#152 CFR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PARAMOUNT COMMUNICATIONS INC. and KDS ACQUISITION CORP.,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 10866
TIME INC., et al.,	:	
Defendants.	:	
LITERARY PARTNERS, L.P., et al.,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 10935
TIME INCORPORATED, et al.,	:	
Defendants.	:	
IN RE TIME INCORPORATED SHAREHOLDERS LITIGATION	:	Consolidated Civil Action No. 10670

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Courtroom No. 301
Public Building
Wilmington, Delaware
Tuesday, July 11, 1989
10:10 a.m.

- - -

BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

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ARGUMENT ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CHANCERY COURT REPORTERS
135 Public Building
Wilmington, Delaware 19801
(302) 571-2447

APPEARANCES:

BRUCE M. STARGATT, ESQ.,
EDWARD B. MAXWELL, II, ESQ.,
JOSY W. INGERSOLL, ESQ. and
DAVID C. McBRIDE, ESQ.
Young, Conaway, Stargatt & Taylor
-and-
MELVYN L. CANTOR, ESQ.,
MICHAEL J. CHEPIGA, ESQ.,
DAVID E. MASSENGILL, ESQ. and
JOSEPH F. WAYLAND, ESQ., of the
New York Bar
Simpson Thacher & Bartlett
for Plaintiffs in Civil Action No. 10866

P. CLARKSON COLLINS, JR., ESQ.
LEWIS H. LAZARUS, ESQ. and
BARBARA MacDONALD, ESQ.
Morris, James, Hitchens & Williams
-and-
MICHAEL R. KLEIN, ESQ.,
RICHARD W. CASS, ESQ.,
THOMAS W. JEFFREY, ESQ. and
ERIC MARKUS, ESQ., of the
District of Columbia Bar
Wilmer, Cutler & Pickering
for Plaintiffs in Civil Action No. 10935

GARY W. ABER, ESQ.
Heiman, Aber & Goldlust
-and-
SHERRIE R. SAVETT, ESQ., of the
Pennsylvania Bar
Berger & Montague
-and-
STUART H. SAVETT, ESQ., of the
Pennsylvania Bar
Kohn, Savett, Klein & Graf
for Plaintiffs in Civil Action No. 10670

APPEARANCES, Cont'd.:

MARTIN P. TULLY, ESQ.,
LAWRENCE A. HAMERMESH, ESQ. and
THOMAS REED HUNT, JR., ESQ.
Morris, Nichols, Arsht & Tunnell
-and-
ROBERT D. JOFFE, ESQ. and
RORY O. MILLSON, ESQ., of the
New York Bar
Cravath, Swaine & Moore
for Defendant Time

CHARLES F. RICHARDS, JR., ESQ.,
WILLIAM J. WADE, ESQ.,
THOMAS BECK, ESQ.,
GREGORY V. VARALLO, ESQ.,
MICHAEL J. FEINSTEIN, ESQ.,
DANIEL A. DREISBACH, ESQ. and
WILLIAM P. BOWDEN, ESQ.
Richards, Layton & Finger
-and-
HERBERT M. WACHTELL, ESQ.,
BARBARA ROBBINS, ESQ.,
WILLIAM C. STERLING, JR., ESQ.,
KENNETH B. FORREST, ESQ. and
GEORGE T. CONWAY, III, ESQ., of the
New York Bar
Wachtell, Lipton, Rosen & Katz
for Defendant Warner

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THE COURT: Good morning, ladies and gentlemen. This is the time set by the Court for hearing motions for preliminary injunction in three related cases, Civil Action 10866, 10670, and 10935, Paramount Communications vs. Time Incorporated and others.

Mr. Cantor, are you prepared to proceed?

MR. CANTOR: I am, Your Honor.

As Your Honor is aware, the discussions between Time and Warner with respect to a prospective business combination began sometime in early 1987. In the summer of 1987 Mr. Levin, who is the vice chairman of Time, wrote a memorandum, and it is marked Levin Exhibit 11. And I thought what I would do is -- there will only be five or six exhibits that I will be referring to specifically, I believe, and quoting from in part, and I thought I would hand that up and hand a copy back to counsel so that you can follow with me.

THE COURT: Thank you.

MR. CANTOR: This was a memo, Your Honor, to Mr. Munro, with copies to Mr. Nicholas and Mr. Bigelow, the vice chairman of Time and a man who

has been described as their chief strategic thinker and a man who was their chief negotiator in the Warner transaction.

He says on the first page of the memo, "While size alone is no guarantee of independence, this company" -- he is talking about a merger with Warner and TBS -- "this company should be relatively secure and able to narrow the spread between its private and public market values."

On Page 3 of the same memo he says, "With Steve and the Warner businesses, clearly we need a period of getting-to-know you. Indeed, in my view the principal issue is Steve. Can we work with him, can we communicate comfortably? Will we ultimately be the survivor company and management focus? Can suitable divorce provisions be worked out in advance?"

On the fourth page, Your Honor, in what I think in a sense will bring us full circle to where we are today, with the preclusive effect of the Time-Warner merger if it is permitted to go through, he says, "An overriding question would still be: have we secured the company? Is sheer size sufficient protection, or will we still need a large

block of stock in friendly hands? And what do we do about our pledge to make this more of an employee-owned company?"

Now, Mr. Nicholas and Mr. Munro were asked about this document, and they essentially said, "Well, you know, that's Jerry. He is full of ideas. This really didn't mean very much." But from that point onward, Your Honor, the parties were engaged in an effort that had a semi-climax on March 3 and a climax on June 16 to put the companies together to secure Time from any unwanted bid by any third party.

Discussions with Warner proceeded through the summer of 1987 and into 1988, and they got to the point where on July 21, 1988 a presentation was going to be made to the Time board with respect to the prospective combination.

On July 8 Mr. Levin again, Levin Exhibit 17, on the first page of the document -- about two-thirds of the way down, underscored, Mr. Levin says, "Key is for Ross to step down as co-CEO in four years." He says below that "name," referring to the name of the combined entity, "Time/Warner, Inc. - history and the alphabet require it."

He says on the next page, "Exchange ratio - should be market to market (currently .38)." Your Honor remembers that it ended up as .465.

"We should be flexible if Ross agrees to No. 1"; namely, stepping down. "Their number is around .415 (although they say it's .45)."

Two weeks after this memo, Your Honor, there was a board meeting, and the board was presented with the prospect -- and it was still a prospect at that time -- of a Time-Warner get-together. And from our reports the board was interested in that possibility.

Commencing immediately after the board meeting on July 21, what the record shows -- and in my view, Your Honor -- and perhaps it is a prejudiced view -- you have an awful lot of evidence here, much more than you see in the normal case, of management going out to sell its deal. Your Honor remarked, I think it was in Interco, but in one case, that it is very rare to find actual evidence of self-dealing or of bad faith. Business people at least in these types of cases are very, very sophisticated. It is very hard to find a trail. We have here a trail. We also have a lot of objective

facts which we will get to.

But if Your Honor would bear with me one or two more moments of reading, Munro Exhibit 26, which are Mr. Munro's handwritten notes of the contacts that he had with directors immediately subsequent to the July 21 meeting. Now, these are a compendium, Your Honor. And the first page I have reference to is the fifth page, which starts, "Bere phone call - July 27." At the top third of the page he is talking about -- these are notes of the phone call that Mr. Munro had with Mr. Bere, one of his outside directors.

THE COURT: Well, these reflect a series of phone calls around that time that Mr. Munro had.

MR. CANTOR: That's correct.

THE COURT: Does the record indicate whether he was initiating those calls at that time?

MR. CANTOR: I believe it does, Your Honor. The record does indicate that Mr. Munro and Mr. Nicholas were traveling from Vermont to Chicago to Texas to contact and talk to all of the directors. I believe the record -- and I can be corrected if I am wrong in this -- indicates that he was initiating

these phone calls.

With respect to Mr. Ross' interest, Mr. Bere apparently said, "...rids him of Siegel. That's his primary motivation. He's concerned about being put in play."

Going down about two-thirds of the page, "He," Bere, "mentioned that Arthur," Arthur Temple, "thinks Nick and I are fleecing our nests...."

Continuing on to -- let me count, Your Honor, because the Bates numbers are fairly difficult to read. Four more pages, the caption at the top, "Wharton phone call - July 25. He finds the Temple situation most disturbing but feels that Bruce is overreacting to it. He feels we'll be put in play regardless of Temple's negative vote."

This is a director telling Mr. Munro that no matter whether Mr. Temple, who people thought was on the fence, would vote yes or no, they would be put in play. This is in the summer of '88, Your Honor.

Your Honor may remember that on June 8, 1989, when Mr. Munro wrote to declare war, he said to Mr. Davis, "Your statement that the merger with

Warner put us in play is so much rubbish, and nobody knows that better than you." You will see, however, from the record constant references to the fact that if they did this deal, they would be put in play.

I want to keep counting, Your Honor. Three more pages, a phone call with Mr. Perkins dated July 22. Perkins evidently said, "He thought I came on much too strongly in my opening remarks in the closed session; that I was telling them what we should do instead of asking them."

And finally, Your Honor, the last two pages of the exhibit reflect a meeting with Mr. Temple in Texas. The bottom of the first page, "He's still concerned about culture and compensation. Called the latter a deal breaker."

Then on the next page, and in a statement that I think summarizes Mr. Munro's attitude towards all of these visits, in the last paragraph he says, "I'm afraid I didn't make the sale but he's wavering, and I think we have a slightly better than 50 percent shot at getting his support."

A few days after the last of these telephone conversations, Your Honor, Mr. Munro wrote a letter to the outside directors. It is in the

record as Munro Exhibit 15. This one -- I will hand it up, but I will spare Your Honor my reading. This is a form letter. This one was to Mr. Finkelstein, but this letter went to each of the outside directors. And he talks about the outstanding issues, and he references first the ultimate succession to a sole CEO of Time Warner, and then he talks about an appropriate exchange ratio, and then he talks about protection mechanism through supermajority voting.

And the attachment, Your Honor, talks about the protection that would be afforded under the deal as then contemplated to Time's editorial integrity. And it talks about a supermajority voting provision with respect to the editorial committee of Time. And the specific reference, Your Honor, is on Page 3, in Paragraph F, and on Page 4, which says that each of the above arrangements could only be amended, rescinded, et cetera, by a two-thirds vote of the board.

As we know, that never came to be, Your Honor. The only thing that ultimately came to be was that you couldn't get rid of Mr. Munro or Mr. Nicholas or Mr. Ross except with a two-thirds

vote of the board.

THE COURT: Well, the editorial committee continued to exist, but the restriction on modification of it by a supermajority vote never --

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

THE COURT: Right.

MR. CANTOR: All the supermajority provisions fell away, except for the ones that protected Mr. Nicholas' succession as CEO, as surviving CEO.

On August 11, Your Honor, the talks broke down. The record is clear that the reason they broke down is because Mr. Ross would not agree on when he would step down as co-CEO. Levin Exhibit 24 says that Ross terminated the talks. I think that's at best a euphemism. What happened was, Ross wouldn't agree when he would step down, and Time viewed that as a termination of the talks.

The interesting question, Your Honor, is why Mr. Ross was not a fit successor at Time. We learned that as the fall progressed in 1988 and by the time we got to early 1989, Mr. Ross apparently came to his senses on this issue. He came to

realize, as he had been told, that he was not the appropriate successor for the Time culture, that only Mr. Nicholas, only Mr. Nicholas, Your Honor, who had fought his way up through the cable industry, had the appropriate sensitivity to protect the journalistic integrity and the nurturing value that seems to be at the centerpoint of this case.

Mr. Ross recognized that. I don't know whether he recognized that because of Mr. Siegel or he recognized that for some other reason, and it took him a while to get there. But in early 1989 he finally did get there, Your Honor, and then the talks resumed.

THE COURT: Well, your alternative vision of what was going on must be, I suppose, that Mr. Munro had feelings of regard or affection for Mr. Nicholas, and it was for that reason that he was willing to commit his efforts in this endeavor to assure ultimately that Mr. Nicholas would have to come to be the CEO of the merged company or that the deal couldn't be done.

MR. CANTOR: Well, I would refer to it as entrenchment, Your Honor.

THE COURT: Well, I don't object to

using that word. It is conclusory in a sense. And I am trying to understand what is the motivation in your vision of the case for Mr. Munro behaving as you say he has done.

MR. CANTOR: Well, I think Mr. Munro felt a sense of loyalty to Mr. Nicholas. I think Mr. Munro had already picked Mr. Nicholas as his successor, and I think Mr. Munro could not conceive and would not permit the possibility that anyone other than Mr. Nicholas survived to the chairmanship of the combined entity.

And if I can get a little bit out of sequence here, Your Honor, when Mr. Davis had his aborted talks with Mr. Munro in '86-'87 about the possibility of putting the two entities together, Mr. Davis testified that a question that was prominent in Mr. Munro's thinking was whether Mr. Nicholas would be the successor if they ever did a deal. Mr. Davis responded, "That's not for me to decide and that's not for you to decide." And the matter was dismissed.

I can't get into Mr. Munro's mind and say why. I can say that for whatever reason, Your Honor, it is entrenchment. And I can say further

that the notion that this was some abstract concept of the Time culture, the nurturing, journalistic integrity of Time, simply doesn't bear scrutiny, Your Honor.

First of all, in the combined entity, magazines -- I assume when we are talking about the Time culture, we are not talking about HBO, and we are not talking about the motion picture industry, and we are not talking about recordings. We are talking about magazines. Magazines would consist of 20 percent, 20 to 25 percent of the combined entity. Of that 20 to 25 percent, Your Honor, Mr. Munro has stated that People Magazine and Sports Illustrated are far and away the two driving forces of the magazine section.

So when you get down to what the Time culture is and how it would enhance shareholder value in a combined entity -- I am tempted to refer to the People Magazine culture, Your Honor. I have wanted to say that now for a month, and I will say it. But when you get down to what the Time culture really is, Your Honor, it is a small fraction of 20 percent of the combined entity. And that is the abstract concept, not entrenchment, that has motivated this

board to prefer Warner and to do its deal with Warner come hell or high water. That's all they have offered, Your Honor. That's all they have offered. And they have accused us of crassness and they have accused Mr. Davis of crassness in not understanding what the Time culture is.

THE COURT: You know, there are aspects of identity in all parts of human life that don't withstand close scrutiny. I mean, people may regard themselves as one sort of person because of an ancestor or some element, aspect in their life. And if you subject it to close scrutiny and say you are not this sort of person at all, you are not this ethnicity, you are not this social class, you are not this type of person, but nevertheless, identity and construction of identity is a funny thing.

It may well be that the Time Magazine per se has these days a relatively small role to play in the financial vitality of Time Incorporated. I am not even certain that's the case. But it may be the case. But if it is the case, I am not sure it is conclusive on the point as to whether people are genuinely motivated to protect some notion that there is something special about themselves or their

organization.

In making that comment I don't mean to say that it is a legally valid thing for a board to do. But this case gets close to some fairly abstract notions about what is a corporation and what is it about, which I will try not to be forced to say anything on in writing an opinion.

MR. CANTOR: Let me just respond briefly, Your Honor, because I have obviously given that a lot of thought. And there are three, at least, interpretations, and I submit that Time loses under any one of the three.

One is the Time culture means entrenchment. If that's what it means, they are in big trouble.

The other is that it doesn't mean entrenchment but it is just some cynical view, you know, like motherhood and apple pie and so on, and that doesn't help them either.

The third is that they sincerely believe it. They sincerely believe that they are an American institution. And as Mr. Nicholas said, "We just couldn't conceive that a company like Gulf & Western could take over an American institution."

Even if they believe that, Your Honor -- and it is in a sense a frightening statement. But even if they believe it, I don't understand what that has to do with the enhancement of shareholder values. And I don't understand how that is a defense to a tender offer for all shares, all cash.

If they were a private company, Your Honor, if Mr. Luce was still alive and the public didn't own shares, they could run the company any way they want. But what they have lost sight of here, Your Honor, is that the shareholders own the company. They don't own it. And their notions, even if they are sincere, of this wonderful nurturing environment run by a man who came up from the cable business is just irrelevant, Your Honor; at best, irrelevant.

March 3, Your Honor. On March 3 presentations were made, as Your Honor knows, to the boards of both Time and Warner. Despite what is later said in the papers, the Warner board was told no way can this be considered a sale of Warner. At anything above .4 Warner gets more than 50 percent of the stock. That was Felix Rohatyn speaking.

The Time board is told a couple of interesting things: Number one, Your Honor -- and I

am referencing Exhibit 19. I have got one or two -- I don't think I have to hand it up. I will if you want, but I --

THE COURT: No, that's not necessary.

MR. CANTOR: I have got one or two references from it. Mr. Munro speaking. This was his presentation to the board. He says, "Second, we have both agreed to exchange newly issued common stock with each other. This exchange, which would occur after the Hart-Scott-Rodino filing period and other required regulatory approvals, is intended to dissuade any potential raider from disrupting our plans by putting one or both of us in play." Again, this is the Mr. Munro who three months later accused Mr. Davis of rubbish in saying that they were in play. And also, by the way, this is the Mr. Munro who was chairman of the company that is merging with the company, all of whom say this wasn't defensive, the share exchange.

I think Mr. Levin speaking at this point, "As a defensive measure, the two companies have agreed to exchange shares. This will occur after the Hart-Scott-Rodino and other regulatory approvals have been granted."

And then these minutes go on -- it is Munro 19, Your Honor -- to talk about the dry-up fees and say, "More importantly, the banks would not be able to finance anyone else."

And we are not claiming, here, Your Honor, it is not the fact, and Mr. Davis has made that very clear, that we have not been able to get financing. But the fact that the board wanted dry-up fees is certainly some indication, it seems to me, that they were aware and had been aware since the summer of '87 of the consequences of what they were doing.

THE COURT: Well, what do you contend is the legal consequence of the factual conclusion, were one to make the conclusion, that the Time management and board understood that in announcing the Warner merger the company would be "in play"? It would it get a lot of attention, and if somebody wanted to make an offer, advance an offer, it would do so. I mean, that is a factual statement, and what are the legal consequences of it, in your view?

MR. CANTOR: Well, I think the legal consequences are cumulative, and in isolation probably none, I would say. They were general, they

were defensive. Put together with the fact that 60 percent of the stock was shifting out of Time shareholder hands into Warner shareholder hands, and put together with the fact that Paramount then made an offer which proposed an alternative to the Time shareholders, and put together with the fact that the merger agreement was subject to a vote on June 23 which would have given the shareholders an opportunity to decide between the alternative that management wanted and the other alternative that had been put before them, putting all of those facts together and forgetting for a moment about Unocal, which I will get to, our position is, Your Honor, that the board had Revlon duties which it ignored and that those duties could very easily have been satisfied.

We are not saying they had to auction the company. What we are saying is that they had to permit their shareholders, having gone through all of their defensive maneuvers and having transferred control of the company away from the Time shareholders into the Warner shareholders -- they had to afford their shareholders an opportunity to make a choice. If the shareholders wanted the greatest deal

ever made, they could have chosen the greatest deal ever made. If they wanted the Paramount bid, they could have chosen the Paramount bid. And this nonsense about 30 percent of the shares had traded hands, which at times is an argument that the arbitrageurs don't understand what is really going on and won't be able to vote and at other times is an argument that simply the proxies are in the wrong hands so we won't be able to get the requisite vote, is just so much nonsense.

They could have adjourned the shareholder meeting, as Your Honor is obviously aware, they could have adjourned the record date, and they could have had a vote after things had settled down a little bit, if that's what their concern was.

One other very interesting thing happened, Your Honor, on March 3.

I am beginning to think, Your Honor, that my estimate of an hour was not totally realistic.

THE COURT: Well, we will do our best. Go ahead.

MR. CANTOR: Okay. On March 3, Your Honor -- Munro Exhibit 18 contains two very

interesting documents. I am just going to hand -- it is a lengthy exhibit, Your Honor, but I am going to hand up just the relevant pages of it. Page A001788 shows the Shearson-Wasserstein Perella equity value per share of Time shares, and it shows a range of values. And pursuant to the discussion that we have had in Chambers I guess I am not permitted to say what that range is, but Your Honor can read what it is and was aware before what it was. That range, which, as Your Honor knows, our $200 offer falls square in the middle of -- I was told I was permitted to say that, Your Honor.

THE COURT: Yes, sir.

MR. CANTOR: Has somehow been deemed inoperative, doesn't exist, never meant what it said. It is wonderful how these things become inoperative, Your Honor.

But what is equally and perhaps more probative of the significance of this value, if you turn to Page 1728 of the same exhibit -- does Your Honor have 1728?

THE COURT: Indeed.

MR. CANTOR: Okay. 1728 shows the Shearson-Wasserstein Perella analysis of the equity

value of Warner shares. And somewhat surprisingly, it seems to me, when Time made its fully priced -- and, of course, Mr. Ross was very clear that this had to be a fully priced bid, because he didn't want to be put in play again, and he didn't want to be subject to a low ball offer and so on -- that bid, Your Honor, also fell within the range that Wasserstein Perella and Shearson said was the fair range for the Warner shares. So that range has not become inoperative. All that has become inoperative, Your Honor, after we made our bid is what Time is worth.

Jumping ahead, Your Honor, on March 23 the merger proxy statement was issued. Paramount had been considering, as I have alluded to, a combination with Time for some period of time, had dropped that interest when Mr. Munro made very clear back sometime I guess in '88 that Time wanted to stay as it was, did not want to be acquired, did not want to acquire anyone, did not want to get into the entertainment industry.

Then comes the offer or the announcement of the merger on March 3, and Paramount starts reconsidering its options. It waits, the

evidence in the record indicates, until it sees the merger proxy statement, which is dated March 22 and I believe became public a day or two after that, roughly two weeks before Paramount made its bid. I am sorry. May 20 -- let me start again. May 22 was the date on it. May 23, 24, something like that, was the date that it became public, two weeks or so before Paramount made its bid.

Paramount then goes into high speed, considers -- has a regularly scheduled board meeting, by the way, for June 6, considers what its options are, and on June 7, actually the evening of June 6, announces its bid.

Mr. Davis writes a letter to Mr. Munro saying, "Everything is negotiable. We are offering $175. We can't talk to you beforehand, unfortunately, because of the provisions of the merger agreement, but everything is negotiable." Mr. Munro writes back, declaring war, literally. And he meant it.

Prior to the time that the Time board met on June 16 to consider our offer Time went into a blizzard of activity, the likes of which I have never seen, at least in one respect. I have seen a lot of

companies fight back in tender offer situations. I have never seen indemnifying third parties to sue the bidder. I have never seen -- we used the line, Your Honor, and it might have sounded flip, but I have never seen champerty used in defense of integrity. And that's what they did, Your Honor. And that was all before the Time board even met formally to consider our offer. There had been interim board meetings, but the actual meeting at which they exercised their fiduciary duties and listened to Mr. Wasserstein and listened to Mr. Hill and heard why the prior numbers didn't mean anything didn't occur until June 16.

They rejected our offer on June 16, Your Honor, and they launched, to use half of the metaphor, their own offer. And they launched it in a way that is clearly preclusive of our buying Time Warner certainly at anything like a $200 a share price or of anyone else making a bid for Time Warner at anything like a $200 a share price.

Your Honor has seen the affidavits that were submitted, and we were criticized for submitting them late. The reason is, we didn't get the term sheets until after our original papers were

in. But the reality is, Your Honor, that Time Warner is tapped out on borrowing in a situation where to bid even 200, Your Honor -- and remember that Davis has always indicated flexibility with respect to every issue. But even to get to the same 200 would take $30 billion because of what they are doing.

THE COURT: Following the merger of Time and Warner, you mean?

MR. CANTOR: That's right; following the merger. That's absolutely right.

I could do more on the facts, but I don't know what. And let me speak about the law a little bit. I know that other counsel are going to address themselves in detail to the law. I have alluded to some of our arguments already.

We believe, Your Honor, that under Revlon, that under Unocal and that under Blasius this offer must be enjoined. Revlon I have really spoken about, and unless Your Honor has questions on our position, I will pass to Unocal.

You raise your eyebrows. You want me to summarize what I said?

THE COURT: Oh, no, no.

MR. CANTOR: Unocal, Your Honor --

and I was surprised when I reread Revlon to see that Revlon is a Unocal case. And Justice Moore -- Revlon basically, its prime authority is Unocal. And Justice Moore in Macmillan talks about Revlon being basically a Unocal case, and since he wrote all three, I guess he knows.

Your Honor is familiar with the standards in Unocal, and I won't get into them. I would just say, Your Honor, that what we are dealing with here is an all-shares, all-cash offer. Under Interco I think that eliminates the issue of the threat to the Time culture, to corporate policy, to wanting to merge with Warner. It brings to the fore shareholder interests.

There, there are two. Basically, are the shareholders being put in an involuntary position? And that refers to a coercive offer. This is not a coercive offer. And then, as Your Honor put it, you get finally to the shareholders' substantive interests. Is the offer inadequate? Well, three months ago it wouldn't have been. Apparently today it is way inadequate, way below what Time is worth today.

The other interesting thing about the

Warner range in March and the Time range in March is that Warner -- everybody has agreed to this -- is far and away the faster growing company. Time is slower. It is obviously a good company or we wouldn't be bidding for it. But Warner is the one that is going through the roof. And yet the values in Warner don't change between March and June. The values in Time go up exponentially. It is quite an amazing thing, Your Honor. But that's the challenge. The challenge is simply to the inadequacy of our bid.

And what do they say? Well, they have to go ahead now. They can't wait to see. The pill isn't good enough. The defenses in Bass that were ticked off by the Vice Chancellor as appropriate defenses without doing anything preclusive aren't good enough because you guys will never be able to close, or if you do, it will be three months from now or six months from now or a year from now or whatnot. But, Judge -- Chancellor. I am sorry. I was told never to call you Judge -- this is a problem of their own creation. I don't see how a party can walk into a court of equity and say, "We have to go ahead with our deal now because their deal will be delayed."

THE COURT: Well, Mr. Cantor, it is

the case that Interco says what it says and that Pillsbury says what it says on this subject. And it is the case that Time argues that there is inadequacy in terms of value if Time is to be put into this -- if you are right that they are currently in a Revlon situation or find themselves in a Revlon situation. But it is not altogether complete to say that's their answer, because they also say that they are not in that situation, that Revlon mode, where they have to maximize the shareholder value now. And they say that they have looked at Paramount and they have looked at Warner and they have looked at other companies, and if they are to manage this enterprise into the 21st century, they think that Warner is a better fit and will maximize the value of the corporation as a distinct entity and derivatively the value of the equity of the corporation in the long run.

So that the threat under Unocal, under part of Time's argument, as I understand it, is not simply that more could be gotten than your client is offering. And I didn't mean to say that as though I accepted it necessarily. But also the threat is to the long-term vitality of the corporation as a

distinct, ongoing enterprise. And so the burden to some extent of your case is to show that it is a breach of the directors' duty in this circumstance to continue to manage the enterprise in the long-term way or mode.

MR. CANTOR: I understand that, Your Honor. But what they are -- if Your Honor is asking me whether this is a just-say-no case, it is not a just-say-no case, and it is not a just-say-no case because they are radically altering the structure of the enterprise. If we ever get to a just-say-no case -- and we may in this case two or three months from now -- I guess sufficient unto the day is one answer. But I don't believe that should be the law.

I don't believe that directors should be able to preclude their shareholders ultimately. After they have negotiated, which they haven't done with us here, after they have done whatever they could to eliminate the delays, after they have done whatever they could to get us up above 200, after they have done all of those things, Your Honor, I don't believe the directors should just be able to say no.

But they are not just saying no.

They are doing another transaction, Your Honor. And it is like Interco and it is like Pillsbury and it is like AC Acquisitions.

THE COURT: Well, accepting the first part of what you have just said for the moment that this is not a case that raises that just-say-no issue at this juncture, Time also says that this transaction is not like the transaction that the company sought to do in the Pillsbury case or sought to do in the Interco case or sought to do in the Bass vs. Macmillan case, because this has its origination, although you certainly argue with this -- this has its origination principally as a business strategic decision, not as a decision simply to protect control in the existing hands. And secondly and equally importantly, this is not a bust-up of the company. It is not -- I used the phrase "the functional equivalent" in the TW Services case -- of what the acquiror sought to do to the company. They say that this merger transaction is quite different in that respect.

Your answer, I take it, is that it is equally fundamental, it is equally radical, and as a practical matter, it deprives the shareholders of

ever getting a control premium, and so it ought in law to be regarded as the same type of transaction.

MR. CANTOR: That is our answer, Your Honor. And with respect to bust-up, I don't know. I do know that what they are doing here is essentially the same as a leveraged recap. I do know that there are discussions in their papers about selling billions of dollars of assets to help finance this transaction in their investment banker papers and presentations to the board.

But our fundamental position -- and it goes back to something that Judge Weinfeld said in the Conoco case, which was cited to Your Honor by the class plaintiffs -- that the directors may be right and they may be wrong, but what they sometimes lose sight of is that they don't own the corporation. And under certain situations where they have proposed a radical corporate transaction they can't simply cram it down. And that's what they are doing here, and I don't think there is any debate about that.

And the fact that they were thinking about buying Warner before, I mean, the name hasn't changed. But this is no longer -- I mean, they wrote the President. I took Mr. Munro's deposition, and he

had this line in there about crippling debt, we are not doing crippling debt, this is a wonderful transaction. And I asked him what he meant by crippling debt. He said --

THE COURT: In the letter he had the line, not in his deposition.

MR. CANTOR: Yes, in the letter he had the line. And I asked him in his deposition, "What did you mean by crippling debt?" And he said, "I don't know what I meant. All I meant is, we are not incurring crippling debt, but you are. Other than that I have no idea what that letter meant."

And they told Congress this was going to be the great old-style pooling of interests, merger of equals. This is not that transaction, Your Honor. Only the names have stayed the same. It is simply a different transaction.

I am going to conclude very quickly, because I think I am probably over.

Blasius, Your Honor, we have cited for the proposition of -- let me back up for a second. I mean, one of the things that was startling to me about the papers -- and they were primarily the Warner papers -- is, they refer to shareholder choice

as if it is antithetical to Delaware law. "Who are the shareholders? They have no rights. We can do whatever we want to do. It is only because of some crazy listing requirement that we tried to write a letter and get rid of that the shareholders were even going to be given any choice to begin with. We, the directors, and Time, the directors of Time, the keepers of the Time culture, can decide this transaction no matter what the form, no matter what the alternatives."

I don't think that's Delaware law, Your Honor. It is certainly no law that I am familiar with. Blasius says it is not Delaware law, and Blasius deals with a situation that is entirely applicable here. Had the shareholders been permitted a vote on June 23, among other things, not only would they have voted on whether they wanted the merger; they would have voted on whether they wanted the 12 additional new directors to come onto their board, the Warner directors. They are being denied that franchise now.

If this deal goes through, there will be a merger with Warner. There will be 24 directors, 12 of whom the shareholders will have had no say in,

and four of whom, the four that were just elected on June 30, the shareholders will have had virtually no say in. So 16 of the 24 directors will be put on that board without the shareholders saying boo, basically.

THE COURT: As a technical matter -- maybe you are not the right lawyer to ask this question of -- had your client not extended the offer that it has and the meeting had gone along as scheduled, the shareholders, you say, would have voted upon the 12 Warner directors in the merged company. But the company would not have been merged for some time, until there --

MR. CANTOR: It was going to be merged on June 23, Your Honor.

THE COURT: Oh, it was?

MR. CANTOR: Yes. My understanding from Mr. Munro -- perhaps I am wrong on this, and if I am, someone can correct me -- is, under the original transaction, if that's what you are asking about --

THE COURT: That is what I am asking about, but I had --

MR. CANTOR: The merger would have

been consummated on June 23.

THE COURT: Well, maybe Mr. Wachtell or Mr. Richards will when they get up say -- I had a preliminary injunction application in another case relating to all this, and I had the impression that the original merger was not likely to close until later in the summer.

MR. CANTOR: Then if that's right, Your Honor, I stand corrected. You are talking about a situation where if Paramount had not made its bid. Is that --

THE COURT: That is, that is. And the question really is not central at all to this inquiry. It simply has to do with would the shareholders of Time have voted to fill directorships that wouldn't have been created until the merger occurred, because your point about the shareholders being deprived of a chance to elect directors caused me to think that.

MR. CANTOR: Let me -- I will certainly defer to what counsel for Warner and Time say. But I have a recollection -- and when I sit down, I will check on this, and when I get back up, I will tell you whether I am right or wrong. I asked

Mr. Munro or Mr. Joffe asked Mr. Munro the question of when other than Paramount's launching its bid he planned to close -- maybe I just misunderstood the question and the answer -- whether he planned to close the transaction. I thought the answer was June 23, but we will see.

THE COURT: All right.

MR. CANTOR: Let me just say a word on irreparable injury, Your Honor. The argument that if Paramount through illegal means -- and, of course, we have got to prove likelihood of success, but assuming we get over that hurdle -- will be deprived of an opportunity to bid for Time does not constitute irreparable injury flies in the face of every merger case that I know of, starting with Macmillan. I mean, every bidder has whatever standing he has to raise the fiduciary duty points. Here, the shareholders are here. Your Honor said in Interco you didn't have to get into that abstract thing, because the shareholders were always here.

THE COURT: They weren't in Interco. That's exactly the case. I mean, Mrs. Savett will get up or Mr. Savett will make the point from the point of view of the Time shareholders. And so I

don't know that Delaware law has ever really focused explicitly on it, although you are correct, I think, that the Macmillan case -- well, no. I am not sure the Macmillan case even supposes that there is independent standing of an offeror. It is not something we have addressed.

MR. CANTOR: What Your Honor said in Interco was that since the shareholders were there, although dormant --

THE COURT: Oh, that's right. There was an action pending, but --

MR. CANTOR: It was dormant, and Your Honor said you didn't have to reach the issue, because -- it was an interesting question and so on, and yet Your Honor granted injunctive relief.

It is almost mind-boggling to me to think that if we have made out a case, we don't have irreparable injury. Be that as it may, if we go away, and if no bid is ever made again or not in the foreseeable future at anything like $200 a share, it is clear, absolutely clear, that the shareholders have irreparable injury.

Warner says it has irreparable injury because it had a deal with Time on March 3. We say,

"Fine. Put that deal to a vote. Let's see whether the shareholders think you had irreparable injury or not." They say, "No, no. We have this other deal. You know, on June 16 we changed the whole deal around, and we didn't know that the Time directors were doing something wrong."

Well, Your Honor, on this record I submit to you respectfully that that argument is entitled to little weight. The shareholders could have voted. Everybody knows they would have voted it down. What happened on June 16 was purely reactive to the Paramount bid. Everybody knows that. If Your Honor reads -- and we have cited this in our brief -- the 14D-9 that was filed, and particularly at Pages 2 through 4 of that document by Time, they just go through the checklist of Unocal. It is a threat, it is this, it is illegal and it is illusory and it is all these terrible things. They just go through that Page 35 or whatever it is of Unocal, and now they say Unocal doesn't apply. So apparently the corporate lawyers and the litigators are having a bit of a disagreement.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Cantor.

MS. SAVETT: I am Sherrie Savett, and I am here on behalf of the class of shareholder plaintiffs.

Your Honor, I would like to focus on the issue of irreparable harm to the shareholder plaintiffs.

On March 3 Time gave the shareholders a choice to vote on a stock-for-stock merger which they boasted about because they said it was marvelous, there was no debt involved, it was an old-fashioned, grand old merger. They boasted this to Congress, the President and the New York Stock Exchange. On June 6 Paramount intruded and made its $175 cash offer. Paramount gave the shareholders an alternative, a choice.

On June 13 Time applied to the New York Stock Exchange, asking if they could get relief from the requirement that their merger be subject to a shareholder vote. They were trying to take away the shareholder choice. They were turned down by the New York Stock Exchange.

By June 16 the Time board realized that they were going to lose the election that was scheduled, that the shareholders were not going to

exercise their choice in the way the Time directors wanted them to exercise it. And so they changed the entire transaction to a tender offer for Warner with a back-end merger, and they forever intended to take away any choice from the shareholders and cram this deal down the throats of the shareholders.

They even took away choice from themselves by giving themselves no fiduciary out. They were strapped to a rocket, as Nicholas said.

THE COURT: Ms. Savett, is it the case that Time's shareholdings are largely by institutional investors? Do you happen to know or does the record reflect?

MS. SAVETT: There is some evidence in the record of share ownership. I could not answer that precisely. We know that lots of the Time shares have changed hands, in the record I believe it stated that approximately 25 percent to a third in the last couple of weeks.

THE COURT: Thank you.

MS. SAVETT: If this merger, this takeover, this tender --

THE COURT: You wouldn't say that that third is institutional investors only.

MS. SAVETT: No. I think a lot of it is in the hands of arbitrageurs, and I don't know whether you would consider them institutional investors. Probably not.

THE COURT: No, I wouldn't.

MS. SAVETT: If this transaction over which the shareholders have no choice -- that is, Time's tender offer for Warner -- is not enjoined, number one, the shareholders will not have the opportunity to choose the Paramount alternative of a $200 all-cash-for-all-shares offer.

And incidentally, I think it is not on the record at this moment because a press release only came out yesterday -- and we intend to supplement the record with this fact -- Paramount has now stated that it will pay 9 percent interest, starting in 60 days, on its offer if the tender offer of Time is enjoined. I think that is --

MR. CANTOR: Let me just say -- excuse me. I meant to mention that, Your Honor. We will hand that up. I think there is going to be a 14D-1 amendment today, and we will hand that up as soon as we get it.

THE COURT: Thank you, Mr. Cantor.

MS. SAVETT: We shareholders think that is quite important, because an argument has been made by Time that $200 is not really the value of this offer but it is considerably less because of the delays that are involved. Anything less that it is than $200 now is minimized by this commitment of Paramount to pay interest after 60 days.

So the shareholders will not have the opportunity to choose the Paramount alternative. They have not had the opportunity to choose something even higher than the $200 Paramount alternative because Time has utterly refused to negotiate or sit down with Paramount, even though they have said that all terms, including price, are negotiable, and they have continuously repeated that.

Further, there is no opportunity for the shareholders to choose to keep Time in its current form. Instead, the shareholders are going to be forced to accept a stock which will now be laden with $13 billion of debt that it didn't have before.

THE COURT: Why do you say $13 billion? It is, I think, 7 billion to finance the first stage.

MS. SAVETT: Yes. And I believe that

there is evidence in the record that the second stage has to represent a certain portion of cash and a certain portion of equity. And it is estimated that the total debt that will encumber Time will be 13 billion. I believe that that is found in some of the Wasserstein-Shearson reports, which are in our brief. But I don't have the citation right here.

THE COURT: My impression was that the tender offer was $7.2 billion in new debt, some refinancing of about $3 billion, that the second step merger -- of course, all of this is premised upon if it all goes through -- would be under current arrangements not -- since it may be confidential, I suppose I will stop talking about it, but not all debt, and that there would be approximately $10 billion of new debt. That's my impression.

MS. SAVETT: Your Honor, the figures to the extent they are known, because it is not precisely known what form the back end will take, are set forth in certain of the Wasserstein-Shearson reports. And specifically, they are made exhibits to the Nagy affidavit of July 7. And this is within the realm of what we are not allowed to disclose here in court today, but the Nagy affidavit of July 7

analyzes the debt numbers and gives the actual pages from the Shearson-Wasserstein report to back them up.

THE COURT: All right. I will look at that. Thank you.

MS. SAVETT: The shareholders do not have an opportunity to retain Time in its current form, and the new company that they will be forced to have stock in if Your Honor doesn't enjoin the Time tender offer will have an enormous amount of debt and consequent losses in earnings per share for the next three years, as projected by Time's own advisers. And again, those specific numbers are contained in the Nagy affidavit and pages of the Shearson-Wasserstein presentations that are referenced therein.

Eliminating shareholder choice is at the core of the irreparable harm here. And as Your Honor predicted, I will cite Interco, which specifically says, "The loss of an opportunity to effectively choose is for them," referring to the shareholders," irreparable."

In evaluating irreparable harm and balancing the equities, the Court must analyze what the shareholders are losing the right to choose

versus what they are being forced to accept. By not being able to choose the shareholders are losing the premium Paramount offer, which represents an 85 percent premium over the price of Time on March 2, right before the March 3 merger was announced. That is a $92 differential. If you look at the price of Time right before Paramount came in, this $200 offer represents a 62 percent premium over the then June 5 $123 price.

Mr. Nagy, plaintiffs' expert investment banker, in Schedule 1 has analyzed premiums in acquisitions or mergers of other media companies, and the premiums offered here are at the high end of his scale. That is Schedule 1 to the Nagy affidavit of July 7.

Ironically, by denying the Time shareholders the ability to choose a high premium cash offer, they are allowing the Warner shareholders to experience a 100 percent premium cash offer if you compare the price of Warner before the Time-Warner merger was announced. The shareholders are being denied the opportunity to choose the Paramount offer, and that offer is within the range of fair value that has been opined by many different experts, including

Time's own experts.

On March 3, just about three months ago, as Mr. Cantor said, after a 55-page detailed segment analysis which analyzed the discounted cash flow of Time, a comparable company analysis and a comparable acquisition analysis, Time's advisers found $200 to be almost smack in the middle of the range of value. Three months --

THE COURT: What is the exhibit number again to that investment banker report; do you know?

MR. CANTOR: I believe it is 18, Your Honor, Munro 18.

MS. SAVETT: Three months later, on June 15, Time's advisers came up with new ranges and new analyses. They had different ranges for different purposes, and they said that the original March 3 was irrelevant to June 15 because the facts had changed.

What had changed? Well, they got new projections from Time, which were very optimistic, and they go out for 10 years. So that's one of the bases for their higher range. And they also said that media companies had become very hot; and

therefore, the multiples were higher. Well, one of the reasons that media company stocks had become very hot and the prices were higher is because of Paramount's very bid for Time.

Nevertheless, if you take all of their ranges, $200 is still within, well within some of their ranges. But they say that the only relevant range is the pre-tax segment valuation, which they give a range which is considerably higher than the $200 Paramount offer. Interestingly enough, when they derive that range, they use the exact same methodology that they had used on March 3 to derive the much lower range, where the $200 was smack in the middle.

THE COURT: Well, surely -- would you say if they used a different methodology it would be curious, or are you saying it is curious they used the same methodology because now they are purporting to do a change in control or private market evaluation?

MS. SAVETT: I am making the point that I think it is curious that when they use the same methodology, they come up with significantly higher numbers just three months later, and their

basis for that is media stocks are more attractive now. That is flawed, because Paramount's bid for Time has skewed that analysis. And their other basis is these revised aggressive projections that go out 10 years and are inherently highly speculative. So that the March 3 range is one that ought to be seriously looked at.

Oddly enough, the higher range that was developed on June 16 and repeated on June 26 was changed again in the Rossoff affidavit to something even higher, but the basis therefor is not given.

Another curious fact about Time's advisers is, they also do an analysis of the value of Warner on March 3 and again on June 15. Warner, which is supposed to be the faster growing company with the more volatile assets, only increases in value, according to their range, by 4.6 percent to 5.1 percent between March and June. Time mysteriously and miraculously goes from the original March 3 numbers and goes up 22.6 percent to 29.2 percent.

All of this is detailed in the shareholder plaintiffs' reply brief in Footnote 11, Pages 18 and 19, and at Page 33. And the record

references for all of these numbers are given.

This Court has recognized that opinions of value involving projections of future performance, particularly those going out for a long time in time -- and in this case they go out for 10 years -- are speculative and not completely reliable. Wasserstein has been wrong before. In yesterday's Wall Street Journal there is an article indicating the current value of the Interco shares in Day. The package that Wasserstein valued in the middle of a takeover contest when the company was trying to protect itself from a hostile takeover, Wasserstein opined the value of that package was $76 at that time.

THE COURT: At least 76 was the --

MS. SAVETT: Yes. According to yesterday's Wall Street Journal article, that package is now worth $61.

The advisers' analysis about Time's worth, which changed so radically from March 3 to June, has to be viewed with some skepticism, particularly when an offer that is rather close to the range and well within its original range is being totally rejected and the shareholders are getting no

choice whatsoever to consider it.

Pillsbury recognizes also that opinions of value are subject to speculation, and a shareholder could conclude that an all-cash offer which is less than a banker's opinion of some alternative may be what the shareholder would prefer to choose, and that shareholder should have the right to make that choice where there appears to be a bona fide offer. And there are other indications in this record, Your Honor, that the $200 offer is bona fide and within a range of fairness.

Manufacturers Hanover is one of the lead bankers for Time in financing its takeover of Warner. When it was making its decision about whether or not to give Time credit, it analyzed the value of Time, and it came up with a range of 189 to 202. That is the shareholder plaintiffs' Exhibit 38.

In the Morgan Stanley analysis --

THE COURT: When you say Exhibit 38, is it in some deposition or is it in an affidavit?

MS. SAVETT: No. The shareholder plaintiffs created their own exhibit numbers, and that was not made an exhibit to any deposition, I don't believe.

THE COURT: How was it authenticated?

MS. SAVETT: Well, a lawyer has taken an affidavit that it is a true and correct copy of a document that was produced in discovery.

In Hope Exhibit 8, which is the Morgan Stanley report, the opinions as to value of several independent analysts have been collected. Many of them show that $200 is within the range of fair value or break-up value. For example, C. J. Lawrence, they opine 180 to 200 is the break-up value; Drexel, 185 to 200; Tucker Anthony, 200.

Salomon Brothers has opined that the fair value of Time is 180 to 220. That particular analysis is found in the affidavit of Barbara MacDonald, Exhibit B.

Plaintiffs' investment banking expert has independently analyzed, using all of the numbers that were used by Shearson and Wasserstein, that $200 is fair. That is based not only on the facts and figures used by Time's bankers but also on an independent analysis of premiums paid for other media companies where there was an acquisition since 1985 to the present and also a comparison of transaction value multiples. That analysis is found in Nagy's

July 7 affidavit and exhibits. Warner's own advisers told Warner that $200 was within the range of fair value for Time. That is found at Rinaldini Exhibit 12, on Page W2398.

So there is lots of evidence in this record even apart from Time's own advisers that 200 is within the range of fair value. And we contend that even Time's own advisers when looked at critically have opined that 200 is within the value.

The Pillsbury court has said that the Court can look at statements of other independent investment bankers, other financial analysts and experts to decide whether an offer is within the range of fair value.

Now, I have just explained what the shareholders are being deprived of if they cannot select the Paramount offer, a fair offer. Now let's look at the other side of the coin. What are they going to get?

According to plaintiffs' expert, Nagy, at Paragraph 13 of his July 7 affidavit, the shareholders are going to get something inferior. "The $70 tender offer will produce a combination which has lower earnings per share, an absence of

free cash flow through 1998 and a higher degree of financial leverage and hence risk." His conclusion is that it is inferior to the $200 offer.

Time's response is, in the long run it is going to be better, and also we want to preserve the Time culture. I believe Mr. Cantor has already disposed of the fact that in a context of a noncoercive, nonfront-end loaded, all-cash-for-all-shares offer, that only the shareholders' interest is relevant and not the interest of the Time culture. And as to the long run, we are really talking about the long run here, because it is highly speculative when a $200 value will ever be realized.

There is ample evidence in the record for Your Honor to see that there is a sincere and severe question as to whether the market price after a Time-Warner merger for anytime in the foreseeable future within the next year or two will approach $200 per share. Mr. Waters of Morgan Stanley testified at Page 242 of his deposition to a price range at which Time will sell after the merger, which I cannot state because of confidentiality provisions right now, but if you look at that page, you will see that it is infinitely below the $200 now available to

shareholders.

Mr. Phillips of Dillon Read, using Time's financial advisers' own numbers and his own analysis as well, opines a range of trading value for Time shares after the merger again that is infinitely below the $200 per share.

And I hate to use adjectives, but I am not allowed to use the numbers. But if Your Honor goes and looks at those numbers --

THE COURT: Particularly the adjective "infinitely."

MS. SAVETT: It has just been suggested to me by Paramount's counsel that maybe "a lot" would be more descriptive.

But in any event, as a shareholders' representative, it is an enormous differential and one that the shareholders don't necessarily want to give up, and they want to have a right to choose.

Time's own advisers in the June 26 presentation -- we ask the Court to look at Page 56101 -- opine a range of prices which --

THE COURT: Where can I find 56101?

MS. SAVETT: It is Exhibit 3 to the Nagy reply affidavit. It is also --

THE COURT: What is it?

MS. SAVETT: (Continuing) -- Luce Exhibit 17.

THE COURT: To what?

MS. SAVETT: The June 26 presentation --

THE COURT: I am sorry. To what?

MR. CANTOR: Luce Exhibit 17.

MS. SAVETT: Time's own advisers in opining on a range of prices at which Time will trade if this merger is allowed to go through have a beginning number that is considerably below the price at which Time sold for before March 3 and is considerably below what all these other experts that I have just cited, including plaintiffs' investment banking expert, have said is the level at which Time will trade. So even Wasserstein and Shearson recognize that in the short term -- and the short term might be a year or two or three -- there will be a severely depressed trading price.

There is other independent evidence in the record as to what the trading price might be if this Time tender offer is allowed to go through. The Phillips affidavit at Paragraph 15 cites

Donaldson, Lufkin, who believed the range would be 115 to 125; Kidder, who says the range would be 120 to 140; Bacon Capital, who opined that the range would be 120 to 125. And Heine Securities opines that the Time stock would trade at $100.

The New York Times in its article of June 28, 1989 states, "Traders estimated that Time will plunge to $130" if the deal goes through.

THE COURT: I am really not going to give any weight at all to things that appear in the newspapers. I don't mean any disrespect to journalists, I should note in this case, but courts have to work on more reliable data.

MS. SAVETT: So shareholders cannot choose Paramount. Paramount is definitely not going to exist if the Warner transaction goes through. That is on the record. Davis has stated that. It is a term of the $200 offer. They are going to get something that several experts have opined is inferior and will trade at much, much lower trading values than $200. And they will end up with a company that Shearson and Wasserstein concede will report large losses of earnings per share for 1990, 1991 and 1992. That is found at the June 26

presentation, the relevant pages, the Nagy affidavit Exhibit H.

THE COURT: Well, what is the significance? That is because there is going to be a large amortization of good will components; is that right?

MS. SAVETT: Oh, that is only one of the causes for the depressed earnings per share. The other major cause is the debt burden and the interest expense to carry that debt. And the precise amount of the debt burden is laid out in the Nagy affidavit, and it is derived from Shearson and Wasserstein's own numbers. So even if you were to discount the good will charges as merely an accounting entry of no real substance, that cannot be done when you look at the debt and the interest charges. Judge --

THE COURT: The other side tends to say that the charge to good will is a non-cash charge and that the debt reflects leverage, and so long as the company is well managed, the leverage might increase the value of the company, and that what is likely to happen is that the stock is going to trade as a multiple of cash flow instead of earnings, and so this line of reasoning that the merged transaction

is not a sound one in the judgment of somebody because it is going to have low reported earnings is really a strawman argument. That's, I think, what they say.

MS. SAVETT: There are two responses to that. Number one, Nagy has opined and has given evidence that Time has traditionally been viewed on the basis of earnings per share, and he believes that there is a high likelihood that that will continue. But even if it does not continue and Wasserstein and Shearson are right that the analysis in the future will be based on cash flow, all of these other experts have come up with trading ranges that are quite low relative to the $200 per share.

So if the market is going to look at it in the future as a cash flow company, why are all these experts opining that the trading ranges will be so low? Even Wasserstein and Shearson in their own analysis recognize that the trading range could be extremely low through 1990. You will see that when you look at that particular exhibit.

THE COURT: Does that mean that even if valued on a cash flow-based formula, that the record seems uncontradicted that in the near term a

merged Time-Warner entity would trade at the ranges that you referred to?

MS. SAVETT: What is the question, Your Honor?

THE COURT: It was too long. I understand what you are saying to mean that the record is uncontradicted that even if -- and Time can correct me about this if I am wrong -- that even if the merged entity, the stock of the merged entity is valued on a cash flow as opposed to an earnings basis, that it will result in a value substantially below the current offer that Paramount has extended.

MS. SAVETT: Yes. And another answer is that it is the future values that Time claims are highly speculative. And the shareholders have a choice now to accept something that is fair, that is high premium, and they are being deprived of that choice. Interco and Pillsbury forbid that.

What else are the shareholders losing by being deprived of this choice? They are losing the opportunity to possibly ever get a premium, because the new combined company, according to Waters, will just be too big to buy or, if it is to be bought by the few buyers that could possibly

afford to buy a company worth $30 billion, the price will be below $200 per share.

Time says, well, nobody is stopping somebody else from coming in and buying the new company. But there is absolutely no evidence in the record that anybody will. In fact, there is evidence to the contrary, as I have just stated, and that is the Waters affidavit.

Again, the shareholders are being deprived of a choice to get something now that is certain, that is bona fide, as opposed to some future speculation that they will get something better. There is a lot of evidence to show that in the at least near-term future, in the next year or two, they won't get a chance to get anything close to $200 per share.

So balancing the injury to the shareholders versus the harm to others, Interco and Pillsbury say that the only constituency which the Court should consider in the noncoercive context is the shareholders. And while Paramount may be deprived of making an offer and a good business combination which it desires, the shareholders are deprived of something extremely concrete: The choice

that they should be able to have now.

Time has other devices, like the pill, to use to negotiate an even higher offer, but right now they are strapped to that rocket, and there are no choices for them or the shareholders.

As to Warner, they claim they are losing the benefit of this $70 premium offer. Even assuming that they are an innocent party, which we don't believe -- we think that they have been aiders and abettors and direct participants in this entire unlawful action to perpetrate this tender offer upon the shareholders without choice, violative of Revlon and Unocal and their progeny. But even assuming that Warner is innocent, its interest arose after that of the Time shareholders. And the Jewel case says the person that comes second is to be viewed in second place. And if we are right on the merits that the actions of Time were improper and violative of fiduciary duties under Delaware law, Warner cannot be heard to complain, because they can't benefit from the illegality that was first perpetrated to the detriment of the Time shareholders.

Also, Warner is not out of alternatives, as the Time shareholders are. They

placed themselves up for sale. Now, if they pursue their Revlon duties and try to maximize their value, maybe they will be able to get more than $70 a share. They haven't even tried. But they have the chance to. Time shareholders don't. The door has been closed to them unless this Court enjoins the Time tender offer.

As aiders and abettors, because they knew of the Time board's unreasonable response, they participated in it, they insisted on the hell or high water no fiduciary out, Warner is a participant in the wrongdoing and has unclean hands; and therefore, the balance of equities can't shift toward them.

The Time tender offer for Warner is the show-stopper that will effectively preclude forever the Time shareholders from taking advantage of either the $200 offer or an even higher offer, if Time would ever negotiate. We ask the Court enjoin it.

THE COURT: Thank you, Mrs. Savett.

Mr. Klein, would you first spend a moment explaining any differences that may exist between the relief that your clients seek on this motion and the relief sought by Paramount and the

class.

Now, I didn't ask Mrs. Savett this question. I understand the relief sought on this motion by Paramount to entail principally a request to enter a preliminary injunction enjoining Time from closing on the current offer. The motion paper of Paramount also asks for the convening of a meeting, although no one has addressed that question.

There was something in some of the briefs that suggested to me that your client may seek broader relief on this motion, although I haven't focused upon a lot of briefing on any other issues. So let us try and straighten that out first.

MR. KLEIN: Yes, Your Honor. Indeed, we have sought a wider and different range of relief. It is pivotal here for us that we better put ourselves back in the position in which the directors, who were responsible to us, are in a position to exercise their fiduciary obligations under Unocal at this phase of the matter.

In order to accomplish that, from our perspective, we seek to have an injunction that precludes Time from completing its tender offer for Warner, but we also seek an injunction at this time

asking that Time's directors not enforce and be restrained from abiding with the no-shop confidentiality agreement, that they be ordered to waive any obstacles that they have created by the dry-up agreements, which preclude the development of further and better alternatives for the shareholders, as does the first, and finally, that some injunction be issued enjoining them from what has been referred to as their flirtation with champerty in the instigation of obstacles to the approval by Paramount of the cable transfers by both the FCC and state and local authorities, or at least stopping them from complaining about that directly as a time feature in discounting the reality of the Paramount offer.

The accumulation of those orders which we seek from this Court would once again, Your Honor, to be put back into the hands of Time's directors, I would pray an admonition in the form of an opinion as to the nature of their duties, the obligation to evaluate alternatives, Paramount and other alternatives.

The suggestion has been made that Warner can pursue its alternatives. Warner could buy Time. Indeed, there is not an unrealistic view that

that is what has been happening here all along, at least in the first instance. They are larger. They have the capital base to do it. The borrowings that have been alluded to in the last few days suggest the capacity of some $27 billion of potential borrowings here. If you deduct the cost of Warner from that, which is a $14 billion total cash out-cost, Warner could pay $225 with the remaining proceeds of the offering that was just announced last Friday, and we will accept it in a moment if it turns out to be the highest and best alternative.

What we will not accept, at least with the Court's assistance we will not have to accept, is a total thumbing of the nose of the Delaware courts' efforts since Unocal. We said in our opening brief, Your Honor, that we thought the real issue before this Court was not what the law was governing the conduct of the parties here but what more the courts of this jurisdiction must do to secure compliance with those laws.

We cannot understand -- we have read almost all, I hope, of Your Honor's opinions and the other opinions of this jurisdiction germane to what we perceive to be the issues before the Court today

as a matter of law. I cannot find a single decision post-Unocal that is supportive of the conclusions, and I frankly am unwilling to rely upon a 1980 Second Circuit decision that goes to whether or not a plaintiff on a pre-Unocal, rejected-by-Delaware standard managed to prove as a matter of fact, having taken no depositions, that people were motivated by self-interest. Unocal rejected that test, and for good reason. And it is that it is unseemly and inappropriate and unnecessary for the courts of this or any jurisdiction to delve into the motivations, the self-interest of individual directors, because we recognized what Unocal referred to as the omnipresent specter of potential self-dealing or at least less than vigorous activity to protect the interests of the shareholders when control is at issue.

And if I may, Your Honor, I would like to walk rather briefly through, since my colleagues have spent most of their time dealing with factual matters, what I think the plaintiffs' side all aligned agree are the fundamental legal principles that are applicable to the conduct presently before this Court.

We at least begin, as I think this

Court began with its analysis of Revlon in Interco, that Revlon is not necessarily properly citable for instantly putting a company in an auction mode before a board decides whether or not it is for sale. But the other progeny, like Revlon, of Unocal, undiscussed by our colleagues for Time and Warner, is the Moran case and the Henley case, both of which post-Unocal decisions make quite clear that the Unocal analysis is applicable, wholly applicable to the evaluations of measures taken in anticipation of potential or feared change of control situations.

Indeed, in Moran what we have is the Court analyzing the question whether a poison pill put in place in anticipation of potential takeover threats should stand in its place or whether it, too, is an act which per se is precluded by Unocal. The Court finds no. Why does it find no? Because it is a reasonable, nonpreclusive response. The time will come for the directors to exercise their fiduciary obligations, and, as we have seen since in Pillsbury, in Interco and other cases, the courts have addressed that. We are not at that poison pill phase yet. I pray and hope we will get there. But we are not there yet. But the analysis of Moran is perfectly

valid.

Even in Henley, where again Vice Chancellor Jacobs sustained what it is that Santa Fe did in anticipation of a feared proxy contest or coercive bid by Henley, were the actions taken unanalyzed in terms of Unocal standards? Explicitly not. Indeed, whereas in our briefs we suggest that the proclamations by Time and Warner that the revised merger had nothing to do with the Paramount bid is perfectly susceptible of being analyzed by what it is that was suggested quite clearly by Vice Chancellor Jacobs in that case, and that is, it is simply implausible, quite aside from their admission in their 14D-9 --

THE COURT: Well, there are two transactions, proposed transactions. The plaintiffs would tend to view them as vastly different. The defendants tend to like them viewed as the same transaction with some slight modifications.

I take your point now to be that even if one is to accept the defendants' characterization and reject the argument advanced earlier this morning that the June 16 action was itself an independent action and defensive or reactive and one instead

looks at the March agreement, that the record supports or compels the notion that it, too, was defensive and that the Moran case suggests that a Unocal analysis is appropriate rather than a straightforward business judgment type analysis of that transaction. Is that what --

MR. KLEIN: It is clearly our position that the whole purpose of the Unocal decision and all of its progeny have been to impose a regime upon corporations susceptible of being applied in court that says that we recognize the human nature and how it reacts under the stress of change of control situations. It reacts in a different way.

So without having to have us take Mr. Munro's deposition and prove that in his heart of hearts all he wanted to do was entrench himself, that burden is not a burden that any plaintiff here needs to carry nor an issue that this Court needs to resolve. It is sufficient, indeed, it is appropriate, indeed, it is the purpose of the Unocal test, to ask, in our view, whether the decisions that were made in March were decisions that were in the nature of control, whether control was at issue.

Certainly in a C. Wright Mills sense,

there is no question that control was transferred to a shared enterprise between two people. We don't need to go very much further, however, than to look at what it is that the defendants themselves consistently said, did and acted upon. What is the reason given, just to take a return to the relief we are seeking here -- what is the reason given for the share exchange agreement?

You know, on reflection, Your Honor, it occurs to us we probably misdescribe the share agreement as the most outrageous lockup in the history of corporations. It is probably more in the nature of a break-up fee, because what it really does is, when you take the differential between the value of the Time shares and the value of the Warner shares exchanged, provide at least a $410 million consolation prize and as much as an $800 million consolation prize to Warner in the event that somebody other than Warner acquires Time. That is stunning.

Why was it done? Is there any doubt why was it done? The answer is in the record. The reference has been given to you. The answer is, it was done to defend the transaction. Why? Because it

was quite clearly understood, unmistakably understood, that the market's reaction to this entire transaction might be deemed to, perceived to be that Time and Warner were both going to be up for grabs.

Why is that? I mean, how much of a psychologist of the corporate world do we need to be? Not very much. The dry-up fees. What conceivably is the reason for a dry-up fee? What is its justification? In the context of Revlon what is the justification -- what does it do for the shareholders to buy off lenders to preclude the development of a better alternative for their shareholders?

And I suggested in our brief, and I really would very much like this Court and ourselves to have the answer, whether that $27 billion slew of commitments that was announced last Friday included committing all of those institutions also not to provide credit for alternatives. And, if so, this Court should enjoin it. It is unconscionable. It is the grossest breach of loyalty I have seen yet. It is the kind of device that hired gun participants in this process express glee over when they -- or just forget that they are supposed to do something for their client's shareholders and not their client's

personal career objectives. How can you justify that? I don't understand it.

And, you know, in the context of what we are dealing with it seems to us quite clear the no-shop agreement -- I mean, Revlon addressed the no-shop agreement. What did it say about it? Is there something new to be written on the law of no-shop and confidentiality agreements? We just had an opinion from the Supreme Court on the 3rd of May in the Macmillan case in which critically noted was that Maxwell was given less access to information than management's partner and bidder, and clearly Warner here is management's partner and bidder. Less? They have taken the position that nobody gets anything, that they are contractually bound.

We suggested in our opening brief to Your Honor that really what is awful about what is going on here is the complete, premature, unconscionable abdication by the directors of Time of all their financial obligations. They take the position that they had a business plan. The business plan consisted of acquiring Warner, or at least they thought they were acquiring Warner. I am pretty sure that Warner thought they were acquiring Time. But we

will leave the metaphysics aside for the moment. The fact of the matter is that they thought they were acquiring Warner.

When they did that -- I have lost my thought, Your Honor. I am sorry. It sounded dramatic, and I am desperately unhappy I have lost my own conclusion.

Oh, I recall. The basic argument that we were confronting, in fact, the only argument I think of any potential novelty, is a string of citations building off Crouse-Hinds, this wonderful 1980 decision of Judge Kearse on evidentiary grounds that suggests that just because somebody lobs in a tender offer, you don't have an obligation if you are a director to disregard all of your plans and accept that tender offer. And we agree with that. But that is really not what is at issue here.

What is at issue here is essentially the duty that this Court observed in Anderson Clayton II. In Anderson Clayton you may recall, Your Honor -- and in that opinion it appeared at 519 Atlantic 2nd -- Bear Stearns had made what the Court observed could be regarded as a somewhat conditional offer. And you said, "Surely, the obligation" --

excuse me. A somewhat conditional offer in the face of a recapitalization plan that was out in the form of a proxy statement about to be voted upon by the shareholders, rather far developed, and an analogy not terribly distinctive from the facts at hand here, where the Warner deal was out, submitted in a proxy statement. What did the Court then find was the duty, and did the Court find it a difficult proposition? I don't think so.

The sentence begins with, "Surely." "Surely, the obligation of the board at this time is to explore in good faith an alternative that, if available, would appear to have a significantly greater present value than the recapitalization, at least based on the best available evidence," citing some cases, one of which was not cited, but another opinion of this Court cited for, interestingly, the opposite proposition by Time and Warner is UIS v. Walbro, in which in 1987 we were dealing with a rather coercive, one might say, or at least a very small tender, a 51 percent tender, to be responded to by an 8 percent. And the Court quite quickly, almost, it seemed to me, sua sponte, observed, "Defendants' failure to explore to any extent whether

UIS, which had begun this bid, would make a higher offer for all shares surely is worthy of further inquiry. A board's duty is to act with due care, and that duty includes the responsibility to reasonably inform oneself of one's alternatives."

We had dealt in the brief, Your Honor, at length with each of the cases cited for the proposition which I think is the slender thread sustaining the fabric of the argument presented to this Court on behalf of Time and Warner, and that is that we have some core corporate purpose that is at work in the acquisition of Warner. I have no disregard for the sincerity of the Time directors when they formulated that strategy. I do not for the moment think that any of them need be shown here to have been motivated by anything other than what they believed was in the best interests of the shareholders of Time. But when they did that, when they made that choice, they were quite consciously aware of the substantial likelihood that the marketplace would present them with alternatives.

And what they did in the face of that understanding is so inconsistent with Unocal that I will await in rebuttal replying to whatever argument,

because it has not appeared yet in the briefs, justifies creating at the inception preclusive obstacles intentionally, as preclusive as they could make them, to a company that already had a pill, that already has a supermajority provision, that is a Delaware corporation subject to 203. The anticipatory actions taken are really just beyond the pale.

Another issue I would like to develop briefly, Your Honor, and my view, therefore, proceeds from that first event into the events of June, where there is no question, notwithstanding the proclamations of the brief, at least when they had a statutory obligation to be honest under the securities laws, they made it absolutely clear that the share exchange, the revised merger, the tender offer, all of those things were done precisely in response, precisely in response. And the questions then are, is it a proportionate and is it a reasonable response.

There are two answers to that question, one of them substantive, which Your Honor has already heard some of from Ms. Savett, which is to say, how does it compare in terms of enhancing

shareholder values. Not necessarily going to a transaction right now, but some effort to develop the alternatives and assess what is in the best interests of Time and its shareholders, with an all-cash, all-share, ask-me-for-more bid to a company fully able to preserve its negotiating authority until the end phase of the case, what was the wrong, what was the excuse for not going and talking to Paramount or choosing not to talk to Paramount in the belief that not talking to them would provoke even a higher offer, talking to other people, but doing something other than strapping themselves to the rocket, contracting away the fiduciary out, irrevocably committing themselves to a transaction that at the very best, at the very best values the shares at $150 a share based upon the exchange values and the $70 a share?

There is no excuse, and there is no new law that is necessary to address that question. It was disproportionate and it was inappropriate. But one of the reasons, I believe, that they got there, frankly, is an issue that probably has not been developed adequately in the briefs. When one wakes up at 4:00 in the morning and tries to think

about how to occupy one's Chancellor, you have new thoughts. And I at least had a few thoughts, and it is that we have really probably done not as good a job as we should for you of explaining the procedural defects that took place here. Looking at Macmillan and Revlon and all of these cases, what is it that really went wrong here? I think, frankly, first, again, all with reference to well established law, first, who negotiated this transaction, the first one or the second one? What role did the board have in that?

Again, at the Revlon opinion, Page 183, we have the Court's explicit approval of the opinion that had just been rendered in the Hanson Trust case. "The directors," the Supreme Court of Delaware writes on Page 183 -- excuse me. It doesn't. Yes, it is. The Supreme Court first writes, and then it is a quote from Hanson. "...the directors failed to fully inform themselves about the value of the transaction in which management had a strong self-interest. 'In short, the Board appears to have failed to ensure that negotiations for alternative bids were conducted by those whose only loyalty was to the shareholders.'"

Now, I don't know what motivated Mr. Munro, the question that Your Honor asked. I am prepared to assume that it was his loyalty to Mr. Nicholas, the grander vision of Time. It was not -- it was not the highest price available to the shareholders. It could not have been.

We have a transaction here in which originally we were going to have .65 shares issued for every share of Time. That is assumedly for a share of Warner for which $70 is completely satisfactory even in a front-ended deal, which is what the Warner people are now subject to. If you take the $200 value, which we will for want of another way to describe it say the Paramount bid -- that just happens to be well within the range of all of the ranges that have been established as a fair price -- that was a $93 price. That was quite a negotiation. It was described, as Your Honor knows, as "a hell of a deal" by Mr. Rohatyn, who has seen a deal or few. If it is the 250 that we have heard bandied about, they were paying $113, $114 a share for this $70 piece of paper. That was one glorious, hell of a deal.

In the context of those numbers is it

really conceivable that it was necessary to give Warner the no-shop confidentiality agreement, the share exchange agreement, to enter into the dry-up provisions, in the context of everything else that happened here? I suspect not. And even if it was, the burden, says the Supreme Court in Revlon, is to prove that it either brought a bid to the table or brought an enhanced bid. It is the opening of the process.

The next thing that happened here is that we are dealing with advice. The board needs advice. From whom does it get advice; its bankers? No. Management's bankers, the bankers which, like in Macmillan, had been working with management from the Day One. Now, it might be that in this kind of a business decision that it was untainted perhaps by the highest level of the Unocal standard, if there is such a thing, the Revlon auction duty standard. They could have muddled along for a little while, although I note that Wasserstein is among the people who is telling them the reason for the shareholder agreement, exchange agreement, is to be preclusive and the lockup is important in this context. But put that aside for the moment.

The plain, bald fact is that Wasserstein and Shearson were the only bankers ever on the scene, that both of them had an immediate and substantial financial stake in the Warner transaction, not vague, not unambiguous, a five followed by six zeroes for each, and that that bonus for the achievement of the desired management objective was not waived until after these suits were filed, a bid was in and all of the relevant decisions on June 16 were made.

So we had no independent bankers, nor did we have an independent committee. For a while in the early stages of discovery here we thought we had a special committee. After all, at this stage of the law one would expect that a corporation with the august majesty of Time would have taken the time to formulate a special committee of independent directors. I mean, certainly they cared enough about the directors. We have Mr. Munro running all over the country trying to twist Mr. Temple's arm or talk him into things. He knew who his buddies were. He said they were going to be on the special committee, but it never functioned as such.

We were told the only purpose of the

committee was to meet in between. They met, when they met, for the most part with the board, with Wasserstein, with Hill, and never had their own bankers and never had their own lawyers.

THE COURT: Is there a resolution constituting this subcommittee?

MR. KLEIN: The special committee?

THE COURT: A board resolution?

MR. KLEIN: Yes, and I will have to get my colleagues to develop it. I have been relying upon the record. As Your Honor knows, we got into this case rather late, and I thank the Court.

THE COURT: I am just wondering how the resolution creating the subcommittee defined the function of the committee.

MR. CANTOR: Your Honor, it was done at March 3. We will dig out the March 3 minutes and report to you on it. I don't remember a resolution. Maybe there was one. But they were appointed.

THE COURT: I see. Can you go back to the investment bankers' compensation arrangements for a moment. I do understand from Mr. Wasserstein's deposition, although I haven't looked at the amended retention letter, that currently the investment

bankers are to be paid a fee that is noncontingent with respect to -- Mr. Wasserstein uses the phrase who buys who or who acquires who.

MR. KLEIN: Yes, that's correct.

THE COURT: And you say that previous to that, however, the arrangement was contingent in the sense that -- this is previous to the time that Paramount came on the scene -- that there was a contingent element. Can you tell me what is the exhibit number for the original retention agreements?

MR. KLEIN: The exhibit number for the February 14 letter agreement is Wasserstein Deposition Exhibit 1, and the minutes that reflect the timing of the -- how shall I say it? That enables Wasserstein and Time and Warner, Time to declare the neutral statement in the fashion that they did, which say as of this date, Your Honor, we are neutral. And all of this reference is on Page 23 of our reply brief, Footnote 17, is Exhibit P of the exhibits in support of Paramount's motion for preliminary injunction, Exhibit P at Pages 056, 085, and 086.

THE COURT: Exhibit P to what?

MR. CANTOR: In the appendix, Your

Honor.

MR. KLEIN: P. There is an appendix.

THE COURT: Were these documents identified by a witness and so forth?

MR. KLEIN: They are the minutes of the meeting of the 16th, I believe.

THE COURT: It would have been helpful to create -- I don't mean this as a criticism, because I do understand the extraordinary pressures that a case of this kind places upon counsel. But it would have been helpful to create a compilation of the minutes, for example. It is slightly odd to find some of the minutes with Mr. Finkelstein's deposition and some of the minutes are over here.

MR. CANTOR: I am sure counsel could do that, Your Honor, if you wanted, and get them to you.

THE COURT: Well, it is unnecessary. I have gone through a lot of the work already to look at them.

MR. KLEIN: Your Honor, Ms. Ingersoll, who in previous engagements I have found to be a master of the record, has once again

demonstrated that strength, and points to Finkelstein Deposition Exhibit No. 6 at Page A003351. That is the specific resolution creating Kearns, Finkelstein and Opel members of the special committee, plenary power and authority to approve the taking of any actions, payment of any costs and expenses in relation to the merger as they may deem advisable.

THE COURT: And what meeting was that?

MR. KLEIN: March 3.

MR. CANTOR: March 3.

THE COURT: March 3.

MR. KLEIN: I believe the record reflects that that committee never met.

THE COURT: Yes, that is the testimony of Mr. Finkelstein.

MR. KLEIN: And having not met and having not had anybody involved protecting the shareholders' interests in the negotiation of the first or at least the second transaction, and having not had the advice of an independent investment banker of their own or, for that matter, as best as I know, counsel of their own, they found themselves able to accept a rationale which has been so much

developed by others that I have simply one or two very brief observations about it. And that is, one, to the extent that this transaction with Warner has as any semblance of its justification the potential future valuation, the future enhancements of value for shareholders in out years, it is a dimension of what my mother used to call a wish and a hope, the likes of which this Court and its fellows have not seen.

We are not talking here about -- what was it in Interco; the 68 to 74 differential? We are talking about a differential here that, taking $200, which is the alternative that is already on the table -- and perhaps if banks aren't prohibited and other things are to happen, we could have a better alternative -- that is, if we assume the $150 value that their transaction places on their stock, assumes a 33 percent increase, from $50 to $200 increase, not the small margins we were dealing with in Interco or, if we forget the funny numbers that run out of their badly negotiated transaction and look at the market as it valued that transaction or at least the Time shares in that transaction prior to this announcement, $126, as I recall the market, we are

talking about a 68 percent increase over time.

A fortiori, Your Honor, if a shareholder choice is necessary when you have got a 4 or 5 percent margin either in Interco or in the Pillsbury case, how can you justify doing this here?

You know, the only thing about this recap that is really quite stunning that no one has quite said, and I will say it, there was a lot of effort by the Time directors here to enhance shareholder value, and the problem we have got is that the only shareholders whose values they have enhanced have been Warner's. Warner is getting a hell of a deal. We are not now talking about a functional alternative, because we are not talking about any efforts to enhance the value or put some cash into the hands of the shareholders. We are talking about a wish and a promise enhancement, that if they buy the Warner shares and if everything goes as the wish and the promise would have it be, somewhere down the line between a 50 percent and a 68 percent enhancement in value will come along to be better than the $200 offer.

And again, they have yet to negotiate. They have yet to pursue alternatives

freed of the constraints of the dry-ups. They have yet to take any action except actions totally inconsistent with what I understand to be the fiduciary obligations of directors, either procedurally or substantively.

One final note, because I am going to want to observe the strictures that we were put under, and that is on the, I thought, very effective presentation by Ms. Savett on the question of irreparable harm. I just want to bring the Court to focus on the latest state of affairs here. We don't care whether Paramount pays us or Warner pays us or some, God help us, non-U.S. person would own the majestic swimsuit issue of Sports Illustrated. We are indifferent to that. What we are not indifferent to is the inability to ever again see something close to $200 a share.

We have competing affidavits. They have come in in the last days. I assume they reflect the highest and best efforts of the parties' experts on both sides with respect to the consequence to the shareholders of the preclusive Time Warner bid. And they are as follows: Mr. Walters says, "I don't think that you could do a Time Warner acquisition

given the credit available in the world. But if you did, it would have to be a lot less than $200 a share." I think the affidavit says billions less.

The reply from Mr. Seegal, who is the banker from Shearson -- I think the affidavit came in yesterday. Today?

MR. CANTOR: This morning.

MR. KLEIN: This morning. Says, oh, yes, we can do a deal, and it is silent, silent on the question of what happens to the owners of Time, to whom fiduciary duties have run of a Unocal nature since at least the consideration of the March Time Warner offer. In our view, that is irreparable injury.

Moreover, Your Honor, with respect to the lockups, the break-up fees and the other things of which Warner complains it would be deprived, the Revlon court and the Macmillan court had no problem wrestling with these difficult issues of entitlement to enforce contracts. Under virtually identical circumstances in which the board violated its obligations, it was found entered into agreements, lockups and the like, the Court enjoined them because, as in Jewel, the first obligation runs to

us. We pray at the conclusion of this case this Court reaches a similar conclusion.

Thank you, Your Honor.

THE COURT: Let me ask you, Mr. Klein, how many shares of Time Incorporated do your clients own.

MR. KLEIN: My clients in the aggregate, I believe, have in excess of a million-two shares.

THE COURT: Did you bring your action as a class action or was it an individual action?

MR. KLEIN: No. We brought it as we brought the Macmillan action, just on behalf of Mr. Bass individually. There are already class actions here, Your Honor. And I want to thank the Court very much for permitting us an opportunity to participate.

THE COURT: Yes, I understand. You referred to the Seegal affidavit that was delivered this morning. I haven't seen it.

MR. KLEIN: It is an affidavit. We have the cite provided. I think we got it just as we sat down for conference with the Court.

THE COURT: I am going to take a

luncheon recess, and I will take a look at that affidavit, since I haven't seen it yet.

When we recommence, we will hear from the defendants, and the plaintiffs will have a short reply period.

Just as a sort of small background fact, it is not necessary for the Time defendants to supply the information this afternoon, but I would like to know what is the proportion of total revenue generated by Time's publishing activities say last year and then five years ago, and what is the proportion generated by the cable and Home Box Office and that entertainment segment of the business as well, just for my own edification, to see how the evolution of the company over that short period has affected its income statement.

We will take a one-hour break. I will ask that some of the people that have seats -- I know this is rather crowded because there is interest in it. Some of the people that have seats had reserved seats because they were parties or lawyers, and I would ask that those that are not sitting in those seats not sit in them when they come back, because I don't know the details of why people got

seats and others didn't, but I think that should be respected.

We will take a recess until 1:15.

(Luncheon recess taken at 12:15 p.m.)

AFTERNOON SESSION

(Reconvened at 1:20 p.m.)

THE COURT: Mr. Joffe, I see you have changed your chair to permit you to get at the podium more easily.

MR. JOFFE: Thank you, Your Honor. Good afternoon. I would like to emphasize some facts which are simply ignored by the plaintiffs and deal with some of the snippets they have chosen to single out of the record.

Their selective culling bears no relationship to this record as a whole. It omits mention of the overwhelming evidence in the documents and the depositions and the affidavits that the tender offer for Warner is the culmination of a responsible, two-year, long-term planning process to make Time a major player in the entertainment business and worldwide. The fact that this transaction with Warner has been two years in comtemplation and one year in negotiation and that

the Time board was determined to preserve some of the qualities that have made Time successful is cynically referred to as management entrenchment.

If Time's management and board had been interested in entrenchment, there would have been a lot riskier ways of doing it than combining with a fast-moving, successful company with its own dynamic leadership, doubling the size of the board and dropping four Time members from the final board.

Significantly omitted from the plaintiffs' argument is any recognition of Time's outside directors, except by Mr. Klein, who says it doesn't matter what they thought. Matina Horner, president of Radcliffe; James Bere, Borg-Warner; Donald Perkins, former head of Jewel, a member of the AT&T board; Ed Finkelstein, a chairman of Macy's; Michael Dingman of Henley; Hank Lewis; David Kearns, chairman of Xerox; John Opel, former chairman of IBM, chief of its executive committee, these are not careless people, Your Honor. These are not patsies for Time's management, nor were the four outside directors, Mr. Temple, Mr. Grum, Mr. Goodrich and Mr. Wharton, who also voted for the March 3 transaction and are no longer on the Time board.

Now Paramount says at Page 4 of its reply brief that the relevant decision was made on June 16. Paramount took 14 depositions but only four of Time's outside directors as of June 16, even though Paramount has the burden of proof.

Like so many great disputes, this case turns on the facts. After looking at the record I will turn to the principal legal issues. First I better take my watch off, so I can see how long this is taking. But let me say a word about the legal issues before I look at the facts. I will get back to the legal issues.

First, at bottom, plaintiffs argue that because Paramount made an offer above the current market price, the Time board was not justified in pursuing a long-term business plan without giving the shareholders an immediate choice between the current maximization of share value and the long-term business. That's not the law. There is not one case that supports that proposition.

Crouse-Hinds is squarely on point, and under it plaintiffs lose. They dismiss it as an old New York case. Well, it is 1980. It is the Second Circuit. It does deal with New York law, but

it didn't just receive passing mention in Unocal. The Supreme Court of Delaware endorsed it in Unocal. They cited it for the proposition that it was an appropriate response to a tender offer by a raider designed to interrupt a planned stock merger. They just ignore that.

Plaintiffs are really asking the Court to make law inconsistent with the present law of Delaware. The Court should decline the invitation. Plaintiffs' position should not become the law. It is a pernicious doctrine that would disrupt the conduct of business, disrupt long-term planning and allow outsiders to put a company up for sale or require a plebiscite by the mere making of an above-market offer. It would take the governance of the corporation out of the hands of the board and create a bias toward short-term maximization, which would be harmful to the economy of this country. I guess every lawyer thinks his case is the most important, and I don't want to sound grandiose, but that's really what is at stake here.

Now, by emphasizing the long run I do not mean to say that there has been a show-stopper here for the near term. The proposed acquisition of

Warner is not a lockup which will preclude an eventual offer to Time's shareholders. No less an authority than Martin Davis has sworn under oath that there has been no determination by Paramount of whether it will proceed to buy Time shares if Time acquires Warner. That is at Page 330 of his deposition, and it goes on for several pages. In any event, the condition is in Paramount's hands. They designed the condition.

As to Mr. Waters' 24-hour old speculation that there may be no buyers for the combined entity, it is simply speculation based on several false premises which are dealt with in the affidavits we filed this morning. I note in passing that Mr. Waters, a distinguished managing director of Morgan Stanley, does not say that it is his opinion that no one would make a bid or that Time is not financeable. He says if A is true, then B may be true, then C will be true, et cetera. He does not state his opinion. He makes a series of logical connections. The logical connections are based on false premises in the affidavits, and the affidavits we have submitted make that clear.

There is no affidavit from Mr. Davis

saying Paramount won't bid for the combined entity. Your Honor may remember when we had the argument on the share swap I stood up and said Paramount is claiming irreparable injury if there would be a share swap, or at least their lawyer is, but where is an affidavit from someone at Paramount saying that they won't come after Time if the share swap is allowed. That never happened, and in Mr. Davis' deposition at Page 326 he said the share swap was not preclusive. Where is he now? He is on the record as saying no decision has been made as to whether Paramount can or will bid for the combined entity. How can Mr. Waters say it won't happen when even his own client won't say that?

Let me urge that when all is said and done, plaintiffs should lose unless they have convinced this Court that they are more likely than not at a final hearing on the merits to convince this Court that the Time board of directors' decisions were based primarily on perpetuating themselves in office or some other breach of fiduciary duty, such as fraud, overreaching, lack of good faith or gross negligence.

Let me turn to the record. In sum, I

suggest that the record discloses the revised merger agreement, the tender offer for Warner, was undertaken by Time to implement a long-term strategy to make Time a major player in the international entertainment business. After about a year of informal discussions the Time board approved a plan which for at least the last year has had as its major target the acquisition of Warner. There is simply no evidence that controverts Time's deeply held belief that such combination was necessary if Time was to prosper over the long term.

To the extent that any corporation in America has a long-term policy to insure long-term shareholder value, Time has it. This is not something dreamt up by the lawyers after June 6.

The form of the transaction changed because Paramount's tender offer made the original March 3 transaction difficult, if not impossible, to obtain in the near term, and Warner was not going to wait. But the long-term business objective of becoming a global entertainment company by combining with Warner did not change.

There has been a great deal of heat generated by whether Time's offer was a response to

Paramount's. It depends on what you mean by the word "response." The current offer by Time was not taken to defeat the Paramount offer. It was not taken as a defensive move to convince shareholders not to tender. In that sense, it was not a responsive move like a recap or a self-tender. It was taken to effectuate an earlier decided-upon goal, a combination with Warner, which the Paramount offer had impeded in its original form. It was not taken for the purpose of blocking the Paramount offer. It was taken to counter Paramount's offer and its effect on the acquisition of Warner. No witness or document has suggested otherwise.

Our offer for Warner is a plain vanilla tender offer. If it had been made on March 3, no one would be here arguing that there was anything wrong with it. It had no fiduciary out; right. Neither does Paramount's offer. Paramount's offer has 40 different outs. It doesn't have a fiduciary out. It has no financing out. But we had every reason to believe that we would get the money, and we did get the money.

It has no regulatory approval out, because by this time, four months having passed or

three and a half months, virtually all have been obtained. The rest are expected. And in any event, the few remaining are not material.

As for the notion that all this has been a scheme whose sole or primary purpose -- and that's the language of the cases, "sole or primary purpose" -- has been to provide job security for Messrs. Munro, Nicholas and Levin, it is simply not supported by a fair reading of this record.

Let me turn to Levin Exhibit 11, from which a few snippets were read this morning. It is a four-page document. I suggest you cannot read this document and come away feeling that Mr. Levin's purpose was entrenchment. I would like to read just a couple of sentences into the record and then make a comment on it.

"The resulting company would be a complete, world-class entertainment and publishing giant with well in excess of a billion dollars of operating income. Like IBM or GE, its size and range of solid franchises would make it an institutional 'must carry' stock."

"This would be an operating company" -- "operating" is underscored -- "not a

financial construct, with sufficient internal cash generation to fuel new development. Indeed, the cross-section of businesses, particularly in entertainment, would provide growth opportunity across cable, CD's, home video and pay-per-view. The strength of the new company would be in its operating management and philosophy, its extraordinary distribution capabilities, and in its handling of a diverse array of talent."

It then goes on for four pages examining each business and its long-term implications, and then it ends -- there are several dots, and then it says, "A word of caution and reality: neither our senior management nor our Board would presently proceed to the end result I have described. The memorandum is intended to provoke debate...."

Under the plaintiffs' view of the way corporations should act, debate should not occur.

In any event, the issue is not what went through Mr. Levin's mind in 1987 but what was the intent of the board of directors when the board of directors acted on March 3 and again on June 16, the June 16 being the issue for today. The record

discloses a concern that in any deal with Warner corporate governance issues between the two have to work out to provide a balance between Time and Warner management, assurances that would for both the Time businesses and the Warner businesses secure their way of doing things, and ultimately for the Time people secure the Time culture and the Time way of doing things. There is nothing sinister about this. Time and Warner each had their corporate culture and traditions on which the success of their businesses depended.

To put it in colloquial terms, as did one of our directors, "Show biz people cannot be treated as button-down types and journalists are not content with an artsy-craftsy atmosphere."

The depositions and affidavits make clear the Time culture is corporate policy of Time, one of its most fundamental. I think Mr. Opel referred to the fact that a lot of the directors still view Time in large part as a journalistic company.

Governance provisions had to be agreed upon if the businesses were to survive and prosper. Time's magazines earn approximately 20

percent of the revenues generated by the United States magazine industry and 30 percent of its profits. This is an important business plus. Time believes that its culture contributes to its ability to enjoy premium prices from its readers and its advertisers. It also enables Time to attract and keep the best people in the business.

As the directors' testimony makes clear, this was at the heart of their concern. Once it was clear that the Time people were ultimately going to run the business, that the signal to the marketplace was going to be that this was going to be an acquisition by Time, many of the issues were settled.

I notice Paramount in its reply papers makes a big deal of the fact that some of the supermajority provisions that existed in the Time proposals that were never agreed to, that existed in the Time proposals of August of '88, dropped out by March of 1989. They dropped out when Mr. Ross agreed to retire, when he agreed to have a press release saying that it was going to be an acquisition by Time and when the Time people felt comfortable with what they were doing.

You can be sure that had we kept those supermajority provisions, the plaintiffs here would be arguing they were absolute evidence of entrenchment. I submit, Your Honor, they can't have it both ways.

THE COURT: Well, the supermajority provisions that you are referring to relate both to the change in the editorial committee of the board and to termination of the senior executive officers?

MR. JOFFE: Well, I think the senior executive officers can always be thrown out if they are not doing a good job. It may end up being a breach of their contract, but clearly the board has the power to do that.

I should say a lot is made over the fact that Mr. Nicholas is not a journalist. Mr. Nicholas has spent his entire business career at Time. He has lived with journalists, he has lived in the Time culture, and that fact distinguishes him from Mr. Ross, for instance, and may be one indication why Time people were clearly comfortable with Mr. Nicholas.

Let me turn for a second to Time's activities at the FCC and with local authorities.

ATC is protecting its rights and its public shareholders' rights. It is 20 percent -- 18 percent owned by the public. There is a big difference between the Time-Paramount situation and the Paramount-Time situation. If Time acquires Warner and it doesn't have an approval for a little franchise out in Dubuque or someplace -- no insult meant to Dubuque. Maybe it is not so little -- but some tiny little town out in the Midwest, the only thing that happens if, in fact, there is a revocation and it is lost is that Time loses an asset that it owns 100 percent of it. If an ATC cable franchise is disrupted because of Paramount's offer, Paramount may shrug its shoulders and say we don't care about that asset, but 20 percent of the owners of that asset may have a different view of it. They are ATC's public shareholders.

I don't think I am going to say anything more on that issue except to refer Your Honor to the Grand Met case, where Justice Duffy was faced with a claim that Pillsbury's recourse to the tied-house statutes was improper. He declined to rule on the claim as material to the main issue at hand, there the redemption of the pill.

It is equally immaterial to the main issue at hand. The record simply will not support a finding that ATC's actions were improper. Paramount is perfectly capable of defending itself in each of those fora. If it is right, it will win, and if it is wrong, it will lose. The FCC's actions to date indicate Paramount is much closer to being wrong than to being right.

Let me turn now to the Paramount offer. It is not really an issue in this case, but it is a piece in setting the context for looking at Time's offer. Also, the rules cannot be devised for judging Time unless they have some bearing to the rules which fit others. Paramount is asking this Court to choose between its bid for Time, such as it is and as presently structured, and Time's bid for Warner. It is appropriate to look at both.

According to Mr. Davis, Paramount, like other entertainment companies, has been in play. That's Davis deposition at 94. He says almost all entertainment companies have been in play for two years. Clearly, Paramount is under no duty to auction. Clearly, they have no duty to get a shareholder vote.

Paramount has never before or after its offer undertaken any internal studies or analyses of the business fit or commercial benefits of a Paramount-Time combination. That is his deposition at Page 49. Essentially no internal work was done by Paramount management in connection with deciding whether or not to make an offer for Time.

THE COURT: What is the purpose of those two facts?

MR. JOFFE: To contrast the way the two offers came about.

THE COURT: Why is that relevant?

MR. JOFFE: Because here we have a long-term business plan of Time that is going to be judged by some rule which also has to be applicable to Paramount. In Paramount's case there clearly isn't any long-term business plan or at least none that we have been able to discern.

THE COURT: Well, the Paramount offer is an offer for all shares in cash, so insofar as the Time directors are concerned, is it material consideration --

MR. JOFFE: Oh, I agree, Your Honor.

THE COURT: (Continuing) -- that this

is not a carefully thought through proposal?

MR. JOFFE: No, Your Honor, I am not suggesting that this is a matter that should have been of concern to the Time board. What I am saying is that the Court cannot craft a rule of law that cuts one way for one company and another way for another company --

THE COURT: Well, I --

MR. JOFFE: (Continuing) -- unless they are in different situations.

THE COURT: Exactly. And it seems to me that they are in different situations, particularly at the moment.

MR. JOFFE: Well, I --

THE COURT: I mean, I am asked to or the Court is asked to pass a preliminary judgment with respect to broadly the question whether the directors of Time have breached a duty of a fiduciary character that they owe to the shareholders. No one has suggested that they have not the legal power to do what they have undertaken to do. And while I appreciate that there is sort of attenuated atmospheric quality to this business that you are referring to now, I don't think it deserves very much

of our time this afternoon.

MR. JOFFE: Well, if you don't think so, I don't think so. Let me move on to the next subject.

Let me turn to Time's inadequacy determination. The plaintiffs seem to concede that unless Time's inadequacy determination was fundamentally wrong or improper, they can't win this case. I believe, Your Honor, they can't carry that burden. It was done with due care after advice from nonconflicted investment bankers. Let's look for a moment at that statement of mine.

I understand all the Wasserstein-bashing that went on during this morning. I think it is unjustified in this context. They have a fee letter which makes it absolutely clear their fee is not dependent on whether the Paramount transaction goes through or not. There was a lot of discussion about it in the Wasserstein deposition. I don't think it is formally part of the record. I would like to hand up Document W400001. It is a three-page document.

THE COURT: Mr. Joffe, would you identify it, please, for the record other than by

that number; the date and so on. Would the clerk hand it back to Mr. Joffe.

MR. JOFFE: Sure. It is a June 15, 1989 letter from Wasserstein Perella & Co. to the board of directors of Time Inc. It is the fee letter. I know we sent it over to Mr. Chepiga two days ago.

THE COURT: Do you mean this was only produced two days ago?

MR. JOFFE: I believe it was produced earlier, but when Mr. Chepiga told me two days ago he couldn't find it, we sent over another one. There was a big to-do at the Wasserstein deposition as to whether it had or hadn't been produced, and I don't know, Your Honor, but --

THE COURT: But the contents of it, Mr. Wasserstein was asked about the contents of this at his deposition?

MR. JOFFE: Yes, and it is summarized in a schedule to the 14D-9.

THE COURT: And does the record indicate that Mr. Britt signed this letter for the board, that this reflected an agreement that had been reached and that it was --

MR. JOFFE: Certainly the board of directors minutes and the 14D-9 referred to an agreement, and this is that agreement.

THE COURT: The minutes of the June 16 meeting?

MR. JOFFE: Yes.

THE COURT: Okay.

MR. CANTOR: Your Honor, I am under a slight handicap, because while it may have been produced two days ago, I don't know what it is.

THE COURT: Do you have another copy of this, Mr. Joffe? This is a letter -- I am surprised to hear that you haven't seen it -- I would have thought that while not perhaps central or critical, nevertheless, clearly material to what the parties have been talking about.

It is a June 15 letter on -- interestingly, not on Wasserstein Perella & Co. letterhead but on blank paper with Wasserstein Perella & Company, Inc. typed in at the top. And it is a three-page letter signed by Mr. Rossoff and accepted and agreed by Time by Mr. Britt. And Mr. Joffe says it refers to the adjusted fee agreement.

MR. CANTOR: Well, I am familiar with the adjusted fee agreement, if that's all it refers to.

MR. JOFFE: That's all it is.

THE COURT: Testimony on it.

MR. CANTOR: Testimony on it; that's right.

MR. JOFFE: And it is summarized in the documents. I realize it was not a deposition exhibit because there was an argument at the Wasserstein deposition as to whether it had or had not been produced. We believed it had. In any event, when Mr. Chepiga asked me for it two days ago, we sent it over to him. I don't know whether it was produced or not.

All right. Let's put one thing to rest once and for all. Paramount or our board of directors recognized, and it is stated in the 14D-9, that Paramount's -- or put it this way: They recognized that the merger, the revised merger agreement, the tender offer for Warner, was inconsistent with the terms of Paramount's current offer and it may adversely affect Paramount's ability to consummate it. That was considered by the board.

It is in the minutes. It is at least in the 14D-9.

Now, we have had a lot of testimony about how ridiculous our determination was that their offer was inadequate. I think what all the argument this morning cleverly omitted was that the offer at that time was not $200 --

THE COURT: I have very much in mind that it was $175.

MR. JOFFE: (Continuing) -- and was not within the range that Ms. Savett got up and pronounced. I would like also to point out that while she read three numbers from Waters' Affidavit 8 as to what people thought the ranges were, she left out seven. She left out the fact that Kidder Peabody thought the break-up value was 225, that Donaldson, Lufkin thought the value was 215 to 240, that another fellow at Kidder Peabody thought it was 225 to 250, that Paul Kagan Associates said 240, that John Bauer at Kidder Peabody said 218, that Merrill Lynch had 231, and that Mr. MacDonald of First Boston had 230. That was all left out.

Also left out --

THE COURT: Remind me just so this note has it -- there is so much information in the

case that my office is like a blizzard of paper. You are reading from notes of Waters' affidavit or deposition?

MR. JOFFE: Exhibit 8 to Waters' deposition. It is Page 8026.

Also significantly left out was the fact that Mr. Klein's client had a number well north of 220 as his valuation, that Morgan Stanley's own numbers -- Morgan Stanley's own numbers were 219 to 248. It is just inconceivable to me that anyone could attack the determination that 175 was inadequate as a bona fide determination made by outside directors after advice from their investment bankers.

Now, there has been a lot of talk about the changes between March and June.

THE COURT: Well, not to drag you into a subject that you intend to address later, but I am reminded, of course, that -- it was Mr. Klein's argument, at any rate, that there was a distinctive duty of inquiry at this point, even if one considers that 175 might reasonably be thought to be lower than achievable value in a break-up or sale transaction, that the directors when confronted with this offer in

a situation, albeit in Mr. Klein's argument negotiated in good faith for all the reasons that he referred to earlier -- on June 16 the directors had a transaction which was subject to a negotiated out for shareholder approval; and therefore, inquiry based on the 175 offer in order to make an informed decision as to whether to recast the transaction or how was their fiduciary obligation.

And you were talking about value, and I don't mean to get you on something that you were going to talk about later. But if you are moving away from that meeting at this point, you might tell me what your reaction to that argument is.

MR. JOFFE: All right. Well, first of all, the directors did consider the benefits of a combination with Paramount from two different directions. They considered the possibility of acquiring Paramount and what that would mean to a long-range business plan for Time and what sort of values that would get, and they did consider the offer. And they were told by their investment bankers it was inadequate. They were also told by their investment bankers what the investment bankers thought those numbers were.

Now, those numbers are covered by a restriction, but they were well north of $200, well north of $200.

And in addition, the investment bankers told them, "Look, if you want to sell this company, we will run an auction for you." And you can imagine how much the investment bankers would have liked to have run that auction. "We will run an auction for you, and we will get you a price way, way above 175."

There was no point to talk to Mr. Davis. He was a low ball bidder. You don't conduct an auction by talking to a low ball bidder. In fact, if we had talked to Mr. Davis and done a deal with him, someone else would be in here saying we should have run an auction.

I think the Time board quite properly felt that if they wanted to sell the company, the way to do it was to run an auction. They didn't want to sell the company. They thought there was a long-term value in the Time-Warner deal that was far and away better than this.

This is not a situation of comparing $64 and $62 or $74 and $76 --

THE COURT: Well, yes. The other side certainly agrees with that.

MR. JOFFE: Well, if you are offering the shareholders two very similar things, two short-term deals, one worth $64 and one worth arguably $66, then maybe there is a duty to offer the shareholders a choice. But from whence does this duty to compare and give the shareholders a choice between this bid and the long-term business objectives for Time spring? Does the making of an offer create a duty to go short term? Does the making of an offer create a duty to put the company up for sale or conduct an auction? It is just not the law. It shouldn't be the law.

If the Time board on March 3 had decided to make a tender offer for Warner, if Mr. Ross had agreed that he could live with the debt at that time if he was willing to be visibly bought out and Time had done that deal then, would there also have been a duty to go out and see if there could be a buyer because they were taking on debt? Of course not. There was no duty at Paramount to hold an auction before they took on what in the end is more debt, given the relative size.

I don't think at this point it is worth going over the changes in the valuations that took place between March and June. They are detailed at great length in the Rossoff affidavit. There is an argument with Mr. Phillips about that. It is all set forth in the affidavit.

I think there are a couple of things that are worth saying. First, the board considered the advice of experts nonconflicted. Mr. Phillips, Paramount's expert, agrees with our people that cash flow is the right way to value the company, in spite of Mr. Nagy's view to the contrary. That, incidentally, is how Paramount values Paramount-Time.

THE COURT: I take it that all of these Wasserstein and Shearson valuations are on a cash flow basis?

MR. JOFFE: Yes, Your Honor. Well, they use different valuations, but they certainly use cash flow valuations. Morgan Stanley uses the same ratios as does Wasserstein and Shearson, even though Mr. Phillips takes issue with them when we use them. That's Exhibit 7 to the Waters affidavit.

And then finally I should also point out that Lazard revalued Warner between March and

June in light of the Time bid. Now, ultimately they decided $70 was fair, but they also moved the values up in light of the passage of time and in light of the Time offer. It is just not so, incidentally, that Time's value of Warner didn't change between March and June. It did.

THE COURT: Well, it was stated, I think by Ms. Savett, that it changed 4 or 5 percent.

MR. JOFFE: I think it was 11 percent, Your Honor. A lot of discussion that our assessment of the -- that we took into account the fact that the stock market had gone up and part of that was due to Paramount's bid for Time. As Mr. Rossoff explains, they looked at the numbers before Paramount's bid for Time.

I won't get into a debate as to what the trading range of Time Warner combined stock will be after the deal goes through except again to say that plaintiffs can't have it both ways. If the Time Warner stock drops to where Ms. Savett says, then surely someone will be able to take over the combined company. The lower the stock, the easier it should be for someone to make a bid, a successful bid, for the combined company.

THE COURT: Well, is it not the case, although my question ought not to lead to the assumption that I regard it as critical at this stage -- but is it not the case that in electing to pursue the transaction that the board did on June 16, that the advice that the board had was that the immediate value of the securities of the merged company would likely be substantially lower than the offering price?

MR. JOFFE: Well, the offering price then was 175, and the range that was given I think was between the low one hundreds and the high one hundreds. For the first year it was a very wide spread.

THE COURT: It was a wide spread.

MR. JOFFE: The ranges got narrower or proportionately narrower as the time went on. But surely it cannot be the law that one must take the higher -- even if it had been -- let's say it had been 150 instead of 175.

THE COURT: I was just asking a factual question.

MR. JOFFE: The range was wide.

THE COURT: And can you point me

where in the record it is what the board was told with respect to projected values in the future? I am aware in the depositions --

MR. JOFFE: There is a chart.

THE COURT: (Continuing) -- there is testimony about rather rapid --

MR. JOFFE: Nagy 3 I am told is the chart from the Wasserstein-Shearson presentation on the values.

THE COURT: Nagy Deposition Exhibit 3?

MR. JOFFE: Affidavit, Affidavit 3, Your Honor. Is it the reply affidavit?

MR. MILLSON: The reply affidavit.

MR. JOFFE: The reply affidavit 3. And those projections show after several years numbers far in excess of $200.

I don't know whether I will ever get to the law, but let me spend another minute on the facts. There was nothing improper about the terms of the new transaction. It was an effort to implement the acquisition of Warner in the face of a move that made the old acquisition impossible, at least for the time being.

The new form certainly had arguable disadvantages: Debt, leverage, negative accounting, impact on earnings. I won't do Ms. Savett's job for her. She did it very well. But the new form also had various certain and other potential advantages, especially for the existing Time shareholders. There was substantially greater equity ownership, much less dilution, if any, potentially higher market valuation of the stock, no restrictions as in a pooling transaction --

THE COURT: Was that quantified? Somehow I have in my memory $10, but it wasn't in the Rossoff affidavit when I looked back to look.

MR. JOFFE: I think it was $10. Morgan said 10.

THE COURT: Morgan said 10.

MR. JOFFE: Mr. Perkins in his affidavit points out that the debt in this transaction need not have lasted for more than a few years. In fact, it is sort of in a way the reverse of the original transaction. In the original transaction you couldn't incur the debt for two years because of the pooling restrictions. It is likely the debt would have come after two years, when the

restrictions were lifted. In this transaction it sort of works the other way around.

The $70 price for Warner is fair. Mr. Waters from Morgan Stanley says that. He says it is at the high range but that it is fair.

The form was altered. Why was the form altered? It was altered to overcome the interference with the plan caused by Paramount's bid. But the underlying purpose was the same. The purpose was to make Time a long-term entertainment media player on the world scene. If that transaction had occurred on March 3, no one would be complaining that it disenfranchised anyone.

The fact that a vote was planned on a different transaction which required dilution of the Time shareholders and then that transaction didn't occur and the dilution didn't occur doesn't graft a right to vote onto the new transaction. This is not Blasius. This does not deal with a situation where there was a right to vote for a director which is then made meaningless. There was a right to vote for a transaction which involved dilution. There wasn't a right to vote for a Warner transaction per se. That vote didn't exist, and it wasn't created by

anything that Time did.

Now, let's look at the fact that there were no fiduciary outs in Time's offer, the famous tied-to-a-rocket quote. What did that mean? All it means is that there was a firm deal. There were no fiduciary outs. There is no fiduciary out in the Paramount offer.

Why is there no fiduciary outs? First and foremost, Warner insisted. Warner was not going to put itself up for sale and then allow Time to walk away or be dragged away from the altar.

Second, Time would have done that transaction right there then, on June 16, if it could have. If it had a pile of cash and could have bought those shares, it would have. Why didn't it? Because the Williams Act requires the tender offer to be open for 20 business days. The no fiduciary out was nothing other than as if that transaction had occurred there on June 16. If they had done the transaction on June 16, on June 17 they couldn't have taken an offer for just Time shares. But there is nothing that says you must forever maintain all your options.

And they, of course, eventually will

have the option of selling Time Warner. And if the shareholders really want Time to be sold, they can elect directors who will sell it. They can elect directors who will carve the company up, sell off the pieces. They can sell Warner. They can sell Time. That's the right Delaware law gives them.

Let me quickly dispose, if I can do anything quickly, of the notion that Time was put up for sale on March 3 and that, therefore, Time had some duty to get a quick profit. Paramount has abandoned this argument, but the shareholders still cling to it. The board of directors of Time certainly have not determined that the sale of the company was inevitable, as is required by Ivanhoe or Freedman v. Restaurant Associates. Time's shareholder interests were not being converted to cash or being terminated, which was the definition this Court used in Interco. There was to be no change of control.

Let me go over that, because it seems to have become a big issue. No group controlled Time before March 3, and no group was to control Time Warner. This is completely different than Black & Decker. Indeed, 40 to 50 percent of the shareholders

of Time and Warner were the same people. So surely, there was no change of control.

Time's shareholders did not receive a premium for change of control under the original deal, and they were not denied such a premium in the future. The premium paid by Time, which the shareholders make such a fuss out of, is, of course, still another indication that the original transaction was a purchase by Time, not a sale. The payment of a premium is a classic indicia of purchase of control.

Even assuming the Time and Warner shareholders were entirely different people, the fact that only 40 percent of the surviving shareholders were originally Time shareholders is a red herring. The same would have been true if Time had a public offering and used cash to buy Warner. Hardly a sale of Time.

The reason only 40 percent of the shares ended up in Time's shareholders' hands or would have had the transaction gone through was in part due to the fact that Warner had become larger through the purchase of Lorimar and in part due to the fact that Time had purchased some of its own

shares and in part due to the premium Time paid. There was no change of control.

Let's look at the structure. Warner was merging into a Time sub. Time was the surviving company with the name Time Warner. The shareholders make much out of the fact that Time was in play. The most that appears to have been said as far as I can tell from the record was that on or before March 3 some people told Time that it might become in play. As far as I know, it is not a term with any legal significance. It doesn't have any definition. It seems to mean susceptible of being the target of a hostile offer. That can't be the equivalent of being up for sale under Revlon. The mere possibility that someone might make a bid for you, even the making of the bid can't mean that you are up for sale.

Mr. Davis, as I said, has testified that all entertainment companies have been in play for two years. Are they all up for sale?

Time's March '89 decision to go ahead with the original transaction was not made in the context of a sale of the company. It was for the reasons I have discussed. It clearly was subject to the business judgment rule. The June decision should

receive the same protection. The Time board was not free to be passive. It had determined what was in Time's best interests. It looked at the situation and determined it was still in its best interests. It was not excused from the duty to act even if the appropriate response might involve a fundamental change. Unocal says that, Ivanhoe says that. The Crouse-Hinds case is absolutely on point and approved by the Delaware Supreme Court. There is no blinking about it.

This need not be viewed as a Unocal case just because a tender offer has occurred. Unocal cases involve acts designed to get shareholders not to tender into the offer. Time's offer was not designed to do that. It was designed to accomplish an end, a speedy acquisition of Warner, that Paramount's tender offer had rendered impossible.

Let's turn, however, to Unocal and see what happens if you apply it. Was there a plausible basis for believing there existed a threat to corporate policy and effectiveness? Yes. Time didn't believe it could get that vote through and get the deal with the dilution and all of that done in

the face of the $175 offer.

Was there an impact on long-term plans? At this point it seems too obvious to linger on. A plan to make Time a global media power two years in the making, two weeks from consummation, was about to be disrupted.

Oh, Your Honor asked when the original transaction was scheduled to close. Under the terms of the agreement it could have closed anytime after the shareholder vote, which was set for June 23, after which time Time had received 50 percent of the required cable consents. They had received far more than the 50 percent. On June 15 they received the New York City cable consents, which were a large portion, and they were prepared to close on June 23.

I should say that Paramount timed its offer aware of the shareholder vote and aware that it had to make that offer in order to disrupt the shareholder vote. There is some testimony by Mr. Hope that they had to wait until they saw Time's proxy statement on May 22, but he conceded there was nothing in that proxy statement that in any way affected them, and it is hard to imagine what would

have.

Nothing could be more disruptive to Time's long-term policy than that inadequate tender offer. It was misleading. It was subject to all sorts of conditions. The price has since been raised, which shows the original price was inadequate. They have since said yesterday -- I actually haven't seen the terms, but I understand they are willing now to pay interest on it, so that even if it closes a year from now, as some people well thought it might, including their own bank, that the shareholders would be compensated. None of that was present, of course, in June.

It is hard to imagine a response that was more proportional to the threat. The threat was to the acquisition by impeding the shareholder vote. The response was to accomplish the acquisition.

Let me turn finally to the irreparable injury and balance of the equities point. If this transaction is not enjoined, how will plaintiffs be irreparably harmed? Paramount says it may not bid for Time Warner. That is a condition of its own making. It could go after both. Mr. Davis has said that there is no impediment, and he has not

made up his mind what he will do and will not make up his mind until it happens.

Let's turn to the shareholders. Mr. Klein's clients, how did they get in this mess that they say they are in? They bought all their shares after March 3. Did they just buy Time shares? No. They bought a huge block of Time shares, a huge block of Warner shares, a huge block of Paramount shares. They are clearly not in it for the long run.

But will the shareholders be irreparably injured if Paramount's offer doesn't go ahead? It is not clear Paramount's offer ever will go ahead. They still have all sorts of conditions, many that they can choose or not choose on their own volition. They certainly haven't established that no one else will bid, although, of course, they concede no one else has bid, which is one of the reasons this isn't an auction.

THE COURT: Well, that sort of brings up the request that Mr. Klein had, to find out whether Time has negotiated so-called dry-up fees with respect to the additional billions of dollars.

MR. JOFFE: It has not, Your Honor. It has not. We are prepared to give the shareholders

the benefit of Time Warner without denying them the opportunity to obtain a control premium from Paramount or others if Paramount drops out. They can, as I said, elect directors who will sell the company or large portions of it.

Let's look at the balance of equities. Time is ready, willing and able to go ahead on the 17th. Paramount may not be ready for months, if ever. If Time is enjoined, Warner may not sit still. Time faces the loss of the benefits of the transaction which Mr. Snyder, the chief executive officer of Paramount's Simon & Schuster, has called the greatest deal ever imaginable, a great concept, a perfect company. He wrote that in a letter to Mr. Nicholas that they failed to produce.

The equities, Your Honor, are not in equipoise. They are lopsided in our favor. Thank you.

THE COURT: Thank you, Mr. Joffe.

Mr. Wachtell.

MR. WACHTELL: If Your Honor please, as I indicated in Chambers, I will be treating the merits, and then Mr. Richards will be talking about the balance of equities as it particularly impacts

Warner and Warner's shareholders.

Warner's shareholders are to receive $7 billion under a tender offer that is going to expire Monday night at midnight, to be followed by an additional $7 billion on the back-end merger. And I would submit that there is no reason in law or in evidence for this Court to interfere with that happening.

Obviously, the sine qua non of any claim that this Court should interfere with Warner's contractual rights is that there has been a breach of fiduciary duty by the board of Time. Now, the evidence here shows that the board of directors of Warner did not believe that any such breach was occurring when they authorized Warner to enter into this revised merger agreement. And I would submit -- and I am now going to be giving my views on it, Your Honor -- that the board of directors of Warner was quite correct in this conclusion.

And I am going to ask Your Honor to indulge me for a few minutes in presenting a hypothetical case, stepping back. It is going to build on what Mr. Joffe was saying, but I wish to explore it in perhaps a little more detail, and I

think it will serve to place our actual case in fairly sharp focus.

THE COURT: Let me interrupt you for a moment, Mr. Wachtell. The word "indulge" caused me to think that it is awfully --

MR. WACHTELL: I will take it back.

THE COURT: It is awfully warm in here, and if any of the gentlemen want to take off their jackets, I certainly wouldn't object. For litigation lawyers there is a Marine Corps mentality that prevents it.

MR. WACHTELL: Your Honor, I would ask you to assume the following as a hypothetical case: That early in 1987 Time and Warner embark upon discussions of a possible combination of portions of their businesses for strategic reasons. Discussions go on, and over a period of time they ultimately turn to a concept of merging the two companies. Each of them is highly excited about the prospect. The business advantages to be gained are quite striking.

And a great deal of focus is given to how the two businesses, then of approximately equal size, will be combined. And a very careful plan is developed for a combined board of directors, for a

concept of co-chief executives for a number of years, for a detailed structure of combining the entities and setting up lines of responsibility and reporting and organization all the way down through the proposed company.

And I then will ask Your Honor to hypothesize that the next thing that happens is that on June 16 of this year a plan of merger was agreed upon and approved by the boards of the two companies. Time will acquire Warner. There will be a first-step tender offer whereby Time will pay $70 cash, a price established to be eminently fair, that there will be a second-step merger whereby the Warner shareholders would receive a combination of cash and equity worth another $70. Time, the acquiring company on the tender offer, would have no fiduciary out, and there is no provision for a shareholder vote by the Time shareholders before the tender offer was made.

And now let us assume that some party comes into court and seeks to block that tender offer, Mr. Klein's Literary Partners, the class plaintiffs or Paramount, with its hundred shares, I think it is, of Time stock. Does any of us in this courtroom have any real question that that motion

would be viewed as frivolous? You would have a transaction entered into in traditional form, nothing remotely unusual about it, for a legitimate business purpose at a fair price. Would there really be any serious thought whatsoever of enjoining that transaction because Time was paying a premium over the current market price of Warner stock, which is a feature of essentially every tender offer, as we know, because Time was not providing for a shareholder vote before it went forward with the tender offer, where the law manifestly imposes no such requirement and in everyday experience such votes are not sought, or on some theory that the careful corporate governance provisions amounted to impermissible so-called entrenchment?

And I submit not. I submit that if anyone even brought the motion, it would not have been taken seriously. The transaction manifestly would be perfectly correct and legally unassailable.

Now, let me just add two facts to that hypothetical which will bring the hypothetical down to the actual case that is before us today. The parties did not go directly on June 16 to the concept of a cash acquisition of Warner by Time. Time wanted

to enter into such a transaction, but Warner was unwilling. Warner insisted upon doing a stock-for-stock merger. And accordingly, back on March 3, the boards approved that type of a transaction and, inasmuch as Time's shares were being issued, provided for a vote of Time shareholders to satisfy New York Stock Exchange listing rules.

The second fact that I would add to my hypothetical to bring that case down to today's case is, three months after March 3, two to three weeks before the transaction is to close, Paramount announces a tender offer for Time with all of the features of the actual Paramount tender offer that is of record here. And the question that I would ask is, does the addition of those two facts make the motion for an injunction to bar the tender offer any more meritorious. Does it make the transaction any less unassailable? And I would respectfully submit that the answer is clearly no.

Let me first address the circumstance -- and I don't think I have to take very much time on it -- that the original transaction called for a Time shareholder vote. Was this some sort of an irrevocable decision? Well, first,

nothing in the General Corporation Law requires a shareholder vote for either transaction, whether the form of the June 3 transaction or the June 16 transaction. The March 3 transaction called for a shareholder vote because of an NYSE listing requirement that applied when you are issuing Time stock. The revised transaction does not call for such a vote because it does not involve the issuance of Time stock, at least at this stage.

Even if the General Corporation Law hypothetically did impose a requirement for shareholder vote for a transaction in the form of March 3 -- let's call that for the sake of argument Form A -- I submit that under the classic Delaware doctrine of independent legal significance that would not mean that a transaction structured otherwise, Form B, would require a vote. And I think that is elemental in Delaware law.

And I don't think that that has changed any because a party starts down the path of a transaction in Form A and then changes its mind, for whatever reason, and decides instead to pursue Form B. And I think, Your Honor, that that is the teaching of such cases as Lowenschuss. You don't go

down a path of no return and therefore abandon the Delaware doctrine of independent legal significance.

And as Mr. Joffe has pointed out, there was nothing nefarious about the decision of the Time and Warner boards to change the form of transaction from stock for stock to cash for stock. The evidence is uncontradicted that the timing of the Paramount offer was expressly dictated by a desire to throw a monkey wrench into the approval which everybody knew was going to be forthcoming on June 23, and Paramount was very successful in this.

The evidence shows that when they came forward with this tender offer and mounted a monumental campaign of disinformation and public confusion, which has still not been dissipated, as to what the actual timing was of their deal and whether -- and I can quote the press releases. They announced -- they trumpeted this FCC trust so they could consummate the deal rapidly, and they bandied around Mr. Rumsfeld's distinguished name, and they purposely obscured the fact that that did not mean they could close the transaction because they still had to get the local cable approvals.

And as the evidence before Your Honor

shows, not only did they muddle the public perception but they even muddled the FCC. The FCC wrote to them to say, "We don't know what you are talking about. You keep on contradicting yourself. What is it? Are you saying that you can close without the regulatory approvals or are you saying you are going to get them first?" And to this day the FCC has been incapable of getting a straight answer on this question, even now, from Paramount.

So you had a situation where, due to a campaign of misinformation and disinformation, the boards looked at this and quite accurately said within a reasonable time frame it is not going to be feasible to get a shareholder vote to approve the stock-for-stock transaction.

Now, are the boards then helpless? Warner, which was not implicated in the shareholder vote, was not prepared, and I think quite accurately so, to say, "Well, we are just going to sit by for many months and we will see. And, Time, when you are good and ready to get a shareholder vote, we will still be sitting here for you." Warner was not prepared to give Time a perpetual option to make a deal with Warner.

THE COURT: Well, review with me, if you will, the specific testimony as you recall it on that point.

MR. WACHTELL: The testimony, uncontradicted from both sides, is that the parties felt that it was not feasible to get a shareholder vote within a reasonable time frame. No one said they could not get it ultimately once the air had cleared, and Warner was saying -- I mean, you have to remember the context, Your Honor. If you think back to newspaper stories, not as evidence but just for atmosphere, every day there was a newspaper story, Warner is now in play, offers are forthcoming for Warner, offers are forthcoming for Time, offers are forthcoming for Paramount. And Warner basically said, "We are not going to sit in this climate for months until it is feasible to do a stock-for-stock deal."

Yes, we wanted to do a stock-for-stock deal. Mr. Ross testified -- when asked, "Was it your first choice," his answer was, "It was my first choice. It was my second choice. It was my third choice." He very much wanted to do a stock-for-stock deal, but he came to the realization

that he would have to take that which from Warner's perspective was second best.

Mr. Aboodi testified, as did Mr. Ross, that Time -- as to the Time people, Time had always wanted to do the cash deal. Time felt that the cash deal was a preferable deal for the Time shareholders. Warner felt that the cash deal was a preferable deal for the Time shareholders, which is precisely why Warner had been unwilling to do it. It was precisely why the cash deal was Warner's second best deal. It was a good deal. Warner was prepared ultimately to recommend it to its board. But in Ross' view and in everybody else's view, it was a second best deal from Warner's perspective, it was a first best deal from Time's.

So the irony is here that this lawsuit is essentially criticizing the Time board for being engaged in a breach of fiduciary duty for entering into a revised transaction, which is the transaction which was a better deal for Time and a transaction which Time had wanted to do all along because it was a better deal and we had been unwilling to do until we were faced with the choice second best or nothing, and we decided to take second

best.

Now --

THE COURT: Well, I am sure that your brief has the citations to the record that I am seeking, and I don't --

MR. WACHTELL: If you look at Page 47, Your Honor, we set forth on the point that we were not willing -- no, this is not the right place.

THE COURT: Well, what I was seeking were the cites with respect to the insistence by Warner --

MR. WACHTELL: The insistence of Warner on not sitting still, not being in limbo.

THE COURT: Yes.

MR. WACHTELL: I will find that in a moment and I will give it to you, Your Honor.

THE COURT: Thank you.

MR. WACHTELL: I can just briefly refer to a line of cases such as Schnell and Blasius. Your Honor obviously knows Blasius and that line of cases intimately. I think they are simply inapplicable here.

It is totally different to say that where a stockholder vote is required, as example, on

the fundamental issue of who the board of directors of the corporation should be, that you cannot manipulate the process. Fundamentally, that has nothing whatsoever to do with the question of is a stockholder vote required at all in a given situation.

Let me then go back, if I may, to my hypothetical and add the second fact. The June 16 transaction would have been totally irreproachable. Does it become different because Paramount on June 6 or June 7 came on the scene with its tender offer? And again, Your Honor, I think the answer is a clear no.

I am not going to go into a lot of the evidence, but let me just sort of very briefly give an overview of things which by now are familiar to Your Honor. At the top of Page 45 of our brief, Your Honor, the sentence says, "And Warner was not prepared to sit in limbo for months," and then there is a citation to Ross deposition, Aboodi deposition, Nicholas, Levin.

THE COURT: Why don't you just tell me the numbers.

MR. WACHTELL: Oh, sure. Ross

transcript 112-13; Aboodi, 180, 188, 201, 223-25; Nicholas, 167-70, 188-90.

THE COURT: I am sorry. What were the Nicholas numbers?

MR. WACHTELL: 167-70, 188-90. Levin, 323-24; Wasserstein, 112-119.

THE COURT: That's enough.

MR. WACHTELL: That's enough. I think the point is, there is no dispute about this. It is established by the record, Your Honor.

Now, just to give an overview, the combination of Time and Warner -- I think I am just stating the obvious, but sometimes it is worth stating the obvious, I believe -- is indisputably, and to understate it, a legitimate business deal. It is not some gimmick. It is not a scorched earth tactic. It was not some scheme that anybody cooked up to defeat a Paramount offer. The theory that it is an entrenchment device I think is Alice in Wonderland fantasy.

Here everybody was sitting around saying that if we go into this transaction, it may serve to put the two companies in play and put a spotlight on them. If you are really interested in

entrenchment, that is a very, very, very odd way to go about it, to put yourself at risk. I mean, the whole concept here -- some of these arguments I have been hearing really I submit come straight out of Alice in Wonderland. They are just counterintuitive of our common sense.

This was a preexisting transaction. It was planned over a long period of time for compelling and sound business reasons. It is not making Time less valuable. I have heard counsel get up this morning and say it is clear that no one would pay $200 for Time if it is Time Warner combined. And in their brief they say Mr. Davis so testified.

In their original brief they have two record citations. You could look at them in vain to see whether Mr. Davis so testified. In their reply brief they don't even bother to give any record citations, for good reason, because there are none. Mr. Davis never so testified. And Mr. Waters conjectures in his affidavit submitted for the first time on reply, and that isn't sound. It doesn't make any sense.

If this transaction were a waste of the Time assets, if it was a transaction which made

Time less valuable, then I suppose one could say, well, no one would offer $200. But this is a transaction which everybody concedes is a highly beneficial transaction to Time. It is a transaction conceived, being carried forward because it makes Time more valuable. The concept that, therefore, the price of what someone is willing to pay is going to be diminished is again, I submit, straight out of -- it is words, but it is just words that make no sense, common sense, investment banking sense or any other kind of sense. And Mr. Davis never so testified.

Now, Your Honor asked this morning what is the new debt I think when Ms. Savett was arguing, and the new debt -- it is fairly obvious what the new debt is. It is $10-1/2 billion. It is on the front end $7 billion, and what is most -- let me correct myself. It is at most $10-1/2 billion, because the back end is going to be not less than 25 percent equity. So the maximum --

THE COURT: Half, so the whole deal, 25 percent --

MR. WACHTELL: The back end --

THE COURT: (Continuing) -- is 10.

MR. WACHTELL: The back end is not

less than 50. Thank you, Your Honor. So by definition the most the new debt could be is $10-1/2 billion.

Now, the other thing I would say about the revised transaction is, no one claims -- I haven't heard a word where anybody says that the June transaction would make Time Warner one whit more difficult to acquire than the March transaction would have. Think about it. No one has even -- you haven't heard a word to that effect. No one says that the revision made it more difficult to take over the combined entity. And again --

THE COURT: Well, I would have thought they would say that it does, and the argument I would expect to hear is that the shareholders of Warner are getting paid a substantial premium in the second form of the transaction, which is reflected on the combined entity's balance sheet as debt and which will make it harder after the second transaction is effectuated to finance a takeover of the merged entity.

MR. WACHTELL: Think about it, Your Honor.

THE COURT: Well, I will try.

MR. WACHTELL: I have tried. I guess I don't claim to be an investment banker. I don't claim to be an investment banker, so I have to grapple with these concepts; and therefore, I asked myself this question, stepped back, came up with what I think is an answer. Let me share it, and you agree or you disagree.

In the original transaction you had, let's say it is ball park, $30 billion or more of market value. You would have both the Time shareholders and the Warner shareholders sitting there, and if the company is to be taken over, both of them have to get a premium. The erstwhile Warner shareholders, who are now Time Warner shareholders, are pari passu with the erstwhile Time shareholders. Anyone who wants to take over the company, you are going to have to pay a premium for both shareholder bodies.

The new transaction, Your Honor is quite correct, the Warner shareholders have already been taken out at a premium, and there is some debt having accomplished that. They are out. You don't have to pay them a premium again. All that anybody has left to deal with now is the Time shareholders

and to pay them a premium.

So, Your Honor, one way or the other, if you are going to take over the company in bites, you are going to take it over because it is merged, and you are doing all the combined shareholders at one time, anyone is going to have to pay a premium. But it is not more difficult to take over. In fact, in a sense, Time is doing a potential acquiror's job for them. Time is getting rid of the Warner shareholders, is arranging the financing to get rid of the Warner shareholders, and now anybody who wants to take over the combined enterprise only has to deal with the Time shareholders, who are there all along anyway.

THE COURT: Well, have you told this to the plaintiffs?

MR. WACHTELL: Your Honor, the answer is, Your Honor, if I told all of my thoughts to the plaintiffs, we wouldn't have to be wasting a day in court here, I would respectfully submit.

But the point is, they know this. That is why there is not a word in their papers which even so much as suggests that it is more difficult to take over Time Warner on the revised transaction than

it was on the earlier transaction. All they say with respect to either one is, you are big. You are big either way.

In a sense, as I say, on the second one, half the job has already been done of taking out shareholders. Yes, at a premium, but there is always going to be a premium.

Now, the other thing, you know, that just struck me this morning -- and Mr. Joffe has alluded to this, but I want to focus on it even more than he did -- is, we have had Mr. Cantor, we have had Ms. Savett, we have had Mr. Klein all here, and the essential linchpin, the whole premise of everything that they have said here is, over and over again, the stockholders are being deprived of an alternative. The stockholders are being deprived of a choice. You have to give the shareholders a choice.

And the essential premise of their argument is that these two transactions are mutually exclusive, as indeed was the case in Interco, Anderson Clayton, Pillsbury, Bass, the whole litany of cases. You had two mutually exclusive transactions being directed simultaneously to the

same shareholder body. The board was standing in the way of the nonmanagement deal either by a pill or by a dividend or by the timing of self-tender. I mean, that's the rationale of those cases. Two mutually -- you can only sell the company once. And as Your Honor held in TW Services, each of those cases was the functional equivalent of a sale. You can only sell the company once, and you have two conflicting transactions, one management, one nonmanagement, either both fair or someone claiming one was marginally better than the other. And in that context, Your Honor's case law, the Vice Chancellor's case law was, you have to give the shareholders a choice. But that isn't this case at all.

And I think that we really should look at what Mr. Davis' testimony is here. And they brush it off. In their brief they say that my partner, Mr. Hein, asked very confusing questions. He took great umbrage at this. So let's see -- just take two minutes -- what were the questions that Mr. Davis, a very sophisticated chief executive officer, was asked and what were his answers and see if there is anything very complicated about it.

"Question: If Paramount does not get

injunctive relief to enjoin the revised merger agreement between Time and Warner and Time's tender offer for Warner's shares pursuant thereto, will Paramount proceed and purchase Time's shares pursuant to its offer in any event?

"Answer: We will evaluate -- should that happen, I'm sure we will evaluate it.

"Question: Has any determination been made as of this time as to whether if Paramount does not get an injunction enjoining the revised merger agreement and Time's offer for Warner shares pursuant thereto, whether or not Paramount will go ahead and buy Time shares anyway?

"There's been no determination."

Does this sound like a man who says, "It is impossible. No one could ever do it. We couldn't do it"?

"Question: It was Paramount's choice to condition its offer on the termination of the revised merger agreement between Time and Warner; is that correct?

"Answer: I would hope so.

"Question: And that was a business judgment that Paramount made; is that correct?

"Answer: It was a collective judgment that it be made."

I am going to skip over a question. "Question: In the event that the Delaware court would not enjoin the revised merger agreement and Time's offer for Warner pursuant thereto, is there anything to your knowledge that would prevent Paramount from are electing nevertheless to proceed with its offer to purchase Time shares," anything that would stop you?

Mr. Cantor interjects, "You're talking about a legal impediment of any kind?"

Mr. Hein clarifies, "Any type of impediment; business, legal."

Mr. Sucharow says, "Common sense?

"Answer: From a -- may I use your phrase, common sense, from a business judgment standpoint, we'll get to that point when we get there."

That testimony is, frankly, the end of this case, whether you view it as a merits case or I am sure, Mr. Richards, when you talk about balance of equities, because if these two offers are not mutually exclusive, if it is open to Paramount to go

forward, ahead, none of the Delaware case law upon which they rely has any conceivable relevance to the facts of this case.

And what else does Mr. Davis testify? Here is other testimony from Mr. Davis. This is at Page 242. This is not Mr. Hein's questioning, so I don't have to defend this questioning, but the answers are very interesting just the same, Your Honor.

Here is an answer: "We're twisting something. I thought it could be less. A combination of the original transaction might make them more vulnerable," talking about vulnerable to being acquired, Time. "That's the market perception. A perception within the shareholder community of Time."

And then there is a question, "That the Warner-Time transaction could make them more vulnerable to an offer?

"Answer: It could.

"Question: And yet it's your view that the motivation for the transaction is one that is defensive, to make them less vulnerable to an offer?"

And he says, well, they didn't ask me for my opinion.

And "Question: That's your view of what the motivation was of Time; correct?

"Answer: Yes.

"Consequently, you think what they did was not a very effective way to implement that goal, if that was the goal?

"Answer: You're putting words into my mouth, but you have said it well."

In other words, Mr. Davis is testifying that he believes that the Time board is really stupid. They totally messed up. They thought they were entrenching themselves, but in his view they were making themselves more vulnerable to takeover, not less. If that is his testimony, I do not see what we are doing here in this courtroom on this motion.

Now, what we have simply, then, is that Mr. Davis concededly would prefer to acquire Time without Warner for his business purposes; and therefore, they conditioned their offer. But the fact that he would prefer to do that, the fact that he would prefer to take over a smaller company does

not mean that the Time board lost its power to go forward with this transaction or that it became wrongful for the Time board to go forward with this transaction.

And, Your Honor, you know your decision in Walbro, you know your decision in Interco, Anderson Clayton. There is no right of a raider to have the target's standstill be frozen. And this is true under the case law even if something is conceived after the offeror comes along, as, for example, the disposition of Ethan Allen in Interco. A fortiori is that true here, where we have a transaction which indisputably was conceived and, because everybody was motivated by entrenchment and was worried sick about being taken over, proceeded at a leisurely pace of discussions for two years before the parties entered into their initial agreement on March 3 of 1989.

Now the fundamental issue here, Your Honor, is -- and I think someone fairly slightingly said that we say there is no room in Delaware law for shareholder choice and we just brush it off. That isn't our position at all, Your Honor. It would be fairly stupid of us to come before Your Honor and

argue that there is no room in Delaware law for shareholder choice.

Of course, there is room in an appropriate case, and this Court has held that in certain cases, as I say, where there are mutually exclusive offers, a management transaction, a nonmanagement transaction, being addressed to the same shareholder body at the same time, there isn't much to tell between the two, that the board cannot stand in the path of the nonmanagement transaction in order to cram down the management transaction. In that context is there shareholder choice? Yes.

Does that mean that it runs throughout Delaware law that every major corporate transaction has to be put to a shareholder vote, which is essentially the position that they are advocating here, or at least they say every major corporate transaction if someone refuses to put a tender offer on the table against you? That is not Delaware law.

And, Your Honor, the fact that a board does not lose its powers under 141(a) just because some raider chooses to come along, no matter how last-minute, no matter how conditional and iffy

the offer, no matter how slow a track the offer may be on, no matter how inadequate the offer may be -- the whole concept here -- we have had a lot of verbiage here about shareholder choice. I want to focus very, very precisely. What is it that they are saying the board should do? They are saying the board's powers are frozen. The board can't act by itself anymore. Notwithstanding 141(a), the board lacks the powers it normally has. For how long?

Here Paramount's banker is saying in a document before Your Honor that Paramount's schedule does not even contemplate a closing until March or April of 1990. And they are saying that the board of Time was sterilized until that time, that Time had to live in some state of suspended animation.

Who is to say that offer will ever be consummated? Suppose Paramount doesn't get the local regulatory approvals or suppose a very, very real possibility that when they go all over the country to the local franchisees they get held up and blackmailed, to use the colloquial, and they are told, "Yes, we will give you approval, provided you put in a hundred million dollars in new capital

investment, suppose you do this, provided you do that," and assume Paramount decides the game isn't worth the candle, and suppose there never is a Paramount deal.

What they are really saying is that the board of directors of Time was obliged to go into a state of suspended animation, could not pursue the bird in the hand, the Warner transaction, in order to chase some iffy, inadequate bird in the bush, even though the two were not mutually exclusive and one would not preclude the other. And there is just absolutely no basis in Delaware law or, for that matter, common sense which would support this argument.

An offeror -- there is nothing -- the board action here was completely reasonable. Of course, the board had to act -- I am not just talking about power, Your Honor. Of course, the board of Time had to act reasonably. But there was nothing here remotely unreasonable about what the Time board did. The uncontradicted evidence is, this is an unbelievably desirable and advantageous transaction for Time. And Your Honor has the Gordon Crawford affidavit before you, a very major long-term

shareholder and investor, who sets forth his opinion that this -- I think he is the single largest shareholder Time has, and they pooh-pooh that. They said, "Well, you can't trust that man. He also owns Warner stock." Well, I suppose you can't trust Mr. Klein's clients. They also own Warner stock.

It is beyond a shadow of a doubt clear that Time's directors believed it was very much in Time's interest to acquire Warner on the terms of this transaction. No one even questions that. So that there was nothing unreasonable about the board taking steps to bring this transaction to a conclusion. It was not obliged to sit around for six months or a year and wait to see how the Paramount offer would play out. It was not obliged to see a Warner transaction go down the drain after two and a half years of negotiation.

Now, very briefly, what do the plaintiffs say -- some of this I have already covered -- as to why this Court should bar Time from going forward? Well, they say this whole thing is really an entrenchment scheme. Mr. Joffe has alluded to that and covered it. They say corporate governance is just a code word for entrenchment. And

I submit that that is a totally bogus claim. To say that the decision of Time's independent board of directors that Time should enter into a business combination with Warner to create what concededly would be the world's greatest communications company, a transaction which was wildly hailed when it was announced by the business community, by analysts, by Congress, to say that this decision of Time's independent directors was -- and I am going to quote from Anderson Clayton -- "Motivated solely or principally for the impermissible purpose of retaining office for personal reasons and not for reasons relating to the corporation's welfare" is simply frivolous. I don't know what other word could be ascribed to that argument. It is a frivolous argument.

And as has been pointed out, if anyone was seeking to entrench themselves in office, it is a very strange way to go about it, A, to put the takeover spotlight on your company, and B, to bring 50 percent strangers onto your board of directors to have to relate with 50 percent new directors on your board. I cannot conceive of anyone as a matter of plain common sense that would view

that as an entrenchment scheme for an executive who is moving along and all is well with the world and he has a perfectly fine relationship with his existing board.

Now, of course, the parties paid close attention to corporate governance. If you were putting together $30 billion of value in corporations that were crucially dependent upon key people, relationships, journalistic independence, artistic autonomy, you would be derelict and you should be found guilty of a breach of fiduciary duty if you did not pay very careful attention to corporate governance, because that is how you first preserve the values that are there and you make sure that you don't ruin them, and that is how you build. And unfortunately, our corporate history is replete with examples of corporations that have gone down the tubes because managements and boards did not pay sufficient attention before they sought to put together two corporations as to how the fit would work, would it work and what corporate governance arrangements they were going to have.

Your Honor, I think I have already talked about the case law. Let me just then give it

a very quick reference. We are treated to all of the familiar case names. They say it is Revlon, it is Macmillan, it is Bass, it is Pillsbury, it is Interco, it is Anderson Clayton. And the reason that we get every case name in recent Delaware corporate history cited is because they are unable to come up with any coherent theory that has any support in actual Delaware law.

The short answer: This is not Revlon, this is not Macmillan. Time is indisputably not being sold. Time is making a tender offer to buy my client for $70 a share. Now, those are the facts. There is nothing very complicated or abstruse about it. They say it is a big, complicated transaction; therefore, it is really Revlon, and they say we don't want an auction. I heard that this morning. Oh, we don't want an auction. Revlon, no, we don't want an auction. We want a shareholder vote.

Well, I defy anybody to read Revlon and see where Revlon sets forth any requirement of a shareholder vote. But we are not in a Revlon mode. Indeed, it is a total illogic. Their basic argument is that because Time is entering into a transaction designed to build long-term values for the Time

shareholders, the transaction with Warner, they are basically saying that ipso facto you should find that Time has entered the Revlon mode, so it is compelled to focus exclusively upon short-term maximization of shareholder values. I mean, that is a totally preposterous proposition. I don't know any other words to address it to.

They say, "Well, you have got a tender offer against you. That changes everything." Your Honor, I think I heard Mr. Joffe say that at one point the board of Time considered making a Pac Man tender offer for Paramount.

Let's think about that one for a minute. Suppose they had done it. We would now have Paramount with a tender offer for Time, massive change in Paramount's capital structure, to use their words, extraordinary transaction. On their theory Paramount would now have to get a shareholder vote to decide whether to pursue its tender offer for Time. If they didn't have to do it right away, on their theory, they would certainly have to do it anytime Paramount wanted to revise its offer; for example, if they wanted to add interest or if they wanted to drop a condition or if they wanted to raise the price. So

you would have perpetual shareholder votes.

Paramount would have to have a shareholder vote for its offer for Time. Time would have to have a shareholder vote for its offer for Paramount. And I am sure it would make Corporation Trust Company exceedingly rich and exceedingly happy. But that has no foundation in Delaware law.

It is just a very, very, very slippery slope that they would ask this Court to embark upon when they say that if you are doing a big deal, it is going to change your capitalization, that somehow or other we should look around somewhere in Delaware law and we should find that that means that you have to have a shareholder vote, because shareholder choice here, Your Honor -- they take that phrase -- it is a nice phrase. It comes out of Your Honor's opinions. The only shareholder choice here is a vote. I mean, you don't have two conflicting offers coming in on the same shareholder body as you did in Interco or the other cases. So shareholder choice is a euphemism for shareholder vote.

They can't find a requirement in the statute. They can't find a requirement in any single Delaware case that ever says you have to have a

shareholder vote on any issue like this, and for good reason: Because you would be injecting massive uncertainty into the corporate law as to the circumstances upon which a corporation is entitled to act.

The General Corporation Law is very specific on the categories of cases where a shareholder vote is called for, and it is not remotely one such as this, and there is no case law.

Interco and the other cases, Your Honor, I think I have talked about. They are just not applicable here. They are mutually exclusive, offers close in time, one management, one nonmanagement, very narrow, if any, price differential, and they are just saying to the board step aside. You can't cram down one where each is the functional equivalent of a sale. I think that's Your Honor's words, and the concept is clear. That just is not applicable here, on Mr. Davis' own testimony.

I think I have taken more than enough time, Your Honor. Just to sum up, there was no breach here, I submit, of any fiduciary duty on the part of the Time board. I think they are to be

commended for a highly advantageous transaction. And as I stated at the outset, and we detailed it in our brief, the Warner board did not remotely believe that the Time board was acting in breach of its fiduciary duties. And there is no reason here -- Mr. Richards will be talking about the equities, but as a matter of substantive law there is simply no basis for this Court to feel that Warner's contractual rights and its stockholders' contractual rights to receive $14 billion can be simply set a aside.

Thank you very much.

THE COURT: Thank you, Mr. Wachtell.

Mr. Richards, Mr. Wachtell took, as he mentioned, a little longer than he had planned to take, I think. So if you can keep it within 15 or 20 minutes on your irreparable injury, I would appreciate it.

MR. RICHARDS: I think I can do that, Your Honor, and I will certainly try. I am mindful of my position here at the end of a long day, and many of the points that I will touch on in a summary fashion I am afraid that somebody else will have said something about, but I will try to confine myself to what at this point I think is maybe a summary of the

points with respect to the plaintiffs' failure to show irreparable harm and then finally dealing with the balance of the equities.

I am, however, constrained to make three observations before I reach those points based on the discussion that has taken place here today. I would submit that Delaware law implies no duty to maximize short-term market price of a stock at the expense of a sensible long-term business strategy to maximize shareholder value. And plaintiffs' argument, whether it faces it baldly or not, asks for the adoption of such a requirement.

And I think it is worthwhile in the hysteria of this conflict -- and there has been hysteria in the press about what is going to happen and what the contentions are. Maybe it is worthwhile to step back and look at what the folly of such an absolute principle would have been based on some other historical examples. And I will pick other examples that occurred in the entertainment industry and which engendered a similar howl of protest.

Each one of these companies, when an offer was made for it and was rejected or some alternative was put forth by management, there was a

similar howl of protests that accompanied this transaction. And these are in the record in the Crawford affidavit at Paragraph 4.

Now, we think about the movie company, the Disney example. In June of 1984 it rejected $72.50, and there was just a howl about that. Without going through the entire transaction, the current market value of Disney now, only five years later, is $380 per share. Could anybody have proven that in June of 1984? You know, I doubt it.

Let's look at my own client, Warner. Warner was subject to an approach by Rupert Murdoch, and again the facts are set forth in Crawford Affidavit Paragraph 4. Early in 1984, in then comparable terms, Mr. Murdoch was offering $10 to $12. And you will recall that Warner in part defended itself by inviting Mr. Siegel into the company, a strategy which it may later have come to regret.

THE COURT: It resulted in several applications in this Court over the years.

MR. RICHARDS: Yes, Your Honor. But the fact of the matter is that Warner is now to be sold, unless Your Honor enjoins it, for seven times

more, for $70 a share.

A similar example in the same industry is the McGraw Hill-American Express example. McGraw Hill was selling at $26. American Express made an offer at $34. Some of the commentators were outraged at that, and later, by the way, some of those same commentators have formally apologized in the press.

On June 7 McGraw Hill was selling at $143-1/4 on a comparable basis. That is why, by the way, that Mr. Ross, who everybody in this transaction appears to agree has a special business acumen -- I mean, there is nobody on the Paramount side that has attacked him. Indeed, they have sort of gone out of their way to praise him and everyone else.

That is why, of course, Mr. Ross and the Warner side preferred the first form of this transaction, because they believe in this dream. They believe in this combination, and they believe the values are there. And that is why Mr. Ross and the Warner side are fighting for maximizing the equity in the back end and particularly for it to be common equity, because they want a part of what the arbitrageurs apparently do not want.

Of course, no one can prove -- we can't prove here today, you know, what will happen in the future in this transaction or in any transaction. But if we don't plan for the future and if we don't permit our corporations to plan for the future, then what kind of a future are we going to have in America with respect to our businesses?

Now, secondly, I think it is worth noting, without going through a long exegesis about 8 Delaware Code, Section 141 -- but I think it is worth noting in answer to Mr. Cantor's rhetorical question, "Who are the shareholders" -- I believe that's a question he attributes to us. Who are the shareholders? We don't apparently care about them, in his view. And similar views are ascribed to us by other plaintiffs.

As Your Honor has noted, the Delaware Corporation Law, in effect, provides for a representative form of government, just as we have in our state and we have in the federal system. It is the opposite of a New England town meeting, as Your Honor was constrained to observe. You don't in a New England town meeting --

THE COURT: I didn't say an opposite.

I said it is not a New England town meeting.

MR. RICHARDS: No. In a New England town meeting everyone gets together and they all decide. In a representative form of government the electorate elects people, whether it is senators and representatives or directors, and except under specified circumstances those representatives decide. And that's the system, and that's where the shareholders work in.

I would submit a corporation law that elevates abstract principles, such as shareholder democracy or shareholders must have a choice in all circumstances if a third party wants to give them one or maximizes short-term market values over any other consideration, has cast itself adrift from the certainty of our statute and the careful step-by-step development of our case law in favor of imprecise slogans and rallying cries.

THE COURT: Now, what has cast itself adrift?

MR. RICHARDS: If you simply take a principle, such as shareholder democracy --

THE COURT: If one were to --

MR. RICHARDS: If one were to --

THE COURT: (Continuing) -- one would be adrift? I am really trying to understand what you are saying.

MR. RICHARDS: Yes, yes. If you simply say that you can solve this problem by saying shareholder democracy is the greatest good, that means you get a shareholder choice, or you say the greatest good is maximize short-term values, if there is an offer, then all we can look at is what would lead to the highest short-term value now, and that is the good, and it casts itself adrift, I suggest, from the statutory scheme and from the whole notion of statutory and judicial restraint.

And the point is that under our statute, as I understand it, if conduct is not prohibited, it is permitted. Under our case law the business judgment rule prevails unless a recognized exception to it is applicable. And that is how we approach these problems rather than with sloganeering.

Anyhow, having --

THE COURT: I hadn't noticed any sloganeering in the briefs.

MR. RICHARDS: Well, perhaps not.

THE COURT: I think that the core point that you are making is a valid point. I think that the notion that the point of view that the other side is taking is nothing but easy slogans doesn't ascribe to it the dignity that it deserves.

I agree with you that the problem is not solved by simplistic reference to very broad principles of the kind that you have referred to. But I don't think that one necessarily is driven to sloganeering if one were not to accept the position that you are advancing.

MR. RICHARDS: I agree with what Your Honor said. And what I was suggesting is that what you have to do is do the sort of careful case-by-case analysis that Mr. Wachtell and others have argued and which I am not going to repeat now rather than approaching the matter with respect to some of the claims at least and the approaches that I have seen taken in their papers, which is a rather abstract and nonprecise understanding of the cases and an appeal to these broad principles.

THE COURT: All right.

MR. RICHARDS: And I think Your Honor and I are in agreement that that is not the way to go

about it. Whether that is the way they have gone about it in part or not maybe we differ on.

I think now I would like to turn to the failure of the plaintiffs, in our view, to show irreparable harm. And much of this territory I think has already been covered in part by Mr. Joffe and by Mr. Wachtell, so I will go over it briefly.

The first is the point, of course, with respect to Paramount and from a different point of view the shareholders, that they claim that they will lose the chance to take over Time. And I think Mr. Wachtell has read into the record most of Mr. Davis' testimony appearing at Pages 325 to 332, and I will not repeat that, except to say that I think it shows that Paramount has made no decision as to whether to pursue Time and Warner.

And I think the other point is that there is no new Davis affidavit. If we had mischaracterized Mr. Davis' position or mischaracterized Paramount's position, it would have been easy for them in the reply papers to put in an affidavit as to what Paramount's position is rather than just putting in a Waters affidavit in which he drew certain inferences, which I think are not

justified, as to whether or not we had capped out in arranging or Time had capped out in arranging the financing.

And there has been reference made to an affidavit that was handed up before lunch, the Senie affidavit. And I am wondering if Your Honor also got the Seegal affidavit. There were, in fact, two affidavits filed by Time this morning.

THE COURT: Yes, they are on my desk.

MR. RICHARDS: All right. Well, I won't go through those. I think those affidavits do try to meet the assertions of Mr. Waters that for some reason the debt capacity of the Time Warner combination has been exhausted; and therefore, you would not be able to borrow any more money on their assets. I think he is simply mistaken as to that.

We also have the admission from Mr. Davis' testimony both that there is no legal impediment to their making an offer for Time Warner and that there is no insuperable structural defense. And, indeed, I think our common sense would tell us with respect to the RJR transaction and other very large transactions in the recent past, and as are set forth in the Senie affidavit and the Seegal affidavit

and, indeed, in speculation in today's Wall Street Journal, that there appears to be, I think, little doubt that someone could raise the credit facilities.

And I think there the $27 billion that Time announced had been subscribed or offered for its first transaction, it doesn't indicate that $27 billion would be available for that financing, but it does indicate that there is a lot of money available if the terms are appropriate for such transactions.

We have noticed, I think, that there has been no dispute that $70 is a fair price, so there would seem to be no harm to either Paramount, if it ultimately takes over Time or Warner, or to the Time shareholders from the acquisition of these assets at a fair price. In fact, from Paramount's point of view, all they will lose is their preferred way of acquiring Time. But I suggest that their preference is not entitled to legal protection in derogation of the rights of others, and particularly in derogation of the rights of Warner.

I think there can be no irreparable harm to Paramount from a combination planned by Time and Warner and known to Paramount long before

Paramount decided upon its offer. There is no right to freeze the business of its target for its own advantage. And I think Your Honor is familiar with those cases.

The Court may want to consider, I believe, the speculative nature of the alleged injury to Paramount and the Time shareholders from what can only be described as the highly conditional and remote as to Time and uncertain as to its completion offer. I think Paramount and the shareholders like to talk about that offer as if it was a hard, fast, unconditional offer that could be closed soon. That's not our view of it at all. And we think that there is a speculative element to damage either to Paramount arising from those facts or to the Time shareholders.

It is completely within Paramount's discretion to remove its conditions and make its offer firm. It is not Time's or Warner's fault that Paramount started three months late and thus doesn't have the regulatory approvals, as Time and Warner do. They are not entitled to an injunction forcing Time or Warner to wait until they can catch up. And, in fact, our approvals took over four months, as Your

Honor knows from the other litigation that we were involved in.

There is, then, no imminence or concreteness as to the threatened harm because of this iffy nature of the Paramount offer and the uncertain date as to when it may close. Paramount agrees and everyone agrees -- the shareholder plaintiffs apparently agree, too -- that the combination of Time and Warner would be beneficial. How, then, can there be harm from such a combination?

Paramount made its offer intending to break up the Time Warner deal and hence with full knowledge of Warner's and Time's plans. Certainly, that cannot raise any additional equity in its favor from those circumstances, particularly with respect to its motivation.

We turn now briefly to the balance of hardships. All the plaintiffs ignore this element in their opening papers. There is the quip in Paramount's papers about slowing down Nicholas' rocket, but there is not a word about the balance of equities in favor of Warner's shareholders. Indeed, Mr. Davis testified -- and I think he was right in this -- that the Warner shareholders were not his

concern and he hadn't given them any thought.

Now all we have in the record are the conclusory arguments without any foundation or citation to the record as to what Warner has done wrong. And I think Your Honor's case in Telecommunications and a number of other cases that we have cited indicate that something more is required.

Warner's shareholders will lose $70 per share or $7 billion in immediately available funds on Monday, July 17, if Your Honor grants an injunction. Time has the money and has stated it intends to close next Monday at midnight. And that is in the Britt affidavit, Paragraphs 3 to 4.

There is a unique value to the Warner shareholders from this transaction because of the unique value of Warner to Time and the unique fit. And I think that is manifest a number of places in the record, and particularly in Ross' testimony at 127, 180, and in the Ross affidavit, Paragraph 3. The shareholder plaintiffs claim that Warner could go out and auction off the company and maybe they would get more. But there is absolutely nothing in the record to support the suggestion that Warner would

get any more if it followed such a course.

In addition, of course, if an injunction issues, Warner stands to lose, and its shareholders, the additional $7 billion in the second-step merger.

I think importantly, and not discussed to much extent so far, is that if an injunction were to be issued, Warner would suffer serious disruption of its business and adverse effects on its employee morale, and this is in a business, as we have heard many times, where those elements are particularly sensitive and you have a highly mobile population of talented executives and talents. And I think I would commend to Your Honor particularly Ross' affidavit at Paragraph 7, where he explains what the danger would be of such interim relief.

In addition, there is the possibility and the probability, we submit, that the price of Warner would drop precipitously if such an injunction were to be granted and that Warner would then become susceptible perhaps to a takeover at a reduced or unfair rate, and the uncertainty of that period of time would add to the turmoil that such an effort

would cause and the adverse effects on Warner's employees and morale.

In addition, as has been noted, Warner and Time would lose the unique benefits of this merger, which has been planned for over two years and which they are now ready to go forward and start building on. Warner would also be harmed from its adverse change of position. We have heard today how Warner did not want to be hanging out there and wanted a firm deal, and there isn't any dispute about that.

It would now face, I submit, the worst of all possible situations, because if a preliminary injunction were to be granted, its future would be uncertain, and it would be to some extent paralyzed. It would have the difficulty of going forward with the transaction that it planned in the face of an injunction while still for a considerable period of time being bound by its contract to Time. The granting of a preliminary injunction does not allow Warner to get out of that transaction for some period of time. And so it would be there sort of suspended in a very vulnerable state with the adverse effect on its business and employees.

And what if something untoward were to happen? There are some conditions of the offer, the usual and customary conditions. There is a condition that deals with the kind of market crash or whatever it is that occurred in October of 1987. Nobody foresaw that coming. I am not suggesting and certainly have no idea as to whether or not any similar event could occur in the future. But there are other intervening circumstances that could occur such as that which would cause the Warner shareholders, I think, to be incalculably damaged.

We submit that the balance tips against Paramount and the plaintiffs. We think that this Court suggested in Jedwab and Solash and Yanow that the Court is reluctant to enjoin tender offers and to deprive -- and here we have a firm tender offer with a firm closing date -- and deprive shareholders of premium offers. Indeed, the Court stated that that provided an independent basis for the relief granted in the Restaurant Associates case, and Hecco Ventures is to the same effect.

The Time Warner merger agreement will provide $14 billion in certainly available funds for Warner shareholders versus -- and I don't know

whether you make this sort of a balance, because as Your Honor observed in the RJR Nabisco case, we haven't gotten to a hard case. But there is $14 billion at stake for the Warner shareholders versus $11-1/2 billion at stake for the Time shareholders possibly, maybe, depending upon what Paramount would do. The rights of over 28,000 registered shareholders and some 82,000 beneficial Warner shareholders are at stake, and relatively Time has less than half as many.

There is no other currently available offer for Warner shareholders, which is a 53 percent premium over the March 3 price, pre-March 3 price. Moreover, injunctive relief would at the instance of Warner's --

THE COURT: You said 53 percent premium over the pre-March 3 price? I thought it was more than that.

MR. RICHARDS: Well, Mr. Liman stated in one of the board meetings that the ultimate price was a double. But he was referring to a price, I believe, in December or January. I believe by the time of March 2 the price had gotten up to 40, $42.

THE COURT: In the 40's, in the

mid-40's.

MR. RICHARDS: Yes. So unless my arithmetic has failed me, I believe that's correct, Your Honor. In any event, the actual prices are all in the record.

Moreover, in this instance injunctive relief would be granted at the application of one of Warner's principal competitors and would create uncertainty with respect to these very same key business relationships and employees as to which the various movie and other studios are in competition.

As I think we have said, and I won't go through it, no serious claim of wrongdoing has been demonstrated by Paramount against Warner. And I think it is typical of -- the showing that has been made here today is typical of what is in their briefs, is that when asked or when making that point, Mr. Cantor in his opening says everybody knows that the Time action is wrongful; and therefore, the Warner people knew it. It is that sort of conclusory argument that is asserted against my clients.

Surely, this absence of a showing should weigh in the balance in considering Warner's shareholders' rights. Can or should our completely

blameless shareholders be deprived of this $7 billion in immediately available funds in order to advance what we suggest is the speculative proposals of one of our principal competitors' belated attempt to bust up what has been generally described as a fantastic combination at a fair price? Aren't Warner's shareholders entitled to the same protections that the class plaintiffs would ask for Time's? In fact, aren't they more entitled to protection, since Paramount's case against Time falls so short? We submit that they are.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Richards.

I would like to wind up this up by 4:00 or so, but I am going to take a 10-minute recess. I hate to do that with this crowd, because it takes it 10 minutes to get up and 10 minutes to get down, but we will take a 10-minute recess, and then I will hear rebuttal from the plaintiffs.

We will stand in recess.

(Recess taken.)

THE COURT: Mr. Cantor.

MR. CANTOR: Your Honor, I am now going to try to distill about 400 very good ideas

that I got in the last 10 minutes and --

THE COURT: I will object to that.

MR. CANTOR: (Continuing) -- and restrict my comments to 10 minutes. Let me make good on a promise that I offered before lunch. Page 217 of the Munro deposition, Munro was asked by Mr. Joffe, "When did you" -- I am having trouble reading it. Let me start at the beginning.

"The shareholders for the original transaction was set for June 23rd. As of early June, prior to Paramount's offer, when did you think you would actually be able to close the transaction?

"Answer: June 23rd." That is Mr. Munro at Page 217.

THE COURT: Thank you. I had understood that answer as well from Mr. Joffe.

MR. CANTOR: Okay. I have the press release, Your Honor. The 14D-1 has either been issued or will be, but it will essentially just have the press release announcing Paramount's granting of interest under certain conditions that are spelled out in the press release and dealing with the interference that is going on with respect to our seeking to get cable approval. So I will hand that

up.

THE COURT: If there is no objection, I will consider that.

MR. CANTOR: I will give copies to counsel.

THE COURT: Thank you.

MR. CANTOR: Your Honor, a few points --

THE COURT: And, Mr. Cantor, this will be put in the record in an affidavit form or something?

MR. CANTOR: I would be happy to do that, Your Honor.

THE COURT: Yes. I think it would be a good idea, because this will be on my desk and among other papers and may never get into the record.

MR. CANTOR: We will take care of that, Your Honor.

A few points, Your Honor, and I apologize if they are disconnected. But Mr. Joffe made a point about ATC and how dare we say that ATC should not be permitted to protect its minority shareholder interests. We don't think very much of the ATC lawsuit, and we have made that point in the

court in Connecticut. We question ATC's motives. We question this heartfelt concern that they are showing for their minority shareholders, none of whom have joined in the lawsuit, as far as I am aware. But that's not what we are complaining about here, Your Honor.

ATC is a corporate entity. It has a right to bring a lawsuit, whether it is meritorious or frivolous. What we are complaining about and what Mr. Joffe did not address at all is the sending of legal indemnities and draft pleadings to cities and towns to sue Paramount all over the country. That's what we are complaining about, as well as the drafting of letters for people and all the other stuff that is going on that is not in the name of ATC and Time. And it is that that is slowing down our offer, Your Honor.

Now, another point that Mr. Joffe made -- and I don't know where this comes from -- is, he says that we concede that if their inadequacy opinion is wrong -- in other words, if our bid is, in fact, inadequate -- we can't win this case. We absolutely do not concede that, and that is absolutely not the law.

Where we are, where we would be at that point is a threat to the shareholder financial interests or substantive interests, as Your Honor put it in Interco. They have done nothing, Your Honor, to deal with us on that issue. They haven't negotiated. They have not fulfilled their Unocal duty to inform themselves of what our position is. I don't see how they can meet their duty of care under Unocal or, indeed, even under the business judgment rule if they are unwilling to find out what our position is.

We wrote a letter saying 175 and that's negotiable. We wrote a letter saying 200 and that's negotiable. And they absolutely refused to find out what our position was. Mr. Davis called Mr. Munro on the phone just as a courtesy. That's the only communication that there has been between the parties, despite many offers by us or other letters, by the way. There was a June 15 letter to the board of directors also offering to negotiate, also rebuffed.

They make a point -- and again, I am not sure where this comes from -- that we are arguing that there is no fiduciary out in their offer. That

is not what we are arguing. What we are arguing, Your Honor, is that there is no fiduciary out in the merger agreement and that the offer is unconditional. That's the strap themselves to a rocket. They have robbed themselves of any flexibility by the combination of the merger agreement and the offer to consider a bid for Time.

THE COURT: When you say the merger agreement, you are referring to the revised merger agreement?

MR. CANTOR: Yes, that's right, Your Honor. There was a fiduciary out, interestingly, in the original one, which is an interesting point in itself, because someone who is making an acquisition normally, I would think, does not have a fiduciary out. They had a fiduciary out. It was a limited one. I mean, it could only be triggered under certain circumstances, if someone made a bid and so on. But there is no fiduciary out in the second merger agreement.

The other thing that is interesting about that, Your Honor -- and it kind of jumps ahead to Mr. Richards' point about Warner's irreparable injury -- is, they say that they did that at Warner's

insistence. Warner insisted that there be no fiduciary out. Warner insisted that the offer be unconditional. And yet Warner comes into court now and says, "We did nothing wrong. We are going to be harmed. They have no outs. Unless Your Honor messes up this deal, we have got a deal."

Well, they were the ones who insisted after the vote not be put to the shareholders that those -- at least that's what the record indicates -- that those be the conditions. I mean, it doesn't seem to me to be quite equitable to insist on that and then say, "Oh, my gosh, you know, if Your Honor intervenes because there is no other way out, that would be inequitable somehow to the Warner shareholders."

There was testimony -- and it came up in a couple of different ways. It came up with respect to Mr. Davis, I believe, that in his view what Time and Warner have done here is to make them more vulnerable, because they have depressed the price of the stock. That may or may not be true. Morgan Stanley does not think it is true. Mr. Seegal does think it is true. But what is absolutely uncontroverted even by Mr. Seegal is that the price

won't be $200. It is one thing to say you are more vulnerable, and maybe the experts could differ on whether a $30 billion deal can really be done. But there is not a shred of evidence in this record offered even in surreply by the defendants that anyone would be willing to pay anywhere near $200 a share for this company. And that is certainly irreparable injury to the shareholders, even assuming we could go ahead and even assuming Mr. Davis' answers to hypothetical questions.

And I think in fairness, Your Honor, if you read the testimony from Pages 325 to 332, I guess, of the Davis deposition transcript, which I would tell Your Honor was taken at about 8:00 or 9:00 at night, having started at 10:00 in the morning, he was asked a series of hypothetical questions, what would you do if this, what would you do if that, and basically what he was saying is, "We will cross that bridge when we get to it." That's all that testimony says.

Crouse-Hinds, Your Honor, a couple of points. First of all, under New York law, at least in the Second Circuit, the plaintiffs made no evidentiary showing entitling them to a preliminary

injunction. Unlike in this court, the law in the Second Circuit is if you are the movant on a preliminary injunction and there are any disputed issues of fact, you lose unless you have proffered live testimony or deposition testimony that supports your position. You can't have a battle of affidavits. And most preliminary injunction hearings in New York, as Mr. Wachtell knows, are done on live testimony. Judge Kearse made a point of the fact that there was no live testimony in this case. There were some deposition excerpts, but they were taken by the target. They weren't taken by the bidder.

Crouse-Hinds was a coercive bid. It was a 54 percent bid, $2 above the existing market price, and in any event, it is simply not the law. It was five years before Unocal, and it was cited in Unocal for kind of just a blanket proposition that directors can look to shareholders' interests.

Well, nobody disputes that directors can look to shareholders' interests, Your Honor. I mean, it is not the law. The evidentiary record was totally different. We didn't cite it in our first brief because we didn't think it was relevant. We didn't cite it in our reply brief. I guess we

distinguished it in our reply brief. We think it has nothing to do with this case.

Switching to Mr. Wachtell's comments for a moment, he said that Time always wanted a cash transaction, Mr. Ross always wanted an equity transaction. A funny thing about that. I asked Mr. Munro that question a couple of times, and he said, "Well, we did or we didn't. I am old-fashioned, and I don't like debt, but maybe debt is better."

The fact is, Your Honor, that Mr. Ross and Mr. Munro went before Congress. They wrote a letter to the President of the United States. On June 13, 1989, three days before this deal was announced, Mr. Butler, the presiding partner at Cravath, and Mr. Lipton, one of the senior partners of Wachtell, Lipton, wrote a letter to the New York Stock Exchange, which is in evidence -- I believe it is Wasserstein Exhibit 13. It has been referred to in a number of the briefs -- denouncing leverage, saying, "Please don't make us do leverage. Please waive your voting requirements so we can cram this through without doing leverage."

Now all of a sudden it turns out that

what they really wanted to do, Judge, all along, Your Honor, what they really wanted to do is borrow $14 billion and amortize $12 billion of good will. That was their intent all along. They just didn't tell the President that, the Congress that, the New York Stock Exchange that, the press that or anyone else that. And it is a bit hard to swallow.

I do believe that Mr. Ross wanted a pooling of interests all along. That half of what Mr. Wachtell said I think is true.

Mr. Wachtell also made the point that Warner was not willing to sit in limbo forever because of our disinformation. I am tempted to say -- I hope Your Honor will take this in the right way -- that I don't think any side in this case has a monopoly on disinformation. But what he is alluding to specifically I take it is our telling people, both under oath in depositions and elsewhere, that we could get this deal done in a reasonable period of time, and that has been variously estimated as a few months. I think Morgan Stanley said three or four. I think Mr. Oresman in his deposition said a few.

The Citibank document, by the way, which goes back to March of '90, assumes a starting

time of August or September. So they are really talking about six months, and Ms. Coppola testified that she viewed that as an outside limit.

But whatever it is, Your Honor, the fact remains that they are doing everything they can to block us from getting that approval. So they are sitting here saying our offer is illusory. I mean, the other conditions are the pill, and they are pretty garden variety. What they are doing is, they are doing everything they possibly can to block us from getting approval and then saying Your Honor should let this transaction go through because it is going to take a long time for us to get approval. And that to me, Your Honor, does not seem to weigh very well for them in the balance of equities.

Also with respect to the disinformation, it is inconceivable to me -- and I didn't hear it stated quite this way -- that Time and Warner, for that matter, and their advisers could not, if there is a misimpression in the marketplace as to when we would close or be able to close -- to suggest that you could never in the foreseeable future get a shareholder vote is being much too modest, much too modest. I mean, we have proxy

fights all the time and we have securities litigation all the time. And, you know, you can have a vote, you can have a proxy contest, and they can say it is going to take us nine months to a year, and we can say we don't believe that is true, and the shareholders vote on it.

Nobody was asking Warner to stand still forever. They didn't want a vote. Time didn't want a vote. And they didn't want one on June 23, and they don't want one on July 23, and they don't want one on August 23, because they know what is going to happen if there is a vote.

One other point dealing with Mr. Davis' testimony and what I believe to be the series of hypothetical questions that he was asked, and I would just refer Your Honor back to Levin Exhibit 11. And Your Honor has to understand -- and it may be asking too much to go back to Nicholas and Munro and the way they said, "Oh, that's Jerry. Jerry has just got ideas. Nobody pays any attention to him. He is only the vice chairman of the company, senior strategist, chief negotiator, but, you know, who can listen to him?"

What he said in August of '87 is, "An

overriding question would still be: have we secured the company? Is sheer size sufficient protection, or will we still need a large block of stock in friendly hands?"

It just simply defies credulity, Your Honor, to suggest that you could do a $30 billion transaction for these companies and have any expectation that the shareholders would get anywhere near, even assuming it could be done at all -- in RJR it was a friendly transaction. I mean, there was fighting, as you know, between KKR and Shearson, but once the board ruled, the special committee picked the KKR bid and Shearson went away, and it was a friendly transaction. And even in that context the total debt raised, I guess, was $19 billion, but the total size of the transaction with assumed debt and so on was something in the range of $30 billion.

So what they are saying here is that in a presumably hostile environment -- because my guess would be that if this deal goes through and Paramount did say, "Okay, we are now going to offer 140," I don't think Mr. Wachtell and Mr. Joffe are going to say, "Okay, now you can buy the company." So what they are suggesting is that in a hostile

environment somebody can go out and raise $30 billion to assure the shareholders the same negotiable $200 that is on the table right now. And it is an incredible proposition.

A point on Interco, Your Honor. A couple of references were made to Interco. The fact is that in Interco -- well, I am telling Your Honor what the fact is in a case that you wrote -- that the restructuring in Interco was a very different type of restructuring, as Your Honor knows. Ethan Allen was going to be sold. It was going to be sold to the highest bidder, and there would be no problem with the Rales bidding on it, and Your Honor referenced that fact. If they wanted to buy Interco, they could buy Interco at a fair market price. There was also an allusion to a cash dividend, which Your Honor did not rule on, deferred on, although you expressed a view as to why you would have difficulty in finding cash dividended out to be a problem, and I guess the amount could be reduced by the amount of cash dividended out.

But what you were saying, if I understood that portion of the Interco opinion, is that there was nothing that was being done there that

had a preclusive effect or that affected the value that the shareholders would receive, and that simply is not the fact here. It simply is not the fact.

Let me deal a little bit with Mr. Richards' irreparable injury argument. He claims, number one, our offer is speculative. Well, as I have already stated, the main condition is regulatory approval, and that's much more within Time's control really than ours. And we do seek -- a portion of our relief, as Your Honor knows, seeks relief against their continuing this champertous course of conduct. That would speed things up immeasurably.

Mr. Richards made a reference, if I understood him correctly, to a purpose, one of Paramount's purposes being to break up this deal. That has been a theme that I have heard from the time the federal complaint was filed, in which a preliminary injunction was denied a week or two ago, I guess, up in New York. There is not a shred of evidence in this record that any part of Paramount's motivation was to break up the Time-Warner deal. We expressly said in our original offer that we will withdraw if the shareholders vote for the Time-Warner

deal. There simply is no evidence of that.

The other points, they claim that the Warner shareholders have changed their position. I covered some of this this morning, and I apologize for repeating. But the shareholders -- there was supposed to be a vote, Your Honor. And that was the deal that Warner cut after the two years of negotiations, and that was the deal that Steve Ross wanted. Nobody disputes that. I don't know what the change of position is. You know, the rug was pulled out. There is no vote. There is a crammed-down deal, and somehow there is a change of position which balances on the equities in some fashion. It is hard for me to follow that, Your Honor.

I guess the final point I would make -- I have a few others, but it is late, and I feel they would be lost -- Mr. Richards said that under Delaware law, if conduct is not prohibited, it is permitted. I would submit to Your Honor that it is also true that there is a spirit to the law as well as a letter to the law. And in this case, Your Honor, what we are arguing is that Time and Warner have broken the letter of the law, and they have decimated the spirit of the law.

Thank you.

THE COURT: Thank you, Mr. Cantor.

Ms. Savett.

MS. SAVETT: To clear up something that was said in the afternoon about what was the percentage jump in the Warner numbers from the Shearson-Wasserstein March 3 report to the June 15 report versus the jump in the Time numbers, I would like to give you the precise citations so that you can verify the percentages that I stated.

The Warner numbers are found in the March 3 report at Finkelstein Exhibit 7, Page A1728. The Warner numbers in the June 15 report are found in Hill Exhibit 5 at Page W202696. The Time numbers are found in the March 3 report, which is Finkelstein Exhibit 7, at A1788. And the Time range is found in the June 15 report, which is Hill Exhibit 5, at W202553.

And what that yields, Your Honor, is that Time's numbers jumped in the three-month period from 22.6 percent to 29.2 percent, while Warner's numbers changed only 4.6 percent to 5.1 percent.

THE COURT: I am sorry. What you are telling me is -- I thought I was going to get one

percentage, the percentage increase.

MS. SAVETT: The reason there is a range is because there is a range of value at each period.

THE COURT: I see. What was the range again in your calculation, the increases?

MS. SAVETT: The Warner numbers increased from March to June by 4.6 to 5.1 percent.

THE COURT: That is the bottom of the range increased 4 percent, the top of the range increased 5 percent.

MS. SAVETT: Yes, the range of value.

THE COURT: Right.

MS. SAVETT: And the Time numbers jumped 22.6 percent to 29.2 percent.

THE COURT: All right. We have some disagreement apparently. Mr. Joffe said 11 percent was the Warner increase, as I recall.

MS. SAVETT: That is why I have given you the precise citations, so that you can look at the underlying numbers.

THE COURT: All right.

MS. SAVETT: But I think our math is correct.

The relief that the shareholder plaintiffs seek is not to ask Your Honor to order a vote. We are asking you to give the shareholders a choice, which they don't have now. And the only way they can have a choice is if this tender offer is stopped.

If the tender offer is stopped, then the shareholders have the choice of accepting Paramount, of not accepting Paramount, of accepting the status quo, of waiting to see if another offer comes along or waiting to see if the board takes another action that can withstand scrutiny under Unocal and Revlon. We are not saying that the board is frozen. We are just saying that the actions that they have taken right now in response to Paramount's offer cannot withstand scrutiny.

There really isn't any question that the Time tender offer of June 16 is a defensive reaction. It has been admitted in the 14D-9, and it is a different deal than the March 3 deal. March 3 was a deal that had no debt. June 16 is highly leveraged. March 3 called for a shareholder vote; June 16, no vote required or sought. March 3, it was conditioned on approvals from regulatory agencies;

June 16, no conditions. March 3, pooling of interests treatment, no charge of good will; June 16, purchase treatment, massive good will charges. March 3, fiduciary out; June 16, no fiduciary out. March 3, Warner shareholders received a modest 12 percent premium; June 16, Warner shareholders receive an enormous premium, which Mr. Liman said was 100 percent. Mr. Richards has said 85 percent. In any event, the Warner shareholders are coming away with an enormous premium.

THE COURT: Didn't Mr. Richards say 56 percent?

MR. RICHARDS: 53.

THE COURT: All right. So it is just a calculation of what -- does the record show what the trading value of Warner was just prior to the -- can anybody tell me where in the record that is?

MR. WACHTELL: It was in the 40's.

THE COURT: Go ahead, Ms. Savett. Somebody can find it for me.

MR. WACHTELL: I will find you the citation, Your Honor.

THE COURT: In any event, I take it your point is, there is a large difference in the

premium being paid, whether it is one number or another.

MS. SAVETT: If you compare the March 3 transaction to the June 15 transaction, they were different deals. And the second deal was clearly a defensive reaction to what they perceived was a serious threat to their corporate policy, and they said that in so many words in their 14D-9.

So there can be no question that the Unocal standard applies. It has been studiously avoided by defense counsel this afternoon. But applying it, the first question is, is there a threat to shareholders' interests. And in the case of this offer, which is all cash for all shares at an enormous premium, it is not coercive, it is not front-end loaded. The only interest which must be considered is that of the shareholders, and such an offer presents no threat.

There is dispute about whether or not it is within the range of fairness or adequacy. Many experts say yes, some say no. But there is a lot of evidence that it is fair or at least approaching fair, and it is all cash, so it cannot be considered a threat. So we must move on to the next step of the

Unocal test, and that is, was the response proportional to any threat which was posed, even if some small threat is perceived. And the shareholder plaintiffs submit no, it was not at all proportional.

Instead of negotiating with Paramount when they were asked to and almost begged to, instead of completing the long-term plan of a merger with Warner for no debt, which was touted to Congress, the SEC and the President, they changed the deal to a high debt deal with no vote.

They have been trumpeting the conditions that Paramount has placed, particularly whether or not Paramount can get the cable approvals. But they are trying to make it a self-fulfilling prophecy that Paramount will not by all of their obstructive actions, which are in the record.

Time is doing a preclusive, show-stopping deal which will cause Paramount to withdraw its $200 offer. Davis stated at Page 257 of the transcript that he wanted to buy Time, and if the Warner-Time deal goes through, he will withdraw his current offer. Whether or not he will ever have another offer remains to be seen. It is highly speculative. After all the testimony that

Mr. Wachtell read, there is absolutely no certainty or even likelihood that he will come forward with another offer, and even if he does, there is nothing in the record that indicates it would equal $200 per share.

Another aspect of the disproportionate response was changing the transaction from one which required a vote to one where there was no vote. On the --

THE COURT: Ms. Savett, I don't mean to cut you off, but in your original argument you limited yourself to irreparable injury aspects, and I don't understand the arguments that you are making to be really the sort of pointed reply that I might tolerate at this hour and temperature. So why don't you take a few minutes and conclude.

If you have any points you want to make with respect to irreparable injury particularly, I would be happy to hear them.

MS. SAVETT: I will try to be more pointed. I did not understand that I was limited to that in this rebuttal, but I will try to finish up.

I just wanted to make the point that in taking away the vote, the excuse was that the

Paramount offer was highly misleading. There was a more proportional response to that. The vote could have been delayed, and Time could have tried to correct the alleged misinformation in the market. After all, Time is an information company, and they should have been excellent at doing that. But that really was a pretense, because instead, when the vote wouldn't come out the way they wanted it to, they took the vote away.

The shareholder plaintiffs believe that the Revlon duties do apply. And I know I didn't discuss this the first time, and I want to make it clear that we think that Revlon is not limited to when the company announces we are for sale but where there is a change of control.

And the point has been made that even though the Time shareholders started out with 100 percent of the stock and they would end up in the March 3 deal with only 40 percent of the stock in the new entity, this is meaningless, and it doesn't represent a shift of control, because the share ownership is so disparate that nobody votes as a block, and nobody would exercise any control. The point is that when the Time shareholders went from

100 percent to 40 percent, even if they ever did coalesce, they couldn't exercise any control, they couldn't direct the direction of the corporation, but the Warner shareholders could, because they had the 60 percent.

Instead of maximizing the shareholder values, which was the directors' obligation under Revlon, its progeny, and Unocal, the shareholders are being forced to accept without any say in this matter an inferior or, at best, highly speculative long-term option. When compared to the concrete $200 plus interest offer available now from Paramount, the equities fall heavily in favor of the shareholders.

If the Time stock were to fall to $150, which is approximately where it is now, after the merger were completed, the shareholders would lose $50 per share times 57 million shares, or $2.85 billion of value, which could never be replaced. At the same time Warner's shareholders will have already been cashed out at $70 a share, which represents an extremely high premium over its pre-March 3 price.

The question this Court will have to answer is, was the Time board protecting the interests of its shareholders. And we submit that it

was not.

THE COURT: Thank you.

Mr. Klein, you get the last chance to speak. I say that with --

MR. KLEIN: The hour is late, Your Honor. I will try to be as succinct as I can and keep myself to the issues that were raised responsive to my original opening argument.

May I first deal with some of the questions that perhaps were put rhetorically by my colleague Mr. Joffe. He asked is it not the case that what we are here urging this Court to do is to articulate a rule that will deprive the board of directors and the management of Delaware corporations of their rights of governance and their obligations of governance of Delaware corporations. That is not at all close to what it is that we are urging here. Indeed, precisely the converse is the case on the facts of this particular matter, because what has happened here is that at the earliest conceivable stage of the evaluation of alternatives to the Paramount bid this board, in fact, took all of its fiduciary obligations and all of its rights of governance on a continuing in futuro basis and put

them in a bag and tied a rope on the top and threw them into this court, because they committed themselves irrevocably, with no fiduciary out, to a tender offer, so that today, if someone came along with a $500 a share offer, they would be without the intervention of this Court helpless to provide that to the shareholders.

And then Mr. Joffe asked once again, I assume rhetorically, from whence would such a duty as we urge come. The duty which he posits is the duty to consider alternatives where consideration has already been given to other corporate objectives. Well, I would assume that corporations are constantly considering corporate objectives, some of them greater, some of them lesser. Some of them reflect themselves in a formulated business plan, others are the day-to-day situations.

And there is no doubt whatsoever but that an uninvited bid for all of the shares interrupts all of those plans. In this particular instance, interestingly, it interrupts it in a case where the plan itself arranged managerial control, board control, blocking control under 203 of a takeover, were already in place, as a consequence of

which under both scenarios, as we understand the law, there is a clear answer to Mr. Joffe's question from whence does that obligation come. It comes from the basic obligation of fiduciaries that began before Unocal but certainly from Unocal on. And it doesn't come by virtue of simply referring to Unocal in the abstract.

But, Your Honor, I hope we have made the point both in our briefs and oral argument from specific cases that have applied it to the specific sets of facts that are as nearly analogous as there are of all of the cases that are available. We applied it in Anderson II, where management had a recapitalization plan that was about to go to the shareholders. Questions about how that compared to a highly conditional letter from Bear Stearns suggesting an offer were answered by this Court. I won't recite it. It is in the record already. The page reference is in the record. Likewise, UIS v. Walbro. I won't go through it again.

We are not pulling these issues and these formulations out of the abstract. It comes, Mr. Joffe, from the law of Delaware. Indeed, I repeat what I said at the outset. What is surprising

here is not what it is that is the law but that it has not been followed. It is rather clear. It is rather unequivocal.

We were asked the question by Mr. Joffe, who asked good questions -- he said what would have happened, he says, if they had done the bid for Warner on March 3, if they had done the revised merger with a front-end tender offer and then Paramount were to come in. What then, he says. We would be here, Your Honor.

Why would we be here? We would be here because it is the obligation of the directors of a corporation in this state to consider alternatives as they are presented to themselves.

And why does Mr. Wachtell offer us a hypothetical that turns the case inside out and on its head and says, "Well, what if we had already closed the deal? What do we do then?" Well, there is some consequence to timing. There is no doubt but that if they had closed the Warner takeover tender and then a bid would have been made, you can't undo it. You can't unscramble those eggs.

But we are in this court because there are eggs that should not be scrambled, because

there are shareholder rights that should not be transgressed. And the clearest and most recent articulation of those shareholder rights is in the Macmillan case, in which the Court affirms as to Macmillan I both that a transfer of the nature of percentages that we have here was, in fact, putting up the company for sale within at least the Unocal test, if not the Revlon duty of auction, and probably that, too; but more importantly, precisely what we have here, not vague labels and cases and general principles, but actual holdings, a holding that you cannot coerce, which is to say with no choice, an inferior economic alternative on the shareholders of a Delaware corporation in the face of a superior alternative.

I mean, perhaps I just made that up, but I thought I read it in an opinion or two that I helped participate in litigating on behalf, by the way, of the same lead plaintiff that I am here for, which is exactly why we are here, a sense that there must be some certainty and predictability to this wonderful body of law, this innovative development that has taken place in this very important jurisdiction over the last four or five years. It

cannot be shredded by recitation of 1980 Second Circuit evidentiary rulings. It cannot be shredded by the posing of hypotheticals that have nothing to do with the facts of this case.

I will give you a hypothetical. Let's assume we had a fiduciary, a real live one, of the kind that is not here when we are dealing with corporations, a trust that owned a piece of property next to another piece of property. One of the pieces of property was called Time and the other one was called Warner. And the Time people thought a lot, should they move, should they go out of town, what should they do with this piece of property. It had an independent value of $100,000, and the neighbor's property had a value of $100,000. And the neighbor said to them, "You know, we ought to put these two pieces together, because together these two $100,000 pieces of property are probably worth 250. I will get us an appraisal to that effect."

And they marched off to the lawyer, and the lawyer had everything done, and they were just ready to sign it when Klein, the mischief maker, comes along, and he says to the trustee, "You know what? I will give you $200,000 just for your piece

of property." Do you think for a minute that this Court would permit that trustee not to consider whether that $200,000 offer was not a better offer? Forget not deciding to consult the beneficiary in the first instance and deciding the hell with the beneficiary in the second and charging straight ahead.

How is that for a hypothetical? Because that's exactly what happened here. And it is a clear breach of the fiduciary's obligation, shredded from all of the complexities of this transaction.

There is no question, moreover, that if that fiduciary said to you, "And by the way" -- I mean, if Klein, the mischief maker, said to you, "By the way, if you, as you plan, go ahead and you are going to hock that to the bank on a 14 percent loan so that I am not going to be able to offer you that same amount of money if I have got to take out that financing, and my price is going to drop to less than the price that you have got it on," is there any question about what it is we would be doing here?

There is no question in the record here, Your Honor, as to the information that cannot

be recited in open court but that the trading value of Time shares combined with Warner will be measurably and significantly, if not infinitely, below $200 a share.

And the rationale proffered for accepting that crummy alternative, that expectation that 10 years out or five years out this company may be worth three or four hundred dollars, there is something funny about that. It is funny because the discount rate that is applied to Paramount's $200 bid by Mr. Hill, who must know some loan sharks I don't know, applying a 24 percent discount rate to get him somewhere down in the numbers in which he can plausibly look at some directors and say it is not worth something -- you know, if you apply a 24 percent appreciation rate to the $200 cash price that is now on the table here, we are talking about, what; $380, I think, three years from now, $380 in cold cash, not expectations about whether they come up with another Batman as opposed to another Fred the Duck or whatever the movie is that failed.

We are talking about -- I don't mean to make too light of this, Your Honor. I apologize. I don't mean the levity. I mean to suggest the

obvious, which is to say, we hear a lot of uncertainties in life, but there is no uncertainty which American corporate enterprise is more aware of than the inability, in fact, to predict the future course of the earnings of a complicated conglomerate, particularly in the entertainment field. There is nothing that I can imagine that is less susceptible of being predicted, and yet precisely that, with an enormous gap, is sought to be foisted upon us. It is not right. It is not fair, and it is not consistent with the law of this jurisdiction.

In Macmillan the judge wrote, "...the defendants argue that the $64...offer was reasonably perceived as a threat, because it was substantially below the value that their financial advisers, Lazard and Wasserstein Perella, had opined was fair. If that price were firm, the argument might have a plausible factual basis," citing Koppers. "However, the...offer was only an opening bid, by its own terms, subject to negotiation. Management here had no desire to negotiate. They chose to close their eyes, to treat the offer as firm and unalterable," and the Court found that to be violative.

If there is a difference between that

case and this case, I don't know it. And I certainly don't know it on the principal ground that is suggested to distinguish this case from every other case, because they can't find one that they can cite that supports their proposition, so they distinguish them all.

The basic distinguishment is that, if I understand it right, for two years, during a long, careful, tough negotiation in which a wide array of other alternatives were pursued and examined, they came to the conclusion that based on what they knew as of the day they knew it, from whom they were here advised, this was a terrific deal. But the record in the Macmillan case is absolutely clear, that in that case as well -- and Mr. Wachtell's partner argued it on behalf of the management -- they had been planning it, he told us, for two years. From the moment they saw an offer for another media company, publishing company, they said, "Let's go hire these guys, Wasserstein. They really know how to do it. Let's plan some defensive transaction that will be a functional alternative" -- they might have used the word if they were that sophisticated -- "and so we will have something ready in case it happens." And

sure enough, an offer with an offer to negotiate came in, uncoercive, declared.

But, you know, the truth of the matter is, that was a better deal than this deal, because that deal was a couple of bucks away at least at the opening. This one is billions of dollars away. It is $50 away. It is potentially more than $50 away. And the shareholders at least got that. Here it is Warner shareholders that get it.

It is just not right. It is wrong to basically come into this court and suggest that all of the cases that require some halting of the coercive functional alternative or permitting a choice between functional alternatives ought not apply in this case, that there ought be no choice because these people have not even developed a functional alternative.

Their functional alternative, if it is deemed that, basically benefits -- the only immediate beneficiaries of it are Warner, not Time. Why is that? That's because of how they decided, how they decided -- no one forced it upon them -- how they decided to approach defending themselves and their corporate policy.

I repeat, it remains possible to fulfill their entire corporate policy by having Warner buy Time. It is more logical. They are bigger. They have got the dollars. The same assets can be taken to the same banks, and hopefully they will avoid Mr. Hill's bankers and interest rates. It is possible to achieve their corporate objectives. They haven't even thought about it for a second. They don't want to think about it.

And I don't want to here delve into a record with which I am not sufficiently familiar to do more than mention a substantial basis to believe that, in fact, when all is said and done, management and their particular futures and the relationships with respect to their careers was at the core of what these negotiations consisted of. It is cited in the record. The competing parties argue those facts. I am sure the Court has already familiarized himself with it. I simply urge them to do it as well.

Mr. Wachtell suggested in addition to his hypothets some principles that he declared were clear to him. Mr. Wachtell is a spectacular lawyer, as we know, and we now know why he is not an investment banker. He says nobody could believe that

Time will be worth less after this deal, nobody except even Wasserstein, even Shearson. Everybody has said that the trading price of Time shares after this deal will be less, indeed, Your Honor, less than $200. Indeed, the trading market told us that.

Forget all of these wonderfully brilliant, talented and maybe even some days independent bankers. The marketplace traded, after all, from March 3 until the day before the Paramount bid. It was a sophisticated market. You have got the trading volume. You can see it. You know it by virtue of your experience here. By the time this transaction came down, that market reflected some of the most sophisticated economic judgments capable of being rendered on real terms, not opinions but investing dollars, and that price was $126, $126. And it included undoubtedly some speculation that somebody would come along and offer something. $126 is 68 percent off. It is $4 billion. It is extraordinary.

Mr. Wachtell says the revision won't make it any worse. It may not make it worse in some senses. It may make it just as easy for some things to happen. But it is unchallenged that because of

the leverage, the combination of Time with Warner, because of the borrowing commitments that will have been made, because of all of the things that are discussed in the Morgan Stanley affidavit that was submitted two days ago that we have referred to at length, the Walters affidavit, that the financing that is necessary will require a degree of equity that will make, given people's expectations of return, it absolutely impossible to approach by billions, I believe is the number in the affidavit, which in 57 million shares turns out to be about 40 bucks a share if it is billions, meaning more than one, or at least $20 a share.

I mean, I would have liked it to have been quantified, but I guess it would have just been one opinion against another opinion. But billions got my attention and my clients' attention. It is certainly consistent with their fears.

And finally, we are saying -- we are told that Time is doing Paramount's job for it. It is making it easier to acquire this company. I won't dwell on that at all except to say that is not only the height of speculation; it is speculation in the face of all of the professional affidavits, which is

to say that there are antitrust problems, there are financing problems, there are hostility problems, there are management problems. You are going to have a board that is going to be composed 50 percent of the Warner people, who just took over Time, however measured, and Steve Ross. And I can just imagine the glee with which he is going to receive a bid for his loss of managerial control over Time Inc., and his directors are similarly going to greet that.

I just don't think it is real. And with all due respect to his legal talents, I don't think the investment banking advice that we have gotten this afternoon from counsel is worthy of serious consideration.

Finally -- or not finally. I will try to make it quick, though -- what are we asking this Court to do. We are not asking this Court to reconvene a shareholders meeting and have a vote, although I will tell the Court, as I did in the papers, I expect to come back to this Court at a final hearing and have that sham of a meeting we just had turned down, turned over, fixed, because although you may have denied a temporary restraining order because of your capacity to repair that harm, there

was harm, and we will come back to that.

But what we are asking the Court to do here is not to convene a meeting. We are asking the Court to do precisely what it did in Anderson Clayton, precisely what the Macmillan court did in Macmillan I, precisely what it is the Pillsbury court did, and that is to deprive directors of the right to abdicate their duties, to deprive them of the right to coerce the shareholders into accepting an inferior economic alternative and to vindicate the law of this jurisdiction that directors have an obligation that continues so long as they lawfully have or should retain discretion to act for the benefit of the shareholders to exercise that discretion that way. And that's what I think this case is about.

The most problematic part of this case, frankly -- I am sure Your Honor has spent more than a little bit of time thinking about it. Certainly we have -- is how in the world what Time has done here can be affirmed, in effect, permitted, consistent with the body of law that has been developed. Certainly not on the ground that they have been developing an alternative for a long time. That has been disposed of before. Certainly not on

the ground that when someone puts in another alternative, you don't have to analyze it. That has been disposed of before. Certainly not on the ground that there are prospective future values that may approach on some rational basis something comparable to the values that are offered all in cash. That has been disposed of before.

And I don't mean this as a challenge to Your Honor's substantial intellect. I mean not to suggest that the game here is to figure out a way through all of that law but rather to say it is precisely the opposite.

The right thing to do here, in our opinion, and we submit can be done by this Court, is to confirm what the rules of law here are -- they are quite clear -- and to take such measures as are necessary and appropriate to see to it that we are not again faced with a group of professional bankers and lawyers and prestigious corporate directors who have conducted themselves for whatever reason in a fashion totally inconsistent with those responsibilities.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Klein.

MR. WACHTELL: Your Honor asked what the trading price was of Warner stock before the deal. If you look at Page 27 of the proxy statement, the closing price of Warner stock on March 3 prior to the public announcement was $45-7/8, and Mr. Richards' 53 percent calculation he reaffirms to me is correct.

I would also note that it may be of interest, Your Honor, if you look at the Time trading price at the same time, prior to the March 3 announcement. It was 109-1/8.

And the reason I mention that is just to pick up on Mr. Klein's derogation of my talents as an investment banker. No, I don't claim to be an investment banker, but if Time was trading at 109-7/8 before the announcement of a Warner transaction, and if the best estimates, including Mr. Wasserstein's, is that it will be trading somewhere around 150 after the announcement of the transaction without a takeover premium, I am not the only one, then, who thinks that Time is going to be massively enhanced in value by the Warner acquisition --

THE COURT: I am sorry. I didn't quite understand that. You said the best estimate of

value without a takeover. Do you mean without a Paramount --

MR. WACHTELL: Yes, I mean basically what these gentlemen --

THE COURT: Don't we know what the market went to? I mean, why do you need -- I am a little confused as to what that number represents.

MR. WACHTELL: What I am saying -- and I think Mr. Joffe referred to a number of people who were predicting where the trading range of Time will be of the combined company --

THE COURT: Yes.

MR. WACHTELL: (Continuing) -- in the immediate short term, putting aside --

THE COURT: Yes.

MR. WACHTELL: (Continuing) -- the three or four hundred numbers going out a couple of years.

THE COURT: Right.

MR. WACHTELL: I am saying if the short-term view, which presumably is either without takeover fluff or largely without takeover fluff, is estimated to be somewhere around 150, 140, that is a massively higher price than Time before the

announcement of a Warner deal.

So obviously, although Mr. Klein doesn't think I am much of an investment banker, obviously the marketplace thinks that a Time Warner company is a far more valuable company even without a takeover premium built into it than Time alone, which was trading at 109-1/8 prior to the announcement of the first Warner transaction. That's all I am saying.

THE COURT: Well, I take it your point that is made, without any speculation by looking at what the market, in fact, did at the time upon the announcement of the merger, I mean, without people's theories about what is going to happen in the future, it went up to 125 or something. So that while there may be quarrels or quibbles about how much, it is extraordinary, I suppose, that the market reacted to this proposal by the stock of both companies increasing.

MR. WACHTELL: Well, I think, as Your Honor says, that is extraordinary, and I think it is a market testament to the market's recognition, just as Gordon Crawford's, that you are creating a new and more valuable entity, not taking away value.

THE COURT: I knew that Mr. Klein wouldn't get the last word in. I knew that would happen.

Well, thank you, counsel, for this lengthy argument. I will say a word not about the case or the resolution of the case to the people in the courtroom that are not familiar with cases of this kind, as counsel all intimately are, about how matters are decided of this kind in the Court of Chancery.

I have perhaps alluded to, counsel has perhaps alluded to during the course of the day the fact that there have been many hundreds, thousands of pages, I suppose, of testimony taken down. And over the last week I have spent virtually all of my time reading testimony and over the last weekend reading the various affidavits that have been submitted and the briefs that have been submitted. So that while in some jurisdictions an application of this kind goes on for days of live testimony in the courtroom, in this jurisdiction the testimony is taken in in a written form before the court hearing. That permits the Court to move more speedily than might otherwise be the case. And transactions of

this kind often require rather rapid decisions.

Here the principal aspect of the application of the plaintiffs is to enjoin the closing of a tender offer which, if not enjoined, can close no earlier than the end of the day on the 17th. This necessitates a rather rapid decision in this instance as well.

My plan I say, so that you all or your representatives don't deluge the Court of Chancery with phone calls, because we have very few employees -- my plan is to try and decide this matter by the end of the week. And as I say, I have done a great deal of work already. I before today's argument had not formed a fixed view or even a strongly held view about the outcome of the case. This argument was helpful. I am going to have to consider all of this intensively in the next few days and write an opinion expressing the conclusion that I come to. I would hope that that, as I say, will be by the end of the week.

I would like to meet with counsel that I met with prior to the hearing for two or three minutes -- well, five minutes -- as we adjourn, so I can discuss with them the details of proceeding in

the case.

The Court will stand in recess.

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(Court adjourned at 4:37 p.m.)

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CERTIFICATE

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware and Notary Public, do hereby certify that the foregoing pages numbered 4 through 236 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 12th day of July, 1989.

Official Reporter for the
Court of Chancery of the
State of Delaware