

BEFORE THE SUPREME COURT OF THE STATE OF DELAWARE

PARAMOUNT COMMUNICATIONS :  
INC. and KDS ACQUISITION :  
CORP., :

Plaintiffs Below- :  
Appellants, :

vs. :

No. 279, 1989

TIME INCORPORATED, et al., :  
Defendants Below - :  
Appellees. :

LITERARY PARTNERS, L.P., :  
et al., :

Plaintiffs Below - :  
Appellants, :

vs. :

TIME INCORPORATED, et al., :  
Defendants Below - :  
Appellees. :

IN RE TIME INCORPORATED :  
SHAREHOLDERS LITIGATION

- - -  
Courtroom No. 301  
Public Building  
Wilmington, Delaware  
Monday, July 24, 1989  
10:00 a.m.  
- - -

BEFORE: HON. HENRY R. HORSEY, Justice.  
ANDREW G. T. MOORE, II, Justice.  
RANDY J. HOLLAND, Justice.

- - -

ARGUMENT ON APPELLANTS' INTERLOCUTORY APPEAL

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

## 1 APPEARANCES:

2 BRUCE M. STARGATT, ESQ.,  
3 JOSY W. INGERSOLL, ESQ. and  
4 DAVID C. McBRIDE, ESQ.  
Young, Conaway, Stargatt & Taylor

5 -and-

6 MELVYN L. CANTOR, ESQ.,  
7 MICHAEL J. CHEPIGA, ESQ.,  
8 DAVID E. MASSENGILL, ESQ.,  
9 JOSEPH F. WAYLAND, ESQ. and  
10 PETER THOMAS, ESQ., of the  
11 New York Bar  
Simpson Thacher & Bartlett  
for Appellants, Plaintiffs Below in  
Civil Action No. 10866

12 P. CLARKSON COLLINS, JR., ESQ.  
13 LEWIS H. LAZARUS, ESQ. and  
14 BARBARA MacDONALD, ESQ.  
15 Morris, James, Hitchens & Williams

16 -and-

17 MICHAEL R. KLEIN, ESQ.,  
18 RICHARD W. CASS, ESQ.,  
19 THOMAS W. JEFFREY, ESQ. and  
20 ERIC MARKUS, ESQ., of the  
21 District of Columbia Bar  
Wilmer, Cutler & Pickering  
for Appellants, Plaintiffs Below in  
Civil Action No. 10935

22 HENRY A. HEIMAN, ESQ.  
23 Heiman, Aber & Goldlust

24 -and-

SHERRIE R. SAVETT, ESQ., of the  
Pennsylvania Bar  
Berger & Montague

-and-

STUART H. SAVETT, ESQ., of the  
Pennsylvania Bar  
Kohn, Savett, Klein & Graf

-and-

LAWRENCE A. SUCHAROW, ESQ., of the  
New York Bar  
Goodkind, Labaton & Rudoff  
for Appellants, Plaintiffs Below in  
Civil Action No. 10670

1       **APPEARANCES, Cont'd.:**

2                   **MARTIN P. TULLY, ESQ., and**  
3                   **LAWRENCE A. HAMERMESH, ESQ.**  
4                   **Morris, Nichols, Arsht & Tunnell**

5                   **-and-**

6                   **ROBERT D. JOFFE, ESQ.,**  
7                   **RORY O. MILLSON, ESQ.,**  
8                   **VERONICA S. LEWIS, ESQ. and**  
9                   **STEPHEN MADSEN, ESQ., of the**  
10                   **New York Bar**  
11                   **Cravath, Swaine & Moore**  
12                   **for Appellee Time, Defendant Below**

13                   **WILLIAM J. WADE, ESQ.,**  
14                   **THOMAS BECK, ESQ.,**  
15                   **GREGORY V. VARALLO, ESQ.,**  
16                   **MICHAEL J. FEINSTEIN, ESQ.,**  
17                   **DANIEL A. DREISBACH, ESQ. and**  
18                   **WILLIAM P. BOWDEN, ESQ.**

19                   **Richards, Layton & Finger**

20                   **-and-**

21                   **HERBERT M. WACHTELL, ESQ.,**  
22                   **WILLIAM C. STERLING, JR., ESQ.,**  
23                   **KENNETH B. FORREST, ESQ.,**  
24                   **BARBARA ROBBINS, ESQ.,**  
25                   **ANDREW C. HOUSTON, ESQ. and**  
26                   **GEORGE T. CONWAY, III, ESQ., of the**  
27                   **New York Bar**  
28                   **Wachtell, Lipton, Rosen & Katz**  
29                   **for Appellant Warner, Defendant**  
30                   **Below**

31                   **- - -**

1 JUSTICE HORSEY: The Court will hear  
2 argument in Time-Warner-Paramount.

3 Mr. Stargatt.

4 MR. STARGATT: If Your Honor please,  
5 the Court administrator suggested that we start by  
6 introducing or reintroducing to Your Honors the  
7 lawyers who will actually be making the argument.

8 For the part of Paramount our  
9 argument will be presented by Melvyn Cantor, who is a  
10 partner in the firm of Simpson Thacher & Bartlett.

11 MR. CANTOR: Good morning, Your  
12 Honor.

13 JUSTICE HORSEY: Welcome to the  
14 Court, Mr. Cantor.

15 MR. HEIMAN: Good morning, Your  
16 Honor.

17 JUSTICE HORSEY: Mr. Heiman?

18 MR. HEIMAN: Heiman, yes, Your Honor.  
19 I would like to introduce to you Mr. Stuart Savett,  
20 who will be arguing to you on behalf of the Time  
21 shareholders. He is a partner in the firm of Kohn,  
22 Savett, Klein & Graf.

23 JUSTICE HORSEY: Welcome to the  
24 Court, Mr. Savett.

1 MR. HEIMAN: Thank you.

2 JUSTICE HORSEY: Thank you,

3 Mr. Heiman.

4 Mr. Collins.

5 MR. COLLINS: May it please the

6 Court, I would like to introduce to the Court

7 Michael R. Klein, of the firm of Wilmer, Cutler &

8 Pickering, who will be making the argument on behalf

9 of the Literary Partners plaintiffs this morning.

10 JUSTICE HORSEY: Welcome to the

11 Court, Mr. Klein.

12 Mr. Hamermesh.

13 MR. HAMERMESH: Thank you, Your

14 Honors. It is my pleasure to introduce to the full

15 panel Robert D. Joffe, of the firm of Cravath,

16 Swaine & Moore, who will be making the presentation

17 on behalf of Time Incorporated and its directors.

18 JUSTICE HORSEY: Welcome to the

19 Court, Mr. Joffe.

20 MR. JOFFE: Thank you, Your Honor.

21 JUSTICE HORSEY: Mr. Wade.

22 MR. WADE: Good morning, Your Honors.

23 It is my pleasure to introduce to the Court

24 Herbert M. Wachtell, of the New York firm of

1       Wachtell, Lipton, Rosen & Katz, who will argue on  
2       behalf of Warner Communications.

3                   JUSTICE HORSEY: Welcome to the  
4       Court, Mr. Wachtell.

5                   MR. WACHTELL: Thank you very much,  
6       Your Honor.

7                   JUSTICE HORSEY: We understand,  
8       Mr. Cantor, you would like to have 20-minute opening  
9       and reserve 10 minutes for rebuttal. Is that  
10      correct?

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

13                  Let me just spend a minute, if I  
14      might, on the procedural context which we find  
15      ourselves in.

16                  As the Court is aware, on July 11 the  
17      Chancellor heard argument on Paramount's motion and  
18      the other plaintiffs' motion for a preliminary  
19      injunction in this matter, seeking to enjoin the  
20      Warner offer and seeking other ancillary relief. The  
21      matter was submitted to the Chancellor on a paper  
22      record. On July 14, three days later, he rendered  
23      his decision, denying the application for preliminary  
24      injunction. He did, however, later in the day

1 certify the matter to this Court, a certification  
2 which was accepted by this Court, and he entered a  
3 stay, which will expire at 5:00 p.m. today.

4 And I stress that only obviously  
5 since the stay will expire, and I understand that  
6 Time intends to proceed with its offer unless there  
7 is a further order of this Court before 5:00 p.m.

8 JUSTICE HORSEY: I was under the  
9 impression the stay didn't expire until midnight.

10 MR. CANTOR: No. As finally entered  
11 by the Vice Chancellor -- the Chancellor is away --  
12 it expires at 5:00 p.m., and the Time offer to  
13 coincide with that also expires at 5:00 p.m.

14 JUSTICE HORSEY: Thank you, sir.

15 MR. CANTOR: Your Honors, the Court  
16 below, in our view, entered an opinion that, if it  
17 becomes the law of this state, will totally  
18 eviscerate this Court's holding four years ago in the  
19 Unocal matter.

20 JUSTICE MOORE: Well, what did we say  
21 in the Macmillan case about the right of the board to  
22 take long-term strategic plans into account?

23 MR. CANTOR: Your Honor, I don't  
24 think there is any question the board has the right

1 to take long-term strategic plans into account. What  
2 we question -- and that phrase as a phrase is fine.  
3 What we question here is what the board did in the  
4 way of inquiry and evaluation and study to measure  
5 those long-term plans against any present value  
6 realization that the shareholders might achieve.

7 JUSTICE HORSEY: Well, when you speak  
8 of eviscerate, isn't it your underlying assumption  
9 that -- it is your predicate that Unocal establishes  
10 a wholly objective standard that does not permit the  
11 Court to take into consideration reasonable motives?

12 MR. CANTOR: No, there is -- no, it  
13 is not quite, Your Honor. There is one aspect of  
14 Unocal, as I read it, that is subjective, and that is  
15 that the board must be acting in good faith. We  
16 submit that it is the board's duty to prove that.

17 The Chancellor, we submit, turned  
18 that on its head and at Pages 75 and 76 of his  
19 opinion said that no evidence had been adduced that  
20 they were acting in a venal way. But putting that  
21 aside -- that is a subjective element -- the rest of  
22 Unocal, we believe, is purely objective.

23 JUSTICE HORSEY: But your argument  
24 also proceeds on the concession, doesn't it, that you



1 are not attacking Time's -- you are not attacking at  
2 all Time's original plan of merger and you are not  
3 contending that that original March 4 plan of merger  
4 with Warner triggered Revlon duties. You are  
5 conceding that that -- you are not submitting that  
6 argument to us.

7 MR. CANTOR: We submitted it in a  
8 paragraph, Your Honor. We don't press it strongly  
9 here basically for this reason: We think on these  
10 facts Revlon and Unocal merged, that effectively what  
11 happened here is when the board did what it did on  
12 March 3, it put itself in a position at the least  
13 where it had to respond in a Unocal mode to any  
14 alternative that was presented.

15 JUSTICE MOORE: Do you mean that  
16 Unocal and Revlon require that the moment there is  
17 any bid, that everything must come to a halt and a  
18 company must immediately evaluate that bid and decide  
19 what it is going to do with respect to its long-term  
20 plans?

21 MR. CANTOR: Yes, Your Honor. They  
22 must evaluate. I am not saying they must accept, but  
23 they must evaluate.

24 JUSTICE MOORE: Let me ask you this,

1 Mr. Cantor, from a general corporate governance  
2 standpoint. Regarding the role of the board of  
3 directors, generally a board cannot effect short-term  
4 results; wouldn't you agree with that?

5 MR. CANTOR: Yes, I would agree with  
6 that.

7 JUSTICE MOORE: Well, so isn't their  
8 primary focus and responsibility quite properly on  
9 the long term?

10 MR. CANTOR: I think that is fair,  
11 Your Honor.

12 JUSTICE MOORE: So the Chancellor  
13 found that that was the heart of the matter, that  
14 this was a long-term strategic plan, and at Page 46  
15 of his opinion he said, "...and the record contains  
16 no evidence to support a supposition that" this  
17 long-term strategic plan was not in the best  
18 interests of the corporation. How do you address  
19 that?

20 MR. CANTOR: Two ways, Your Honor.  
21 Number one, it seems almost to go without saying that  
22 if a board has a long-range plan -- let me give this  
23 hypothetical -- that in 1993 will yield the  
24 shareholders \$100, and it is a plan -- it is an

1 honest plan that they believe in, but they are going  
2 to get a hundred dollars in 1993, and instead they  
3 are being offered \$200 today, I don't suppose anyone  
4 would suggest that the board could preclude accepting  
5 today's offer in favor of that long-term plan. And  
6 yet effectively that's what the Court has done here,  
7 because there is no dispute on this record that the  
8 range of values that was set forth for the board on  
9 June 15 and June 26, when you discount them to  
10 present value, as we have done, as Mr. Phillips did  
11 in his affidavit, yield a range of values in the 90  
12 to \$140 range.

13 Mr. Rossoff in his affidavit says  
14 that Mr. Phillips used too high a discount rate, but  
15 he never said what discount rate he would use. And  
16 it goes without question that you have to discount  
17 for the time value of money --

18 JUSTICE MOORE: Well, are the lawyers  
19 suggesting then that this transaction makes no  
20 business sense?

21 MR. CANTOR: No, I am not suggesting  
22 that. I am suggesting that it makes less business  
23 sense, objectively less business sense for the Time  
24 shareholders than what is on the table today.

1 JUSTICE MOORE: Well, then how do you  
2 respond to the letter that Mr. Richard E. Snyder, a  
3 top executive of your client, wrote to the president  
4 of Time? And he said, "My congratulations, coupled  
5 with my jealousy, for making the greatest deal ever  
6 imaginable! Fear and trembling strikes when we view  
7 your colossus but I think we will muddle our way  
8 through. It's a great concept, a perfect company and  
9 my congratulations to all your colleagues as well."

10 And incidentally, why was this  
11 document marked confidential?

12 MR. CANTOR: It was produced by Time  
13 and it was marked confidential by Time, Your Honor,  
14 so perhaps Your Honor would ask Mr. Joffe that  
15 question.

16 JUSTICE HORSEY: Well, in connection  
17 with that, wouldn't your argument be a lot stronger  
18 if you had a strong case for invoking Revlon duties?  
19 As the Chancellor said, the case presents the  
20 question of when must a board shift from its  
21 long-term maximizing profit motives to pursue  
22 immediate short-term values. And I am just echoing  
23 and adding to what Justice Moore said.

24 And the Court found that you didn't

1 prevail on that argument, and you don't resist that  
2 argument. So you agree that the board is still in a  
3 long-range mode of action, and it doesn't have to  
4 shift to immediate enhancement of shareholder values,  
5 and yet you are quarreling -- so what you do is, it  
6 comes down to a quarrel with what is the future value  
7 of Time discounted to a present value versus -- your  
8 witnesses versus the others.

9 MR. CANTOR: Well, it is not our  
10 witness versus the other, Your Honor, because there  
11 is no evidence in the record that the board ever  
12 considered discount to present value, and their  
13 witness, Mr. Rossoff, in an affidavit submitted at  
14 the preliminary injunction hearing did not. All he  
15 said was that our discount rate was too high.  
16 Ironically, our discount rate was the very rate that  
17 Shearson uses when it expects a rate of return in a  
18 highly leveraged equity investment, so -- but they  
19 have never suggested what the appropriate discount  
20 rate should be.

21 And let me say one other thing about  
22 the long-range value, the long-range plan. This  
23 long-range plan, Your Honors, which was worked on  
24 from 1987 through to March of 1989, was scrapped,

1 absolutely scrapped, in the summer of 1988, when  
2 Mr. Ross would not agree to step aside after a  
3 specified number of years.

4 JUSTICE MOORE: I don't think you  
5 answered my question --

6 MR. CANTOR: I would like to, Your  
7 Honor.

8 JUSTICE MOORE: (Continuing) -- about  
9 Mr. Snyder's letter of March 9, 1989, when he views  
10 it as the greatest deal ever imaginable.

11 MR. CANTOR: Your Honor, first of  
12 all, I think, as Your Honor read the entire letter,  
13 it is a bit puckish, a bit tongue in cheek. But in  
14 any event, we do not question that Time Warner is a  
15 good deal. We don't question that. What --

16 JUSTICE MOORE: Then don't you lose?

17 MR. CANTOR: No, Your Honor, I don't  
18 believe we lose, because what we do -- you can have a  
19 good deal and you can have a better deal. And if the  
20 value to the shareholders of the long-range deal is  
21 less than the immediately achievable value of the  
22 short-range deal, I don't see how -- I don't see how  
23 we can fail but win.

24 JUSTICE HOLLAND: Mr. Cantor, what

1     about all the contingencies that Paramount had in its  
2     offer? You talk about this alternative for Paramount  
3     as if it is inevitable that the money will be paid.  
4     But isn't it a fact that Paramount can walk away if  
5     it wants to?

6             MR. CANTOR: Your Honor, it is a fact  
7     that there are a number of conditions. It is also a  
8     fact that the only significant condition at this  
9     point is cable approval. It is also a fact that Time  
10    in the eight days between -- nine days between June  
11    7, when the offer was announced, and June 16, when it  
12    was formally considered by its board, launched a  
13    campaign that included champerty to seek to defeat or  
14    delay cable approval.

15            JUSTICE HOLLAND: Well, I understand  
16    that argument in your brief, but with respect to the  
17    ability of Paramount to pay the \$200, some of the  
18    public statements it made indicate it could have done  
19    that maybe on July 5 or July 7. And yet Time and  
20    Warner say because of the cable approval, it might  
21    have been months away or a year away, and in the  
22    cable negotiations the agreements that might have  
23    been extracted from Paramount might have made it too  
24    expensive to go forward.

1 MR. CANTOR: Well, Your Honor, with  
2 respect to the months away or years away, the  
3 evidence in the record below is, Paramount has agreed  
4 if Time is enjoined from interfering with the cable  
5 process, Paramount has agreed to pay interest  
6 beginning 60 days after any such order to the  
7 shareholders. So we will have a present value  
8 number.

9 There is no other real impediment to  
10 the offer.

11 JUSTICE HOLLAND: Well, but if we go  
12 back to the concept that we are analyzing this under  
13 Unocal --

14 MR. CANTOR: Right.

15 JUSTICE HOLLAND: (Continuing) -- and  
16 you have indicated Time and Warner is a good business  
17 arrangement, and your argument is Paramount may be  
18 better, and we take the principle that to a certain  
19 extent the board is recognized as someone who can be  
20 the intermediary between the stockholders and someone  
21 that wants to present another proposal, if we are  
22 really down to two business choices, why doesn't the  
23 board get the benefit of the business judgment rule  
24 here?



1 MR. CANTOR: Because the board did  
2 not follow what both Unocal and Smith vs. Van Gorkom  
3 told it to do.

4 In Smith vs. Van Gorkom this Court  
5 held that a failure to inquire is gross negligence.  
6 And this board failed to inquire with respect to the  
7 Paramount offer, with respect to the present value of  
8 the revenue stream that was expected from Time, with  
9 respect to the editorial integrity issue.

10 JUSTICE MOORE: Well, isn't it  
11 Smith -- I am sorry.

12 JUSTICE HORSEY: Well, don't you have  
13 to agree that the record shows a long history of  
14 Time's board prior to March 4 giving lengthy  
15 consideration to what companies Time should merge  
16 with and/or make a business combination with, and  
17 Warner was definitely preferred, definitely preferred  
18 over your client?

19 MR. CANTOR: Yes, it was, Your Honor.  
20 And Warner was preferred, the record indicates, or at  
21 least my reading of the record indicates, because  
22 Mr. Ross was willing to make a commitment that  
23 Mr. Nicholas would be the successor CEO, and  
24 Mr. Davis was unwilling to make that commitment.

1 JUSTICE MOORE: Well --

2 JUSTICE HORSEY: But they finally  
3 worked out that problem, didn't they?

4 MR. CANTOR: They did, Your Honor.

5 JUSTICE HORSEY: And, in fact, that  
6 problem was a result of the share exchange idea  
7 falling through, and then Time decided to go with the  
8 cash acquisition proposal. And that, in fact, was  
9 not a new idea, was it?

10 MR. CANTOR: The cash acquisition?  
11 Well, it was --

12 JUSTICE HORSEY: It wasn't a new  
13 idea, was it? Hadn't it been considered before?

14 MR. CANTOR: It became a latter day  
15 old idea, Your Honor.

16 JUSTICE HORSEY: Well, so it wasn't a  
17 radically different, new idea. And this gets back  
18 to -- so what I am getting at is that you are saying  
19 that the Time board did not do what it should have  
20 done after receiving the June 7 offer from Paramount,  
21 which came at the 11th hour, one might say; correct?

22 MR. CANTOR: I am not sure it came at  
23 the 11th hour. It came two weeks after the merger  
24 proxy statement was issued.

1 JUSTICE HORSEY: Yes, and just before  
2 the shareholder meeting.

3 MR. CANTOR: Two and a half weeks  
4 before the shareholder meeting.

5 JUSTICE HORSEY: And if the board  
6 shows a history, a record, including the outside  
7 directors, of thoroughly going into this matter and  
8 using their business judgment to decide what kind of  
9 a future Time should have and with what other  
10 company, aren't you just ignoring all that?

11 MR. CANTOR: Your Honor, I am not  
12 getting through obviously.

13 JUSTICE HORSEY: No, no. Yes, you  
14 are getting through. What you are saying is that  
15 they didn't give enough further consideration to this  
16 175 versus what the alternative was.

17 MR. CANTOR: They gave no  
18 consideration, Your Honor.

19 JUSTICE MOORE: Well, has any  
20 Delaware court at any time ever compelled a board of  
21 directors to negotiate when it did not consider it  
22 was appropriate to do so?

23 MR. CANTOR: No, and we are not  
24 saying here they had to negotiate. We are saying

1       they had to inquire.

2                   JUSTICE MOORE:   Well, did --

3                   JUSTICE HORSEY:   And what case, what  
4       case supports your position that Unocal requires --  
5       that this ruling of the Chancellor completely  
6       eviscerates Unocal?   What case law, first of all, of  
7       the Supreme Court of Delaware says that?

8                   MR. CANTOR:   Well, the Smith vs. --  
9       Your Honor, all the cases that say that a board -- we  
10      are talking about the process part of Unocal now, not  
11      the substantive part, which I will get to if I have a  
12      moment.   But on the process part of Unocal, a board  
13      has to make a reasonable investigation both in terms  
14      of what the bidder is offering -- they don't have to  
15      negotiate.   The investment bankers can speak between  
16      themselves.   A letter can be written.   A telephone  
17      call can be made, "What is your offer?"

18                   Mr. Davis tried on a number of  
19      occasions to indicate that his offer was negotiable.  
20      They never spoke to him.   They never spoke to the  
21      investment bankers.

22                   JUSTICE MOORE:   Well, isn't -- excuse  
23      me.   Isn't the case law of Delaware directly opposite  
24      to your position, and two cases that you didn't even

1 cite in your brief, Pogostin vs. Rice and Bershad vs.  
2 Curtiss-Wright? Both of those cases dealt with  
3 refusal to negotiate.

4 MR. CANTOR: We are not saying there  
5 is a duty to negotiate.

6 JUSTICE MOORE: Or a duty to even  
7 consider a bid.

8 MR. CANTOR: We are saying, Your  
9 Honor, there is a duty to inquire. I don't  
10 understand --

11 JUSTICE MOORE: Well, what do you say  
12 about Pogostin and Bershad?

13 MR. CANTOR: I don't believe, Your  
14 Honor, that either case deals with a duty to inquire,  
15 with a duty to become informed. Even in Macmillan,  
16 Your Honor, which Your Honor is much more familiar  
17 with than I, with Macmillan II, there were at least  
18 contacts.

19 And in Macmillan, by the way, the  
20 final price that Mr. Maxwell put on the table, which  
21 got him an injunction, was 20 cents a share higher,  
22 if I remember correctly, than the KKR offer.

23 JUSTICE MOORE: Well, what did we say  
24 in Pogostin and Bershad about that? Weren't those

1 cases almost exactly like what you describe?

2 MR. CANTOR: I just don't believe so,  
3 Your Honor. I don't believe that they dealt with the  
4 duty of inquiry. And I think it is absolutely clear  
5 under Delaware law -- I don't see how a director can  
6 fulfill his duty of care --

7 JUSTICE HORSEY: Excuse me.

8 MR. CANTOR: (Continuing) -- without  
9 making inquiry.

10 JUSTICE HORSEY: Mr. Cantor, you are  
11 down to about two minutes, I think. I think Justice  
12 Holland had a question.

13 JUSTICE HOLLAND: That's all right.

14 MR. CANTOR: Well, let me say one or  
15 two words then on Warner's status here, and then I  
16 will save my two minutes for reply.

17 Warner argues essentially that they  
18 are an innocent third party in this transaction.  
19 Warner's preferred transaction, the preferred  
20 transaction, was one that would have submitted the  
21 deal to a shareholder vote. When that became  
22 unavailable, they engineered and directed the  
23 transaction, insisted upon the transaction that we  
24 allege is a breach of the Time directors' fiduciary

1 duties.

2 JUSTICE HOLLAND: Well, but doesn't  
3 Time and Warner argue somewhat strenuously that Time  
4 wanted to pay cash all along, and it was only because  
5 Mr. Ross of Warner wanted to participate in the  
6 equity that they moved on to the stock swap?

7 MR. CANTOR: They argued that, Your  
8 Honor. But if that assertion is true, they lied  
9 under oath to the Congress of the United States, to  
10 the Senate of the United States and in a letter to  
11 the President of the United States.

12 JUSTICE HOLLAND: Well, they were  
13 trying in that, as I understand it, to argue that the  
14 arrangement they had made was a good one, because  
15 they would not incur a lot of debt.

16 MR. CANTOR: Right.

17 JUSTICE HOLLAND: And preferable to  
18 other takeovers that we had seen around the country.

19 MR. CANTOR: That's exactly right,  
20 Your Honor.

21 JUSTICE HOLLAND: But did they ever  
22 say to anyone that an acquisition was not the first  
23 choice by cash?

24 MR. CANTOR: I can't tell you that

1       there was a statement where they said that. I would  
2       read their statement to Congress and to the Senate  
3       and to the President at least implicitly as saying --  
4       and also to the New York Stock Exchange in a letter  
5       written by Mr. Lipton and Mr. Butler three days  
6       before June 16. They were still heralding the  
7       nonleveraged transaction as the preferable  
8       transaction.

9                       JUSTICE HOLLAND: Well, if we look at  
10       the Time minutes of June 15 --

11                      JUSTICE HORSEY: You are down to --

12                      JUSTICE HOLLAND: (Continuing) --  
13       there is a notation in the minutes on Page 33 where  
14       Mr. Hill is saying he preferred the rearrangement  
15       because it was consistent with their original resolve  
16       to go forward.

17                      MR. CANTOR: Your Honor, I would say  
18       with no disrespect to anyone that if you are  
19       represented by Cravath, Swaine & Moore, Skadden,  
20       Arps, Wasserstein Perella and Shearson, you will  
21       probably create a good paper record. I don't think  
22       that makes it so.

23                      JUSTICE HOLLAND: Well, before you  
24       sit down, you talk about creating a paper record.



1 And to the extent these minutes came after the  
2 Paramount offer, if you go back to the July '88 Time  
3 minutes, when they are anticipating the risks, one of  
4 the risks they anticipate is a hostile offer.

5 MR. CANTOR: Right.

6 JUSTICE HOLLAND: And when they talk  
7 about the contingency plans -- this is a year before  
8 Paramount appeared -- one of the contingency plans is  
9 possibly a white knight, but on the contingency plan  
10 they list a purchase transaction.

11 So I think the point Justice Horsey  
12 was trying to get you to respond to is, no matter  
13 what they did after Paramount appeared, you have to  
14 read it in the context of everything they did ahead  
15 of time.

16 MR. CANTOR: I don't -- I am not  
17 disagreeing with that, Your Honor. But what I am  
18 saying, just to summarize two points, and then I will  
19 sit down --

20 JUSTICE HORSEY: Yes, you will have  
21 to sit down.

22 MR. CANTOR: Okay. Is, Your Honor,  
23 number one, a long-range plan is fine if it is going  
24 to yield benefits for the shareholders that over the

1 long term are greater than what is being offered  
2 today. I go back to my example if the long-range  
3 plan were going to yield a hundred dollars. Well, on  
4 a present value basis it is going to yield a hundred  
5 dollars.

6 Number two, I would just ask how a  
7 company can have a long-range plan that depends  
8 solely on Mr. Nicholas being its captain.

9 JUSTICE MOORE: Thank you, sir.

10 MR. CANTOR: Thank you, Your Honor.

11 JUSTICE HORSEY: Thank you,  
12 Mr. Cantor. You have 10 minutes for rebuttal.

13 Mr. Savett. Mr. Savett, you  
14 represent the shareholder class, class plaintiffs.

15 MR. SAVETT: Yes, yes, Your Honor.  
16 If it please the Court, I am Stuart Savett, one of  
17 the co-lead counsel --

18 JUSTICE HORSEY: Excuse me. Savett.

19 MR. SAVETT: (Continuing) -- for the  
20 shareholder plaintiffs. I have written on two pads.  
21 One I call the Revlon pad, the other I call the  
22 Unocal pad. Was Time involved in a change of control  
23 transaction? We believe yes.

24 JUSTICE HORSEY: Yet you only wrote

1 two pages of a 50-page brief on that issue; is that  
2 right?

3 MR. SAVETT: Because it is so clear,  
4 Your Honor, that it was, and we wrote much more in  
5 the Chancery Court.

6 JUSTICE HORSEY: You didn't even put  
7 that in your summary of argument, your Revlon  
8 argument. You didn't even put it in your summary of  
9 argument. I mean, that suggests to me that it is a  
10 subordinate argument.

11 MR. SAVETT: Your Honor, no matter  
12 which it is -- that is, Unocal or Revlon -- we  
13 believe that they are arguments that are exceedingly  
14 valid.

15 Your Honor, on March 3, March 4, due  
16 to the exchange ratios, the Time board and the world  
17 knew that the market would perceive at the very least  
18 that the Time shares were for sale at a discount, and  
19 perhaps Time itself was for sale.

20 JUSTICE HOLLAND: Now, the Chancellor  
21 found to the contrary.

22 MR. SAVETT: That's correct.

23 JUSTICE HOLLAND: And so given our  
24 standard of review, where did he go wrong?

1 MR. SAVETT: Well, he found to the  
2 contrary in two very short paragraphs, Your Honor.  
3 He said that Revlon could not apply in this instance  
4 because there was no change in control, and there was  
5 no change in control because the Time shareholders  
6 before the proposed merger were unaffiliated and  
7 after the proposed merger were unaffiliated. He held  
8 very specifically that so long as you do not have a  
9 control block, you can never in a share-for-share  
10 merger have a change in control transaction.

11 We think that holding is almost  
12 ludicrous.

13 JUSTICE HORSEY: He also said  
14 something else, didn't he? Didn't he speak of the  
15 division of the Warner holdings and of the spread of  
16 the Warner holdings and that he couldn't find any  
17 perceived group of Warner stock that would give the  
18 62 percent a control?

19 MR. SAVETT: That's exactly right,  
20 exactly right. He held that unless you have a  
21 control block, you can never have a change in control  
22 transaction.

23 Your Honor, 62 percent --

24 JUSTICE MOORE: How was it to change

1 control? The board remained equally divided, so that  
2 the shareholders did not lose control in the sense  
3 that a majority of the board became -- came to power  
4 from the Warner side. So how did they lose control?

5 MR. SAVETT: Mr. Justice Moore, the  
6 easy answer is, of course, the 62-38 percent. You  
7 continue down the line with that.

8 JUSTICE HOLLAND: Well, before we  
9 leave the 62-38, there is a lot of argument in the  
10 brief that some people own stock in both companies  
11 and, therefore, the 62 is not really a correct  
12 figure. Did anyone ever quantify the percentage of  
13 ownership of that 62 percent that was really dual  
14 ownership?

15 MR. SAVETT: I don't believe so, Your  
16 Honor. I have seen figures thrown around in the  
17 press, but I don't think there is anything really in  
18 the record other than citations to some press  
19 analysis.

20 JUSTICE HOLLAND: Well, do you think  
21 that is a relevant factor?

22 MR. SAVETT: No, I do not, Your  
23 Honor.

24 JUSTICE HORSEY: It doesn't give you

1 a heavy burden?

2 MR. SAVETT: No, I really don't think  
3 so. But let's take March 3 and let's see what we  
4 really have here. In the record there are statements  
5 that a premium was being paid to Warner of 12  
6 percent. That is an absolutely really wrong  
7 analysis, because what was happening here is that the  
8 Warner people were acquiring Time shares at a  
9 discount of between 20.8 percent and 26.9 percent.  
10 It is a simple mathematical calculation.

11 JUSTICE HORSEY: But wasn't the whole  
12 structure of the transaction to ensure that Time  
13 would remain in command of certain functions of the  
14 combined company and that Warner would obtain command  
15 of certain other functions of the combined company  
16 and that Time would be in control of the -- through  
17 the control of, was it called the entertainment  
18 committee, that Time would control that; therefore,  
19 its journalistic integrity would survive and not be  
20 threatened, but Warner would assume control of the  
21 entertainment phase of the business?

22 . Doesn't the whole transaction show a  
23 fairly careful division of responsibility, ending  
24 with both sides, in effect, having equal

1 participation but in different phases of the  
2 business?

3 MR. SAVETT: Well, Your Honor, I  
4 think that comes down to shareholder versus director  
5 interest. What are the shareholder interests? What  
6 are the rights of the shareholders?

7 What Your Honor just said, the only  
8 word that jumps to mind is entrenchment, of which I  
9 am not about to argue in a Revlon mode. You are  
10 saying here they entrenched themselves for at least  
11 10 years. They made sure they had a succession. And  
12 if you want to --

13 JUSTICE HORSEY: So you are saying  
14 that because Time wanted to continue to see that Time  
15 Magazine and its journalistic functions continued in  
16 command of the combined company, that that's  
17 entrenchment?

18 MR. SAVETT: No. The entrenchment  
19 was Munro and Nicholas, Your Honor.

20 JUSTICE HORSEY: They happened to be  
21 the heads at that time.

22 MR. SAVETT: Well, under the  
23 agreement they are going to be the heads at that time  
24 for several more years to come.

1 JUSTICE MOORE: Well, isn't it  
2 incumbent upon responsible directors to try to  
3 achieve continuity in management, and particularly  
4 successful management?

5 MR. SAVETT: Absolutely, Your Honor,  
6 but there --

7 JUSTICE MOORE: So what is wrong with  
8 trying to do that?

9 MR. SAVETT: There was a question  
10 whether there was successful management, Your Honor.  
11 Time in its return on equity was, for example, in the  
12 cable business very, very low. The record is replete  
13 that Time was undervalued, absolutely replete. You  
14 have a stock selling at \$99, a hundred dollars, and  
15 we are now told that stock is worth \$250 or even  
16 more.

17 JUSTICE MOORE: All right.

18 JUSTICE HORSEY: And that's why  
19 Warner is entitled to a premium, isn't it?

20 MR. SAVETT: Warner is entitled to a  
21 premium of getting shares in a company that is so  
22 undervalued? No. Warner should be happy. In fact,  
23 Warner should pay more for it.

24 But if I can just get back, because



1     it was never mentioned, I think, in the briefs and  
2     the argument before, and just focusing on this  
3     discount --

4                   JUSTICE MOORE: Well, let me just,  
5     before you leave the entrenchment problem, weren't a  
6     majority -- wasn't there a majority of the Time board  
7     that consisted of outside directors?

8                   MR. SAVETT: They were as passive as  
9     in Macmillan. They were outside directors. There is  
10    no question about it. What did they do? They  
11    relied, as in Macmillan, completely on management  
12    advisers, both legal and financial.

13                   And what questions did they ask? Did  
14    they ask, as Mr. Cantor pointed out, what is the  
15    discount rate, what --

16                   JUSTICE HORSEY: Was Mr. Finkelstein  
17    a passive outside director?

18                   MR. SAVETT: I believe they all were.  
19    And, in fact --

20                   JUSTICE HORSEY: Well, wait a minute.  
21    Wasn't Mr. Finkelstein one of the leaders in the  
22    resumption of the -- Mr. Finkelstein and the other  
23    outside director --

24                   MR. SAVETT: No, no --

1 JUSTICE HORSEY: Wait a minute.

2 Weren't they the leaders in getting the Time-Warner  
3 deal back on track?

4 MR. SAVETT: No. I believe it was  
5 Mr. Dingman, Your Honor.

6 JUSTICE HORSEY: Dingman.

7 MR. SAVETT: Dingman.

8 JUSTICE HORSEY: But Mr. Finkelstein  
9 played a leading role, didn't he?

10 MR. SAVETT: No, I don't think so,  
11 Your Honor. And, in fact, there was, as Your Honors  
12 will recall, on March 3 a committee appointed of  
13 outside directors. The committee never functioned.  
14 It --

15 JUSTICE HORSEY: Well, I am speaking  
16 of pre-March 4 activity, and, oh, up to March 4.

17 MR. SAVETT: Up to March 4 activity,  
18 they just rubber-stamped whatever Wasserstein told  
19 them. I think the record is very clear. There were  
20 very few questions asked.

21 JUSTICE HORSEY: Wasserstein didn't  
22 come into the picture until -- he wasn't in the  
23 picture back in '84, '85, '86, '87.

24 MR. SAVETT: No. He was in the

1 picture, as far as we know, sometime I would say  
2 around 1987, beginning of 1988. That's when  
3 Wasserstein came into the picture.

4 JUSTICE HORSEY: You are down to two  
5 minutes, sir. Sorry. We cut you down to two  
6 minutes.

7 MR. SAVETT: I will now switch to my  
8 Unocal pad.

9 Your Honor, whether or not this Court  
10 holds that there was a Revlon mode, Unocal obviously  
11 must apply. And the real question is threat. If  
12 this Court affirms the Chancellor, you will  
13 specifically be overruling Grand Met, Interco and  
14 Polaroid. In those cases--

15 JUSTICE MOORE: Those are all trial  
16 court decisions.

17 MR. SAVETT: That's correct. That's  
18 absolutely correct.

19 JUSTICE HORSEY: And they also  
20 involved -- they involved such things as poison  
21 pills, redemption of poison pills, efforts to enjoin  
22 a spin-off of a subsidiary --

23 MR. SAVETT: Absolutely.

24 JUSTICE HORSEY: (Continuing) --

1 efforts to declare a special dividend. They involved  
2 a lot of different kinds of activity that doesn't  
3 seem to be present in this case.

4 MR. SAVETT: Well, Your Honor --

5 JUSTICE HORSEY: Isn't that right?  
6 Isn't that right?

7 MR. SAVETT: Well, they involved  
8 certain activities. Present in this case are also  
9 poison pills and stock swaps and almost anything else  
10 that one could imagine.

11 What is the threat? Under Unocal is  
12 it a threat to the corporate enterprise which  
13 includes the shareholders or merely to the  
14 shareholders? Your Honors, of course, are right.  
15 There is no Supreme Court case that says that you  
16 only look to the shareholders. But I think that must  
17 be the law. It was the law until last week in the  
18 Chancery Court. The only threat when you have an  
19 all-cash, all-share offer is price. Is it adequate?

20 JUSTICE HOLLAND: Well, you say all  
21 shares, all cash, and you leave out all those other  
22 conditions. Don't those other conditions merit some  
23 scrutiny by the board?

24 MR. SAVETT: We believe those

1 conditions are easily satisfied, Your Honor. The  
2 only problem would probably be the cable, but I think  
3 they can do the cable. If Time Warner could do the  
4 cable, they could do the cable. I don't think there  
5 is any question. And that is the only one. But,  
6 Your Honor, we have to decide here --

7 JUSTICE HORSEY: You will have to end  
8 your argument.

9 MR. SAVETT: Okay. We believe, Your  
10 Honor, that the price was adequate. It falls within  
11 the range of various investment advisers, and, in  
12 fact, the price falls within the range of what  
13 Manufacturers Hanover, Time's own bankers, said.  
14 They said the range of values -- I don't know whether  
15 that is confidential or not. It fell between the  
16 range. I can cite to that in the supplemental  
17 appendix at Page 33.

18 And even if it weren't, the only  
19 threat is to the shareholder value, and the board had  
20 a duty. Their duty was to respond. And the response  
21 was a very, very poor response, and that was to  
22 completely preclude Paramount or any offer.

23 Thank you.

24 JUSTICE HORSEY: And that's a

1       repetition.

2                   MR. SAVETT: I am sorry.

3                   JUSTICE HORSEY: And you are picking  
4 up on the argument of Mr. Cantor.

5                   MR. SAVETT: I am sorry.

6                   JUSTICE HORSEY: Thank you, sir.

7                   Mr. Klein. You wish 10 minutes'  
8 opening; correct?

9                   MR. KLEIN: Yes, Your Honor. We will  
10 try to hold ourselves to it.

11                   JUSTICE HORSEY: Thank you.

12                   MR. KLEIN: Perhaps I might, though,  
13 best spend my time addressing some of the questions  
14 the Court has posed thus far and perhaps have not  
15 been answered as completely as one might.

16                   May I start, for example, with  
17 Justice Holland's questions with respect to the  
18 conditions. That is a way of crystallizing in our  
19 mind what it is that was asked earlier by Justice  
20 Moore with respect to what must a company do, must it  
21 come to a halt. These relate.

22                   We have directors who undoubtedly  
23 have an obligation to formulate long-range plans. We  
24 have directors who are obligated to formulate

1 long-range plans not for their own sake but for the  
2 benefit of the shareholders. And when an offer is  
3 made to those directors that is in juxtaposition to  
4 the long-term plans, one does not look very far to  
5 see whether duty of inquiry, or as one looks to  
6 Unocal itself at Page 955, where this Court, reciting  
7 Cheff v. Mathes, said, "However, they satisfy" -- the  
8 directors -- "that burden 'by showing good faith and  
9 reasonable investigation.'"

10 When I was before two of the three  
11 members of this panel a year ago in the Macmillan  
12 case, I remember quite clearly, Justice Horsey, your  
13 inquiry. Why didn't they ask? How could they hunker  
14 down? Why didn't they ask about these conditions?

15 The conditions that Paramount put  
16 forth, as well as the problems that Time had with the  
17 Paramount offer, if one believes their public  
18 pronouncements --

19 JUSTICE HORSEY: But in that case you  
20 had a case of the management restructuring --  
21 management design and restructuring, in which  
22 management would end up with, so to speak, the crown  
23 jewels or largely control of them.

24 JUSTICE MOORE: Well, would end up

1       owning the principal assets of the company.

2                   JUSTICE HORSEY:   Yes.   And that is  
3       not this case, is it?

4                   MR. KLEIN:   I yield to no one in my  
5       dislike of what it is that the directors in Macmillan  
6       did there or to no one for this Court's opinion  
7       straightening out what it is that the directors of  
8       various corporations are entitled to do.   But the  
9       distinctions between those cases as to the avarice of  
10      management, they are not the point to which one is  
11      asked to address oneself right now.

12                   The question is, what is it that  
13      perfectly knowledgeable, mature, sophisticated,  
14      substantial directors concerned with their  
15      shareholders should do, must, indeed, do under the  
16      law of this court when they receive an offer.

17                   JUSTICE HORSEY:   Don't you have to  
18      start with what they already knew and whether they  
19      were aware of this company that was interested in  
20      them, Paramount?   And it wasn't a stranger to Time,  
21      was it?

22                   MR. KLEIN:   Well, there is a  
23      difference, Justice Horsey, between whether they wish  
24      to acquire Paramount at a price as yet unascertained



1 by them and, indeed, at what price they wish to  
2 acquire Warner. The first price translated into \$50  
3 a share when they were exchanging shares. The second  
4 one was \$70 a share.

5 There must be some point at which the  
6 commitment to a particular mate in a corporate sense  
7 is overpriced, and it must be in a context as  
8 compared to what. In this instance we are talking  
9 not about the abstract question whether Paramount or  
10 Warner are the best parties with which a stock-for-  
11 stock merger should take place -- this board decided  
12 not to do a stock-for-stock merger in the end -- nor  
13 necessarily only the question of what Time should buy  
14 if Time would only be a seller but what Time's  
15 directors should have considered and inquired into  
16 when they were facing the question whether to proceed  
17 with this strategic plan and all of a sudden another  
18 alternative appears to them.

19 JUSTICE HORSEY: And the alternative  
20 is, in effect, a takeover, and another company  
21 determines what our corporate -- what Time's  
22 corporate objectives are going to be in the 21st  
23 century.

24 MR. KLEIN: Well, I assume that

1 Time's objectives are not self-standing. I assume  
2 that Time's objectives are to serve, among other  
3 things, and high among them, the interests of the  
4 shareholders. I assume that the driving force  
5 between all of these Court's decisions pre-Unocal but  
6 particularly post-Unocal is how does one measure the  
7 fidelity in process and substance of the directors to  
8 the best interests of their shareholders.

9 JUSTICE MOORE: Well, what did we say  
10 in Pogostin and Bershad, which again was not  
11 mentioned in the briefs?

12 MR. KLEIN: Well, the reason it  
13 wasn't mentioned in the briefs, Your Honor, are  
14 twofold. First, because at least counsel  
15 representing the Literary Partner plaintiffs and I  
16 believe the others regard this Court as having made a  
17 major turn in its analysis in the Unocal case.

18 But looking at those cases  
19 themselves, Pogostin was a demand case. The issues  
20 were quite different.

21 JUSTICE MOORE: Well, Pogostin was  
22 cited by us, as was Bershad, and in the Macmillan  
23 case specifically referred to with regard to the  
24 duties to negotiate.

1 MR. KLEIN: Yes, sir.

2 JUSTICE MOORE: And the Chancellor  
3 cited that part of the Macmillan opinion in his  
4 opinion. Now, why do you ignore those cases?

5 MR. KLEIN: We don't ignore those  
6 cases, Your Honor. Pogostin is a case in which we  
7 are dealing with a shareholder demand, a very  
8 different posture.

9 JUSTICE MOORE: We didn't treat it  
10 that way when we cited it in Macmillan?

11 MR. KLEIN: Well, if we are talking  
12 about Footnote 35 in Macmillan. If we are talking  
13 there about the various criteria to which the Court  
14 directed parties and said a variety of conditions and  
15 circumstances may be taken into account by directors  
16 in their evaluation of how to respond to an offer,  
17 that is an undebatable proposition. It depends on  
18 the circumstances.

19 What are the circumstances? Are they  
20 the circumstances the directors see with their eyes  
21 closed or are they the circumstances that the  
22 directors ascertain, fulfilling duties that go back  
23 to Pogostin and Cheff v. Mathes and carry forward in  
24 Unocal, to make a reasonable inquiry into what it is

1       that the directors have as an alternate opportunity?

2       If only one proof, the Warner transaction.

3               JUSTICE HORSEY: And isn't it also  
4       fairly likely that your clients are particular  
5       shareholders? Correct?

6               MR. KLEIN: My clients are  
7       substantial shareholders.

8               JUSTICE HORSEY: That's right.

9               MR. KLEIN: In this and other  
10      Delaware corporations.

11              JUSTICE HORSEY: That's right. And  
12      your clients' objectives in holding -- in buying and  
13      holding Time may be quite different than the board's  
14      considered judgment about what the long-term benefits  
15      and future of Time is with Warner; isn't that true?

16              MR. KLEIN: There is no question. We  
17      wouldn't be here in this lawsuit if we agreed with  
18      their decision.

19              JUSTICE HORSEY: That's right.

20              MR. KLEIN: At the core of that, at  
21      the core of that, however, is what is it that  
22      directors are there to do. Are they there to decide  
23      and preclude the shareholders from any opportunity to  
24      have them pursue other alternatives?

1                   This is not yet a question whether  
2 Warner and Time was up for auction. This is a  
3 question, in fact, whether the directors of this  
4 corporation did not prematurely, irrevocably, without  
5 following any of the procedural standards that this  
6 Court has set down, adhere to a course of conduct  
7 that this Court would have rejected, I believe, in  
8 Unocal.

9                   JUSTICE MOORE: They have a long-  
10 range -- they have a long-range strategic plan.  
11 Would you agree with that?

12                  MR. KLEIN: I would be shocked if  
13 there was any public corporation that did not.

14                  JUSTICE MOORE: Well, that included a  
15 long-standing series of conferences, communications,  
16 negotiations and the like with Warner; isn't that  
17 correct?

18                  MR. KLEIN: All negotiations -- yes,  
19 Your Honor. But all of the negotiations were  
20 conducted by management with advisers that it hired  
21 and it supervised and who were from February all the  
22 way through the final board meeting rejecting out of  
23 hand any alternatives, incentivized by \$5 million  
24 bonuses to the Warner transaction. Is that the kind

1 of dispassionate, disinterested, independent advice?

2 In Revlon, Your Honors, you noted  
3 affirmatively what the Court had held in the Hanson  
4 Trust case, and that is when management is out there  
5 negotiating for the shareholders, the independent  
6 directors have an obligation to exercise oversight to  
7 assure that management's interests are not  
8 transcendent vis-a-vis the shareholders' interests.

9 JUSTICE HORSEY: You aren't saying  
10 that management wasn't operating, wasn't going -- are  
11 you saying that management was going out without the  
12 authority of the board of directors and without their  
13 explicit authority, and particularly without the  
14 authority of the outside directors?

15 MR. KLEIN: It is absolutely clear on  
16 this record that the exchange ratio put forth, which  
17 is the key question here, value, was put forth by  
18 management without any specific direction or  
19 authorization of the board of directors. There is no  
20 question about that whatsoever. There --

21 JUSTICE HORSEY: And what about the  
22 broad -- beyond that? Wasn't management operating  
23 within parameters offered by the board, set by the  
24 board, rather?

1                   MR. KLEIN: Yes, they were. Yes,  
2 they were. And when the board -- and when the  
3 management came back with a transaction that had  
4 several elements in it, one of which was their  
5 continued unsatisfactory tender and another one was a  
6 share exchange ratio that was thrown on the table by  
7 Mr. Nicholas and was described by Mr. Rohatyn as a  
8 hell of a deal, that was more than Warner ever  
9 thought it could get, the question is this: Under  
10 those circumstances is it really permissible for  
11 directors to proceed without any independent,  
12 untainted, free advice with respect to the  
13 comparative values. And even if so, then what  
14 happens when, as it happened here, Paramount came and  
15 offered an alternative, a dollar amount, and they  
16 presumptively, angrily, hostilely, in ad hominum and  
17 personal terms reacted through Mr. Munro and never  
18 corrected him?

19                   JUSTICE HORSEY: Well, the offer came  
20 a little late, didn't it?

21                   MR. KLEIN: I don't think it came  
22 late.

23                   JUSTICE HORSEY: It didn't?

24                   MR. KLEIN: No.

1 JUSTICE HORSEY: Wasn't it carefully  
2 timed to come after a certain time, after the  
3 shareholders --

4 MR. KLEIN: I wasn't responsible for  
5 Paramount's bid, but the only thing that has come too  
6 late is our day in this court. I hope that we are  
7 able to put the directors back to the table with  
8 independent advisers to pursue all alternatives,  
9 including alternatives that are better for the  
10 shareholders.

11 JUSTICE HORSEY: Speaking of -- you  
12 are downplaying corporations. You say all  
13 corporations have long-term strategic plans. Wasn't  
14 the problem of Pillsbury it really didn't have -- the  
15 Court found it didn't have any well thought-out,  
16 consistent plan? It was just sort of reacting to --

17 MR. KLEIN: I thought the holding in  
18 Pillsbury --

19 JUSTICE HORSEY: I am not speaking  
20 about the holding. I am talking about what was the  
21 status of the board's considered long-term -- did it  
22 have really a long-term plan?

23 MR. KLEIN: It had a reaction to the  
24 offer put forth before it. I hesitate to believe



1     that the right, proper role for this Court is to  
2     become an evaluator of the directors' business plans  
3     as opposed to the enforcer of procedures and  
4     standards that are reasonably objective that assure  
5     that consideration is given to shareholder values.

6                   JUSTICE MOORE: Well, must we adopt a  
7     rule that says that a bid that comes in really on the  
8     11th hour, after a transaction has been considered  
9     for over two years, and everything must stop, that  
10    the board is then held hostage to any bidder that  
11    walks in?

12                   MR. KLEIN: Well, yes, you must hold  
13    that. And the reason --

14                   JUSTICE MOORE: Must hold that?

15                   MR. KLEIN: Yes, and --

16                   JUSTICE MOORE: Excuse me. Excuse  
17    me. You mean we must hold that a board is hostage to  
18    any person who walks in and makes a bid, no matter  
19    what the long-term plans are?

20                   MR. KLEIN: I accepted the  
21    pejorative, Your Honor, but let me explain why I  
22    accepted it even on those terms.

23                   JUSTICE HORSEY: Yes, and you will  
24    have to do it very shortly, because your time is up.

1                   MR. KLEIN: I will try very, very  
2                   shortly. Because hostage here meant to do nothing  
3                   more than to stop, look and listen and reevaluate,  
4                   which is exactly what they did here.

5                   Has Time been harmed by the two weeks  
6                   that it spent, less than two weeks -- excuse me --  
7                   the 10 days that it spent examining the alternatives  
8                   as they did and when it excluded a whole range of  
9                   other alternatives? Is there harm in having the  
10                  fiduciary check his fiduciary judgment to see  
11                  whether, in fact, it benefits or punishes his  
12                  shareholders because he may be emotionally or  
13                  otherwise committed to a preexisting set of theories  
14                  that preclude alternatives that are then placed in  
15                  front of him? I don't think that's a bad rule.

16                  We are dealing here with 20 or 30  
17                  billion dollars. We are dealing here with 30,000  
18                  shareholders. Is haste the issue?

19                  JUSTICE HORSEY: Thank you.

20                  MR. KLEIN: Is lateness the issue? I  
21                  think not and I pray not, Your Honors.

22                  JUSTICE HORSEY: Thank you, sir.

23                  Thank you, Mr. Klein.

24                  The Court will hear from Mr. Joffe.

1       You have 30 minutes.

2                   MR. JOFFE: Good morning, Your  
3 Honors.

4                   JUSTICE HORSEY: 30 minutes.

5                   MR. JOFFE: Good morning, Your  
6 Honors. May it please the Court, in all its briefs  
7 below, in its argument below and in its opening brief  
8 Paramount said only the short term could be looked at  
9 by the board. Finally, in their reply papers in this  
10 Court and in their oral argument they make a grudging  
11 concession to the long term. But they say that if  
12 the directors do not arrive at a specific present  
13 dollar value of the long term to show that the  
14 shareholders will receive more value than the present  
15 offer provides, the directors cannot opt for the long  
16 term even if the present offer is inadequate.

17                   JUSTICE MOORE: Well, let me ask you  
18 this, Mr. Joffe: Your company established an outside  
19 committee of directors. Why didn't they activate  
20 that committee and use them?

21                   MR. JOFFE: Mr. Finkelstein  
22 testified, Your Honor, that that committee's purpose  
23 was to meet in between board meetings if the need  
24 arose in order to implement the March 3 transaction.

1 As it turned out, there was no need until June 6 to  
2 meet, and once the meeting occurred on June -- the  
3 offer occurred on June 6, the board met almost  
4 continually as a full board. There was no need for a  
5 special board to meet in the interim.

6 There was no conflict between  
7 management and the board on this matter. This is not  
8 a management-sponsored transaction. Management  
9 doesn't gain control of the company. There was no  
10 need to have an independent board of directors. The  
11 directors --

12 JUSTICE MOORE: No need to have an  
13 independent board of directors?

14 MR. JOFFE: Independent committee of  
15 directors, Your Honor. I misspoke.

16 The directors, the outside directors  
17 did meet with counsel and investment advisers without  
18 the insiders present during the course of various  
19 meetings and were able to ask whatever questions they  
20 wanted, but they had no need for separate advice  
21 because there was no conflict. The Chancellor looked  
22 at this issue and gave his views on it in a footnote  
23 in his opinion.

24 Paramount's new-found requirement of

1 a specific dollar determination of intrinsic value  
2 would take --

3 JUSTICE MOORE: Excuse me. Let me  
4 ask you one other question.

5 MR. JOFFE: Yes.

6 JUSTICE MOORE: You are talking about  
7 the problem of no entrenchment, that there was no  
8 attempt here to do anything that would entrench  
9 management, if I understand you correctly, so there  
10 was no conflict between the board and the management.  
11 But can the payment of these dry-up fees designed to  
12 eliminate the possibility of a superior bid for the  
13 company be reconciled with Time's duty to its  
14 shareholders?

15 MR. JOFFE: I think, Your Honor, the  
16 payment of those fees can be. First of all, they had  
17 an important transaction, the March 3 transaction,  
18 that they were trying to implement. They felt that  
19 transaction was essential to the well-being of the  
20 company. They obviously didn't want to give their  
21 confidential information to a lot of bankers and then  
22 have those bankers turn around and help someone who  
23 was going to try and break up the transaction.

24 We saw the kind of leak just last

1 week that can occur from a bank in an article in the  
2 press.

3 In any event, Paramount has never  
4 said that they had any trouble finding money. The  
5 Chancellor found that at best this was a vain effort,  
6 that the global economy was awash with money, I think  
7 was the phrase used.

8 JUSTICE MOORE: Why were you also  
9 going around and paying the expenses of other lawyers  
10 in local communities to oppose a transfer of your  
11 cable rights?

12 MR. JOFFE: Well, I think out of the  
13 hundreds of ATC franchises, they are talking about  
14 one incident that occurred in Casselberry, Florida.

15 JUSTICE MOORE: No. But didn't your  
16 client make that offer to all?

17 MR. JOFFE: I don't believe so, Your  
18 Honor. At least as far as I know, only -- there was  
19 only one indemnification agreement that was ever  
20 reached. Quite frankly, Your Honor, when I learned  
21 about it, I asked the client to stop it, not because  
22 I thought there was anything the matter with it, but  
23 I was concerned with how it would look.

24 ATC is 18 percent owned by the

1 public. They were concerned in part that if they  
2 lost these franchises, their public shareholders  
3 would have a claim against them. In any event, it is  
4 up to the courts in those communities to decide who  
5 is right, and I don't think anything ever came of  
6 these arrangements.

7 JUSTICE MOORE: Well, one final  
8 question I have about this so-called balance of  
9 fairness. What justification is there for failing to  
10 have any sort of fiduciary out by your client? That  
11 is very unusual.

12 MR. JOFFE: In the recent tender  
13 offer?

14 JUSTICE MOORE: Yes.

15 MR. JOFFE: It is not unusual.  
16 Paramount does not have a fiduciary out in its offer  
17 for Time, Your Honor. I don't know, in fact, of any  
18 tender offer --

19 JUSTICE MOORE: Time's fiduciary out  
20 is what I am speaking of.

21 MR. JOFFE: Time does not have a  
22 fiduciary out in its offer for Warner. I know  
23 Paramount has no fiduciary out in its offer for Time.  
24 In fact, I know of no case where the offeror in a

1 tender offer has a fiduciary out. But let me be more  
2 direct.

3 Warner would not agree to a  
4 transaction where there was a fiduciary out, because  
5 they were concerned that if we were going to make a  
6 bid for them under this revised arrangement, they  
7 would have put themselves up for sale, they would be  
8 hanging out there in the wind, and if we then decided  
9 to walk away and do a different deal, they would be  
10 in real trouble. So they didn't agree.

11 A third reason, Your Honor, we would  
12 have done the transaction right then and there on  
13 June 16, if we could have. Federal law requires that  
14 the offer be open for 20 business days. If we had  
15 done the transaction right then and there on the  
16 16th, obviously we would not have been free on the  
17 17th to be bought by somebody without Warner as part  
18 of us. All this arrangement did was essentially make  
19 it a done deal.

20 JUSTICE HORSEY: Was there any  
21 discussion of this fiduciary out clause in the  
22 meetings of the board of directors of Time, and did  
23 the outside directors actively participate?

24 MR. JOFFE: Yes. I think Mr. Opel



1       raised it, either Mr. Opel or Mr. Dingman. I think  
2       it was Mr. Opel raised the question on either the  
3       15th or the 16th -- I think the 15th, but perhaps the  
4       16th -- about it. And it is in the minutes, Your  
5       Honor.

6                   JUSTICE HORSEY: I think you say in  
7       several places in your brief that the outside  
8       directors met several times without any management  
9       directors present to consider the Paramount offer.  
10      Can you substantiate that and be more particular,  
11      giving the dates of those meetings --

12                   MR. JOFFE: Yes.

13                   JUSTICE HORSEY: (Continuing) -- and  
14      where those meetings are shown in the record?

15                   MR. JOFFE: They occurred during the  
16      board meetings. There were periods during the board  
17      meetings on the 8th, the 15th and 16th, which are  
18      reflected in the minutes, when management left and  
19      the outside directors met with counsel and investment  
20      bankers, and then the investment bankers were also  
21      absent during some of these discussions --

22                   JUSTICE HORSEY: Are you speaking of  
23      June?

24                   MR. JOFFE: Yes, Your Honor.

1 JUSTICE HORSEY: The 8th and the 15th  
2 and 16th.

3 MR. JOFFE: And 16th. I am  
4 absolutely certain about the 15th and 16th. I am not  
5 absolutely certain about the 8th, but I believe that  
6 to be the case.

7 JUSTICE HOLLAND: So you are  
8 speaking, for example, on the June 15 minutes, at  
9 Page 35 of those minutes, under the redacted, there  
10 is an excerpt that says, "Everyone except the outside  
11 directors and the legal representatives left the  
12 meeting."

13 MR. JOFFE: Right. And legal and  
14 business questions or legal questions were then  
15 raised with counsel.

16 JUSTICE HORSEY: And who did they  
17 discuss -- who did the outside directors discuss --  
18 from whom did they seek advice?

19 MR. JOFFE: Counsel, Cravath, Swaine  
20 & Moore and Skadden, Arps, Your Honor.

21 JUSTICE HORSEY: And any financial  
22 advisers?

23 MR. JOFFE: I believe that the  
24 financial advisers were present during that -- those

1 sessions, or at least some of those sessions as well.

2 JUSTICE HORSEY: And those were whom?

3 MR. JOFFE: Shearson and Wasserstein  
4 Perella, Your Honor.

5 JUSTICE HORSEY: Shearson and  
6 Wasserstein?

7 MR. JOFFE: Yes, Your Honor.

8 JUSTICE HORSEY: So you would say you  
9 think the 8th, but you are certain of the 15th and  
10 the 16th?

11 MR. JOFFE: Yes.

12 JUSTICE HORSEY: What about earlier,  
13 in reaching the decision, the original merger  
14 agreement on March 4? Is there --

15 MR. JOFFE: I am not aware that they  
16 met separately, Your Honor. They may well have. But  
17 there was certainly no conflict between the  
18 directors, the inside and the outside directors.  
19 There was no reason to seek separate advice.

20 JUSTICE HORSEY: And was there any  
21 conflict within the outside directors at that point?

22 MR. JOFFE: As far as I know, Your  
23 Honor, the only conflict was Mr. Temple, who in the  
24 summer of 1988 raised some questions about going into

1 the entertainment business, but he eventually voted  
2 for the transaction.

3 JUSTICE HORSEY: And is it correct  
4 that all outside directors unanimously voted for the  
5 transaction on June 16?

6 MR. JOFFE: Yes, Your Honor.

7 JUSTICE HORSEY: And that included  
8 Mr. Luce and Mr. Temple, who had reservations about  
9 it?

10 MR. JOFFE: Well, Mr. Temple had  
11 resigned by then, Your Honor. There were 12 outside  
12 directors on March 3. They all voted unanimously in  
13 favor of it, except for Mr. Wharton, who was not  
14 present at the meeting but was deposed and said he  
15 was in favor of it. Four of them then had to resign  
16 in order to shrink the two boards, and all eight  
17 outside directors voted in favor of it on June 16.

18 JUSTICE HOLLAND: Well, Mr. Joffe,  
19 you seem to indicate that the arrangement or the  
20 combination of Time and Warner is so compelling that,  
21 you know, it should move forward by the weight of its  
22 own logic, and yet the Time board decided not to let  
23 the stockholders vote. And it seems there are two  
24 competing considerations here: Rejecting the bid by

1 Paramount, which your board said was inadequate, and  
2 what you should do in response.

3 Why wasn't a logical response to  
4 reject the Paramount bid and see if you could just  
5 convince your stockholders of what you thought was  
6 obvious by letting them vote as scheduled?

7 MR. JOFFE: Your Honor, Delaware law  
8 doesn't require that all major decisions be put up to  
9 a shareholder referendum or plebiscite.

10 JUSTICE HOLLAND: No, no. I  
11 understand --

12 MR. JOFFE: And --

13 JUSTICE HOLLAND: (Continuing) --  
14 what the Delaware law says on that, but you were in a  
15 posture after March where, because of the rules of  
16 the New York Stock Exchange, there was a stockholder  
17 vote scheduled, and one of the options available to  
18 Time other than the tender offer for Warner was to go  
19 ahead with the stockholder vote and assume the merger  
20 would get approved.

21 MR. JOFFE: The stockholder vote,  
22 Your Honor, was required under the New York Stock  
23 Exchange rules because of the share dilution. Once  
24 the board found that they had an opportunity to do

1 the revised merger agreement and were concerned as to  
2 whether the original plan would, in fact, under the  
3 conditions that prevailed at that point quickly get  
4 approval, they turned to a way of consummating their  
5 plans through the revised merger agreement. That, of  
6 course, did not require a vote.

7 JUSTICE HOLLAND: But your opponents  
8 argue that Time was apprehensive of the stockholder  
9 vote and in a sense was protecting the stockholders  
10 against themselves.

11 MR. JOFFE: I think, Your Honor, it  
12 was the board's duty to do what they felt was in the  
13 best long-run interests of the shareholders. The  
14 best long-run interests of the shareholders they felt  
15 quite decidedly was to go ahead with the transaction.  
16 This was the best way of achieving that end.

17 JUSTICE HOLLAND: Well, my question  
18 is, I know the board felt that, and you have argued  
19 that. Why couldn't the stockholders understand what  
20 was in their own best interests if the board could  
21 understand it?

22 MR. JOFFE: Well, the problem with  
23 that, Your Honor, is, if that were a general  
24 principle, it would require putting up to shareholder

1 vote many things which Delaware law says are in the  
2 hands of the board and which the board has a  
3 fiduciary duty to do.

4 JUSTICE HOLLAND: No, I am not  
5 suggesting that would change the law. My question  
6 is, why couldn't the stockholders have understood  
7 what the board understood.

8 MR. JOFFE: Well, there were a lot of  
9 conditions in the Paramount offer. It essentially  
10 allowed Paramount to decide at will whether it had  
11 received enough cable clearances or not. This --  
12 there was a lot of confusion going on in the  
13 marketplace. Every day there was a new round of  
14 stories. The stock price was gyrating wildly up and  
15 down. That is hardly the situation in which to have  
16 an unimpassioned examination of future value and get  
17 a fair vote.

18 It undoubtedly -- I think there was  
19 some feeling among the directors -- they testified to  
20 it -- that if enough time had gone by and they could  
21 have got their story out, they could have gotten a  
22 fair vote and won. But I don't think anyone was  
23 prepared to take that risk.

24 Warner wasn't going to stand still.

1 Warner would go off and do other things. And in that  
2 time period the opportunity would be lost.

3 I really would like to turn to this  
4 question of the inadequacy determination and the  
5 consideration of the alternatives. It was done with  
6 care after advice from nonconflicted investment  
7 bankers. The minutes of June 15 and June 16 are 62  
8 pages long. One cannot read them without seeing the  
9 care with which it was done.

10 I remind the Court that the only  
11 offer on the table at the time of the decision was  
12 Paramount's \$175 range -- \$175 offer. It was not  
13 within anyone's range.

14 JUSTICE HORSEY: But at that point,  
15 at that point in time didn't your investment adviser  
16 have a big self-interest in pushing his own proposal?  
17 I am speaking of Mr. Wasserstein.

18 MR. JOFFE: No, Your Honor. Their  
19 fee agreement was amended. It was finally ratified  
20 on the 16th, but the agreement was reached very early  
21 on to -- they would get paid the same whether the  
22 Time-Warner transaction went through or whether it  
23 didn't.

24 JUSTICE HORSEY: When precisely was



1 his agreement changed to eliminate this contingency?

2 MR. JOFFE: Immediately after the  
3 June 8 -- the June 6 offer, Your Honor, and was  
4 eventually signed and ratified on the 15th or 16th.

5 JUSTICE HORSEY: So from that point  
6 on you take the position that Mr. Wasserstein was an  
7 objective, dispassionate adviser?

8 MR. JOFFE: He was the -- Shearson  
9 and Wasserstein Perella were the kind of investment  
10 bankers a board could rely on, but they did not rely  
11 solely on that advice. They had their own judgment  
12 and other factors to look on as well.

13 JUSTICE HORSEY: And who else did  
14 they rely on from other firms? Was it Shearson?

15 MR. JOFFE: Those were the only  
16 investment bankers, Your Honor, but they had their  
17 own view of what the company was worth.

18 JUSTICE HORSEY: Well, was Shearson  
19 working independently of Wasserstein?

20 MR. JOFFE: Yes. Well, they each did  
21 their own analysis, Your Honor.

22 JUSTICE MOORE: Well, who was the  
23 lead?

24 MR. JOFFE: I don't know that there

1 was a lead. On the tombstone I think Wasserstein  
2 Perella's name came first, but I think all the work  
3 was done jointly. And if you read the minutes, you  
4 see the presentations were made by both.

5 JUSTICE HORSEY: Well, then what do  
6 you say about the argument that your opponents make  
7 that you made a fundamental error, your advisers, and  
8 they didn't bother to work a discount to present  
9 value?

10 MR. JOFFE: All right. Let me turn  
11 right to that. Mr. Wachtell is going to talk about  
12 that at length, but let me turn to that and then come  
13 back to the inadequacy.

14 If I could, Your Honor, let me first  
15 say, they first determined that the offer was  
16 inadequate. And --

17 JUSTICE HORSEY: And was that  
18 determination made -- that was made by the board at  
19 one meeting?

20 MR. JOFFE: It was -- they considered  
21 it on the 15th and 16th. They also received some  
22 information on the 8th. They had the advice of their  
23 investment bankers. They had their own views as to  
24 what the company was worth.

1                   And, of course, it is confirmed by  
2   the fact that Paramount's own investment bankers said  
3   that Time was worth 219 to 248. Mr. Klein's clients  
4   said that even at well above 200 his client could  
5   make money. The shareholders now say at Page 23 of  
6   their brief that 228 is a win-win price.

7                   JUSTICE HORSEY: But all those --  
8   that information wasn't all available to the  
9   directors on June 15 --

10                  MR. JOFFE: No.

11                  JUSTICE HORSEY: (Continuing) -- and  
12   16th. What you are using is hindsight information to  
13   buttress your decision now.

14                  MR. JOFFE: I am saying that in  
15   addition to the advice of their investment bankers  
16   and their own advice, there is advice that comes from  
17   the other side of the table which shows that those  
18   numbers were reasonable. But let me turn now  
19   specifically to your question about the future value.

20                  Time considered a whole range of  
21   alternatives of what to do, and if I have a minute, I  
22   will get to that. But let's go right to the stock  
23   market prices.

24                  Paramount compares future stock

1 market projections with its above-market tender.  
2 That's an inappropriate comparison. No future  
3 above-market offer is precluded on this record. The  
4 Chancellor found, so found. Mr. Davis testified that  
5 even Paramount had not decided not to make an offer.

6 If one assumes an offer even just 50  
7 percent above market, which is less than Paramount's  
8 offer, those numbers would go up dramatically. In  
9 other words, they compared stock market prices in the  
10 future to an above-market tender offer price now.

11 JUSTICE HORSEY: But you aren't  
12 giving a very -- there must be an easier way to state  
13 that, yes, they did discount it.

14 MR. JOFFE: Your Honor, they did not  
15 look at those -- the Time board did not make their  
16 decision to go ahead with the Time-Warner merger  
17 based on stock market projections. They believed  
18 that Time was worth considerably more than \$250 a  
19 share alone and that Warner would increase that  
20 value. That was the basic gut of their decision.

21 They did look at stock market  
22 projections to see what the effect of loss of pooling  
23 on the transaction would be. They were advised that  
24 the prices would be -- the stock market would value

1       it based on cash flow and here is what the value  
2       ranges might be.

3                   JUSTICE HORSEY:   So they didn't base  
4       it on stock market projections.   Instead they based  
5       it on --

6                   MR. JOFFE:   They based it on the  
7       synergies of the two companies, their expectation  
8       that the two companies would do better than the one  
9       company alone.   Paramount's own investment banker  
10      says that.

11                   JUSTICE HORSEY:   But synergies is  
12      sort of a nebulous term --

13                   MR. JOFFE:   Right.

14                   JUSTICE HORSEY:   (Continuing) -- that  
15      really means almost nothing except that the two  
16      companies are better than one.

17                   MR. JOFFE:   They looked at the  
18      projected cash flows, among other things, of the two  
19      companies.   Warner was a faster growing company than  
20      Time.   It had a higher cash flow per share.   All of  
21      this data was looked on.

22                   Now Paramount comes along and says  
23      take these stock market projections for future years  
24      and compare them with our offer.   That is apples and

1 oranges, I submit, Your Honor, because they are  
2 comparing stock market projections with something  
3 which is 50 or 60 percent over stock market.

4 Then they use discount rates of 25  
5 and 30 percent to work those numbers back. Where do  
6 they get those numbers? They get those numbers from  
7 Mr. Phillips. But Mr. Rossoff says the discount rate  
8 is too high. Morgan Stanley itself uses a lower  
9 number. Paramount in its offer proposes giving 9  
10 percent to its shareholders. I guess, Your Honor,  
11 they are asking this Court to make a choice between  
12 experts as to what the correct discount value is.

13 But I did do some mathematics of a  
14 sort over the weekend, and if you use a 12 percent  
15 rate, discount rate, which is certainly more  
16 appropriate for the average investor and for me than  
17 whatever rate Mr. Klein's clients are accustomed to,  
18 if you use a 12 percent rate and you add a 50 percent  
19 premium, which is less than Paramount's, you get a  
20 present value of 180 to 279 for 1991 and 259 to 362  
21 for 1993. Those are both -- both those ranges yield  
22 numbers way in excess of 200.

23 JUSTICE HORSEY: Was the board told  
24 that?

1                   MR. JOFFE: No, Your Honor, because  
2                   the board's decision was not dependent on future  
3                   stock market projections. And I would hope this  
4                   Court does not lay down a rule which says that boards  
5                   have to make their decisions only after looking at  
6                   future stock market projections.

7                   JUSTICE HOLLAND: Well, using  
8                   whatever the board wanted to use, how did they  
9                   quantify the term that they were holding out to the  
10                  stockholders in the long run that was going to be  
11                  superior to what Paramount wanted to pay in the short  
12                  run?

13                  MR. JOFFE: Well, I think the best  
14                  way of putting it is this: They were told that a  
15                  strategic buyer would pay more than \$225 a share for  
16                  the company. They also looked at the break-up  
17                  pre-tax valuations of the various segments of the  
18                  company, and that yielded a number over 250. That  
19                  was for Time alone. So they were well aware that  
20                  Paramount's offer was inadequate, whether 175 or 200,  
21                  was inadequate for Time alone.

22                  They then asked themselves will  
23                  Warner make Time more valuable or less valuable.  
24                  Everyone in this courtroom agrees it would make it

1 more valuable.

2 JUSTICE HORSEY: Now, you are  
3 referring to -- you say they then asked themselves --

4 MR. JOFFE: That is reflected in the  
5 minutes on the 15th and 16th, Your Honor, and also  
6 the 8th, but I focus on the 15th and 16th. They  
7 looked -- and in the bankers books. They looked at  
8 the cash flows. Warner was a faster growing company  
9 than Time. Time was a faster growing company than  
10 Paramount. That's why Paramount thought a  
11 combination with Time would be a good idea, but it  
12 could never yield a company that produced as much  
13 earnings as a Time-Warner entity.

14 Another reason why it didn't make any  
15 sense to go off and talk to Paramount: Paramount  
16 couldn't afford to offer as much for a Paramount-Time  
17 combination as a Time-Warner combination could yield  
18 to the Time shareholders.

19 JUSTICE MOORE: Well, when  
20 Mr. Nicholas got this letter from Mr. Snyder of  
21 Paramount talking about how jealous he was, why did  
22 you identify this as a confidential document? It  
23 seems that this is being totally misused.

24 MR. JOFFE: Your Honor, during



1 production we had thousands of documents, 35 boxes of  
2 documents, which had to be produced in a few days.  
3 We had lawyers and paralegals producing the  
4 documents. We made a decision that to get those  
5 documents quickly produced, internal nonpublic  
6 documents would initially be stamped confidential so  
7 they could be gotten into the other sides' hands and  
8 then declassified. That document has long ago been  
9 declassified. It was not a confidential document.  
10 We once --

11 JUSTICE MOORE: We don't have any  
12 indication that it has been declassified. It still  
13 bears a --

14 MR. JOFFE: Well, that was --

15 JUSTICE MOORE: It still bears a  
16 large stamp "confidential."

17 MR. JOFFE: That was the copy that  
18 was used in the record. We didn't go back over the  
19 35 boxes of documents and cross it out. But we did  
20 tell the other side and the Court below which  
21 documents we were still maintaining confidentiality.

22 I think, Your Honor, if I may be so  
23 bold, the better question is, why did Paramount never  
24 produce that document. That document came from our

1 files. It was called for in our document requests,  
2 and they never produced it. They refer to it as  
3 puckish, and maybe they believe that puckish  
4 documents don't have to be produced.

5 JUSTICE MOORE: Do you mean that this  
6 is a document that was covered by your discovery  
7 requests and Paramount did not produce it?

8 MR. JOFFE: Yes, Your Honor.

9 JUSTICE MOORE: I will ask Mr. Cantor  
10 about that.

11 JUSTICE HORSEY: Mr. Joffe, let's go  
12 back to Time's board meeting in July of 1988. I  
13 think you make an argument and state the record  
14 supports that at that meeting Time's board back in  
15 July of '88 considered several alternative  
16 transactions, and I think you referred just  
17 recently -- you said in your argument -- a few  
18 minutes ago you said that Time's board considered a  
19 whole range of options.

20 Can you be more specific, first of  
21 all, as to what options did the Time board -- Time's  
22 board consider back in July, at the 1988 board  
23 meeting, and where is it documented?

24 MR. JOFFE: Right. Well --

1 JUSTICE HORSEY: And specifically, I  
2 am relating to the fact that your argument, I think,  
3 at that time the Time -- it was suggested and thrown  
4 out that Time would be better off buying Warner  
5 rather than working a stock-for-stock exchange.

6 MR. JOFFE: I think Your Honor is  
7 referring to the June 15, 1989 board meeting. In  
8 July of '88 Time considered a whole range of  
9 entertainment companies, including Paramount and  
10 Disney, and settled on Warner.

11 JUSTICE HORSEY: All right.

12 MR. JOFFE: On June 15 they  
13 considered a range of options, which included -- they  
14 were told that they could get more money by running  
15 an auction --

16 JUSTICE HORSEY: So you are talking  
17 about June 15, '89.

18 MR. JOFFE: Yes, Your Honor.

19 JUSTICE HORSEY: All right. Now,  
20 what were those?

21 MR. JOFFE: All right. They  
22 considered the possibility of an auction. They  
23 considered the possibility of acquiring Paramount.  
24 They considered the acquisition of part of or all the

1 businesses of certain other companies, of a financial  
2 restructuring or recap, and a material change in the  
3 present capitalization or dividend policy.

4 The easiest place to find those  
5 references are in the 14D-9. They also appear in the  
6 board minutes for the 15th and 16th. I cite Your  
7 Honor to pages in Paramount's appendix 489 to -90,  
8 1772, 1778, 1781, 1812 to -13, 1820, 1861 and 1864.

9 JUSTICE HORSEY: Well, did those  
10 options include the option to purchase? I wasn't  
11 quite clear whether you said that. Did they include  
12 consideration that Time might be better off by buying  
13 Warner rather than exchange of stock?

14 MR. JOFFE: That Time might be better  
15 off --

16 JUSTICE HORSEY: That it would be  
17 preferable to purchase Warner rather than -- for cash  
18 rather than continuing with their original share  
19 exchange?

20 MR. JOFFE: Yes, that was what they  
21 considered, and that was the decision they came to on  
22 the 16th, Your Honor.

23 JUSTICE HORSEY: And what was the  
24 vote of the outside directors on that?

1                   MR. JOFFE: Unanimous. These outside  
2                   directors include Mr. Opel, the former CEO and  
3                   current head of the executive committee of IBM;  
4                   Mr. Kearns, the head of Xerox; Mr. Finkelstein, the  
5                   head of Macy's; Matina Horner, president of  
6                   Radcliffe; Mr. Dingman, head of the Henley Group.  
7                   These are not careless people, Your Honor. They take  
8                   their duties very seriously. Mr. Perkins, former  
9                   head of Jewel, a director of AT&T.

10                  They are not patsies for management.  
11                  They spent a lot of time concerned with what was best  
12                  for the Time shareholders, and they came out that  
13                  this transaction --

14                  JUSTICE MOORE: I don't mean to  
15                  denigrate the distinguished list of persons that you  
16                  have just named, but that was the very same argument  
17                  made to us in Smith vs. Van Gorkom.

18                  MR. JOFFE: But in Smith vs.  
19                  Van Gorkom, as Your Honor knows, they made the  
20                  decision very quickly, without --

21                  JUSTICE HORSEY: It was a much  
22                  shorter meeting without any notice.

23                  MR. JOFFE: Thank you, Your Honor.

24                  JUSTICE MOORE: We all remember.

1 JUSTICE HORSEY: We can't forget it.

2 Thank you.

3 Mr. Wachtell.

4 MR. WACHTELL: If it please the  
5 Court, I appear for Warner Communications. I  
6 respectfully submit that upon analysis plaintiffs'  
7 claims here come down to a single proposition, and  
8 that's whether they are formulated ostensibly as  
9 Revlon or formulated ostensibly as Unocal. And the  
10 single proposition is that as a matter of law the  
11 Time board was required to look only to short-term  
12 maximization of values to sell the company, to  
13 abandon plans for the future and, therefore, by  
14 definition, was guilty of a breach of fiduciary duty  
15 in seeking to accomplish an acquisition of Warner.  
16 And let me briefly show why I think that is the case.

17 I think Revlon can be disposed of  
18 fairly quickly. Obviously, their Revlon argument  
19 says just that by definition, that the board was  
20 required as a matter of law to consider only  
21 short-term maximization.

22 I think, as Your Honors indicated in  
23 some of your questions of my adversaries, I think  
24 both Paramount and the class plaintiffs have for all

1 practical purposes abandoned the Revlon or come very  
2 close to abandoning it. Literary Partners has not  
3 expressly abandoned it, and they still press it, but  
4 I think the argument is unsupportable for the reasons  
5 that were correctly ruled upon by the Chancellor:  
6 The 62 percent was not control, it was a widely  
7 diverse block, there is no foreclosure of future  
8 control premium, even if that were the law. And as  
9 the Chancellor quite correctly held, that is not the  
10 test under Revlon.

11 So why then do I say that their  
12 Unocal argument comes down to a claim that  
13 essentially as a matter of law the Time board is  
14 required to maximize short-term values? Their Unocal  
15 argument upon analysis is an attempt to transform  
16 this Court's reasonableness test in Unocal, which is  
17 by definition a classic test of flexibility -- it is  
18 the old reasonable man concept -- into --

19 JUSTICE MOORE: Doesn't that import a  
20 concept of objectivity?

21 MR. WACHTELL: I think it does. And  
22 I think it most definitely does. I think that Unocal  
23 fundamentally, putting aside the good-faith aspect,  
24 is, indeed, an objective standard. It is an

1     objective standard of reasonableness. And I think  
2     what they have sought to do is to turn an objective  
3     standard of reasonableness into a rigid, arithmetic  
4     formula.

5                     It is almost something -- I was  
6     reminded when I looked back at the Court's opinion in  
7     Weinberger, where this Court rejected the concept of  
8     a structured and mechanistic procedure for appraisal,  
9     and yet we are being treated here, I submit, to an  
10    attempt to import into the law of Delaware a  
11    structured, mechanistic procedure for applying Unocal  
12    to a board's obligations in a takeover context.

13                    Their reasoning goes like this, and  
14    you have to look at their syllogism to see why they  
15    come to the conclusion that I say they come to. They  
16    say that applying an objective standard, that if you  
17    look at this affidavit of Mr. Phillips of Dillon  
18    Read, they say he took the anticipated 1993 trading  
19    values from the mouths of Time's own investment  
20    bankers, that he discounted them back and, in the  
21    words of Paramount's brief, using supposedly -- and I  
22    quote -- "a very conservative discount rate" --  
23    that's what they say in their brief at Page 26 -- and  
24    they say Mr. Phillips came up with a present value of



1 less than \$200. Ergo, on their theory, it is  
2 incontestable that it could not have been reasonable  
3 for the Time board to pursue a long-term strategy  
4 because of Mr. Phillips' analysis that long-term  
5 strategy results in value less than the value of the  
6 Paramount short-term offer.

7 Let me briefly tick off the first  
8 three fundamental fallacies in Mr. Phillips'  
9 analysis. In the first place, his tacit premise is  
10 that corporate life ends in 1993. There is no future  
11 after that. That is not true of corporate existence,  
12 and the record here, indeed, showed other  
13 corporations, other instances, where obviously  
14 long-term growth continues after four years.

15 JUSTICE HOLLAND: But don't they  
16 answer that argument by saying that because of the  
17 nature of the entertainment industry you don't make  
18 predictions much beyond that?

19 MR. WACHTELL: Well, it is one thing  
20 whether you make specific dollar-for-dollar  
21 forecasts. It is another thing if you have an  
22 abiding business conviction that by creating an  
23 enterprise, you will continue to have great long-term  
24 values even if perhaps you cannot make a specific

1       dollar forecast going out into the future.

2                       And the record here showed -- for  
3       example, you have the affidavit of Mr. Crawford, who  
4       is the manager of this group of money which is Time's  
5       single largest shareholder, who pointed back to the  
6       illustration of Disney, pointed back to the  
7       illustration of Warner itself when it was under  
8       attack by Mr. Murdoch, rejected, fought off those  
9       offers, now more than four years later growing,  
10      continuing to grow, and great, great values in the  
11      entertainment industry for shareholders.

12                      So I think that albeit you are in the  
13      entertainment industry, I think that people look to  
14      long-term gains and they are not looking to simply a  
15      four-year horizon, albeit quite correctly they say  
16      that we cannot come up with a precise dollar amount  
17      that anybody should rely on going beyond that.

18                      In the second place, as Mr. Joffe  
19      pointed out, Mr. Phillips' exercise is a comparison  
20      of apples and oranges. On the one hand he is talking  
21      about a future trading price without a premium, and  
22      he is comparing it to a present offer including a  
23      premium.

24                      And finally, on a lesser note, he

1 fails to discount Paramount's \$200 for the delay  
2 which is obviously going to take place even in the  
3 best of circumstances if Paramount were in a position  
4 to close its offer.

5 But the most -- if those fairly  
6 obvious fundamental fallacies in Mr. Phillips'  
7 "objective" analysis were not enough, it just is not  
8 the case that he used a very conservative discount  
9 rate or anything close to one. As Mr. Joffe points  
10 out, he used 25 to 30 percent as a discount rate.  
11 That is not remotely the rate that any normal equity  
12 investor would use in appraising the value of an  
13 ongoing investment in Time Warner. That is the type  
14 of discount rate which is utilized, as the record  
15 shows, by arbitrageurs and other short-term  
16 investors.

17 Now, Mr. Phillips said, "Well, I used  
18 it because of leverage." And I will come back to  
19 that in a moment. But the point is that a normal  
20 investor, the record shows, an institutional  
21 investor, looks to a rate of return closer to 12  
22 percent. And if you apply that kind of a discount  
23 rate, the rate of a normal investor and not a  
24 short-term speculator, to the 1993 numbers even

1 without a takeover premium for Time and relate those  
2 numbers back, the numbers, indeed, run in excess of  
3 \$200 per share.

4 And that, of course, is the bottom  
5 line which is fully corroborated in this record, not  
6 only from the board's view of the matter but from  
7 Mr. Crawford, whose affidavit was accepted by the  
8 court below. And he said, "In my view, it would be  
9 preferable for an investor with a long-term  
10 investment horizon to remain as a stockholder of Time  
11 Warner as opposed to accepting \$200 a share cash from  
12 Paramount."

13 So the point that I am making is that  
14 what plaintiffs are attempting to do is essentially  
15 enshrine an arbitrageur's discount rate as the sole  
16 permissive "objective" criteria for reasonableness of  
17 board conduct. But that is just another way of  
18 saying that under Unocal the only thing that a board  
19 is entitled to do is to look to short-term  
20 maximization of value, because if you use a 25 to 30  
21 percent discount rate from anticipated future prices  
22 --

23 JUSTICE MOORE: Well, in Unocal  
24 didn't we specifically say that you don't necessarily

1 look to the short term?

2 MR. WACHTELL: You most definitely  
3 did.

4 JUSTICE MOORE: And didn't we say  
5 that again in Newmont?

6 MR. WACHTELL: Absolutely. That's my  
7 point.

8 JUSTICE MOORE: And haven't we said  
9 that one more time in Macmillan?

10 MR. WACHTELL: That's precisely my  
11 point, Your Honor.

12 JUSTICE MOORE: How many times does  
13 the Court have to speak on that point?

14 MR. WACHTELL: You don't have to  
15 speak to me, Your Honor. It is my adversaries.

16 If you say 25 to 30 percent, what you  
17 are saying is, a board has to look through the prism  
18 of a short-term speculator and that a short-term  
19 speculator might prefer \$200 now to \$400 in 1993, and  
20 on this objective criteria that the board is  
21 handcuffed and could do nothing but apply the  
22 specious mathematical formula.

23 JUSTICE HOLLAND: Well, Mr. Wachtell,  
24 what percentage of the company would you say had to

1 be owned by short-term speculators before the board  
2 should give some deference to their view?

3 MR. WACHTELL: I think a board, as  
4 this Court has indicated, should, indeed, take into  
5 account, among other things, the interests of  
6 short-term speculators. They are stockholders when  
7 they acquire stock. But I do not think that you can  
8 put it, Your Honor, at a specific percentage, and I  
9 do not think that we can survive as an economy, as a  
10 nation or as corporations if boards are compelled to  
11 look to short-term values.

12 Now, I suppose if you had 99 percent  
13 of your company held by arbitrageurs, maybe you would  
14 have an extreme case. But I don't think when you  
15 look across the parameters of American  
16 corporations -- I would say that boards cannot be  
17 compelled to --

18 JUSTICE HORSEY: Well, if that is so  
19 clear, why didn't Time go ahead and let the  
20 shareholders say so?

21 MR. WACHTELL: Well, I think there  
22 were a number of reasons why that is the case, Your  
23 Honor. In the first place, what has been alluded to  
24 is that you were in a situation where a tremendous

1 amount of misinformation was being put out into the  
2 marketplace by Paramount, and is still being put out  
3 into the marketplace by Paramount, as to when they  
4 would be in a position to close this offer. They  
5 trumpeted around a voting trust with Mr. Rumsfeld and  
6 said, you know, we will do this, and we need it very  
7 quickly from the FCC because we want to be in a  
8 position to close, the clear indication of which was  
9 that they did not have to wait around for cable  
10 approvals, because if they had to wait around for  
11 cable approvals, where is the emergency to have this  
12 immediate summary procedure before the FCC in order  
13 to have Mr. Rumsfeld installed as a voting trustee?

14 JUSTICE HOLLAND: Well, why couldn't  
15 the Time stockholders have understood what you just  
16 said?

17 MR. WACHTELL: Because I think  
18 fundamentally they could have probably after a period  
19 of time, as Mr. Joffe said. But the climate at the  
20 time was every day's Wall Street Journal had another  
21 story about how Time is under attack, Warner is under  
22 attack, Paramount is under attack. And my client,  
23 Warner, quite understandably was not prepared to  
24 stand still and hold itself in limbo to wait and see

1     until -- would it be two months, would it be three  
2     months, before the air could clear and it would be  
3     possible to have an informed vote of the Time  
4     shareholders.

5                   JUSTICE HOLLAND: Well, two of your  
6     opponents at least who represent stockholder  
7     interests say their clients understood what the  
8     choice was now.

9                   MR. WACHTELL: Yes, and you are  
10    talking about very informed and very sophisticated  
11    stockholders. But I would go back to this Court's  
12    decision in Van Gorkom, where this Court expressly  
13    said that a board of directors may not abdicate its  
14    responsibility to the shareholders, that the board  
15    must exercise its duty, and, indeed, in the merger  
16    context at least that a board does not have the  
17    option of recommending a transaction that it does not  
18    itself approve of or that it is neutral on.

19                   JUSTICE HOLLAND: Van Gorkom  
20    certainly said that in part, but wasn't one of the  
21    other problems in Van Gorkom the misinformation or  
22    lack of information --

23                   MR. WACHTELL: Yes.

24                   JUSTICE HOLLAND: (Continuing) --



1       that went to the stockholders?

2                   MR. WACHTELL: Absolutely. I think  
3       here they are both principles in Van Gorkom. I think  
4       Van Gorkom started -- if you take a look, not only  
5       Van Gorkom, if you go back to Pogostin, which Justice  
6       Moore referred to, I think the basic theme that I  
7       read in the decisions of this Court -- and certainly  
8       I am not telling this Court anything that this Court  
9       does not know, because I don't want to be  
10      presumptuous -- is that -- and the express words that  
11      we used in cases such as Aronson and then Pogostin is  
12      that the duty to manage the affairs -- a cardinal  
13      precept -- I am quoting, I guess, from the Aronson  
14      decision. "A cardinal precept of the General  
15      Corporation Law of the State of Delaware is that  
16      directors rather than shareholders manage the  
17      business and affairs of the corporation." And  
18      then --

19                   JUSTICE HORSEY: Section 141.

20                   MR. WACHTELL: 141, 141(a). And then  
21      in Van Gorkom basically this Court says, well, along  
22      with that obligation goes a duty, and the duty is to  
23      be informed, and if you are not informed, the  
24      shareholders have a recourse against you in damages.

1                   The shareholders have no recourse.  
2       There is no obligation, corollary obligation in  
3       Delaware law that says that shareholders have to be  
4       informed before they perhaps stampede into a tender  
5       offer. There is no statutory duty that a shareholder  
6       has to inform himself, and there is nothing that says  
7       that a shareholder who stampedes into a tender offer  
8       is subject to damages if he is uninformed at the  
9       instance of other shareholders who may feel  
10      themselves injured.

11                   And I think it is, indeed, the  
12      bedrock of Delaware law and of Delaware corporate law  
13      that the board of directors has the obligation and  
14      the duty to inform itself, to act reasonably and to  
15      run the corporation. And I don't think there is  
16      anything in this case which would say that one should  
17      carve out an exception to that and say that, well,  
18      why wasn't there a shareholder vote. The vote was  
19      not required by law.

20                   Yes, initially there was a  
21      contemplation of a vote because of the requirement of  
22      listing under the New York Stock Exchange rule. But  
23      even, as we point out in our brief, if the law had  
24      required a vote for the initial transaction, I think

1 the classic Delaware doctrine of independent legal  
2 significance would say that even though to do a  
3 transaction one way, you require a vote, does not  
4 mean you are not entitled to do it another way that  
5 does not require a vote. And I think that that  
6 basically at least as a matter of law is the complete  
7 answer, that and the directors' obligation.

8           There was nothing nefarious here  
9 about the directors' decision to change the form of  
10 the transaction into a cash transaction. As the  
11 record shows, it was, indeed, the transaction that  
12 Time had wanted all along, that Warner had been  
13 unwilling to accede to. And I think in a sense the  
14 Time directors and advisers and management viewed  
15 this in a paradoxical way as an opportunity, because  
16 now they had the opportunity essentially to push  
17 Warner into a transaction that had been Warner's  
18 second-best transaction. Mr. Aboodi testified --

19           JUSTICE HORSEY: And this gets back  
20 to my earlier questions about how strong is the  
21 record in showing that the outside -- that the board  
22 and particularly the outside directors had thought a  
23 long time ago that an acquisition of Warner was  
24 better from Time's point of view, position, than a

1 share exchange.

2 MR. WACHTELL: I think the record is  
3 totally uncontradicted on that point. There is --  
4 let me see if I can find the record. You find it in  
5 the Warner minutes at A-1937 and -38. You find it in  
6 Mr. Ross' testimony at Appendix BB-914-5. You find  
7 it in Mr. Nicholas' testimony at Appendix BB-755.  
8 You find it in Mr. Aboodi's testimony at BB-187 and  
9 195. You find it in Mr. Levin's testimony at BB-630.

10 JUSTICE HORSEY: Okay.

11 MR. WACHTELL: I just thought it was  
12 uncontradicted. So --

13 JUSTICE HOLLAND: Mr. Wachtell, you  
14 say Warner was pushed into a transaction that it  
15 didn't want to go along with originally, but your  
16 opponents argue very strenuously that Warner was not  
17 a pushover and that, in fact, the \$70 that was  
18 negotiated was much more beneficial to Warner than  
19 Time.

20 MR. WACHTELL: Well, I am not sure I  
21 understand that argument, because there is no  
22 question here and there is no issue that the \$70 is  
23 fair. Their own expert said the \$70 was fair. So I  
24 am not quite sure how they can argue that it is "more

1       beneficial" to Warner than to Time. It is, as most  
2       transactions, beneficial to both parties who see an  
3       advantage to going into a transaction. It did not  
4       make Time more takeover-proof, and no one contends  
5       that it did. It was not some gimmick or some device.

6               Mr. Aboodi testified --

7               JUSTICE HOLLAND: Didn't the  
8       Chancellor say that it would be more difficult, that  
9       it wasn't a preclusive arrangement, but it certainly  
10      was going to have an effect on future offers?

11              MR. WACHTELL: Yes, the Chancellor  
12      held that it might diminish or would diminish a  
13      likelihood. He expressly held that it did not  
14      legally or as a practical matter preclude a takeover.  
15      But the point I am making is a somewhat narrower one.

16              No one contends that the June 16  
17      transaction -- or if anyone contends it, they  
18      certainly contend it without any record support in  
19      the evidence. No one contends that the June 16  
20      transaction made a combined enterprise any more  
21      difficult to take over than would have been the case  
22      in the March 3 transaction. In other words, the  
23      point that --

24              JUSTICE HOLLAND: Well, in fact, at

1 Mr. Ross' deposition he has left that option -- not  
2 Mr. Ross. Mr. Davis' deposition.

3 MR. WACHTELL: He most definitely  
4 has.

5 JUSTICE HOLLAND: He has left that  
6 option open.

7 MR. WACHTELL: Mr. Davis left it open  
8 and Mr. Cantor left it open. If you look at BB-164  
9 of the transcript -- and this came after the decision  
10 of the court below, but it was on the argument I  
11 guess a week ago Friday of the motion for  
12 certification and injunction pending appeal --  
13 Mr. Cantor very, very expressly said -- and I think  
14 this is a judicial admission on the record -- that  
15 they had not ruled out bidding for the combined  
16 company.

17 JUSTICE MOORE: Well, that was in the  
18 Court of Chancery; right?

19 MR. WACHTELL: That is in the Court  
20 of Chancery, but, I mean, it is a statement by  
21 counsel on the record, which I think is, indeed, a  
22 judicial admission. They had not ruled out bidding  
23 for the combined company. So you have both  
24 Mr. Davis' testimony and you have Mr. Cantor's

1 admission.

2 And the Chancellor found, and I think  
3 what this case boils down to, is that Mr. Davis would  
4 prefer to acquire Time without Warner for his  
5 business purposes. And he has chosen to condition  
6 Paramount's offer upon Time and Warner abandoning  
7 their preexisting business combination. And that is  
8 exactly what the Chancellor found. At Pages 74-75 of  
9 his opinion he said that these two transactions are  
10 alternatives only, and I stress only, because  
11 Paramount has conditioned its offer.

12 But -- and I think justice Moore  
13 alluded to this in some of his questions early on  
14 this morning -- the fact that someone prefers to have  
15 a company in one state and would prefer to see it  
16 freeze its condition does not mean that it is  
17 wrongful for the board to disagree with that and to  
18 do what it deems to be in the best interests of the  
19 shareholders.

20 A board, I submit, does not become  
21 sterilized, nor does it become unreasonable for a  
22 board to exercise its powers, just because some  
23 raider comes along, no matter how last-minute, no  
24 matter how conditional and iffy the offer might be,

1 no matter how slow a track the offer may be on, no  
2 matter how inadequate the board may determine the  
3 offer to be. And looking at it particularly in the  
4 context of this case, I think the entire concept that  
5 the Time board's powers were frozen or that it was  
6 unreasonable for it to act is a particularly strange  
7 one. For how long?

8 You know, here Paramount's banker --  
9 and this is in the record -- Citibank is saying in  
10 their internal documents after consulting with  
11 Paramount's CFO -- and this is right at the  
12 beginning. This is before Time did anything with  
13 respect to cable franchises. So, you know, this is  
14 right up front. And the documentary evidence shows  
15 that Paramount's own commercial banker, the lead  
16 banker, Citibank, is saying that Paramount's schedule  
17 does not even contemplate a closing before March or  
18 April of 1990. Sometimes they talk about November of  
19 '89, but then they expressly say March or April of  
20 1990.

21 And then, Your Honor, Justice  
22 Holland, your point. Suppose they do not get the  
23 cable approvals or suppose they decide that the game  
24 isn't worth the candle, but when they go into local



1 communities, the local communities say, "Yes, we will  
2 give you cable approval providing you put in \$10  
3 million here of upgrading and providing you do this,  
4 that and the other thing." And they eventually look  
5 at the price tag around the country and they decide  
6 the Time-Warner deal has been broken up, we don't  
7 have to face this colossus anymore, what do we need  
8 this for, let's go our own way.

9 JUSTICE HORSEY: Mr. Wachtell, we are  
10 running short of time, and it is getting very hot in  
11 here. So getting back to your principal point --

12 MR. WACHTELL: Sure.

13 JUSTICE HORSEY: (Continuing) -- that  
14 the plaintiffs' argument would turn Unocal into a  
15 rigid -- I think you said a rigid, mathematical,  
16 mechanistic formula, their other argument that you  
17 haven't, I don't think, addressed is that they say --  
18 is that the cases since Unocal support their  
19 position -- specifically, Interco, Pillsbury, and I  
20 think they even say Macmillan -- and that the  
21 Chancellor -- the Chancery decision is a drastic  
22 retreat that eviscerates Unocal.

23 MR. WACHTELL: Well, Your Honor --

24 JUSTICE HORSEY: What do you say

1       about those? How have they analyzed those decisions?

2                   MR. WACHTELL: Your Honor, if anybody  
3       should know what the Interco case and Anderson  
4       Clayton case meant, I would assume it is the  
5       Chancellor, who wrote the opinions. And he didn't  
6       think that they were on point. And therefore, I am  
7       not even going to talk about whether those cases are  
8       correctly decided and whether they would or would not  
9       represent the view of this Court if the day comes  
10      when the Court is ever called upon to decide that  
11      issue.

12                   In basically all of those cases,  
13      whether it is Bass or Interco or Anderson Clayton or  
14      Pillsbury, you have a common theme. You had  
15      alternative transactions which were essentially  
16      mutually exclusive. They were being addressed to the  
17      same shareholder body. In each case, as the  
18      Chancellor has held, there was a functional  
19      equivalent of a sale of the company. And, of course,  
20      this Court held in Macmillan II that Macmillan I,  
21      indeed, was a Revlon case and that there was being a  
22      functional equivalent of a sale of the company.

23                   The shareholders were being cashed  
24      out. The offeror was ready to close or virtually

1 ready to close. There was little or nothing to  
2 choose in value between the two offers. One was a  
3 management transaction, including, as in the case of  
4 Bass, for example, a management roll-up to 39  
5 percent. The other was a nonmanagement transaction.

6 And what those cases basically said,  
7 as the Chancellor pointed out -- and he says that at  
8 Page 53 of this opinion -- that the board in those  
9 circumstances could not stand in the way and bar the  
10 nonmanagement transaction, as, for example, by  
11 refusing to redeem the pill in order to cram down the  
12 management transaction. But, Your Honor, that is not  
13 remotely this case.

14 This is not a management recap case.  
15 The Chancellor expressly held that these were not  
16 mutually exclusive transactions, that the Warner  
17 transaction would not either legally or as a  
18 practical matter preclude a takeover of Time by  
19 Paramount or, for that matter, some other future  
20 requirement. These cases -- this is clearly not the  
21 functional equivalent of a sale of Time. Time is  
22 acquiring Warner.

23 JUSTICE MOORE: Well, that's  
24 interesting, because I think even Mr. Munro had a

1 sort of question about the characterization of the  
2 transaction. From -- as I understand it, from March  
3 to early June Time and Warner had taken great pains  
4 to characterize this as "an old-fashioned merger."

5 MR. WACHTELL: That's correct.

6 JUSTICE MOORE: However, as soon as  
7 Paramount's offer became public, Time immediately  
8 reversed itself and now calls it an acquisition of  
9 Warner by Time. So to paraphrase Mr. Munro, which  
10 was it; a merger or an acquisition?

11 MR. WACHTELL: Well, Your Honor, Your  
12 Honor is, of course, referring to the original March  
13 3 transaction characterization. I for the moment had  
14 been referring to June 16. But having said that, if  
15 you go back to March 3 and if you look at the press  
16 release, the press release expressly says Time is  
17 acquiring Warner. And, of course, the structure of  
18 the transaction under Delaware law was that Time was  
19 acquiring Warner.

20 Time, I think, considered itself to  
21 be acquiring Warner, and Warner, I think, never quite  
22 wanted to recognize the fact that it was being  
23 acquired.

24 JUSTICE MOORE: Well, I notice that

1 in the Time minutes Mr. Wasserstein and several  
2 others kept telling the board, "Remember, this is us  
3 acquiring Warner." But them putting that in the  
4 minutes and telling that to the board doesn't make it  
5 a Rembrandt painting.

6 MR. WACHTELL: No. That's perfectly  
7 correct, Your Honor. I think the reality was that  
8 the transaction -- Warner viewed the transaction --  
9 and this is the evidence -- as a hybrid. In form  
10 Time was acquiring Warner. In substance, as these  
11 arduous negotiations had finally played out, the Time  
12 culture was going to prevail and the Time people  
13 would ultimately be running the combined enterprise.

14 But Warner viewed it, as the  
15 testimony shows, as a hybrid. Warner preferred to  
16 look at it, which was, indeed, also correct, as a  
17 merger of equals, where Warner basically looked at it  
18 and the Court below held that neither was acquiring  
19 the other.

20 And I think that is -- it is a  
21 Roshomon. I think everybody is saying the same thing  
22 and looking at it from a slightly different  
23 perspective, and I think they are all perfectly  
24 accurate.

1 JUSTICE HORSEY: I guess it depended  
2 upon which objects you are talking about.

3 MR. WACHTELL: Yes, and I think that  
4 one thing is clear. As Mr. Ross testified -- he said  
5 that Time viewed it as an acquisition of Warner. We  
6 viewed it as a hybrid. But there was one thing that  
7 was absolutely clear. It was not an acquisition of  
8 Time by Warner. His testimony was that was the one  
9 thing that it clearly was not.

10 And so just to complete, there is no  
11 management roll-up here, as in Bass. There is no  
12 information of the board, as in Bass. And so I think  
13 this case is just totally distinguishable from such  
14 cases as Interco and Bass, and, of course, the Court  
15 below so found. And I hope that is the answer to  
16 Your Honor's question.

17 JUSTICE HORSEY: Thank you, sir.

18 MR. WACHTELL: Just --

19 JUSTICE HORSEY: I think you are down  
20 to about three minutes or less.

21 MR. WACHTELL: Well, three minutes  
22 then, for three minutes what I would really like to  
23 say is that unless this Court -- there is an  
24 injunction here, the Warner shareholders are going to

1 get \$7 billion very shortly after 5:00 p.m. this  
2 afternoon, and then they are going to get another \$7  
3 billion on the back end in value. And I would  
4 respectfully submit that in any balance of the  
5 equities here -- of course, the Court below found  
6 that it didn't even so have to reach that, and I  
7 would share that view. I don't think this Court has  
8 to reach it either. But in any balance of the  
9 equities Warner has bona fide valid contractual  
10 rights here. The Chancellor, of course, found there  
11 was no fiduciary breach as to the actions of the Time  
12 board, and I would submit that a fortiori the Warner  
13 board here did not remotely believe that the Time  
14 board was engaged in any breach. And I submit those  
15 facts weigh heavily in any balance of the equities.

16 Plus, as has been shown by the  
17 evidence here, if this transaction should be  
18 enjoined, there would be very serious damage to the  
19 Warner shareholders. One could expect a precipitous  
20 drop of billions of dollars in the value of Warner  
21 stock. The company would be claimed undoubtedly to  
22 be in the Revlon mode. It would be claimed that it  
23 had agreed to sell itself. It would be vulnerable to  
24 somebody coming along to try to pick up the company

1 at less than \$70 in that situation.

2 And that was precisely -- and this  
3 goes back to the question I was asked earlier, why  
4 there were no fiduciary outs in this transaction,  
5 which I think Mr. Joffe fully answered. But that was  
6 precisely the reason why the board was unwilling to  
7 put Warner into this June 16 transaction on an iffy  
8 basis and why Warner clearly insisted on a hell-or-  
9 high-water deal, because it was not prepared to be in  
10 a situation where Time could decide it had better  
11 options elsewhere and would decide to essentially  
12 leave Warner at the altar.

13 The evidence shows that there would  
14 be a prolonged period of uncertainty and speculation  
15 that would be very harmful to Warner's business and  
16 uniquely to a business of the nature -- conversely,  
17 Paramount, I submit, cannot show irreparable injury  
18 here, and the equities militate against it.

19 If the transaction is not preclusive,  
20 as the Chancellor found, and if they concede that it  
21 is their own business judgment and business decision  
22 as to whether they will or will not choose to go  
23 ahead, then I submit there can be no irreparable  
24 injury. They are not ready to close. The Chancellor



1 found, Your Honor, that essentially what they were --  
2 the board of Time deemed that they were asking the  
3 Time board to give them an option, and I submit  
4 that's exactly what they are asking this Court to do,  
5 to give them an option.

6 Thank you very much.

7 JUSTICE HORSEY: Thank you, sir.

8 May we wait a second for the court  
9 reporter to take a breather and change paper. Then  
10 we will have 10 minutes of rebuttal by Mr. Cantor.

11 All right, Mr. Cantor. You may  
12 proceed. 10 minutes.

13 MR. CANTOR: Let me deal first with  
14 the letter, which since--

15 JUSTICE MOORE: Why wasn't that  
16 letter produced?

17 MR. CANTOR: It wasn't produced, Your  
18 Honor, because it didn't turn up in discovery in our  
19 files. We subsequently, when an issue was made of  
20 it -- this is a letter from Mr. Nicholas, their  
21 president --

22 JUSTICE MOORE: This is a letter from  
23 your Mr. Snyder, who is a top ranking executive at  
24 Paramount, congratulating Mr. Nicholas on the great

1 deal.

2 MR. CANTOR: Right. I understand  
3 exactly what the letter says, Your Honor. You can't  
4 produce a letter if you don't have it. We asked  
5 Mr. Snyder after it turned up. He said he didn't  
6 keep a copy.

7 JUSTICE MOORE: That is an  
8 interesting letter not to keep a copy of it.

9 MR. CANTOR: It is an interesting  
10 letter, Your Honor. It is a letter between friends  
11 saying, as I read, "Congratulations. You did a great  
12 thing." That's what the letter says.

13 Your Honor, let me deal with the  
14 short-term/long-term issue and the argument that 25  
15 to 30 percent is an unreasonably high discount rate.  
16 What Mr. Joffe and Mr. Wachtell have done is said  
17 take a 12 percent rate, because that's a reasonable  
18 time value of money rate. In other words, if you  
19 knew you were going to get paid, if you had an  
20 absolute guarantee of getting paid a year from now,  
21 two years from now, three years from now, that would  
22 be an appropriate discount rate to use, and nobody  
23 disagrees with that.

24 But what we are saying, which is

1       totally consistent with what Shearson -- what  
2       Mr. Hill of Shearson said, is that where you have  
3       uncertainty as to the realization of the future  
4       stream, and certainly there is uncertainty here -- I  
5       don't think anyone could disagree that there is  
6       uncertainty -- the 25 to 30 percent is a reasonable  
7       rate.

8                   JUSTICE HORSEY: Well, but you are  
9       dealing with a track record of two companies in which  
10      Warner had a tremendous annual growth rate in its  
11      earnings, didn't it?

12                   MR. CANTOR: Warner did. Time did  
13      not.

14                   JUSTICE HORSEY: Well, it had a good  
15      one, but it didn't quite compare with Warner's.

16                   MR. CANTOR: It was nowhere near  
17      Warner's, Your Honor. And they are now taking on  
18      somewhere between 10 and 14 billion dollars of debt,  
19      which they did not have before, which has to be  
20      serviced. So you have a relatively thin equity base  
21      under that debt.

22                   JUSTICE HORSEY: What do you say to  
23      what Mr. Crawford -- how do you answer Mr. Crawford's  
24      argument?

1 MR. CANTOR: I say Mr. --

2 JUSTICE HORSEY: And he apparently  
3 was an expert investor that held positions in, what;  
4 all three companies?

5 MR. CANTOR: Yes, he did, Your Honor.  
6 That's exactly how I would answer it. He owned 7  
7 percent of Warner. He is going to make a fortune on  
8 this deal if it goes through.

9 JUSTICE HORSEY: So you think he is  
10 just a self-interested person.

11 MR. CANTOR: Yes, absolutely, Your  
12 Honor.

13 JUSTICE HORSEY: And there is no --  
14 we shouldn't give any merit to his opinion.

15 MR. CANTOR: Well, this man owns 7  
16 percent, which is roughly -- I am doing quick  
17 arithmetic -- 10 million shares. He is going to make  
18 \$700 million, or gain \$700 million if this  
19 transaction goes through. That's -- even where I  
20 come from that's interest.

21 JUSTICE HORSEY: Well, he will come  
22 out well anyway, won't he?

23 MR. CANTOR: Excuse me?

24 JUSTICE HORSEY: I mean, he has

1       invested in all three companies.

2                   MR. CANTOR: I understand. But if  
3       this deal doesn't go through and the Warner stock  
4       drops back down, he suffers a considerable paper  
5       loss. Your Honor --

6                   JUSTICE HORSEY: So therefore, you  
7       say this 25 percent or whatever the rate is, you say  
8       that's justifiable, a discount rate?

9                   MR. CANTOR: Your Honor, they have  
10      never offered an alternative rate until Mr. Joffe got  
11      up and said 12 percent. 12 percent is the time value  
12      of money. 12 percent takes nothing into account for  
13      risk.

14                   Mr. Rossoff simply said that  
15      Mr. Phillips was too high. He never offered his own  
16      rate. I can't believe that an investment banker  
17      would say there wouldn't have to be some discount for  
18      risk. And Mr. Hill said in a highly leveraged  
19      situation the rate of return they expect is in excess  
20      of 25 percent to take that kind of a risk.

21                   Can I address myself to the  
22      long-range plan, because it is obviously troubling  
23      Justice Moore, who feels that he has made this  
24      perfectly clear on three prior occasions.

1                   If you read what the Chancellor said  
2                   at Pages 9 and 10 of his opinion, what the Chancellor  
3                   said about the long-range plan is, "Neither the goal  
4                   of establishing a vertically integrated entertainment  
5                   organization, nor the goal of becoming a more global  
6                   enterprise, was a transcendent aim of Time management  
7                   or its board. More important to both, apparently,  
8                   has been a desire to maintain an independent Time  
9                   culture that reflected a continuation of what  
10                  management and the board regarded as distinctive and  
11                  important 'Time culture.'"

12                  I am sorry. "An independent Time  
13                  Incorporated" that would reflect a Time culture. I  
14                  misread Time. I am so imbued with the Time culture  
15                  myself, Your Honor, that I misread it the first time.  
16                  That is the bottom of Page 9 and the top of 10. That  
17                  was the long-range plan. That's why they wanted  
18                  Nicholas to succeed. Well, what--

19                  JUSTICE MOORE: Well, no. On Page 46  
20                  he says, "The board explains its choice -- for  
21                  despite the long negotiations and the agreements with  
22                  Warner, it was free to let the Warner transaction go  
23                  to the shareholders, and thus on June 16 it was free  
24                  to choose -- by reference to the view that the

1 long-term value of a Time-Warner combination would be  
2 superior not only to the premium \$175 presently  
3 available to the shareholders, but to any current  
4 sale price in the ranges it had been told could be  
5 achieved."

6 "This is the heart of the matter:  
7 the board chose less current value in the hope  
8 (assuming that good faith existed, and the record  
9 contains no evidence to support a supposition that it  
10 does not) that greater value would make that implicit  
11 sacrifice beneficial in the future."

12 MR. CANTOR: I understand.

13 JUSTICE MOORE: Now, what is wrong  
14 with that holding?

15 MR. CANTOR: What is wrong with it,  
16 Your Honor, is, it is not based on duty of inquiry.  
17 I have --

18 JUSTICE MOORE: Well, are you saying  
19 that Time did not even examine the bid? I don't  
20 think the record supports that.

21 MR. CANTOR: It certainly did not  
22 examine the Paramount bid.

23 JUSTICE HORSEY: But don't you have  
24 to --

1 JUSTICE MOORE: Did it examine any  
2 aspect of the Paramount bid?

3 MR. CANTOR: It did not examine what  
4 value could be achieved for shareholders.

5 JUSTICE MOORE: What you are saying  
6 is it didn't call Paramount and start talking to  
7 Paramount. But it certainly, the record shows,  
8 evaluated what it perceived the bid to be, did it  
9 not?

10 MR. CANTOR: Yes, Your Honor. But  
11 where a bid is made that includes within it a  
12 statement that the price is negotiable and no inquiry  
13 is made before its rejection as to what the top price  
14 is, I submit that that does not satisfy a duty of  
15 inquiry.

16 JUSTICE HORSEY: Well, but don't you  
17 have to relate that position you are taking with the  
18 other positions the Chancellor said; namely, the  
19 fundamental law that a company and an acquiring  
20 company like your client had no right to freeze the  
21 board's exercise of its conferred power under 141 so  
22 long as a board acts in good faith, in an informed  
23 and deliberate manner, and a reasonable response to a  
24 posed threat?



1 MR. CANTOR: Well, we quarrel with  
2 "reasonable response." We quarrel with "informed  
3 manner." I, you know -- we are not taking --

4 JUSTICE HOLLAND: But didn't your  
5 client contribute to this by starting out at 175,  
6 which was promptly rejected, and coming back at \$200?  
7 Why didn't they come in with something a little more  
8 concrete in the beginning rather than make a low ball  
9 bid, as your opponents argue?

10 MR. CANTOR: Well, first of all, Your  
11 Honor, under the Chancellor's analysis, if we had bid  
12 \$400, it wouldn't have mattered, because he doesn't  
13 compare present value to current value. If you have  
14 the long-range plan and that is enough, that is one  
15 answer. The other answer is, you have to start  
16 someplace. We also said that our bid was fully  
17 negotiable. No inquiry was ever made.

18 JUSTICE HOLLAND: Well, then how do  
19 you reconcile that with the cases that seem to hold  
20 the board had no duty to negotiate?

21 MR. CANTOR: I repeat what I said  
22 earlier, Your Honor, that we are not arguing for a  
23 duty to negotiate. We are arguing for a board  
24 informing itself. This board did nothing to inform

1       itself.

2                   JUSTICE MOORE:   Well, you say  
3       nothing.   Certainly they analyzed what had been put  
4       before them by your client, did it not?

5                   MR. CANTOR:   Well, I don't know how  
6       they could have analyzed the statement that we are  
7       prepared to pay more if they did nothing to inquire  
8       about that.

9                   JUSTICE MOORE:   Well, they could  
10      have, as Justice Holland pointed out, very correctly  
11      viewed your bid as nothing but trying to low-ball it.

12                  MR. CANTOR:   They could have, Your  
13      Honor, but --

14                  JUSTICE MOORE:   Then why, then, do  
15      they have to go back and make inquiries?  If they  
16      have analyzed your low bid and decided that it was  
17      inadequate given the long-range plans, do they have  
18      to continue to sort of follow the trail of dust?

19                  MR. CANTOR:   Your Honor, it is not,  
20      frankly, inadequate even given the long-range plans.  
21      If you discount the revenue stream into the future,  
22      you don't even get to \$175, let alone \$200.

23                  JUSTICE HORSEY:   But the board talked  
24      to two different financial advisers on June 16th;

1 correct?

2 MR. CANTOR: Say it again, Your  
3 Honor.

4 JUSTICE HORSEY: The board talked  
5 with financial advisers. It didn't have to --

6 MR. CANTOR: It talked to  
7 management's financial advisers, Your Honor. It  
8 never talked to its own financial advisers.

9 JUSTICE HORSEY: All right.  
10 Management wasn't self-interested. It wasn't one of  
11 these Interco --

12 MR. CANTOR: Management was self-  
13 interested, Your Honor. Management was getting long-  
14 term employment contracts.

15 JUSTICE HORSEY: That's right. They  
16 were under salary; therefore, they were interested.

17 MR. CANTOR: Your Honor, they were  
18 getting 10-year employment contracts.

19 JUSTICE HORSEY: But the point was  
20 was that the board -- it didn't really do nothing.  
21 And furthermore, the board had considered Paramount  
22 before. It knew what Paramount was.

23 MR. CANTOR: Yes.

24 JUSTICE HORSEY: And so it came down

1 to price.

2 MR. CANTOR: Well, if the Time  
3 shareholders were to be cashed out, it obviously  
4 comes down to price. That's correct.

5 JUSTICE HOLLAND: Well, along those  
6 lines, Mr. Cantor, can you distinguish for me the  
7 concepts you are describing as the duty to inquire  
8 but not the duty to negotiate? What would the Time  
9 board have done when they followed up and made these  
10 inquiries you said they should have made that would  
11 have distinguished negotiating?

12 MR. CANTOR: Well, one thing they  
13 could have done, a very simple thing -- and this is  
14 often done in these situations -- is a back-channel  
15 conversation between investment bankers, "Look, \$175  
16 isn't in the money. What is your bid? We are going  
17 to be having a meeting tomorrow."

18 Mr. Davis wrote a letter on June 7.  
19 He wrote another letter on June 15, when the two-day  
20 Time board meeting was in session, both of which  
21 offering to negotiate with respect to price. They  
22 could at least have made an inquiry as to what price  
23 was his real price. They did not do that. They made  
24 no inquiry as to what the value, what the future

1 value -- the current value of their future revenue  
2 stream was.

3 JUSTICE HORSEY: So you say they  
4 could have, but you have to be stronger than that.  
5 You say they breached their duty by not doing it.

6 MR. CANTOR: We say that they  
7 abdicated their duty of inquiry, Your Honor, which is  
8 a violation of the duty of care.

9 JUSTICE HORSEY: Well, I think your  
10 time is up, Mr. Cantor. Thank you.

11 Mr. Savett, you have five minutes,  
12 sir.

13 MR. SAVETT: Whether this is an  
14 acquisition or a merger with Warner, there is one  
15 thing I think everyone in this courtroom can agree,  
16 and that is between Time and Warner it is a  
17 combination. The Chancellor held specifically that  
18 the Paramount offer was not a functional equivalent  
19 to the Time-Warner combination and, therefore, you  
20 needn't give the shareholders a choice.

21 I think there is absolutely no  
22 difference between a Time-Warner combination and a  
23 Paramount-Time combination. We have heard arguments  
24 that we are just talking about numbers. It is much

1 more than numbers, though, of course, numbers have  
2 its place. Give the shareholders a choice. The  
3 shareholders --

4 JUSTICE HORSEY: But at the same time  
5 you must concede that Time's board of directors was  
6 not required under Delaware law to submit that  
7 transaction to the shareholders once it decided to  
8 recast its form?

9 MR. SAVETT: We have not argued that  
10 in this court and didn't.

11 JUSTICE HORSEY: Well, you can't  
12 argue it, can you?

13 MR. SAVETT: There is a question  
14 under Section 251, I believe, about -- it refers to  
15 triangular merger, whether or not if you have --  
16 using a subsidiary instead of your own corporation as  
17 a merger candidate, must you give the shareholders a  
18 vote. We have not used that argument in this court.

19 JUSTICE HOLLAND: Well, in Van Gorkom  
20 the board gave the stockholders a choice, and the  
21 stockholders took it. And despite that affirmative  
22 vote by the stockholders, that was of little comfort  
23 to the board that was subsequently held personally  
24 liable.

1                   So in that context was it fair for  
2                   this board to say Paramount even at \$200 was  
3                   inadequate and that offer shouldn't have been passed  
4                   along, or was that so obviously within the range of  
5                   reason that the board had a duty to let the  
6                   shareholders consider it?

7                   MR. SAVETT: The board, I believe,  
8                   Your Honor, had a duty to determine what the value  
9                   was of what they were doing with Warner and what  
10                  could be the value of what Paramount wanted to do. I  
11                  think it is quite clear about numbers here, and that  
12                  is about discount. We have to take --

13                  JUSTICE HOLLAND: That comes back to  
14                  my earlier question. What is it -- you said the  
15                  stockholders should decide. What do you want the  
16                  stockholders to decide; on the Paramount bid?

17                  MR. SAVETT: Yes. I want the  
18                  stockholders to have the choice of whether they can  
19                  elect to tender to Paramount. At present they have  
20                  no choice whatsoever. What Warner and Time have done  
21                  has been to preclude anything whatsoever, whether  
22                  with Paramount or anyone else.

23                  But getting back to numbers and  
24                  discount, one must discount with respect to

1       depression, recession, inflation, the risk of what  
2       will happen in 1993. Are we all in this courtroom  
3       very sure that Warner will have another Batman? We  
4       are not all that sure. And any company that relies  
5       so much on cash flow, there is a real problem whether  
6       their projections are as reliable from today, one  
7       year out, two years out, even three years out.

8                       There is no question here that the  
9       Chancellor decided that so long as there was "a  
10      long-term plan," no matter what anyone else did, that  
11      had to give way to this long-range plan.

12                      We think it is very clear that the  
13      Paramount offer was a functional equivalent to a  
14      combination between Time and Warner, and we have no  
15      problem with the Time board having a reaction to  
16      that. We do have a --

17                      JUSTICE HOLLAND: But as I understand  
18      your argument, you are saying in part Paramount wants  
19      to do with Time what Time wants to do with Warner,  
20      and the stockholders should be able to choose now,  
21      because some people may want to cash in now and not  
22      take the risk that Time and Warner will be able to  
23      make it work.

24                      MR. SAVETT: That's exactly right.



1 We think that Time shareholders have been completely  
2 precluded. There are no ways out except this court,  
3 no ways whatsoever. Thank you.

4 JUSTICE HORSEY: Thank you, sir.

5 Mr. Klein. Five minutes.

6 MR. KLEIN: It is not just, Justice  
7 Holland, that we would like to have Time shareholders  
8 be given the freedom of choice, and it is not just,  
9 Justice Horsey, that Time has the statutory authority  
10 to proceed with the tender. The question is whether  
11 this Court, which has heretofore rejected the mere  
12 exercise of statutory authorities where it has been  
13 inequitable -- we are, in fact, appealing from a  
14 Chancery ruling -- will permit Time shareholders to  
15 be precluded from this choice precisely because its  
16 directors believe that if they were given the choice,  
17 they would accept it.

18 JUSTICE HORSEY: But the directors  
19 have to make that decision in the first place, don't  
20 they, before even submitting it to shareholders?

21 MR. KLEIN: Well, the only reason --

22 JUSTICE HORSEY: And don't they?

23 MR. KLEIN: No.

24 JUSTICE HORSEY: Oh, they don't.

1 MR. KLEIN: Yes and no.

2 JUSTICE HORSEY: What?

3 MR. KLEIN: Let me answer the  
4 question quite clearly, because it is a complicated  
5 answer, and I have five minutes.

6 Before Unocal, directors were not  
7 interposed effectively between the shareholders and  
8 an offer. You permitted this body of directors to  
9 interpose themselves between shareholders and their  
10 right to choose tender offers in order to protect  
11 shareholders from coercive, front-end-loaded,  
12 two-tier, bust-up tenders, which this is not.

13 The Delaware Legislature has then  
14 spoken in Section 203, and it has answered the  
15 question that Justice Holland posed. At what point,  
16 whether you call them short-term speculators or  
17 shareholders who would like to realize short-term  
18 gains in preference to long-term strategy -- at what  
19 point are they no longer to be precluded from doing  
20 so? The statute says to me when 85 percent of them  
21 do.

22 Here what we have is a transaction  
23 that was, in fact, intended to be preclusive. There  
24 is at least one person in this room and I suspect

1       tens of thousands on Wall Street who are holders of  
2       shares who do not believe, in response to Mr. Joffe's  
3       question, that the Time-Warner deal is the best deal  
4       for the shareholders. Indeed, the Time directors do  
5       not believe that their shareholders believe it is the  
6       best deal for their shareholders. It is precisely  
7       because they believe the contrary that they have  
8       taken what is in truth --

9                       JUSTICE HORSEY: Where is the cite to  
10       the record that last statement?

11                      MR. KLEIN: The cite that they do not  
12       believe?

13                      JUSTICE HORSEY: Yes.

14                      MR. KLEIN: It is in the Chancellor's  
15       opinion. He assumes for the purposes of the argument  
16       that the action of the Time directors in canceling  
17       the meeting and proceeding with the Warner bid on an  
18       irrevocable, premature basis, no matter who offered  
19       what to the shareholders, no matter how it compared  
20       to the value of the ultimate long-range plan -- and  
21       he did it solely because they possess a long-term  
22       plan.

23                      Of course, of course, Justice Moore,  
24       directors must direct for the long term. But if

1 directors must direct for the long term and they  
2 develop a strategy for the long term, then what is  
3 left of the proportionality test? What is left of  
4 Unocal? Indeed, are we not exactly back to Cheff v.  
5 Mathes and Singer? Are we not exactly back to the  
6 question --

7 JUSTICE MOORE: I don't think we are  
8 back to Singer, because Singer was overruled by  
9 Weinberger.

10 MR. KLEIN: Well, we are back to the  
11 era in which the academics and investors were  
12 strongly critical of a body of jurisprudence that  
13 looked to a road that had one choice or another.  
14 Directors were self-interested or they had a business  
15 reason. And if they had a business reason, they were  
16 not self-interested; and therefore, they could do  
17 willy-nilly whatever was necessary to preclude their  
18 shareholders from realizing their values.

19 We are talking here about an  
20 unprecedented three to eight billion-dollar loss of  
21 present value.

22 JUSTICE MOORE: What do you say about  
23 the Delaware long-established principle of  
24 independent legal significance?

1 MR. KLEIN: I believe that it doesn't  
2 have force when you are dealing with the question --  
3 it doesn't answer the question here. The question  
4 here is not whether or not, if you can do it one way,  
5 you are not bound to do it that way. The question is  
6 on the facts of this case --

7 JUSTICE MOORE: Well, in Unocal we  
8 specifically said in a footnote rejecting the  
9 so-called Chicago school of economic theory that  
10 boards should be passive entities -- we rejected  
11 that, and we specifically said that boards must take  
12 an active role in such matters.

13 MR. KLEIN: We agree. Our problem  
14 is, they didn't take a sufficiently active role.  
15 They took an entirely defensive role. They took a  
16 role to preclude their shareholders from choosing  
17 something that they suspected their shareholders  
18 would reject.

19 The financial stability and strength  
20 of this country has rested for 30-odd years on a  
21 fully informed securities market. It has never been  
22 a better informed market. What is there in the  
23 way -- in this record to suggest that it was unfair,  
24 wrong or inconsistent with the best interests of Time

1 shareholders for the directors to have pursued  
2 alternatives, teed up those alternatives for the  
3 shareholders, presented them to them on a schedule  
4 that they are completely in control of?

5 This is a company that is armed to  
6 the teeth. It has a poison pill. It has a  
7 supermajority provision. It is a Delaware  
8 corporation. It has elected to be within 203.

9 JUSTICE MOORE: Let me ask you this,  
10 Mr. Klein: What precludes Paramount from making a  
11 bid for the combined companies.

12 MR. KLEIN: Nothing, but a lot  
13 precludes them from offering \$200 a share or more,  
14 because the leverage and the indebtedness that is  
15 being incurred here and the extraordinary premium  
16 that is being paid to Warner -- remember, Warner is  
17 getting paid such a deal here that even though it is  
18 presently the subject of a front-end-loaded tender,  
19 there hasn't been a bit of suggestion that somebody  
20 would seek to acquire Warner. Warner shareholders  
21 are getting an extraordinary transaction here. They  
22 are getting most of the benefit that just --

23 JUSTICE HORSEY: Mr. Klein, I am  
24 sorry to say that your time is up.

1 MR. KLEIN: I am even sorrier than  
2 you are, Your Honor.

3 JUSTICE HORSEY: Excuse us for a  
4 minute.

5 (Discussion off the record.)

6 JUSTICE HORSEY: The Court has  
7 decided to recess at this point, and the Court will  
8 reconvene at 2:00, and you may then return, and the  
9 Court will announce its decision.

10 (Luncheon recess taken at 12:07 p.m.)

11 AFTERNOON SESSION

12 (Reconvened at 2:00 p.m.)

13 JUSTICE HORSEY: Good afternoon,  
14 ladies and gentlemen. The Court wishes to announce  
15 that it has reached the following decision: Given  
16 our standard and scope of review, we find no error at  
17 law by the Court of Chancery.

18 We further find the facts as found by  
19 the Chancellor to be fully supported by the record.  
20 Therefore, we affirm the decision below, and the  
21 mandate shall issue immediately.

22 The formal opinion will follow in due  
23 course, and the Court will now stand in recess.

24 (Court adjourned at 2:01 p.m.)