
4 you're aware of -- and I have to say I haven't done
5 thorough research, but I'm not aware of a case in
6 which a court enters a preliminary injunction -- in
7 which this Court has preliminarily enjoined a
8 transaction that has already been authorized by the
9 shareholders on a Revlon basis.

10 MR. LAFFERTY: Your Honor, I -- I'd
11 have to go back and -- and -- you know, I believe, I
12 guess, Omnicare was a voting agreement. So at that
13 point I'm not sure whether the vote had happened in
14 that case.

15 THE COURT: It had not happened.

16 MR. LAFFERTY: And I don't remember
17 whether in McMullen versus Beran, some of the timing
18 aspects. Again, Your Honor, I'm not sure. And as I
19 stand here, I'm not aware of a case directly on point.
20 But I -- I would submit that --

21 THE COURT: All right. That's that
22 question. But does it make a difference?

23 MR. LAFFERTY: It doesn't make a
24 difference, Your Honor, I would submit, in terms of --

1 this ratification notion here is, one, I would say, as
2 a factual matter -- and -- and it's a point that we
3 raised in our opening brief that my colleagues don't
4 even address in their answering brief, was -- and we
5 put it in -- in the record --

6 THE COURT: But what's your burden in
7 this proceeding? Tell me if I'm wrong. I understand
8 that the burden in a Revlon sort of analysis is -- I
9 mean, you're the moving party. So you have a burden
10 of -- of producing evidence. And what you basically
11 have to produce here is enough to raise -- to convince
12 me there's a reasonable probability that the
13 defendants will be unable to satisfy their burden if
14 we went to trial --

15 MR. LAFFERTY: I --

16 THE COURT: -- burden on the Revlon
17 claim or their burden on a defense.

18 Now, what is there in the record that
19 would lead me to believe that based on what's before
20 me they will be unable to satisfy their burden on the
21 ratification defense?

22 MR. LAFFERTY: I think there are at
23 least five reasons, Your Honor. And -- and let me
24 start with what I had as No. 5 first, because as a

1 factual matter, the forms of written consent that my
2 friends on the other side drafted originally said --
3 it had a provision that said "We hereby ratify all
4 actions taken by the directors prior to approval of
5 the merger," yada, yada. And that was stricken out of
6 the consents that were actually signed in this case.

7 So we believe as a factual matter,
8 there is no evidence -- certainly -- and certainly
9 there's no evidence on this record that the
10 stockholders who actually signed those consents had
11 the intent to ratify the board's conduct. That's
12 Point 1.

13 Point 2, we believe that -- that our
14 allegations here go to their issues of violations of
15 substantive law, 141(a), and the duties of loyalty and
16 good faith, not just the duty of care. So we would
17 say these issues aren't ratifiable.

18 Second -- I mean third, I would urge
19 Your Honor to read the Santa Fe case where the Court
20 rejected a ratification defense to certain Revlon and
21 Unocal claims based upon a shareholder vote on a
22 merger because the Santa Fe shareholders did not vote
23 in favor of the precise measures under challenge in
24 the complaint because the defensive measures had

1 allegedly already worked their effect before the
2 shareholders had a chance to vote in that the
3 shareholder not merely offered a choice between in
4 that case the Burlington merger or doing nothing. And
5 we submit the same is true here. The defendants'
6 actions had already worked their effect before the
7 shareholders had voted.

8 And I guess, lastly, I would say, you
9 know, on this issue of burden, certainly we as the
10 moving party have a burden of coming forward; but
11 ratification is certainly a defense that they would
12 have the burden of proof on if this case proceeds
13 beyond this point. They would have the burden to show
14 that it was uncoerced, fully informed, disinterested.

15 And this isn't a case where -- it's
16 not a public company setting where my friends are
17 relying on a public proxy statement or other
18 disclosure document that -- that contains what they're
19 saying -- the disclosures on which they're relying.
20 What they're saying is, "Well, we" -- "we talked to
21 them here. We had a meeting there. We gave them some
22 information. We don't really know."

23 I mean, again, on this record we
24 haven't taken Harbinger or UBS's deposition. They

1 haven't put in affidavits. But on this record, they
2 have not -- they have not sustained their burden of --
3 of establishing any -- any ratification. Certainly
4 not at this stage of the proceeding.

5 Your Honor, I guess I -- you know,
6 I -- there was one other point. I know my -- my
7 colleagues from Severstal's counsel had put in a
8 letter about -- with a contract rights argument, what
9 I call the vested contracts right argument, which is
10 -- it's an argument near and dear to my heart because
11 I lost it in the QVC case a number of years ago.

12 THE COURT: Well, I'm sure you've won
13 it in other cases, Mr. Lafferty, so ...

14 MR. LAFFERTY: It -- let -- let me
15 briefly touch on why that that argument -- it -- it
16 doesn't fly here. I mean, in -- in QVC, the Court
17 said that "a contract or provision thereof that
18 purports to require a board to act or not act in such
19 a fashion as to limit the exercise of fiduciary duties
20 is invalid and unenforceable."

21 And my friends, my Severstal friends
22 say that they admitted it can't enforce rights if it
23 knew that the board had breached its duties, but it
24 asserts there's no evidence that Severstal knew the

1 board was allowing to dictate -- the union dictate the
2 winning bidder. And I believe that is demonstrably
3 false.

4 Here, Severstal knew that it had the
5 exclusive support and, I mean, it's all in the record.
6 I've already cited the April 25th letter and
7 everything that came before it and thereafter it. But
8 Severstal used this as a club. And -- and their
9 understanding of this provision is not directly
10 relevant to the outcome, but I think it does color
11 this notion that somehow they're an innocent party.

12 What Mr. Mason said in his deposition
13 was that, "My understanding of the successorship
14 clause is that the union has the right of approval of
15 [a] successor ... at the time of the change in
16 control." And that's at Mason-17. And I asked the
17 question after and Mr. Mason basically tried to take
18 back that testimony.

19 But it's clear, if Your Honor goes to
20 the April 25th letter again, which -- which is
21 Exhibit 45, at paragraph 7 -- it's right before the
22 language, the sentence that talks about the full and
23 exclusive support. It says that Severstal
24 understood -- this is quote, "that the Company's [CBA]

1 with the USW contains a successorship clause requiring
2 the approval of the USW to any change of control
3 transaction involving the Company."

4 That's what they thought. They put it
5 right in their letter. And they deliberately use the
6 exclusive dealing arrangement as a club to pressure
7 the defendants into accepting a bid and by initiating
8 the board's fiduciary out by requiring immediate
9 shareholder approval even though they knew at that
10 point that they were the low bidder.

11 For example, on the 9th of May when
12 Moelis again went back and asked for the 150, Mason
13 rejected it. And he said "... [there's] no reason for
14 Severstal to bid above 136 ... because he [had]
15 exclusive union support and that the value is 'take it
16 or leave it.'" And that's at Exhibit 69.

17 And interestingly, Severstal also, we
18 believe, employed the union to help with WCI's board.
19 On May 3rd, as set forth in a Severstal e-mail, the
20 union called WCI to tell them to "stop screwing
21 around" and take Severstal's offer or Severstal is
22 lowering the bid. That's at Exhibit 64.

23 And it's very, very interesting that
24 the response to that from Severstal's investment

1 bankers, that internal e-mail got copied to the two
2 investment bankers working with them. And the first
3 one says, "Thank you for the update. The USW is a
4 resolute partner." That's at Exhibit 65.

5 The other investment banker responds
6 by saying "That is the correct strategy. Stay
7 lockstep with the USW and you will win at your price."
8 Exhibit 110.

9 That same night, Anthony reports in an
10 e-mail that Severstal "[assured] me [that there's] no
11 more price movement - as guided by the [union]."
12 That's at Exhibit 66.

13 And when the deal is finally done,
14 there's an e-mail exchange between Severstal, I
15 believe it was Mr. Nock and Mr. Bloom at the union,
16 Mr. Nock says, he says, "two down and one to go," an
17 obvious reference to the fact that they had just
18 acquired Sparrows Point, now had an agreement for WCI
19 and that they were also seeking to acquire Esmark.
20 Bloom responds "Indeed, indeed."

21 Your Honor, I don't believe that that
22 argument has any merit, and I think it ought to be
23 rejected.

24 We would ask the Court to enter the

1 preliminary injunction that we seek.

2 I'd be happy to answer any other
3 questions Your Honor has.

4 THE COURT: I have nothing right now,
5 Mr. Lafferty. Thank you.

6 Mr. Goldman.

7 MR. GOLDMAN: Just a few comments.

8 Your Honor asked a question about this
9 idea that the offer would be taken directly to the
10 stockholders and, therefore, take the union out of the
11 picture and how that played into the application
12 today. And I submit that that's one of the most
13 significant parts of the application, because before
14 the board voted on the deal, they received a copy of
15 this offering letter, which is Exhibit 79, which was
16 to the stockholders; but they got the offering letter.

17 And it says on page 2, "We would be
18 willing to make an offer, at a purchase price at least
19 as good as our current superior proposal to WCI, to
20 all of WCI's shareholders directly to purchase their
21 shares in WCI in the hope of acquiring 100%, but no
22 less than 51% of the outstanding equity interests of
23 WCI. Because neither WCI's shareholders nor Optima
24 are parties to the collective bargaining agreement,

1 USW support for such a transaction is unnecessary."

2 So when they -- when the board voted
3 to take the lower offer, they knew that all they had
4 to do was to release Optima from the standstill and
5 the stockholders could get \$32 million more, at least.
6 And they knew, yeah, the union was the big bad boy --

7 THE COURT: Well, wait. Let's back up
8 a second. This letter is dated May 15th?

9 MR. GOLDMAN: Yes.

10 THE COURT: \$32 million doesn't
11 materialize until later.

12 MR. GOLDMAN: All right. I'm sorry.
13 The higher offer. The higher offer.

14 THE COURT: The 150 plus maybe some
15 more.

16 MR. GOLDMAN: Plus maybe some more.

17 THE COURT: And, secondly, because
18 this sentence appears in -- at the end of paragraph
19 No. 4 in this letter, does that establish the fact
20 that such a transaction could go forward without USW
21 support? It's just a statement of opinion by Optima,
22 isn't it?

23 MR. GOLDMAN: Right, but they would
24 go --

1 THE COURT: Did the company's labor
2 lawyer think that was true?

3 MR. GOLDMAN: Well, I don't know what
4 Optima's -- oh, Optima's lawyer?

5 THE COURT: No. WCI's.

6 MR. GOLDMAN: I don't know what they
7 thought but --

8 THE COURT: Okay.

9 MR. GOLDMAN: -- the bottom line is --

10 THE COURT: They got a lot of advice
11 from Mr. Faust, didn't they?

12 MR. GOLDMAN: They did. But the
13 bottom line is, the risk is not on them anymore. The
14 risk is on Optima. Optima eats the union. Optima
15 takes the risk. If anything -- in other words,
16 they'll say "Stockholders, I'll buy your stock" --
17 they're just buying their stock; that's all they're
18 doing. And if there's any problem doing the merger,
19 if the union jumps in, it's Optima that fights the
20 union. That's the difference.

21 THE COURT: They don't have
22 preliminary injunction applications in that
23 connection?

24 MR. GOLDMAN: To buy the stock? They

1 could file it. They're not going to win.

2 THE COURT: Why? Why not?

3 MR. GOLDMAN: Why would they win? The
4 union can only block --

5 THE COURT: Well --

6 MR. GOLDMAN: -- a merger. As I
7 understand it, the union can block a merger. They
8 can't --

9 THE COURT: Now you're giving me
10 advice about what the collective bargaining agreement
11 means.

12 MR. GOLDMAN: I'm only saying what my
13 understanding is, you're right. I'm not a labor
14 lawyer. I'm not their labor lawyer. I don't know
15 what their labor lawyer told them. All I'm saying is,
16 there was a way out of this problem.

17 THE COURT: Well, you're saying there
18 was, but you don't -- you don't know. You're saying
19 there was a possibility. All right. There was a
20 possibility. I wanted to understand what negotiations
21 took place between WCI and Optima on the possibility
22 of structuring a transaction in such a way that it
23 could be done without implicating the collective
24 bargaining agreement provision.

1 MR. GOLDMAN: Good point. So on the
2 date of the meeting why didn't they pick up the phone
3 and talk to them? Why didn't the labor lawyer get on
4 the phone and say "You can't do this. You can do
5 this"? They didn't do anything. They just sat there
6 and took the lower offer. Why didn't they do
7 something?

8 THE COURT: Well, I didn't -- I
9 understood that the possibility of some -- of this --
10 of this transaction came up sometime around May 7th or
11 8th, didn't it? I mean, not this precise transaction;
12 but they were talking, there was discussion thereafter
13 about alternative transactions.

14 MR. GOLDMAN: I apologize. I'm not --

15 THE COURT: All right.

16 MR. GOLDMAN: -- I can't deal with
17 those facts. All I know is, it came up at the
18 meeting --

19 THE COURT: Well, I don't think it
20 came up first on May 15th --

21 MR. GOLDMAN: No.

22 THE COURT: -- is the point.

23 MR. GOLDMAN: No, it didn't. But my
24 point is, before they voted, they were told that this

1 proposal was there and they didn't do anything with it
2 at that time. Why didn't they pick up the phone and
3 call Optima and say, "Well, how can you do this?" Why
4 didn't they talk -- where is the report from their
5 lawyer that says they can't do this? It was more
6 money with the promise of even more money. So why
7 didn't they do something about it?

8 My clients own 16 percent of this
9 company, the three plaintiffs, the stockholder
10 plaintiffs. They don't care who wins. They just want
11 the money. And they know they can get \$172 million at
12 least. And what they don't know, nor can anybody else
13 tell us, how much more could they get. And the only
14 way to do that is to release Optima from the
15 standstill, open the bidding and see how high it goes.
16 If we have to go for money damages, I doubt if we're
17 going to be able to guess and no court is going to let
18 us guess how high the auction would go. So we think
19 that's why we need relief.

20 THE COURT: I mean, your point raises
21 a question in my mind. I mean, how did -- how would
22 an injunction work? I mean, where -- where along the
23 line does anyone -- I mean, unless the parties --
24 unless Severstal -- you know, if I issue an

1 injunction, they withdrew; but let's say they don't
2 withdraw, they don't terminate. How far down the line
3 do we have to go before there's a -- a legal prospect
4 of the company being able to enter into a different
5 transaction?

6 MR. GOLDMAN: Well, again, this is --

7 THE COURT: Let me put it this way --

8 MR. GOLDMAN: -- but I believe they
9 made --

10 THE COURT: -- this is, I think,
11 clear. There is at the moment a merger agreement
12 that's been authorized by the board and approved by
13 the stockholders of WCI.

14 MR. GOLDMAN: Correct.

15 THE COURT: Severstal has the right to
16 close that merger agreement and to buy the company at
17 a price which will give the equity holders in total
18 136 -- or \$140 million.

19 MR. GOLDMAN: Correct.

20 THE COURT: I assume -- and I don't
21 think you're going to be able to tell me otherwise --
22 Optima is not going to go out and engage in a tender
23 offer if I enter a preliminary injunction and pay
24 \$172 million to buy that same equity if it has the

1 prospect of having to sell it all basically to
2 Severstal for \$140 million, which would remain a
3 possibility, wouldn't it? We're only talking about a
4 preliminary injunction.

5 MR. GOLDMAN: I'm sorry. The tender
6 offer is for 172. And they can say what they're --
7 what they're going to do and what --

8 THE COURT: There is no tender offer;
9 right?

10 MR. GOLDMAN: I'm sorry?

11 THE COURT: There is no tender offer.

12 MR. LAFFERTY: There's not one yet.

13 THE COURT: There isn't. And so there
14 isn't one, and we don't know what its conditions are.
15 But I got to tell you, one of the conditions is going
16 to be the termination of this merger agreement.

17 MR. GOLDMAN: Right. I thought they
18 were asking you to enjoin the merger -- enjoin the
19 merger --

20 THE COURT: The preliminary injunction
21 is not going to result in the termination of the
22 merger agreement. That would -- that would be the
23 result of a trial on the merits, a final
24 determination. It's possible it would be the result

1 of some -- of somebody who had the right to terminate
2 terminating. But I don't think my preliminary
3 injunction is going to give WCI the right to terminate
4 the agreement. And no one has told me that that's
5 true.

6 MR. GOLDMAN: Well, we're ready to go
7 to trial. We've taken the discovery. I'm sure Your
8 Honor is ready. You read all the papers.

9 THE COURT: I am not ready, but ...

10 MR. GOLDMAN: Well --

11 THE COURT: I can be ready.

12 MR. GOLDMAN: You understate your
13 abilities, sir. I'm sure you are. We can maybe
14 get -- the Supreme Court is ready to hear this this
15 afternoon. We can try it next week.

16 THE COURT: You can go to trial
17 sometime in the not-too-distant future. But it's a
18 question -- I mean, how does this company -- and I
19 really meant to ask Mr. Lafferty these questions, but
20 I'm going to ask everyone these questions. There's no
21 way this case gets tried in less than a couple of
22 months. Let's be realistic. What would an injunction
23 say? I mean, how much would a bond be? What
24 conditions would there be in an injunction requiring

1 the person securing the injunction to provide
2 financing to keep the company going?

3 MR. GOLDMAN: Well, all -- these are
4 questions for Mr. Lafferty. As I understand it, they
5 are ready to provide financing to keep the company
6 going. And I understand there's a call on the
7 stockholders, lenders to come up with more money, and
8 everybody is ready to stand in line. And I think
9 their threat that the company is going to down the
10 tubes shouldn't scare the Delaware Court of Chancery.
11 I just don't see that working. But he can answer
12 those questions, but --

13 THE COURT: I should have asked
14 Mr. Lafferty those questions, and perhaps I should.

15 So have you got anything else, Mr.
16 Goldman?

17 MR. GOLDMAN: No.

18 THE COURT: All right.

19 MR. GOLDMAN: Thank you.

20 THE COURT: Thank you.

21 Mr. Lafferty, if you have a minute.
22 How would it work? What kinds of provisions would
23 there have to be in an injunction to --

24 MR. LAFFERTY: Well, I think there are

1 several things certainly that we seek. And, again, I
2 think we -- we at least sort of laid out the exact
3 type of things that we need. One is, we need a
4 declaration that we -- we can make an offer directly
5 to the stockholders, that the standstill provision
6 doesn't stand in the way.

7 THE COURT: In an injunction?

8 MR. LAFFERTY: Yes. I think that can
9 be done.

10 Second, we would like --

11 THE COURT: Wait. I don't know -- how
12 can I -- you can make -- look, you can go make an
13 offer directly to the stockholders. There's nobody
14 keeping you from doing that. You don't need an order
15 from me to do that. You could have done it a month
16 ago; but what if you mean is that you can -- I'm going
17 to give an order that says you can make an offer
18 that's not conditioned on the termination of the
19 merger agreement, I don't understand how I can do that
20 in the context of a preliminary injunction.

21 MR. LAFFERTY: Well, I guess -- you
22 know, Your Honor, we haven't talked with our client
23 about that precise issue, about whether there would be
24 such a precise condition. What we've talked about is

1 wanting the ability to make the 172 offer directly to
2 the stockholders. And what I understand is --

3 THE COURT: Why are you -- why have
4 you felt at any point up until today that you don't
5 have -- I guess because of the standstill agreement.

6 MR. LAFFERTY: Correct.

7 THE COURT: All right. That didn't
8 keep you from sending letters, but somehow you think
9 it keeps you from making the offer.

10 MR. LAFFERTY: Well, again, Your
11 Honor, we asked for a release --

12 THE COURT: You wrote a letter
13 basically making the proposal, but you think it
14 prevents you from commencing a tender offer.

15 MR. LAFFERTY: Well, we had asked
16 prior to that as well, but -- but, again --

17 THE COURT: Well, I mean, now there's
18 a merger agreement in place that I haven't checked it
19 for this but presumably precludes them from doing
20 that.

21 MR. LAFFERTY: I would -- I would
22 assume there may be provision in the agreement that
23 would preclude them from doing that. And we would
24 want the ability to be able to do that. And whether

1 that means you would need to say that -- that --

2 THE COURT: That doesn't really get --
3 that deals with this problem with the standstill but
4 doesn't get to the substance of my question here.

5 MR. LAFFERTY: Which, again --

6 THE COURT: You're not going to buy
7 the stock with -- if the merger agreement is
8 outstanding. It would be a very foolish thing to do.

9 MR. LAFFERTY: Your Honor, again, I
10 have not been able to talk to my client about that. I
11 think, you know, if.

12 We had the opportunity, we could -- we
13 could talk about that. I don't know. I mean, would
14 I -- certainly we understood and we understand now
15 that if we make that offer, that there may be a claim
16 that Severstal has, whether it's tortious interference
17 or whatever -- whatever the claim is, it may be
18 hanging out there. Certainly we knew that. We knew
19 that when we put in -- put in our -- our prior
20 proposal --

21 THE COURT: Right.

22 MR. LAFFERTY: -- when we put in the
23 reply affidavit.

24 THE COURT: It's a little hard to

1 understand how -- I mean, you're free to go buy
2 anybody -- I guess you're not because of this other
3 provision. But other than that, you can go buy all
4 the stock, you know, but there's still a merger
5 agreement outstanding. And if it's -- if it's
6 completed, your shares are converted into the right to
7 receive \$150 million in cash.

8 MR. LAFFERTY: I understand. That's
9 why we want --

10 THE COURT: Not 150. I'm sorry. 140.
11 All right. It's time I should stop and listen to the
12 other side. I think I need a five-minute recess.

13 (A short recess was taken from
14 12:13 p.m. until 12:21 p.m.)

15 oOo

16 MR. LAFFERTY: Your Honor, might I
17 briefly interject on a point that we closed with when
18 we started?

19 THE COURT: Yes, go ahead.

20 MR. LAFFERTY: Your Honor asked, I
21 think very directly, about whether or not our request
22 for injunction would seek to invalidate the Severstal
23 merger. And I think the answer -- or whether our
24 tender offer would be conditioned on judicial

1 invalidation. I think the answer is it would not.
2 You know, it's our understanding under -- under the
3 merger agreement WCI has the right to terminate if it
4 hasn't closed within 45 days, and if we get control
5 through our tender offer, we would terminate the
6 agreement. And so I don't think we need judicial
7 invalidation as a condition.

8 THE COURT: All right. Thank you.

9 MR. WILLIAMS: Good afternoon, Your
10 Honor.

11 THE COURT: Good afternoon,
12 Mr. Williams.

13 MR. WILLIAMS: May I proceed?

14 THE COURT: Yes, please.

15 MR. WILLIAMS: Your Honor, this is a
16 case where we've heard a lot of criticism of the
17 union. The union's not on trial here. If they want
18 to bring some claim against the union, they're free to
19 do it. They haven't chosen to do it. That's not our
20 business.

21 On trial here today in this 10-day
22 period are hard-working, independent, informed
23 directors, Your Honor. They conducted an auction of a
24 company that was struggling to survive. They garnered

1 a series of bids. They weighed the bids. They
2 considered all the factors that Delaware law requires
3 them to consider.

4 To get an injunction you have to do
5 more than just come in six weeks after the deal is
6 approved by the stockholders and say "Hey, I'll pay
7 more." Hopefully that's not where the State of
8 Delaware goes, and that's where I believe they're
9 trying to get Your Honor to go. You have to earn it
10 through showing you're likely to win on the merits.
11 And let's look at their arguments.

12 This is, in fact, a transaction that
13 has been approved by the stockholders. There is no
14 challenge to that approval. Section 228 is a valid
15 stockholder approval mechanism under our law. There
16 is no challenge that in some way that vote was
17 tainted.

18 With respect to the two stockholders.
19 who delivered that 51 percent, neither was deposed.
20 We had a conference among attorneys on the first --
21 second day after Your Honor -- I believe it was the
22 first day after Your Honor scheduled this injunction.
23 And they asked, "Can you deliver Harbinger for a
24 deposition?"

1 And I immediately said, "Well," you
2 know, "we don't control Harbinger."

3 They said, "Well, will you try to do
4 that?"

5 I said, you know, "I can't commit to
6 that."

7 I later went back to them in that same
8 day and I sent an e-mail saying "If you'd like us to
9 try to arrange Harbinger, let us know." I never heard
10 back.

11 So there is no record, no way to in
12 any way invalidate this vote. So what theory do they
13 have? They have to prove to Your Honor that you're
14 likely to find that these directors violated their
15 fiduciary duties and how. Well, they say they
16 breached their duty of loyalty. But how'd they do
17 that? There's no serious allegation here, Your Honor,
18 that this board lacked independence. It's relegated
19 to a footnote in their reply brief. This is an
20 independent board. They instead say the board acted
21 in bad faith. Now, let's just focus on that a little
22 bit.

23 The Supreme Court in Disney has told
24 us what bad faith means, and it means "a fiduciary

1 intentionally acting with a purpose other than of
2 advancing the best interests of the corporation, where
3 the fiduciary acts with the intent to violate
4 applicable positive law, or where the fiduciary
5 intentionally fails to act in the face of a known duty
6 to act demonstrating a conscious disregard for his
7 duties."

8 In their brief -- and, Your Honor, I
9 think this is indicative of the case -- they cite the
10 Chancellor's post-trial opinion in Disney with respect
11 to bad faith. And here's the quote that they give
12 you. They say bad faith means "violating substantive
13 law," which is a reference to 141(a), "is bad faith."
14 Okay. That's in their brief.

15 The page they cite from the
16 Chancellor's opinion actually says, bad faith exists
17 when a transaction "is known to constitute a violation
18 of positive law," not that it violates positive law.
19 You have to find people acted with malevolent intent.
20 And there's no basis in this record even close to find
21 such an intent. And, Your Honor, this claim of a
22 breach of duty of loyalty should be, in our judgment,
23 outright dismissed.

24 Now let's move to Revlon. Your Honor,

1 of course, is well aware that there is no blueprint
2 for an auction. Auctions come in all different shapes
3 and sizes, all different factual scenarios. And if we
4 look at what actually happened in this process -- and
5 I'd like to walk through it -- we'll see it was a
6 vigorous and effective auction.

7 We started, Your Honor, with 22
8 potential buyers being contacted. Two bidders emerged
9 from the process. And relatively early on you see the
10 committee determining to pursue both of the bidders.
11 On April 4th there's an e-mail from Moelis where it
12 says to the committee, "Our recommendation is to
13 continue to move both Optima and Severstal forward as
14 quickly as possible to preserve options." And the
15 document is WCIE 000227. All three special committee
16 members wrote back and said that they agreed.

17 Your Honor, I have that document. I'd
18 be happy to hand it up, if you would like it.

19 THE COURT: Certainly. Is it --

20 MR. WILLIAMS: I don't believe it made
21 its way into the voluminous affidavits. We -- we're
22 all doing the best we can.

23 This is the document I was referring
24 to.

1 MR. WILLIAMS: May I approach, Your
2 Honor?

3 THE COURT: Yes.

4 MR. WILLIAMS: So here we are, Your
5 Honor, in early April, and the banker writes to the
6 members of the committee. He describes where Optima
7 is. Optima is doing well. We've got a good feeling
8 about Optima. He then talks about Severstal. And he
9 says at the bottom, "Our recommendation is to continue
10 to move both Optima and Severstal forward as quickly
11 as possible to preserve options."

12 That's exactly what they did. That's
13 exactly what this committee did.

14 And did they ever move them? At the
15 end of April, though, the committee was in a tough
16 spot. Bidders were asked to submit bids by
17 April 25th. Severstal bid 101 million. Optima
18 declined to bid. It had previously bid 101 million,
19 but it declined to bid, it said, because it didn't
20 have union support.

21 Now, if the plaintiffs' allegations
22 that the board abdicated its duties are correct and
23 that once the union kissed somebody it was all over,
24 why wouldn't my clients have just stopped? "Okay.

1 The union likes Severstal. You don't want to submit a
2 bid, Optima. Makes life easy for us. We'll see if we
3 can get a fairness opinion and we'll move on."

4 But they didn't. They worked really
5 hard to get Optima back in. And I think it is really
6 ironic when you think about all the auction cases Your
7 Honor has seen and we have seen here in Delaware that
8 you have a special committee taken to task for going
9 back to get a bidder who had withdrawn back in. And
10 they get them back in with -- with some style, Your
11 Honor, not just back in at a little number; they get
12 them back in at a big number, \$150 million. You'd
13 think the stockholders might be applauding, but
14 obviously these three aren't.

15 And I want to just emphasize that for
16 a second. This is not a class action. There are 28
17 stockholders in this company. It's a small little
18 group of people. They all are on e-mail chains, and
19 they -- they understand what's happening and they know
20 about this litigation. The others haven't come
21 forward. So -- so we have to kind of keep in mind,
22 this is not your typical public deal where you've got
23 somebody who purports to represent a class.

24 So the committee gets them back in at

1 150. We've now got two bidders going. That's always
2 a good thing, and the committee pursues two tracks.
3 It works with Optima to try to find a way around the
4 union problem because the union problem is there, it's
5 real. There is a collective bargaining agreement.
6 The union supplies all of our workers. This document
7 was approved by the Bankruptcy Court, and under
8 Section 303, it has the same effect as if it was
9 approved unanimously by our board and stockholders.
10 So the committee's got to deal with it, and it works
11 to get Severstal to increase its bid.

12 I want to talk a little bit about
13 something that I think, Your Honor, I submit, is
14 extraordinary, and that is the meeting that happened
15 on May 9. The board reached out to all of the
16 stockholders for their input. How often does that
17 happen in auctions? I -- I obviously haven't seen as
18 many deals as Your Honor has and probably as many of
19 my friends over here at counsel table, certainly Mr.
20 Goldman, who's been around for a long, long time --

21 THE COURT: There's no need to comment
22 on Mr. Goldman's --

23 (Laughter)

24 THE COURT: -- age or longevity.

1 MR. GOLDMAN: Thank you, Your Honor.

2 MR. WILLIAMS: But when have you seen
3 a special committee say "Let's all get the
4 stockholders together and let's talk with them about
5 the bids that we have. Let's tell them what's on the
6 table. Let's talk to them about the union problem.
7 Let's get together in a room in New York City"?

8 And I would direct the Court's
9 attention to Veet Exhibit 20. Exhibit 20 to the Veet
10 affidavit. It's a presentation made to the investors
11 at that meeting. It describes the process. It
12 describes tactical considerations. It describes the
13 two bids. And these plaintiffs are in attendance.
14 They're taking all this in. Now, these are the same
15 people who told you at the scheduling conference
16 they're in the dark, they know nothing about this
17 because it's not a public company. Well, they
18 actually knew a fair amount.

19 Here we are, we have a chart that goes
20 out to them. And, in fact, it's produced. The
21 production number, the one that happens to be in the
22 Veet affidavit, although there are various versions
23 floating around, is from EagleRock, one of the
24 plaintiffs. And it shows the bids. It shows where

1 Severstal was at 126. It shows 136, and it shows 150.
2 And that's at page ER002506.

3 And if you look back, Your Honor --
4 bear with me -- to the final page, page 2516, "Why
5 This Deal and Why Now?" presented and discussed with
6 all the stockholders. And I apologize for jumping
7 around, Your Honor; but if you then look in the
8 document at page -- it's cut off on my version, but
9 it's page 6 and it's got "Tactical Considerations" up
10 at the top right-hand side, you see there "Union
11 contract."

12 And, Your Honor, in this meeting there
13 was, in fact, and the record reflects, a fulsome
14 discussion. And I'd like to hand up, because I don't
15 think -- this was a deposition exhibit. I don't think
16 it made it into either side's exhibits, but this has
17 happened so quickly, I could be wrong. This is
18 Henkels Exhibit 19, deposition taken by the
19 plaintiffs.

20 And it's hard to read, Your Honor, but
21 these are -- Mr. Henkels was the top Moelis banker on
22 the deal. And he has annotations in here. He made
23 notes he testifies were remarks he made at the
24 meeting. And if you turn to page 3 of the document

1 where it's got the inverted triangle, you'll see all
2 his notes. And I know they're hard to read. He does
3 in his deposition at pages 120 to 122 read them into
4 the record. But clearly there's discussion of the
5 bidding history. There's discussion of the union
6 issue. And I don't -- I'll -- I'll -- I'll read the
7 words that I can read on the right-hand side and then
8 if we need to, Your Honor, I can get out his
9 deposition; but it says, right-hand side sort of
10 bottom right, "Additionally, numerous discussions with
11 Optima's attorneys & our" -- not sure what that says
12 -- "regarding getting around union" something.

13 This, Your Honor, was an informed
14 group of stockholders. And Mr. Henkels testified --
15 and there's been no rebuttal of this -- that the
16 investors caucused after this presentation. They went
17 off on their own, including the plaintiffs here. And
18 then they came back -- I believe the testimony is they
19 were alone for about an hour -- and Mr. Henkels
20 testified at 92 and 93, in essence, they come back and
21 say "We're not happy," you know, "but don't lose
22 Severstal. Don't lose Severstal."

23 Well, so the board could have quit;
24 but then they went back and they eventually got

1 Severstal, which it started at 101 million, up to
2 140 million. Your Honor, this group did a great job.

3 And I want to address something that
4 Your Honor asked Mr. Lafferty about May 14th, which is
5 the Wednesday. The met on the 12th, the 14th, and the
6 16th, Monday, Wednesday, Friday. And Your Honor said
7 well, why didn't they just sign up the deal.

8 THE COURT: Well, they did approve the
9 deal and --

10 MR. WILLIAMS: They did approve it.

11 THE COURT: -- it's, in fact, in the
12 minutes.

13 MR. WILLIAMS: Yes, they did, Your
14 Honor.

15 THE COURT: That was my question.
16 What happened to it?

17 MR. WILLIAMS: And here's what
18 happened. On the 14th there was a very aggressive
19 letter submitted to the board before the merger
20 agreement was signed from Dechert, counsel to
21 Optima -- I'm sorry; counsel to the stockholder
22 plaintiffs. And the board got that letter. It had
23 very serious threats of breach of fiduciary duty. And
24 as well, UBS indicated it wasn't -- it wasn't content

1 with this deal. So, you know, could the -- could the
2 board have -- have really tried to ramrod it through?
3 Maybe. But they're responsive to their stockholders
4 and they're being taken to task for it.

5 So what do they do? Well, they meet
6 again on the 16th, and they go back and they get more
7 money and they then have stockholder approval. Your
8 Honor, that's not a breach of fiduciary duty. Those
9 are directors who are being extremely effective.

10 There's obviously a question that --
11 that --

12 THE COURT: Mr. Williams --

13 MR. WILLIAMS: Yes.

14 THE COURT: -- what -- what's the
15 record for the UBS communication?

16 MR. WILLIAMS: From the plaintiffs,
17 the communication?

18 THE COURT: No; from UBS. I mean, you
19 say at this meeting the board was told that UBS was
20 unhappy with the deal. I didn't see that -- I didn't
21 notice that in the minutes. Is there --

22 MR. WILLIAMS: Your Honor, I -- I
23 don't know that that's expressly in the minutes; but
24 let me, if I could ... On the 14th there's a

1 discussion at the board meeting -- this is at
2 8:02 p.m.

3 THE COURT: What's the exhibit you're
4 lacking at?

5 MR. WILLIAMS: It is Veet-53.

6 THE COURT: At the top of page 2
7 there's a paragraph that mentions the letter from
8 Dechert.

9 MR. WILLIAMS: Yes. And there's also
10 a discussion, Your Honor, of level of stockholder
11 support. And it's not explicit, but it says
12 Mr. Rathburn, who was banker, describes a level of
13 support among the stockholders.

14 THE COURT: Where's that?

15 MR. WILLIAMS: That is underneath
16 "Sale Transaction."

17 THE COURT: Back on the first page.

18 MR. WILLIAMS: And -- and I've also
19 been handed by one of my colleagues Mr. Henkels'
20 deposition at page 113 beginning at line 9. And it
21 says, "Did UBS, do you recall, have a problem with
22 effectuating the approval of the transaction through
23 written consent as opposed to a shareholder meeting in
24 the normal course?"

1 "They didn't have an issue with that."

2 And then he says, "The first part of
3 that ... relates to the board's feedback to us
4 relating to one part of the response going back to
5 Severstal."

6 And so what you had was a board that
7 was trying to do the right thing by its stockholders.

8 And a central theme of -- of
9 plaintiffs, "Why didn't you go back," you know, "Why
10 didn't you go back? Why didn't you back and get more?
11 We would have paid more," I'd like to look at -- at
12 the evidence here and describe to you what the record
13 is on it.

14 On May 14th Optima resubmitted its
15 \$150 million offer, submitted it to the board. That's
16 on Wednesday. Said nothing about paying more. But
17 the letter wasn't silent on what it would pay. It
18 said, "We've already given you 150 million. We gave
19 it to you on May 1st. Now we're giving it to you
20 again, two weeks later, and \$150 million is still our
21 final and best offer."

22 So the board had that letter in hand
23 on the 14th.

24 And then Optima sends a letter to the

1 stockholders the next day that says, "You know what.
2 We may pay a lot more." Doesn't say how much, but I
3 know you're -- and here's what's happening. Optima
4 knows that the board's about to seek approval from the
5 shareholders for the Severstal deal. How do we know
6 that? It's in Mr. Korf's deposition, page 173, 18 to
7 24. So he's a bidder. He knows that the board's
8 about to approve the Severstal deal.

9 And then he says, "Okay. What do I
10 do? Just yesterday I sent to the board something that
11 says 150 is my best and final. And I've told them
12 that twice. What I'll do is I'll write a letter to
13 the stockholders because they're about to vote,
14 basically trying to encourage them not to vote in
15 favor of the deal."

16 And he testified at the time he wrote
17 that letter to the stockholders, he did not know how
18 much more than 150 he was prepared to pay.

19 And can't emphasize enough, Your
20 Honor. This letter was not directed to the board. He
21 didn't write it to us. If Optima wanted to speak to
22 the board, it knew how to reach it, the board. They
23 could -- they knew the number. They could have called
24 up.

1 Severstal, we know, was pushing hard
2 to close its deal. And when they went to 136 on the
3 12th, as reflected in the board minutes of the 12th,
4 they said they wanted it closed by Wednesday, the
5 14th. When we got them to go to 140 on the 16th, they
6 said "If stockholder consent is obtained in 24 hours
7 we're leaving or we're reducing our bid back to 126."

8 So we've got Severstal pressure.
9 We've got the fact that Korf told us yesterday that
10 he's paying 150 and that's it. We've got the fact
11 that he doesn't come to us; he sends this to
12 stockholders who are about to vote, and we have the
13 fact that nobody likes to sort of own up to Optima
14 clearly had violated the standstill agreement. And my
15 friends kind of take the board to task for not liking
16 that. But that's -- that's not the law.

17 Topps I think has -- the Topps
18 decision has given to some parts of the corporate
19 world and some members of the bar -- and I mean
20 nothing personally with respect to my friends on my
21 left; but this concept of "Oh, standstills aren't
22 enforceable in Delaware. Don't worry about it."
23 Well, that's not the law, Your Honor. They clearly
24 had violated their standstill by sending this letter

1 to the stockholders. And Mr. Davis, the chairman of
2 the special committee, explained what the board was
3 thinking.

4 Here's what he says. This is page
5 128, line 3 of his deposition. "What the board said
6 was the following: These were obviously people who
7 were not trustworthy, they were in breach of their
8 contract, they were going around us. They could have
9 easily given us a number if they wanted us to consider
10 it and chose not to. What they were looking to do was
11 act as a spoiler in someone else's transaction. These
12 are not the actions of someone who's looking to
13 actually get a deal by putting a bigger number on the
14 table, because in order to do that, all you've got to
15 do is send a letter to the company with a bigger
16 number."

17 And Mr. Davis, Your Honor, I would
18 submit, is an extraordinarily experienced director.
19 He's a member of the board of Delta and many other
20 companies he has served on their boards, and he is a
21 sophisticated, independent businessman. And the fact
22 that he was not happy at all that they had breached
23 the standstill agreement is perfectly understandable,
24 we submit.

1 And I want to quote briefly from QVC,
2 Your Honor, where the Court, in discussing directors
3 duties under Revlon, stated: "Courts will not
4 substitute their business judgment for that of the
5 directors but will determine if the directors'
6 decision was, on balance, within a range of
7 reasonableness."

8 When you have a bidder telling you
9 that 150 is best and final, when that bidder knows
10 that you're about to do a deal with somebody else, and
11 that bidder doesn't come back to you but, instead,
12 just sends sort of a puffing letter to shareholders
13 saying in essence, "Don't vote. Hold up." You know,
14 "There may be something more, but I'm not going to
15 tell you what the number is and I'm not going to the
16 board," how can it not be within the range of
17 reasonableness for that board to say, "You know what.
18 We're going to take the bird in hand because this bird
19 in hand is starting to get a little loose in our hand
20 and we're a little worried and we're a company in
21 distress."

22 Now, I kind of get the sense from my
23 friends that it's -- it's -- all -- that's all kind of
24 made up. Well, Your Honor, if you look through the

1 contemporaneous documents, reports to the board, there
2 is a continual theme of this company trying to stay
3 afloat. That's not something that's new.

4 I want to also read from another
5 document in this case that I think accurately reflects
6 the reality that the directors found themselves in.

7 This is from Veet-47. This is after
8 the May 9th meeting. "The leading bidder wants to get
9 this done quickly so it's a fine line between buying
10 time and [losing] the offer."

11 Now, that's not Moelis. That's not
12 Davis. That's not Len Anthony. That's a quote from
13 one of the principals of Wilfrid Aubrey, one of the
14 plaintiffs, in an e-mail he wrote to one of his
15 colleagues at Wilfrid Aubrey. And he got it right.
16 He got it right, Your Honor. That's Veet-47.

17 At bottom, their claim is really you
18 always have to go back and ask for more. And, Your
19 Honor, Chancellor Allen expressly addressed that
20 concept in RJR Nabisco, as we've discussed in our
21 briefs. And I won't read a long quote from it, but I
22 think a short quote is in order. At page 19, the
23 Chancellor says, "Clearly, more information was
24 available to the Committee on the central question

1 would either party pay more. Just ask and you may
2 find out (if the answer is yes, time would of course
3 be necessary to evaluate if another proposal was worth
4 more). But in this setting, the act of asking another
5 time for a highest and best bid might itself have
6 costs."

7 And the Court continues "... the
8 Committee ... concluded ... in the circumstances (the
9 stage of the auction, the level of the prices, the
10 events of the day ...), [that] the risks outweighed
11 the potential rewards. In my opinion" -- this is
12 Chancellor Allen speaking -- "this important decision
13 is itself entitled to the deference courts give to
14 business decisions made by disinterested directors
15 with care in the honest pursuit of the corporation's
16 interest."

17 Your Honor, the same applies here.

18 Let me also go to what I understand to
19 be sort of their second claim under the -- the Revlon
20 rubric, "Well, you didn't fight the union hard
21 enough." Well, if you look at Veet-42, it's an e-mail
22 on the Optima side of things, the Optima banker from
23 Jefferies writes an e-mail, Veet-42 and it's the
24 second page of the exhibit, page 2515. Now, this is

1 on May 2nd.

2 42, Your Honor.

3 THE COURT: Yeah. Go ahead.

4 MR. WILLIAMS: This is on May 2nd.

5 And he writes to his team -- this is all the Optima
6 team -- "I spoke with the Moelis team:

7 "- They have had lots of conversations
8 internally with their team and the Special Committee.

9 "- They are working to get Ron," a
10 reference to the union executive, "to the table (Scott
11 Faust, Larry Clark," the Harbinger representative,
12 "Gene Davis," the chairman of the special committee,
13 and Len Anthony).

14 "- They have told the Union ... they
15 can't proceed with the USW-backed proposal due to the
16 Board's and the advisor's fiduciary duty to
17 shareholders."

18 Now, Severstal at the time was at 101.
19 This is their document, Your Honor. We're working.
20 We're working. We're trying to find a way.

21 And Your Honor asked a lot of
22 questions about well, what was this alternative
23 structure that was proposed. There was, in fact, a
24 call, Your Honor, between the parties, and they did

1 have a discussion about alternative structures. And
2 we did propose an alternative structure. And the
3 structure that we proposed was that they would do a
4 tender offer where they would buy 49 percent and then
5 there would be a six-month put. The six months would
6 give them time to deal with the union.

7 Optima says -- the record's not clear.
8 Optima says that they threw out the idea that, "Well,
9 we want to do a hundred percent tender offer with a
10 51 percent minimum." No assurance to the back end.
11 "But" -- "but we'll do a 51 percent minimum. You got
12 to release us from the standstill."

13 There's only one piece of evidence --
14 and I use that term loosely -- where there is a record
15 that they made that request on that call among
16 advisors, and that's the Korf affidavit, and he wasn't
17 on the call.

18 But there was a what was called by
19 both sides a brainstorming call, and I think we would
20 all concede that, that it happened on May 7th. You
21 know, "Let's try to figure out a way around the
22 problem."

23 And you say -- and there was some
24 questions asked of my friends as to, you know, what

1 exactly was the problem. They say "There's no problem
2 if we do a tender offer under the CBA"; and they say,
3 "We're highly confident." You know, "Could the union
4 bring a claim? Maybe union's do crazy things, but
5 trust me, Your Honor, we'll whoop up on them."

6 Well, Your Honor, I'd invite Your
7 Honor to look Veet Exhibit 5, which is the actual
8 successorship language. And you'll see there that in
9 the first line of the successorship provision -- this
10 is on page 181 -- it says, "The Company agrees that it
11 will not consummate any transaction resulting in a
12 Change of Control of the Company." And "Change of
13 Control" is defined later as a 51 percent transaction.

14 In order for them to make a 51 percent
15 or more tender offer, we have to take an affirmative
16 action as a board, and that is to release them from
17 their standstill. Now, I don't want to, you know,
18 presage how that proceeding might go in a federal
19 labor arbitration. But could a union say since you
20 couldn't directly agree with them to -- to sell them
21 51 percent without satisfying this provision, you also
22 can't consummate a transaction, meaning releasing
23 someone from a contract to enable them to do that
24 which they couldn't do directly? That, Your Honor,

1 seems to me to be not a stretch at all. And the board
2 was so advised.

3 And, Your Honor, I want to turn to
4 something in the record that is not in either side's
5 appendix. And I apologize for that. This is a
6 document that I thought I had seen over the weekend.
7 We didn't find it for our brief. I said last night to
8 one of my colleagues, I think there's a document. She
9 looked until her eyes bled. She couldn't find it, and
10 I found a note this morning that referred to this
11 document. And so I'd like to hand it to my friends
12 and hand it up. A little small print there.

13 But it's a -- it's an e-mail string.
14 And if you look down at the first one -- and this
15 deals with the question of what would happen with the
16 tender offer under the CBA -- it's an e-mail from
17 Scott Faust and Dennis White to Steve Kotran at
18 Sullivan & Cromwell. Now, Steve Kotran is counsel to
19 the entire lending group, which includes all the
20 stockholders.

21 And -- and this is on the 16th, just
22 after midnight. Obviously Mr. White and Mr. Faust
23 have now seen this letter of the 15th to stockholders.
24 And they write and say "We are in receipt of [this]

1 letter ... The Board itself has not received any
2 communication from Optima since its letter dated
3 May 14th ... "The Board has considered that
4 proposal." "... the Board has approved a proposal
5 from ... Severstal ..."

6 Important paragraph is the second one.
7 "The Board has not been requested to consider any
8 waiver of the standstill agreement ..." "The Board
9 would, of course, in considering any such request,
10 have to determine how such a transaction would
11 maximize stockholder value and protect the holders of
12 a minority interest in WCI Steel," because, as Your
13 Honor knows, people can be left out in the back end of
14 a tender offer.

15 And then it says, "Moreover, the Board
16 has been advised that the Company's participation in
17 such a transaction could violate the collective
18 bargaining agreement to which the Company is a party."

19 Mr. Kotran then writes -- passes it on
20 at 7:28 in the morning before any stockholders signed
21 a consent approving the deal, sends it on to all of
22 the stockholders, including Harbinger, including the
23 plaintiffs, including UBS. And Your Honor can read it
24 for himself. But at the end he says, "If a majority

1 of shareholders" -- this is the last full sentence --
2 "deliver consents in favor of the Severstal
3 transaction, any opportunity for the WCI Board to
4 waive the standstill or any opportunity for the WCI
5 Board or WCI shareholders to consider a superior
6 proposal from Optima will be foreclosed."

7 Now, the two stockholders who happen
8 to have 51 percent and could approve this merger --
9 and by the way, it's no sin to own a lot of stock and
10 be able to, you know, approve a transaction. That's
11 just the circumstance. They had that e-mail from
12 their counsel saying "Want you to know," you know, "if
13 this deal goes through, you sign up the deal, you're
14 not getting any offer from Optima," and they signed
15 the deal.

16 Your Honor, I want to turn now -- with
17 respect to Revlon, you know, the thing that I can't
18 emphasize enough is that you just simply can't come in
19 after the game is over, this can't be where Delaware
20 law is, and say in a brief filed six weeks later
21 "Well, we'll pay more." And what do they give you --
22 and I want to talk about this later in the balance of
23 hardships. In the first affidavit from Mr. Korf,
24 there's one paragraph. "We'll pay more and we'll fund

1 liquidity." It's not until we get the reply affidavit
2 that they tell us more, but, still, there are a
3 hundred holes in it which I want to go through with
4 you. And I want to say with respect to releasing them
5 from the standstill just a couple more things.

6 Mr. Korf had a very unusual view of
7 standstills. Listen to how he understood his
8 obligations under the standstill. This is the buy the
9 board was dealing with. "When I believed that the
10 standstill provision and confidentiality agreement
11 were being used not to protect the company, but to
12 effect a sale that wasn't in the best interest of the
13 shareholders, I didn't believe after that I was bound
14 fully by those provisions." That's from Korf-141,
15 line 6 to 11.

16 Well, that's certainly not how Gene
17 Davis and the special committee views standstills.
18 And standstills, as Davis explained, are bargained-for
19 agreements. You get something for it and you give
20 something. What you get is inside information. And
21 you say "I prefer to play in the board's process as
22 opposed to going it alone."

23 Now, these stockholders had a fair
24 amount of information. Optima is a competitor. We

1 don't know what it had, but it chose to play in the
2 board's process, and it signed an agreement that
3 contained restrictions.

4 Mr. Korf can't just say "When I'm no
5 longer happy with what the board is doing, I'm just
6 going to disregard that agreement."

7 Your Honor, another point very
8 quickly. As Your Honor this morning asked questions,
9 there really isn't a need for injunctive relief. If
10 you look at what they sent to the stockholders after
11 the 16th, albeit it's futile because the stockholders
12 have already approved the merger, they're making this
13 proposal. They're out there making it. As stated in
14 their -- in their letter, "Optima is making its offer
15 directly to the shareholders." Now, what they've
16 never done is come in and say, "By the way, we now
17 have 51 percent."

18 So this is real, Your Honor. We have
19 51 percent of the holders coming in. They've known
20 all about this. They want the 172, don't care about
21 Severstal, here it is, here's an affidavit. That's
22 not here, nor could be.

23 Finally, very quickly, Your Honor,
24 with respect to standstill, there was some real recent

1 history here that informed the special committee.
2 And, again, what we're looking at is was this
3 committee acting in bad faith according to my friends.

4 Optima first entered the standstill on
5 June 29. On February 5 Optima requested that WCI
6 waive the standstill so Optima could buy Harbinger
7 shares. And that is at Veet-15. "Just Harbinger
8 shares. We want to buy the 35 percent holder shares."
9 The board was in the process of soliciting offers for
10 the entire company.

11 On February 7th this board, which
12 supposedly was, according to a footnote in their
13 brief, was in some way beholden to Harbinger, the
14 board determined that it would not release Optima
15 because the committee had determined that -- I'm
16 sorry; the committee determined it would not release
17 Optima because the committee was committed to trying
18 to maximize value for all shareholders, not just
19 Harbinger. The committee instructed its advisors to
20 go back to Optima and find out if they are able to
21 make a bid for all of the stock. That's Veet-79.

22 The committee was trying to protect
23 all stockholders, and you don't have to believe me.
24 You can -- you can read what Mr. Scott wrote in an --

1 in an e-mail. And this is at Veet-16. Scott is not
2 Scott Faust. This is Mr. Scott from Jefferies. And,
3 Your Honor, I also want to refer to Veet-19 where
4 Optima says that it had a verbal agreement with
5 Harbinger to buy the shares. So that's Veet-19.

6 Then we go to Veet-16 and
7 Mr. Jefferies quotes the message he had received from
8 the special committee. He said "... the Special
9 Committee has an obligation to all shareholders."

10 And then in an e-mail later that day
11 Scott says to his clients, "The real issue the Special
12 Committee is concerned with is that Optima acquires
13 the Harbinger stock, takes the company through
14 bankruptcy, and flushes out current equity holders."

15 So Harbinger, which supposedly,
16 according to their footnote, you know, is pulling at
17 least somebody's strings, comes to this committee and
18 says -- I'm sorry; Optima comes to the committee and
19 says "We're going to buy Harbinger shares. They want
20 to sell them to us." The committee says, "No. Come
21 back. Get into our process. Make a bid for
22 everybody, because we don't want you to just buy
23 Harbinger and then leave everybody else in the cold
24 and maybe leave them with nothing if we have to go to

1 bankruptcy."

2 Your Honor --

3 THE COURT: I take it the proposal was
4 not only to buy Harbinger stock but to buy its --

5 MR. WILLIAMS: Debt and equity.

6 THE COURT: -- debt position as well?

7 MR. WILLIAMS: Yes, debt and equity.

8 So the committee had that history in
9 mind. They had already had a request from -- from --
10 from Optima to release them, and they were very
11 concerned about it, trying to keep value up for all
12 stockholders. And when you're in the middle of a
13 process, very much unlike Topps -- in Topps the
14 process was done, and there was a stockholder vote
15 that had not yet happened. When you're in the middle
16 of a process, a board is just simply not required to
17 release people from standstill so that maybe they can
18 go out and buy a blocking share, buy 51 percent to
19 veto the transaction that the board believes is in the
20 best interests of the stockholders. The board doesn't
21 have to approve that.

22 I want to talk about 141(a). Very
23 important to know that these directors who are on
24 trial here, they did not put this collective

1 bargaining agreement in place. They inherited it.
2 The came out of the bankruptcy proceeding under 303.
3 We know it has the same effect as if it were approved
4 by all of the directors and all of the stockholders.

5 And what -- what is the -- what is the
6 criticism? Well, the criticism is, you interpreted
7 this provision to deprive yourselves of the ability to
8 determine who should buy this company. That's just
9 not in the record, Your Honor. The board determined
10 who would buy the company. And the board determined
11 that, after considering all the factors that it should
12 consider. It's shown, Your Honor, in the minutes of
13 the special committee and the board meetings where
14 they were advised about the litigation and execution
15 risks of the Optima bid and after weighing that advice
16 approve the Severstal deal. As we say in our papers,
17 it's really 141(e) which is at issue here, which is
18 reliance on advisors more than it is 141(a). .

19 It's also shown that this concept that
20 the board just sort of gave up after the union kissed
21 Severstal is completely disputed by what happens after
22 May 1. On May 2 we looked at the -- actually, I'd
23 like to refer to Your Honor Veet-56. I don't think we
24 did look at that yet, though I admit I'm a little

1 tired and -- but I don't think we did.

2 Maybe I have the wrong number. Your
3 Honor, I'll ask one of my colleagues to find in the
4 Veet affidavit -- I believe it's there -- there is an
5 e-mail on May 2. Mr. Scott from Jefferies reflects an
6 e-mail that Moelis called to discuss the following
7 proposal. The number I have for this document is 315
8 through 317, Optima production.

9 And in this e-mail he reflects the
10 proposal that the Moelis team had called him to talk
11 about, A, "Optima to buy 49% stake in WCI (so as not
12 to trigger the change [in] control and not trip the
13 USW succession clause)"; B, "There will be a (6-month
14 or so) put right to the remaining holders to put the
15 remaining 51% to Optima if an agreement is not reached
16 with the Union."

17 Then it says "Other issues:" A,
18 "Severstal has not 'chased' the value of Optima's
19 bid." They say there's bid rigging. These advisors
20 were trying to get people up and trying to get bids
21 that the board could consider. There's nothing wrong
22 with that. And, B, his e-mail reflects "In the
23 scenario described above - with a protracted process
24 with the USW, the Company will need liquidity support

1 (450 million +/-) and will look to Optima to provide
2 it as part of the agreement."

3 That's on May 2.

4 Do you have it?

5 MR. BEAN: Yes.

6 MR. WILLIAMS: What exhibit is it?

7 MR. BEAN: OPT002515.

8 MR. WILLIAMS: Thank you.

9 I apologize for not having that
10 correct number, Your Honor.

11 THE COURT: We looked at this one
12 before.

13 MR. WILLIAMS: Did we?

14 THE COURT: Yes.

15 MR. WILLIAMS: I'm sorry.

16 I want to turn you to one that I don't
17 think we've looked at. This is Veet-81, which I'm
18 hoping is an e-mail from Scott Faust.

19 THE COURT: 82, is it?

20 MR. WILLIAMS: Veet-81.

21 THE COURT: I have an e-mail from John
22 Brice?

23 MR. WILLIAMS: Veet-81? Well, Your
24 Honor, I apologize. The document I'm referring to,

1 which I'll -- it's in my Veet-81. So there must have
2 been a copying problem -- is MOEL 011480.

3 THE COURT: My law clerk just put it
4 in front of me and --

5 MR. WILLIAMS: Okay. I'm going --

6 THE COURT: I'm looking in the
7 wrong -- I'm looking in the Randall affidavit. Wrong
8 affidavit.

9 Go ahead. I have it.

10 MR. WILLIAMS: Is it Veet-81?

11 THE COURT: I was looking in the wrong
12 affidavit. I now have it.

13 MR. WILLIAMS: My side says I'm right,
14 Your Honor.

15 THE COURT: You got one right,
16 Mr. Williams.

17 MR. WILLIAMS: You know.

18 This ... Do you have it?

19 MR. LAFFERTY: Which -- which --

20 MR. WILLIAMS: Veet-81.

21 So here -- and again, they take us to
22 task. You know, "You're not" -- "it's a fait
23 accompli. You're not going to worry about Optima.
24 You've got no choices to make."

1 Scott Faust, the labor lawyer, sends
2 an e-mail to Rathburn at Moelis and he says, "I'm
3 trying to assess the risk factors attendant to the
4 Optima bid."

5 And what he asks about here is how he
6 would calculate the right to bid for Optima in the
7 event that we did, in fact, fight the union -- I'm
8 sorry; the right to bid for the union in the event
9 that we did, in fact, sign up a deal with Optima, go
10 to federal arbitration, fight the union. Clearly, in
11 that circumstance the union would have a right to bid.
12 They'd have a right to top the Optima bid; and time,
13 of course, is of great necessity for our client
14 because it doesn't have much time.

15 And you have to determine -- the union
16 has to get the same amount of time that the bidder
17 got. And so Scott is asking questions here, "How
18 would we measure that? I hope we can measure that so
19 it's a shorter period rather than a longer period but
20 the union," he says, "was very aggressive in
21 attempting to carve out as big a window as they could
22 as a means of stalling the opposing deal in a
23 different transaction."

24 So the committee and its advisors are

1 trying to figure out is there a way around this issue.

2 And ... Now, Your Honor, I'm going to
3 ask that you turn to Veet-83. And 83 is an e-mail on
4 the Optima side of things where, again, Mr. Scott,
5 their banker, says, "WCI's bankers, attorney's and
6 board have been working on the structure as described
7 in my Friday e-mail." That's the 49 percent offer.

8 We know that on May 7 there was this
9 brainstorming call between all the advisors for Optima
10 and the company. Why would all this activity be
11 happening if it really didn't matter? It just defies
12 belief to contend, as they do, that this was all some
13 kind of charade because the special committee was
14 resigned to go with Severstal.

15 Your Honor, the truth is, the board
16 did believe it had the ability to choose Optima; but
17 it determined at this particular time with this
18 particular company, this particular liquidity crisis,
19 that the Severstal \$140 million deal was the best
20 deal. Mr. Davis explained "Everything we considered
21 had to do with the quality of the transactions
22 involved, the price offered, the firmness and
23 credibility of the price and the buyer and the ability
24 to get the transaction closed by that date. In that

1 regard we considered a number of factors. The ability
2 for a buyer to assume the contract," a reference to
3 the CBA, "on a timely basis was one of those
4 elements"; but it wasn't simply the
5 be-all-and-end-all.

6 And I'm not going to belabor the legal
7 deficiencies in their 141(a) argument, Your Honor; but
8 we do believe that 303, with the combination of the
9 proviso to 141 "except as otherwise provided in this
10 chapter," is a complete answer.

11 What we have here, Your Honor, is
12 really a challenge to either the contract itself, the
13 collective bargaining agreement -- and if that's what
14 it is, you can't bring it here. And I think everybody
15 would understand that. (Continuing) -- or it's a
16 challenge to the union's tactics, again, not the right
17 court, not -- and we got the wrong defendants for
18 that -- or what it really is is a challenge to an
19 informed decision by a disinterested board after
20 having heard advice about its counsel and bankers that
21 pursuing litigation with the union was not in the best
22 interests of the company, the risks were just too
23 high. Your Honor, whether or not to sue somebody,
24 whether or not to pursue a litigation strategy is a

1 classic business judgment to be made by directors of
2 Delaware corporations.

3 There's also this -- this criticism of
4 the board for placing too much importance on
5 liquidity, and they -- and they want to make that into
6 sort of a litigation afterthought.

7 Let's look at Veet-80. And, Your
8 Honor, when you get there, I want you to start with
9 the e-mail, the header of which is at the bottom of
10 the page and carries over to the next page. This
11 e-mail is written on April 23rd. Mr. Anthony, the
12 CEO, writes to his counsel -- and there was bidding
13 going on at the time -- "Assuming we have [acceptable]
14 bids ... this ... evening - what are the ... next
15 steps in appropriate" -- "and approximate timing?

16 "Because we are struggling from a
17 liquidity perspective, can we get a merger agreement
18 finished by 5/2 and HSR in 15 days? .

19 "I'm trying to assess how long we need
20 to try to hang on so I can get the WCI organization
21 focused."

22 And counsel, Mr. White, writes back,
23 "I gather the ice cream cone continues to melt." And
24 he talks about how we would go through this

1 transaction.

2 This liquidity problem that the
3 directors were told of by management is not something
4 that the directors made up. It was a very real
5 consideration, one of the very real circumstances that
6 directors are supposed to consider, Your Honor, in
7 deciding whether or not to take a particular cause of
8 action -- course of action.

9 Talk about irreparable harm a little
10 bit. There are only three stockholders here, Your
11 Honor, 15 percent of the shares. That's -- that's all
12 we have here. And if they have been aggrieved,
13 Mr. Goldman said "I can't imagine how a court could
14 figure out what the fair value of their shares is."
15 In fact, the Court does that all the time. The Court
16 could consider this \$172 million number. We realize
17 that's a potential. These people can receive their
18 money while the others get the deal they want. .

19 And with respect to Optima, we know
20 there's a dispute with respect to bidder standing, but
21 I'm not aware of a transaction where a bidder that
22 didn't own any stock got the transaction enjoined.
23 And maybe there is one, I'm missing it, but these guys
24 don't own any stock. And I know the Court a lot of

1 times sort of blurs it because, "Well, okay, but you
2 got the stockholders here." Well, that stockholder
3 group is always a class action, such that you'd have a
4 problem paying -- you know, where would the damages
5 come from if it was 172 million and it was supposed to
6 come from these directors? Well, it's not. It's
7 15 percent, Your Honor. There's no showing that that
8 amount of money can't be paid.

9 And, Your Honor, I want to close --
10 and I'll be done in just a minute -- with the balance
11 of hardships. Plaintiffs say if you enjoin this deal,
12 the stockholders will get more money. But will they?
13 Can Your Honor know that? If this deal is enjoined,
14 we submit the Court can't know what will happen. This
15 corporation is constantly struggling to pay its
16 suppliers and creditors. That's reflected in the
17 record in a number of places, including the Anthony
18 deposition and the Anthony affidavit. And what we get
19 from -- from Optima is a "Not to worry. Optima to the
20 rescue. We're going to solve all the problems."

21 Now, in the first affidavit that they
22 submitted to Your Honor on Tuesday night, knowing, of
23 course, that this is, you know, a major issue, you're
24 trying to enjoin a deal that's been approved by the

1 stockholders and is about to close and everybody knows
2 about the whole balance of hardships thing, they have
3 one paragraph in this affidavit, paragraph 5. Nothing
4 but conclusions. "Optima has proposed, and continues
5 to offer, to finance an acquisition of WCI with equity
6 provided by Optima and the Privat Group and to obtain
7 a letter of credit or other form of guaranty
8 reasonably satisfactory to WCI shareholders ..."

9 Well, what does all that mean? They
10 don't have a letter of credit. What are those terms
11 that are going to be reasonably satisfactory? And
12 then there's just a sentence that says "... Optima is
13 willing and able to provide necessary financing ...,"
14 and that's it. There's a reference to Privat Group
15 here. There's nothing from the Privat Group. We
16 pointed that out in our brief, of course, the
17 weaknesses of their position.

18 And then they come back and they say
19 in their second affidavit, which was filed last night,
20 "Well, now we've heard the criticism, then we're going
21 to respond in detail."

22 So throughout the affidavit you see a
23 reference to Optima and its partners. Optima and its
24 partners are going to come forward and make this bid

1 that we want to serve as the basis for Your Honor's
2 injunction. Well, who are the partners? Where's
3 their commitment letter? What happens to the back
4 end? So they make this 51 percent offer if they
5 somehow do it. And I know they told you we don't care
6 about the merger agreement. I'm guessing Severstal
7 does. That's more litigation there, but what happens
8 to the back end? Is there any commitment to take out
9 the back end? No. And Delaware lawyers know all
10 about the Court's concerns about making sure that
11 people on the back end don't get squeezed.

12 Paragraph 19 -- I'm sorry; paragraph 9
13 of the affidavit, so you want to know when it's going
14 to happen, I assume, Your Honor. Well, they tell you.
15 It will happen "as soon as practicable, after the
16 Court's decision." Okay. Is that the stuff of an
17 injunction? I submit not.

18 And then I would direct you to
19 paragraph 11. And it says at the end, the last
20 sentence of paragraph 11, "Optima will be prepared to
21 join with WCI in defense of claims of the union
22 against WCI or Optima which Optima believes would be
23 without merit and could not delay for a long period of
24 time Optima's direct acquisition of WCI shares."

1 Well, that, Your Honor, is expert
2 testimony from Mr. Korf, and I can't imagine that he's
3 qualified to give that testimony. And they haven't
4 come forward with it. And -- and at some point it's
5 got to be too late.

6 And so, Your Honor, I also want to go
7 back a little bit to history in terms of things that
8 Mr. Korf has said about his financing. Korf
9 Exhibit 14 to his deposition, Mr. Korf's banker writes
10 to him -- and this is as he's about to -- Korf is
11 about to submit a bid for WCI -- and he says, "Just a
12 little housekeeping for tomorrow's WCI bid. Do you
13 intend to have a letter signed by Igor," one of
14 Mr. Korf's associates, "tonight that vouches for the
15 equity check on WCI and pledges the Evraz shares as
16 collateral?" This is his own advisor. Well, he never
17 got the letter, Mr. Korf did, that his advisor asked
18 him should he be getting; and he testified in his
19 deposition "They," meaning Optima, "weren't asking, so
20 I wasn't giving."

21 He also testified in his deposition
22 "Optima offered liquidity assistance to WCI" -- and
23 this is a quote -- "throughout the negotiations."
24 That's at Korf-25 in his deposition. There is not a

1 single piece of paper that anybody has found from one
2 side or the other that says "Yes. We're offering
3 you" -- "we'll" -- "we'll solve your liquidity
4 problem, and yet he says we offered it throughout the
5 negotiations.

6 Your Honor, if this Court enjoins this
7 transaction, the stockholders clearly could be far
8 worse off than they are today. If this Court allows
9 the deal to be consummated, these three stockholders
10 can be compensated in money damages. The potential
11 effect of an order here, Your Honor, could be
12 disastrous to this company, and we respectfully submit
13 that the application should be denied.

14 THE COURT: Thank you, Mr. Williams.

15 Mr. Saunders is going to make a brief
16 appearance, and then I'll hear from Mr. Lafferty.

17 MR. SAUNDERS: Your Honor, I had -- I
18 have five points I wanted to make. I'll try to get
19 through them quickly.

20 The first point is about Severstal.
21 Severstal has rights here. It has rights with a
22 procedural dimension that Your Honor already
23 identified, but let me just make a point about that,
24 right, the procedural dimension being it can't

1 possibly be that we can be preliminarily enjoined out
2 of whatever substantive rights we have under the
3 merger agreement. That was Your Honor's point.

4 Mr. Lafferty says, "Well, but if you
5 can just hold us in place for a little while, then
6 we'll be able to exercise" -- "WCI would be able to
7 get out of the deal because it would be past the
8 drop-dead date." That doesn't change the question of
9 what the Court has in mind today can't possibly be
10 anything beyond preliminary relief. And if the
11 preliminary relief is intending to become final
12 relief, that can't be right.

13 It's also wrong as a matter of the
14 contract, because if WCI doesn't close this
15 transaction on Tuesday -- actually, they'd be entitled
16 to three days; but if they don't close it by Thursday,
17 they will be in breach, and if they are in breach of
18 the contract, then they don't have the right to --

19 THE COURT: Yeah, I understand that.

20 MR. SAUNDERS: -- to terminate.

21 Okay. The substantive dimension.
22 Obviously, we think -- we read QVC differently. And I
23 think the one point I'd want to make is that this is
24 not a case like QVC where there's a provision of the

1 contract that is being challenged as invalid in some
2 way. I think Mr. Lafferty admitted this in response
3 to Your Honor's question. It's not as though there's
4 a lockup or a stock option as there was in QVC that we
5 obviously as acquirer were aware of and that was
6 problematic that restricted the directors' abilities
7 and -- and that, therefore, would be a basis to say
8 that we have no rights.

9 The only claim that's being made is
10 about the insufficiency of the information that the
11 board had and the board's process. And that was not a
12 process that we had -- we didn't sit in the boardroom,
13 we didn't have knowledge of that, right. That's why
14 our rights under this contract are maintained.

15 Second point -- second point has to do
16 with the board. If Your Honor hasn't had a chance to
17 read it yet, absolutely encourage you during the break
18 to read the deposition testimony of Mr. Davis. This
19 is -- I've had experience with Mr. Davis in the past
20 opposing him. I expect I'll have experience with him
21 in the future. He's in a lot of these cases. And
22 when you read that deposition testimony, it's not an
23 independent director who has lent his name to a
24 company as independent director. This is a person

1 who's absolutely the prototypical kind of director
2 you'd want to have in a company in a dire situation
3 like this. He absolutely knew what he was doing. He
4 had his reasons. There's no reason to second-guess
5 that.

6 My third point goes to stockholders,
7 all right. They have ratified this case -- this
8 transaction. Mr. Lafferty's point was that -- the
9 Santa Fe case limited the circumstances in which
10 ratification would really have an effect. But the
11 last time I was before Your Honor in a case that
12 involved steel companies was the Lukens case, and
13 Lukens was after Santa Fe, right. And Lukens was very
14 similar in terms of the nature of the claims that were
15 being asserted, which was that there was something
16 defective about the board's process, okay, that had
17 resulted in the plaintiffs thinking that the deal that
18 was presented to stockholders for their approval,
19 wasn't as good as a deal that could have been
20 obtained, right.

21 And as Your Honor held in Lukens and
22 as the Supreme Court affirmed on the basis of Your
23 Honor's well-reasoned opinion, right, that has -- the
24 stockholders' approval has a ratifying effect in that

1 circumstance and extinguished those Revlon claims.

2 My fourth point, Your Honor, goes to
3 the union, okay. The union is not here. Now, my
4 client has earned over the years a good relationship
5 with the union. But that doesn't change the fact that
6 we don't have the same interests they do. There's
7 nobody in the room who has anything close to the
8 union's interest at heart, and it can't possibly be
9 the case that it would be fair for a bunch of steel
10 companies and owners of steel companies to come into
11 this Court and ask the Court to declare unenforceable
12 or interpret against the union this provision that,
13 frankly, the history shows they made hundreds of
14 millions of dollars' worth of wage and benefit
15 concessions to get in their collective bargaining
16 agreements across the industry.

17 If Your Honor has any -- any -- I
18 don't think you need to go there; but if Your Honor
19 has any interest in the background, it's in the
20 opinion of the federal arbitrator in the Esmark case.
21 That is in -- in the record.

22 My fifth point, Your Honor, is -- has
23 to do with Optima, okay. And it goes to the balance
24 of the equities, okay. And the balance of the

1 equities is often the -- you know, the poor stepchild
2 of the injunctive analysis. I -- I concede that. But
3 here, the balance of the equities is really dramatic,
4 because Optima is a shell. Optima has no
5 subsidiaries. It has no operations. What Mr. Korf's
6 testimony was -- this is at page 15 to 16 of his
7 deposition -- his testimony is that the only asset
8 that Optima has is \$15 million in cash, okay. Nothing
9 else, okay?

10 Now, it -- it apparently has wealthy
11 owners. Mr. Korf testified that he has a lot of
12 money. Apparently it has wealthy friends in the
13 Ukraine in the Privat Group who apparently are
14 interested in financing this investment. But there's
15 not a single piece of paper in the record, there's not
16 a commitment letter, there's not a letter of credit,
17 there's nothing from anybody who's got actually the
18 resources to stand behind the vague promises that
19 Optima is making here.

20 So when you look at the -- Mr. Korf's
21 reply affidavit in which he tries to give the Court
22 comfort that the company won't really face any dire
23 consequences if you enjoin this deal, I think you have
24 to think about two defects in that. One is that the

1 bridge financing that Mr. Korf proposes is essentially
2 a -- it's the cliché bridge to nowhere in the sense
3 that he's not proposing to assume the risk from
4 stockholders of inability to consummate. He's not
5 going to assume the risk that we're successful at
6 trial, enforcing our rights under our merger
7 agreement. He's not willing to assume the risk that
8 the union is successful in enforcing its rights. He's
9 not offering to assume the risk that he doesn't get
10 Hart-Scott approval. He's not willing to assume the
11 risk that his friends in the Ukraine, who are going to
12 own a majority of this company, are unable to get
13 CIFIUS approval, which they haven't yet, as far as we
14 can tell, haven't even begun the process of applying
15 for it, right; all those reasons to think that even if
16 he had the money, the financing that he's proposing
17 just delays the risk, doesn't resolve the risk, okay.

18 And then the second point, of course,
19 is that with absolutely no assurance that any of that
20 money is actually there. And it could be tomorrow or
21 a week from now the people who might actually have the
22 money decide they're not really interested in funding
23 this because something has happened and they're not
24 before the Court. They haven't made any promises at

1 all, no commitments whatsoever.

2 So beyond that, Your Honor, I join in
3 the arguments made by Mr. Williams.

4 THE COURT: Thank you, Mr. Saunders.

5 MR. SAUNDERS: Thank you, Your Honor.

6 THE COURT: Mr. Lafferty.

7 MR. LAFFERTY: Your Honor, thank you
8 for being patient. I know it's already been a long
9 hearing and I'll try to be brief. I may jump around a
10 little bit because some of my points are a little bit
11 maybe not as ordered as I would otherwise be.

12 I want to come back to -- and I think
13 the focal point comes down to the supposed business
14 judgment that the board made on the 16th and whether
15 that judgment was one that was adequately informed and
16 whether it was made in good faith. When the board
17 made that decision, they knew full well that we were
18 willing to raise more, that we said we would. They
19 didn't pick up the phone and call. In fact, from the
20 time of the meeting with the telephone conference
21 between Optima's advisors and WCI's advisors on
22 May 7th, there was no communication. There was no
23 communication other than us sending in a letter on --
24 to them on the -- on the 14th.

1 And at no point did they pick up the
2 phone to seek -- to see -- to discuss whether we'd pay
3 more, to discuss the alternative structures that we
4 had talked about previously or to -- to seek issue --
5 to raise issues about us providing financing if they
6 were really going to go to bat for our higher offer.
7 And they did know, obviously still, that we were the
8 higher -- higher bidder.

9 So when they made the risk/reward
10 assessment, as the record is clear that they say that
11 they made, they didn't have the critical input of what
12 our bid would be. And it's -- again, it's a question
13 of how high were we willing to go. They didn't really
14 want to know. And I think that's -- that is
15 reflective of Mr. Davis' testimony. And I know he
16 sits on lots of boards; but the fact is, his reaction
17 was, as I think it was completely on their side was,
18 you know, they think we're just some fly-by-night.
19 Well, the fact is, their -- their own documents --
20 there's never been a question about our ability to
21 finance a deal. The first time that was ever raised
22 was in these -- these briefs.

23 The contemporaneous record is, all the
24 way -- going all the way back to April 1st, was

1 that -- and you can see that in the April 1st special
2 committee minutes -- that "Moelis expressed the belief
3 that financing would not be an issue for either
4 Optima, which was backed by Privat Group, a large
5 Russian conglomerate, or Severstal."

6 There are other documents even further
7 along in the sales process, again, that made it very
8 plain that there was never an issue. This is -- this
9 is something that they're raising now to try to poke
10 holes in -- in it. And our tender offer is not -- is
11 in any way conditioned on the receipt of -- of that.
12 I mean, they -- they will have the money. There's
13 not -- there's not a question about that.

14 But going back to the business
15 judgment, the assessment wasn't -- they knew at that
16 point in time on the 16th that the difference was they
17 had gotten -- they had gotten Severstal to go up to
18 140 million. So the difference was 10 million. But
19 that really wasn't what the differential was. We had
20 already said we would be willing to pay more. And
21 they didn't make any effort to get that -- to get that
22 additional information from us.

23 The board purportedly decided that our
24 \$150 million wasn't worth the risk. But how could

1 they make an informed judgment when they didn't have
2 all of the inputs? is the bottom line. And that is
3 the fatal flaw here. Maybe the board could have
4 decided that even at our -- our \$172 million number or
5 more that the Optima bid wasn't worth the risk. But
6 it's undisputed that the board never made that
7 judgment. They didn't -- they didn't bother to call.

8 I mean -- I can't remember whether it
9 was Mr. Williams or -- or Mr. Saunders made reference
10 to Mr. Davis' comments about -- about my client being
11 a spoiler; but the bottom line is, how did he know?
12 How would he know? His immediate negative reaction
13 was -- was disgust. I mean, anger and disgust. And
14 that's just not a director who wants to get the
15 necessary input to make an informed judgment at the
16 end of the day.

17 And, you know, how would -- how would
18 he know if we were acting as spoiler or if we were
19 real if you don't pick up the phone and call? This
20 isn't a case like RJR. And -- and we understand that
21 there are cases out there, RJR and others that they
22 cite in their papers. We don't dispute the principle
23 that at the end of an auction there might be -- there
24 might be some advantage gained at some point to

1 granting a lockup option at some point. This is not
2 like RJR. This isn't where you were bidding -- they
3 didn't talk to us for over a week, and they didn't
4 pick up the phone after they got our communication
5 that said we would pay more.

6 So those cases, while we don't dispute
7 the legal principle, just have no application here.
8 It's much more like Holly Farms where the board
9 ignored an indication of interest of -- of a bidder
10 that was willing to pay more.

11 I mean, there were issues raised about
12 the standstill. You know, on this record, obviously,
13 we submit that the record is that we requested a prior
14 release. It wasn't given. But, frankly, I don't -- I
15 don't understand -- and I don't -- never really --
16 never really understood, and our advisors never really
17 understood, why it was that they could come to the
18 conclusion that a release from the standstill was a
19 transaction as used in the CBA. It just -- it just --
20 it just doesn't make any sense.

21 Your Honor, I guess I -- there are --
22 there are a number of other issues I guess I could go
23 on talking about. If there are particular questions
24 that Your Honor has, I'm prepared to try to address

1 them and --

2 THE COURT: I don't think so at the
3 moment, Mr. Lafferty.

4 MR. LAFFERTY: We are -- we are
5 prepared to -- to move forward with our offer and
6 would like the opportunity to do that. And we would
7 request that Your Honor grant our motion for an
8 injunction.

9 THE COURT: Is there -- one question.
10 You -- you refer to your tender offer. And I guess, I
11 suppose, in some sense you have a tender offer. Has
12 anyone tendered to you?

13 MR. LAFFERTY: Not to my knowledge,
14 no.

15 THE COURT: All right. We're going to
16 stand in recess. Why don't we say we'll reconvene at
17 2:30.

18 MR. WILLIAMS: Thank you, Your Honor.

19 MR. GOLDMAN: Thank you, Judge.

20 (Adjourned for luncheon recess at
21 1:36 p.m.)

22 oOo

23 AFTERNOON SESSION

24 (Returned from luncheon recess at 2:39

1 p.m., and the proceedings resumed as follows:)

2 THE COURT: I very much appreciate all
3 the hard work that has gone into the preparation of
4 this case. And I also very much appreciate the
5 excellent presentations that were made earlier in the
6 day. They were excellent, and they -- both the briefs
7 and the presentations have helped crystalize my
8 thoughts on this subject.

9 I only wish that my remarks were as
10 well-prepared in rendering my decision from the bench
11 today. I wish my remarks were as well-prepared, as
12 well-organized as the presentations that I have
13 witnessed. Unfortunately, that's not the case. My
14 only -- I only plead that I only got some of the
15 briefs yesterday. So ... there hasn't been that much
16 time to do this.

17 But that's a situation we all knew was
18 going to be true, or certainly I knew it was going to
19 be true, and I made sure you understood it was going
20 to be true when I allowed this matter to go forward.

21 The standard for governing the
22 issuance of a preliminary injunction is well-known.
23 Plaintiffs must demonstrate that they, one, are likely
24 to succeed on the merits of their claims; two, will

1 suffer imminent irreparable harm if an injunction is
2 not granted; and, three, they must show that the
3 balance of equities weighs in favor of the injunction.

4 In this case, having given as much
5 careful consideration to the briefs and the arguments
6 as I have been able to do, my judgment is that the
7 plaintiffs have not demonstrated their entitlement to
8 an injunction.

9 Turning first to the success on the
10 merits, and just to put what I will discuss in some
11 quick context, this company emerged from bankruptcy in
12 March of 2006. And in connection with its emergence
13 from that proceeding the Bankruptcy Court approved on
14 March 29th, 2006, a new collective bargaining
15 agreement between the company and the union that
16 represents all of its employees, which is the United
17 Steelworkers Union. I've shortened the name. It's
18 much longer than that, but that's how I've been
19 referring to it. There is, as a sort of a central
20 focus in this litigation, a provision in that
21 collective bargaining agreement. If I could just
22 summarize it in 20 words, it requires anyone who
23 acquires control of the company, before closing the
24 transaction, to obtain the union's's consent to the

1 change of control, essentially. And it also gives the
2 union a right to match offers in a way that has itself
3 created some uncertainty in this case.

4 After emerging from bankruptcy, as I
5 understand it, the company ran into some real trouble.
6 And it has since the summer of 2007 been engaged in a
7 lengthy process looking for possible bidders to buy
8 the company.

9 The record, I'm convinced, is quite
10 clear at all times relevant to this proceeding, which
11 stretches back to the end of last year, the company
12 has suffered severe liquidity problems. The liquidity
13 and related subjects are the subject of routine
14 discussion at board meetings. And so I don't think
15 it's fair to argue, as the plaintiffs do, that the
16 liquidity issues presented in the context of this
17 motion and which the board of directors relied upon in
18 making its decisions are in any sense trumped up or
19 illusory.

20 And I think it's also fair to say that
21 solving the liquidity problems has been a principal
22 aim of trying to sell the corporation.

23 Now, last December the company entered
24 into a restructured credit facility with Harbinger.

1 Harbinger is also a large stockholder, having
2 something in the area of 37 percent of the stock or at
3 least the voting power. As I said, the company
4 entered into a new credit facility with Harbinger last
5 December that the record reflects sort of was enough
6 to keep the company solvent sometime until the middle
7 of this year, maybe no longer than the beginning of
8 July, which is just next week.

9 So somewhat like in Omnicare, WCI,
10 which is the company at issue here, if I haven't
11 mentioned that so far, was under pressure to complete
12 a deal or face the prospect of another bankruptcy.
13 And from what I read, a second bankruptcy would likely
14 be a liquidation rather than a restructuring.

15 The company retained a financial
16 advisor to assist it in this process. At first it was
17 CIBC. At some point during the process the gentleman
18 from CIBC left to join another firm called Moelis,
19 and -- and WCI switched from CIBC to Moelis. Moelis
20 then ran a process with the help of a special
21 committee of the board which was formed merely for
22 convenience purposes, according to the record, and
23 solicited 22 potential buyers. That number whittled
24 down, and by April of 2008 there were only two

1 remaining bidders, Severstal and Optima. And at that
2 point the two of them were offering quite similar
3 economic terms.

4 Now, as I said before, superimposed on
5 this situation is the successorship provision in the
6 collective bargaining agreement and the union's
7 interpretation of that provision as giving it a right
8 to deal exclusively with the bidder of its choice.
9 And this interpretation potentially gives the union a
10 veto or a negative control power over the potential
11 acquisition of the company by a third party.

12 And as I mentioned, the union also has
13 a right to match, the duration of which seems to be 45
14 days or, if longer, as long as the buyer had to
15 formulate its proposal.

16 Now, an interesting side fact here is
17 that both Severstal and Optima sought the union's
18 exclusive support. That is, when the two of them went
19 to talk to the union, they both proposed that the
20 union should agree to support them -- or agree to
21 their taking control and to refuse to agree to anyone
22 else taking control. And for reasons that are only
23 remotely important in this case, the union decided to
24 support Severstal over Optima. And, as a result, when

1 the company asked for best and final bids at the end
2 of April, only one bid was made, and that was by
3 Severstal. And Severstal in that bid represented that
4 the union had either promised or indicated its
5 exclusive support of Severstal as the acquirer and
6 also that the union had agreed to waive its contract
7 right to make a matching bid to the Severstal bid but
8 not to any other bid. As I said, Optima at that time
9 did not make a bid.

10 Now, this lawsuit essentially is about
11 what happened after that set of facts came into
12 existence. Now, I'm not going to run through a
13 timeline of what happened between that time in April
14 and the time in the middle of May when the board of
15 directors authorized the ultimate merger agreement and
16 that agreement was approved by stockholders having a
17 majority of the vote; but facts will come up during
18 the course of what I'm now going to talk about, and
19 when they do, I will discuss them then.

20 There are two things that I do want to
21 mention, the first of which took on considerable
22 importance in the plaintiffs' application for
23 expedited proceedings but, quite frankly, has been
24 much less important in its briefing and, to my

1 knowledge, wasn't mentioned today, but I'm going to
2 mention, anyway, to put things in context.

3 When this case was filed, a good deal
4 was made of the fact that Harbinger, which owns, as
5 I've said, something like 37 percent of the voting
6 power here, also has parallel or similar investments
7 in other steel companies in the United States which
8 have similar collective bargaining agreements and
9 certainly similar change-of-control provisions to the
10 collective bargaining agreement at issue here. And
11 the argument was presented earlier that Harbinger's
12 interest in those other companies was really much
13 greater than its interest here and that it had a
14 serious interest in not getting crosswise with the
15 United Steelworkers Union and, therefore, that
16 Harbinger favored a quick and cheap sale here for some
17 reason. As I said, that theme hasn't really been
18 reproduced in the briefing or in the argument.

19 Similarly, in their reply brief in a
20 footnote the plaintiffs discuss the composition of the
21 special committee. Now, I mention that the special
22 committee was one of convenience, not necessity, in
23 the sense there weren't a majority of conflicted
24 directors. But the committee's composed of three

1 people, as I understand it, two of whom are directors
2 who have been nominated by Harbinger and one of whom
3 who was a director nominated by the union. But while
4 that -- the composition of that committee is noted in
5 the footnote, it doesn't form the basis of any of the
6 plaintiffs' arguments.

7 So let me talk about Section 141 and
8 the collective bargaining agreement. The plaintiffs
9 make a central argument that the board abdicated its
10 authority or delegated its authority to manage the
11 business and affairs of the corporation to the union
12 and that they did by declining to strenuously
13 challenge the union on its interpretation of the
14 successorship provision.

15 Secondly, whether the board's efforts
16 to manage the problem created by the union's
17 interpretation were so meager as to amount to a breach
18 of the duties of loyalty or care or, putting it
19 differently, from the defendants' point of view, were
20 those efforts a valid exercise of business judgment.

21 Now, the plaintiffs argue that the
22 successorship provision in the CBA is like the no-hand
23 poison pill at issue in Quickturn Design System, Inc.
24 versus Shapiro or the force-the-vote provision in

1 Omnicare. That is, they argue that the CBA improperly
2 limited the board's authority to consider higher bids
3 at a time the board's discretion was of the utmost
4 importance in the sale of the company. They argue,
5 therefore, that the CBA amounts to an improper
6 delegation of the board's power.

7 But I don't think this argument bears
8 scrutiny. The successorship provision is not
9 self-imposed by the board, as was the contractual
10 provision found in Omnicare or Quickturn. Rather, as
11 I've already said, it was a condition negotiated by
12 WCI's creditors in bankruptcy and approved by the
13 Bankruptcy Court as a condition to the company's
14 emergence from reorganization. The defendants point
15 out that under Section 303(a) of the DGCL, provisions
16 of this nature are to be given effect as though they
17 were approved unanimously by the board and unanimously
18 by the stockholders.

19 Now, in this regard I note that the
20 union's interpretation that is at issue here may not
21 have been one that creditors necessarily bargained
22 for. One might have thought that the union would have
23 obligations of good faith and fair dealing to act
24 evenhandedly in negotiating agreements with all

1 qualified bidders. Nevertheless, like many contracts
2 corporations may validly enter into, this one does not
3 expressly limit the board's statutory authority.

4 Rather, it gives rise only to a claimed power by the
5 union that the board must recognize and manage or
6 treat with when it exercises its powers under Section
7 141(a) to manage the business and affairs of the
8 corporation.

9 Now, how the board does so is
10 certainly the subject of a contextual fiduciary duty
11 analysis, but it is not properly the subject of any
12 rigid black and white rule or any analysis that could
13 lead to the conclusion that the board somehow exceeded
14 its statutory authority when this contract was entered
15 into and approved by the Bankruptcy Court.

16 There is another argument made by the
17 plaintiffs that isn't strictly a Revlon argument.
18 That is that the stockholder vote that the board
19 agreed to seek and that was, indeed, obtained shortly
20 after the merger was authorized by the board was a
21 form of a lockup that either exceeded the board's
22 power or breached its fiduciary duties. And the
23 plaintiffs also contend that the board's decision,
24 first on May 14th and again on May 16th, to agree to

1 Severstal's 24-hour or, indeed, shorter stockholder
2 consent period provision improperly contracted away
3 their fiduciary out in violation of Omnicare's alleged
4 supposed teaching to the contrary.

5 But a stockholder vote is not like the
6 lockup in Omnicare. First, it's really not my place
7 to note this, but Omnicare is of questionable
8 continued vitality. Secondly, the stockholder vote
9 here was part of an executed contract that the board
10 recommended after deciding it was better for
11 stockholders to take Severstal's
12 lower-but-more-certain bid than Optima's
13 higher-but-more-risky bid. In this context, the
14 board's discussion reflects an awareness that the
15 company had severe liquidity problems. Moreover, it
16 was completely unclear that Optima would be able to
17 consummate any transaction. Therefore, the
18 stockholder vote, although quickly taken, was simply
19 the next step in the transaction as contemplated by
20 the statute. Nothing in the DGCL requires any
21 particular period of time between a board's
22 authorization of a merger agreement and the necessary
23 stockholder vote. And I don't see how the board's
24 agreement to proceed as it did could result in a

1 finding of a breach of duty.

2 Citing Topps, Optima also argues that
3 the board's refusal to release it from the standstill
4 was a breach of fiduciary duty. To put this in
5 context, there was a standstill that Optima agreed to
6 last summer in which it agreed to modify when the
7 process to sell the company was begun earlier this
8 year. And there was a time in February when Optima
9 approached the board and asked to be released from the
10 terms of the standstill in order to pursue a
11 transaction to acquire Harbinger's debt and equity
12 position in the company. And at that time the board
13 refused the request made by Optima and did so because
14 it came to the conclusion, quite rightly, that the
15 transaction that Optima was proposing to pursue was
16 one that threatened rather than was protective of the
17 interests of all of the stockholders of the company.

18 In any event, Optima relies on the
19 Topps case, arguing that the board's refusal to
20 release it from the standstill here sometime in the
21 middle of May was a breach of fiduciary duty. I think
22 this isn't like Topps where the board had no
23 reasonable basis not to allow a higher bidder to
24 directly approach the stockholders. Rather, the board

1 made a business decision that waiving the standstill
2 would have merely threatened litigation with the
3 union. At the same time the board reasonably
4 concluded that given the company's severe liquidity
5 crisis and the relatively high offer from Severstal,
6 the company could not afford to challenge the union in
7 a strenuous way. Beyond that, it's a little unclear
8 in the record when and if any request was made by
9 Optima to be released from the standstill agreement
10 before the merger agreement was authorized by the
11 board on May 16th and very shortly thereafter approved
12 by the stockholders. There is a conflict in the
13 record. There is some suggestion on the part of
14 Optima that a request was made a week or so earlier.
15 But if that's true, it was made in connection with the
16 discussions that the company and Optima were having
17 about the possibility of an alternative proposal that
18 would not implicate the change-in-control provision in
19 the CBA. And since Optima and the company were never
20 able to come to an agreement about what such an
21 alternative structure could take that wouldn't unduly
22 threaten the company with protracted litigation with
23 the union, there really was no occasion to permit
24 Optima to be released from that undertaking to make a

1 proposal that the board had a reasonable basis to
2 conclude was not in the best interests of the
3 stockholders.

4 So this, I think, takes me, on the
5 question of merits, takes me to the Revlon argument.
6 And there is no question that the Revlon standard
7 applies in this case, as the case is centrally about
8 the plaintiffs' contention that the board and the
9 special committee breached their duties under that
10 case. In the context of preliminary injunction, the
11 plaintiffs must establish a reasonable likelihood that
12 at the trial the defendant directors would not be able
13 to show that they had satisfied their fiduciary duties
14 -- and the cite for that is Revlon itself -- which
15 require them to undertake a process to maximize the
16 company's value for the stockholders' benefit, to seek
17 the highest value that can be secured for stockholders
18 regardless of whether it is in the best interests of
19 other corporate constituencies.

20 In reviewing whether a board did so,
21 courts look to the adequacy of the decision-making
22 process employed by the directors, including the
23 information on which the directors based their
24 decision and the reasonableness of the directors

1 action in light of the circumstances then existing.
2 However, and importantly, the Court will not
3 substitute its business judgment for that of the
4 directors but will determine if the directors'
5 decision was on balance within a range of
6 reasonableness.

7 The record shows the directors are
8 likely to demonstrate that they undertook a
9 deliberative, informed, and reasoned process in making
10 their decision and that this decision, when
11 considered in the context of all the circumstances,
12 fell within a range of reasonableness.

13 Now, I suppose I haven't taken the
14 rabbit out of the hat here yet -- and this is a good
15 time to do it. What brings us to this point in the
16 litigation is that on May 16th the board authorized a
17 merger agreement with Severstal on terms which
18 provided \$140 million in equity to the stockholders of
19 WCI. I think the economic terms of the transaction
20 were more significantly in the direction of the
21 debtholders and that the total amount of the
22 transaction is more than half again -- or is certainly
23 more than twice the size of the equity component. But
24 at the time that transaction was authorized by the

1 board, Optima had on the table a proposal to pay
2 similar terms to the debtholders but 150 million
3 rather than \$140 million in equity to the
4 stockholders.

5 Now, having said that, I should say
6 that Optima's offer, which was made on May 1st and
7 reiterated on May 14th, was at that time conditioned
8 on it obtaining the approval from the United
9 Steelworkers Union which it had not been able to
10 obtain.

11 When the board first met on May 14th,
12 it was considering authorizing a transaction with
13 Severstal at \$136 million equity value. Now, what got
14 them to May 14th itself is a long story. I'm really
15 not going to go through here in detail other than to
16 note that on May 9th, the board or its advisors met
17 with the stockholders.

18 Now, there are, as it was said on the
19 record today, there are only 28 stockholders of this
20 company. And they were all invited to participate at
21 a meeting. I believe it was held in New York. And at
22 that meeting there was a presentation made that
23 reviewed the status of this transaction and reviewed
24 what the competing bids were, reviewed the pluses and

1 minuses, the risks inherent, and reviewed the status
2 with the union and the collective bargaining
3 agreement. So at that time -- and I think at that
4 time there was seen to be some disagreement among
5 different groups of stockholders about how the board
6 should proceed; but the record reflects that a
7 majority of the stockholders, a clear majority were in
8 favor of the board acting in such a way as to be sure
9 not to lose the Severstal bid.

10 Now, at the time the Optima bid was
11 conditioned on getting union approval which Optima
12 didn't have. The Severstal bid was likewise
13 conditioned on getting union approval, but Severstal
14 represented and it was confirmed that the union was
15 supportive of the Severstal transaction and that the
16 union would, indeed, waive its contractual right to
17 make a competing bid in that transaction.

18 When the board met on the 14th, the
19 board had been pushing Severstal to raise its bid.
20 The bid it made originally was \$101 million in equity
21 value. At the end of the April the board called for
22 best and final offers from the two bidders. Only one
23 bid. Severstal made the only one. Optima, which at
24 that time realized it didn't have the support from the

1 union, did not bid. The committee reacted not by
2 signing up a deal with Severstal but by pursuing
3 Optima and getting Optima to return to the bidding
4 with a promise that it would help in dealing with the
5 union, I think go toe to toe was a phrase that was
6 used; and, as a consequence, Optima did make a bid on
7 May 1st of \$150 million.

8 Thereafter for a period of time the
9 company and Optima pursued that transaction. Optima
10 restarted negotiations with the union but after a week
11 or so realized that those negotiations were going
12 nowhere. And also the company and Optima began
13 looking at whether it was possible to pursue an
14 alternative transaction or any form of alternative
15 transaction that would both protect the interests of
16 the stockholders by accomplishing a sale of the
17 company but somehow not trigger the change-of-control
18 provision in a way that would be injurious to the
19 interests of the company or its stockholders.

20 And what I can make of the record of
21 that exercise is that while there were several
22 meetings and various discussions, there was no
23 solution arrived at and none really proposed that the
24 company or its advisors believed was able to meet

1 those objectives.

2 So they got to the point by
3 May 14th where Severstal was offering \$136 million and
4 demanded that the board act and gave it a brief period
5 of time to act. The board met, and although it was
6 apparently advised that it did not have promised
7 support from the majority of the stockholders, the
8 board, nevertheless, approved the merger agreement at
9 \$136 million, although I'm told and I believe that
10 that agreement was never signed. So it -- and it
11 certainly was never authorized by the stockholders.

12 Two days pass. Now in the interim --
13 on May 15th Optima sent a letter not to the board but
14 to the stockholders. And as I said before, on
15 May 14th, Optima sent a letter to the board
16 reconfirming its \$150 million offer conditioned on the
17 same things it had been conditioned on before.

18 On the 15th, Optima sent a letter to
19 the stockholders of the company. Now, sending that
20 letter was very certainly a violation of its
21 standstill obligations, since the letter purported to
22 make an offer to buy their shares. And in that letter
23 Optima expressed that it might be willing to pay
24 substantially more but did not indicate how much more.

1 And I should note that on that same day Optima did not
2 contact the board or any of its advisors on that
3 subject matter and did not call to indicate what
4 additional price it might be willing to offer, if any.

5 So all that's going on on the 14th.
6 In the meanwhile, the board -- the board sent out
7 another communication to its shareholders advising
8 them that it was about to meet again and that if it
9 authorized the merger, it would be looking for them to
10 approve it promptly.

11 When the board met on the morning of
12 the 16th, it was advised about this letter of the
13 15th; and although it did communicate with Severstal
14 and demand one of two things, either that Severstal
15 permit the board to not act -- or not require
16 immediate stockholder consent but have a 20-day period
17 for a meeting, or that Severstal raise its bid,
18 Severstal rejected the first proposal but agreed to
19 raise its bid to \$140 million, demanding that the
20 board act immediately and that the stockholders
21 authorize the transaction immediately thereafter.

22 The board at that meeting, after being
23 advised by its lawyers about the risks inherent in
24 various options and receiving a fairness opinion

1 from -- from its financial advisor, authorized the
2 merger agreement at \$140 million and within a few
3 minutes after that fact was communicated, the company
4 received written consents from two shareholders who
5 together own in excess of 51 percent of the voting
6 power. And so the transaction was authorized by the
7 stockholder.

8 Now, as I look at this, if you leave
9 aside the question of how the board dealt with the
10 union and did the board somehow treat Optima unfairly
11 by always using its offer as the offer to push
12 Severstal against, which are issues I don't think get
13 anywhere, the real question raised here is did the
14 board at the last meeting violate its Revlon duties by
15 failing to call Optima or Optima's representatives to
16 inquire whether Optima would be willing to pay more
17 and, if so, how much. And that really is the crux of
18 the Revlon argument at this point.

19 And I have read the testimony of
20 director Davis. And my judgment is that the board
21 acted appropriately by acting as it did, that it
22 properly was concerned that Optima was violating its
23 obligations under the standstill agreement and
24 properly concluded that if Optima had anything to tell

1 it, Optima knew how to communicate any new bid it had.
2 The board, from what I can see, exercised a very
3 thorough judgment, weighed all the risks associated
4 with the different offers then available and concluded
5 as it did that it was the appropriate judgment to make
6 to approve the merger. In this regard, Optima's bid
7 still lacked union support and Optima had not
8 identified any alternative deal structure that did not
9 entail undue risks.

10 Now, as I said, in reaching that final
11 conclusion, I don't substitute my judgment for that of
12 the board or my business judgment for the board's
13 judgment. My job is to look at what the directors did
14 and determine whether the actions they took are within
15 a range of reasonableness. And I have little doubt
16 that they were.

17 So I think that summarizes what I have
18 to say on the subject of likelihood of success on the
19 merits.

20 Just a few observations on the other
21 points. Irreparable harm. This case is somewhat
22 unusual in that the plaintiffs consist of the
23 frustrated competing bidder which owns no stock and no
24 debt of WCI and three WCI stockholders who

1 collectively own 15 percent of the stock and who act
2 for themselves alone. There are no affidavits before
3 me from any other shareholder indicating any
4 unhappiness with this transaction. Importantly,
5 there's no testimony from Harbinger, there's no
6 testimony from the other stockholder which acted to
7 authorize this deal, that is, UBS, and there are no
8 affidavits from them, either. There's no suggestion
9 that either of them feels that they were misled in any
10 way in signing the authorization that they did. And,
11 frankly, they signed it nearly six weeks ago. So it's
12 not something that couldn't have been obtained.

13 I mentioned the fact that Optima owns
14 no stock and owns no debt. It raises two questions.
15 One is the fact that Optima, while it certainly has an
16 interest in completing this transaction, doesn't have
17 any skin in the game in the sense that it will suffer
18 any detriment to its investment in the company if, for
19 example, I entered an injunction and the Severstal
20 transaction disappeared and the Optima transaction
21 never got completed. So there's some unbalance here.

22 And, of course, there's the -- the
23 point that under our law it is unlikely that Optima
24 has by itself has legal standing to raise questions

1 about breach of fiduciary duty. But I pass this
2 question over in this context because Optima is
3 aligned with people who are shareholders and they are
4 together making these arguments, although, even on
5 that point I note this action isn't brought as a class
6 action. So there isn't really even an undertaking to
7 represent the interests of all the stockholders. It's
8 brought individually by these three shareholders. So
9 that makes the case somewhat unusual as well.

10 Let me say back on the merits just
11 very briefly. There is a ratification question raised
12 by the fact that this transaction has been approved by
13 stockholders. And I haven't been able to -- during
14 the time we were on break I wasn't able to go review
15 the case that was cited to me involving the other
16 steel company, the name of which now escapes me.
17 Anyway, there was a case I decided maybe six or eight
18 years ago involving a very similar challenge to the
19 conduct of an auction. I think in that case what
20 happened was that the two principal bidders got
21 together and formed an agreement to join forces and to
22 end the bid. They determined how much they were
23 willing to pay, and then they just cut up the spoils
24 between themselves.

1 And there was a claim made that the
2 directors had violated their fiduciary duties by not
3 having anticipated that conduct and having it made
4 clear in the bidding rules that it would not be
5 permitted. And I'm quite sure that in that case I
6 held that the fact that after all this was fully
7 disclosed, the stockholders' approval of the agreement
8 served as a ratification of the Revlon claims and
9 distinguished the case from the Santa Fe case.

10 I don't know which case is necessarily
11 more on point, but I do bring it up because there is a
12 ratification defense. And the absence of any evidence
13 from either UBS or Harbinger makes it difficult for
14 the Court to conclude that there isn't merit to that
15 defense.

16 I probably said more than I should. I
17 could talk about balancing the hardships. I think if
18 one did balance the hardships here, it's very likely
19 the hardships to these three plaintiffs are outweighed
20 by the potential hardship to the company and to the
21 remaining shareholders that could follow if the
22 injunction issued and the Severstal deal went away and
23 then the Optima transaction was not able to proceed.

24 So I'm going to end it there. And for

1 those reasons, the motion for preliminary injunction
2 is denied.

3 Now, as I said before, if there's to
4 be an appeal, I'm prepared to enter a Rule 42(a)
5 order. Do you want to come back to me this afternoon
6 on that, Mr. Lafferty?

7 MR. LAFFERTY: Well, Your Honor, I
8 believe -- I mean, if we could take maybe a
9 five-minute break and come back, would that --

10 THE COURT: Sure.

11 MR. LAFFERTY: -- be acceptable?

12 THE COURT: That's fine.

13 MR. LAFFERTY: Okay.

14 THE COURT: We'll stand in recess.

15 (A recess was taken at 3:21 p.m.)

16 oOo

17

18

19

20

21

22

23

24

CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 4 through 142 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 117 through 142, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 1st day of July 2008.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent

