7-17-89
6:16 P.M.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARAMOUNT COMMUNICATIONS, INC. and KDS ACQUISITION CORP. Plaintiffs Below/ Appellants v. TIME INCORPORATED, Defendants Below/ Appellees	)	No. 279, 1989
RE: TIME INCORPORATED SHAREHOLDER LITIGATION	)	On appeal from C.A. No. 19866, Cons. C.A. No. 10670, and C.A. No. 10935 in the Court of Chancery of the State of Delaware In and For New Castle County
LITERARY PARTNERS, L.P. et al. Plaintiffs Below/ Appellants v. TIME INCORPORATED, et al. Defendants Below/ Appellees	)	

JOINT OPENING BRIEF OF SHAREHOLDER PLAINTIFFS

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NATURE AND STAGE OF THE PROCEEDINGS

This is an interlocutory appeal from a decision of the Court of Chancery (Allen, C.) denying motions to enjoin preliminarily a variety of actions taken in response to an all-cash, all-shares tender offer for Time Incorporated ("Time") by Paramount Communications Inc. and KDS Acquisition Corp. (collectively referred to as "Paramount"). That response was a Time tender offer for 51% of Warner Communications, Inc. ("Warner") that was scheduled to expire at 12:00 midnight, New York City time, Monday, July 17, 1989. Pursuant to a subsequent order of the court below, the expiration of Time's tender offer has been stayed until 11:59 p.m., New York City time, Monday, July 24, 1989.

Three actions were filed in the court below: one on behalf of a class of shareholders of Time, Cons. C.A. No. 10670; a second on behalf of certain substantial individual shareholders of Time, C.A. No. 10935; and a third on behalf of Paramount, C.A. No. 10866. These three actions all sought to enjoin Time's tender offer for Warner and other defenses on the grounds, inter alia, that they comprise a disproportionate defensive response to Paramount's non-coercive, premium, all-cash, all-shares tender offer for Time and thus violate the standard established in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985). These actions were consolidated below for purposes of discovery and argument, and are consolidated for purposes of the present interlocutory appeal.

The shareholder-plaintiffs are the owners of Time.1/ They have received a $200 per share tender offer from Paramount. That price is well within the ranges

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1/ This brief is filed by counsel both for the individual plaintiffs in the Literary Partner action and for the class representative plaintiffs.

of fairness reflected in a substantial array of investment banking opinions, including opinions by the two bankers the Time management and directors have looked to for advice. Paramount has offered to increase that price. Time's directors, who have been permitted by Delaware law to interpose themselves between Time's shareholders and the tender offer in order to protect the shareholders from coercive offers and have instead done the opposite. These directors will, unless restrained, force upon Time's shareholders a recapitalization to fund a $14 billion acquisition of Warner that was intended to preclude Paramount's bid and any other better offers that might emerge. Unless restrained, it will immediately cost Time's stockholders no less than $2.8 billion, perhaps as much as $8.1 billion, in current market value.

This appeal presents the following question: What are the rights of the shareholders of a Delaware corporation faced with an all-cash, all-shares, fully negotiable tender offer, whose directors are possessed of the power, by virtue of a poison pill and Section 203, to negotiate and protect the shareholders from coercion? The Chancery Court gave the following incorrect answer: None.

It is no understatement that the opinion of the Chancellor came as a great shock to plaintiffs and will, when circulated and digested, cause thousands of investors like plaintiffs to reevaluate the risks of investment in Delaware corporations. That is because the decision below radically revises the investment community's generally accepted understanding of the business judgment rule as it has evolved since this Court's pivotal decision in Unocal. Since Unocal, plaintiffs and other investors have followed and come to rely upon the salutary effects of the procedural and substantive standards that this Court and the Chancery Court have articulated in the cases that have come to be referred to as the "Unocal progeny."2/

In plaintiffs' view, the Chancellor's decision inexplicably eviscerates both the procedural and substantive standards of Unocal and its progeny. Unless revised, that decision threatens to return all investors in Delaware corporations to the unacceptable pre-Unocal era.

As plaintiffs understood the rationale underlying Unocal, it was as follows. Corporate officers and directors, however reputable, honest and substantial, are mortal. They likely are in their positions as a consequence, not only of their talent, but of their supportive relationships with one another. When directors confront the prospect that they or their colleagues may loose their positions (with the accompanying prestige, compensation and other perquisites), or can enhance their positions, by virtue of a sale, buyout or other corporation transforming transaction or event, one can only expect colleagues to rally around one another and be supportive. Accordingly, Unocal determined, when Delaware courts are called on to review corporate conduct attending a prospective change of control, the circumstances require a greater degree of judicial review to assure an

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2/ See, e.g., Revlon v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1986); Moran v. Household International Inc., Del. Supr., 500 A.2d 1346 (1985); In re RJR Nabisco, Inc. Shareholders Litigation, Del. Ch., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194, Allen, C. (Jan. 31, 1989); Shamrock Holdings, Inc. v. Polaroid Corp., Del. Ch., C.A. No. 10582, Berger, V.C. (Mar. 17, 1989); TW Services, Inc. v. SWT Acquisition Corp., Del. Ch., C.A. No. 10427, Allen, C. (Mar. 2, 1989); City Capital Associates v. Interco, Inc., Del. Ch., 551 A.2d 787, appeal dismissed, Del. Supr., 556 A.2d 1070 (1988); Doskocil Companies, Inc. v. Griggy, Del. Ch., C.A. No. 10095, Berger, V.C. (Aug. 18, 1988); Grand Metropolitan, PLC v. Pillsbury Co., Del. Ch., C.A. No. 10319, Duffy, J. (Dec. 16, 1988); Henley Group, Inc. v. Santa Fe Southern Pacific Corp., Del. Ch., C.A. No. 9569, Jacobs, V.C. (Mar. 11, 1988) (revised Apr. 12, 1988); In re Holly Farms Corp. Shareholders Litigation, Del. Ch., C.A. No. 10350 Cons., Harnett, V.C. (Dec. 30, 1988); Robert M. Bass Group, Inc. v. Evans, Del. Ch., 552 A.2d 1227 (1988); Solash v. Telex Corp., Del. Ch., C.A. No. 9518, Allen, C. (Jan. 19, 1988); UIS, Inc. v. Walbro Corp., Del. Ch., C.A. No. 9323, Allen, C. (Oct. 6, 1987); AC Acquisition Corp. v Anderson, Clayton & Co., Del. Ch., 519 A.2d 103 (1986) (hereinafter "AC Acquisition").

appropriate balance between judicial deference to and oversight of the directors' business judgments. That review can and thus should be largely disconnected from a search for the proverbial "hand in the cookie jar," not only to avoid an unseemly search for "smoking gun" evidence of such misconduct but because such evidence will in most cases be largely tangential to the more fundamental issues of corporate and shareholder interests.3/

SUMMARY OF ARGUMENT

The Chancellor's decision wrote all procedural safeguards out of the Unocal analysis and reduced the substantive proportionality standard to the narrow inquiry of whether a company is following a strategic course to which its directors have subscribed in hopes of producing values over a long term comparable to other unexplored alternatives. There is scarcely a public corporation unable to declare it is on such a course. Certainly none faced with a challenge to control will ever fail to so declare. Thus, the lower court's decision would eviscerate Unocal's procedural and substantive standards.

I. The shareholders of Delaware corporations have a right to certain fundamental procedural safeguards where Unocal standards apply:

A. Before determining whether an uninvited bid constitutes a threat, the directors have an obligation to make a reasonable assessment -- directly or with the aid of independent, untainted advisers -- of the nature or extent of the threat, if any.

3/ Thus while in some Unocal progeny cases, such as Mills Acquisition Co. v. Macmillan, Inc., De. Supr., Cons. Nos. 416, 416, Moore, J. (May 3, 1989) (hereinafter "Mills"); there has been evidence of egregious self-dealing or other misconduct, and in others such as Revlon, there has been some such evidence, in a significant number of the decisions, such as Moran; Ivanhoe Partners v. Newmont MIning Corp.; Del. Supr. 535 A.2d 1334 (1987); AC Acquisition; and Grand Met/Pillsbury, no question of self-dealing or other misconduct arose and its absence was not dispositive.

B. Before determining whether or how to respond to a reasonably perceived threat, the directors have an obligation to adequately inform themselves concerning a reasonable array of alternatives.

C. Where management has a material interest in the transactions at issue, the independant directors, typically constituted as a special committee, should undertake to act independently of management and management's advisers to assure that shareholder interests are not sacrificed to management's interests.

D. Negotiation relating to transactions that could affect control should be conducted, or at least overseen, by independent directors or their independent representatives.

The record evidences the complete failure of Time's directors to adhere to <u>any</u> of these procedural standards. Although these failures were brought to the attention of the Chancery Court, the Chancellor erred in failing to attach the proper legal significance to these fundamental procedural lapses.

II. By virtue of <u>Unocal</u> and its progeny, Delaware corporate shareholders are protected by certain basic <u>substantive</u> standards applicable to control contests:

A. In assessing the extent and nature of a threat posed by a tender offer, the directors must take into account the extent and nature of the structural and other defenses available to help them protect the shareholders, such as Section 203 of Delaware Corporation Law, poison pill plans, and super-majority provisions.

B. An all-cash for all-shares offer presents a legally cognizable threat to the shareholders only to the extent that it may be inadequate and, since the shareholders will have no continuing investment in the enterprise, poses no cognizable threat to corporate policies and effectiveness. Moreover, an all-cash, all-shares offer at a price that may be deemed inadequate, accompanied by an invitation to negotiate, may not be deemed to constitute a threat absent reasonable inquiry to ascertain whether the threat posed by such inadequacy can be removed.

C. When a corporation is faced with an uninvited offer, its response must be proportionate, not Draconian. Lock-ups, break-up fees and no-shop confidentiality agreements that are preclusive, provide substantial advantages to a bidder aligned with management or that do not, in an auction context, produce a new or better bid, are not appropriate. The directors will have the burden of demonstrating that any measures taken in response to a "threat" are proportionate to that threat.

D. If directors respond to an uninvited bid with a "functional alternative," such as a recapitalization or restructuring or self-tender, they may not act coercively, that is to say in a fashion that precludes the shareholders from determining themselves whether to tender or accept the functional alternative.

Time's revision of, and irrevocable commitment to, its merger agreement with Warner was an unreasonable defensive reaction to Paramount's concededly negotiable all-cash, all-shares offer, and was calculated to deny Time's stockholders the option to accept Paramount's (or any third party's) premium offer. The Chancery Court erred in concluding otherwise.

STATEMENT OF FACTS

As the Chancery Court found (Slip Op. at 5), many of the material facts are not in dispute. But the Chancery Court's selective statement of facts requires our own brief summary of material facts.

A. Time's Senior Management Directed the Negotiations with Warner, and Were Strongly Motivated to Assure the Long Term Succession of Time Management.

On March 3, 1989, Time's board of directors endorsed, subject to the approval of Time shareholders, a merger agreement with Warner (the "Original Merger") which would transfer several senior executive positions to Warner executives, half of the seats on Time's board to Warner directors, and 62% of Time's voting securities and equity ownership to Warner stockholders. Slip Op. at 21; A 19-21.4/

From the outset of the negotiations, Time's senior management viewed the Time-Warner merger as a substantial, and hopefully preclusive, barrier to a hostile takeover of Time (Levin Ex. 11 at 1, 4; A 1056, 1059), and made a high priority the achievement of employment agreements providing themselves favorable terms of succession, tenure and compensation. (Id. at 3, A 1058) Indeed, "securing the top job ultimately for Mr. Nicholas" held up the negotiations for months and preceded the negotiation of an exchange ratio. (Slip Op. at 19-20.)5/ Once Ross, Warner's chief executive officer, agreed he would retire five years after the merger and that Nicholas would then become the sole chief executive officer, "other

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4/ Citations to Plaintiffs' Joint Appendix are in the form "A____."

5/ Time's discussions with Cap Cities/ABC were also terminated in the Fall of 1988 over management succession and control issues. (Nicholas Tr. 232-33.)

aspects of the agreement came easily." (Slip op. at 20.) Defendants Munro, Nicholas, and Levin negotiated their own employment agreements, as well as the exchange ratio and other terms of the Original Merger and related agreements. None of Time's outside directors was involved in the negotiations with Warner. (Opel Tr. at 116; Finkelstein Tr. at 98; Temple Tr. at 147-48; A 147-48.) These employment agreements that substantially increased the compensation of Munro and Nicholas and expanded their tenure. (Slip op. 43-44.) These same Time executives, rather than any independent Time directors, retained and directed the principal financial advisers (Wasserstein and Shearson) and the lawyers who assisted Time in connection with the Original Merger and related agreements. (Slip op. at 29-30.) These same Time executives negotiated contracts with Wasserstein and Shearson providing for payment of bonuses of $5 million each if any of a number of transactions with Warner were consummated. (Id.)

When Time's board of directors reviewed and then approved the Original Merger and the related agreements, the directors did not act through a special committee of independent directors. Although a special committee of outside directors, selected by Munro, had been established, it never met or functioned. (March 3, 1989 Time Board Minutes, Finkelstein Ex. 6 at A3351; Finkelstein Tr. at 110; Opel Tr. at 238-239; A 1885, 791, 1311-12.) Instead, the directors met as a committee of the whole and retained no separate independent financial advisers or law firms to advise and assist them. Management and its financial advisers and lawyers provided the information and professional advice upon which the board relied. (Slip op. at 29-30.) The management directors themselves participated extensively in the board's deliberations. (March 3, 1989 Time Board Minutes, Finkelstein Ex. 6; A 1228.)

B. The Exchange Ratio in the Original Merger Agreement Substantially Favored Warner While Exchanging Time Shares at a Discount.

Time's senior management not only insisted that Nicholas have the top job, but that Time be described as the "acquiring" company in the Original Merger even though "[i]n terms of market capitalization and 1988 net income, Warner was the larger of the two companies." (Slip op. at 20-21.) To achieve these objectives, Time's senior management agreed to pay a premium to Warner's stockholders. (Id. at 20-21.) Levin, Vice Chairman of Time and a principal Time negotiator, noted in a July 1988 memorandum that although the exchange ratio for an exchange of Time and Warner shares should be based on market values (then .38), "[w]e should be flexible" if Ross agrees to share power and retire soon. (Slip op. at 20; Levin Ex. 17; A 1060.)

The Original Merger provided for an exchange ratio of 0.465 shares of Time for each share of Warner. By any measure, as Warner's financial adviser put it, the exchange ratio in the Original Merger was "a hell of a deal" for Warner stockholders. (Warner's Board Minutes, March 2, 1989, Aboodi Ex. 3 at 14; A 1871.)6/

6/ If, as Defendants claim, $70 per share is an adequate price for Warner and $200 per share is deemed an adequate price for Time, the exchange ratio in the Original Merger should have been no more than 0.35 (rather than 0.465). If, as Time now contends, an adequate price for Time would be $250 per share, the exchange ratio should have been 0.280, not 0.465. If the exchange ratio in the Original Merger and the $70 price Time has offered for each share of Warner stock are both fair, Time's management was valuing Time stock at approximately $150 per share in the Original Merger.

C. Time Resorts to Lock-Up and Dry-Up Arrangements <u>To Preclude Alternatives to the Original Merger.</u>

Time's senior management anticipated that the announcement of the Original Merger would put Time "in play." (Slip op. at 24.) Therefore, they negotiated several collateral measures and agreements in connection with the Original Merger designed to preclude or at least substantially impede any third party attempt to acquire Time, whatever the price. These included: "dry-up" agreements with various financial institutions that virtually precluded those institutions from providing funding for any offer for Time; a Share Exchange Agreement with Warner, pursuant to which Warner was to receive 7,080,016 shares (11.1%) of Time in exchange for 17,292,747 shares (9.4%) of Warner, that serves as a block to any unwanted change of control; and a no-shop and confidentiality agreement with Warner which substantially restricted Time's ability to furnish information to, or negotiate with, any person willing to offer Time stockholders a financial alternative to the proposed Time-Warner transaction, even if superior. (Slip op. at 23-25.)7/ Those three anti-takeover measures were in addition to the "full armory of defenses" Time had in place prior to March 4, 1989, including, among other things, a super-majority provision, a staggered board, restriction on shareholder action by consent or to call a meeting, rather long (50-day) notice of

7/ By transferring more than 11% of Time's outstanding shares to Warner, Time's management and Board (who held 6.6% of the voting stock as of May 1, 1989) gave Warner and themselves, in light of the super-majority voting provisions in Time's Certificate of Incorporation, an effective veto, through a combined 17.6% interest, over a hostile bid for Time. At $200 per share of Time (a value that Time's board appears to contend is too low) and $70 per share of Warner (a value that Time's and Warner's boards both appear to agree is adequate), the share exchange represents a potential loss to Time shareholders of $410 million. At the $250 per share that Wasserstein now claims Time is worth, the transfer of value from Time to Warner shareholders pursuant to the Share Exchange Agreement may exceed $800 million. This is indeed a high price for an agreement whose "principal purpose was to discourage any effort to upset the [Time-Warner] transaction." (Slip op. at 23) shareholder motions at meetings, and a poison pill preferred stock rights plan, which had been amended in 1988 to reduce its trigger to acquisition of a 15% stake in the company. (Slip op. at 11.)

D. Time Trumpets the Benefits of a Stock-for-Stock, <u>Pooling Of Interests Merger With Warner.</u>

In the immediate aftermath of the announcement of the Original Merger, Time commenced a massive public relations campaign proclaiming the benefits of the Original Merger in strategic and economic terms. Time listed the non-leveraged nature of the stock transaction and "pooling of interests" accounting treatment high among its benefits for Time shareholders. (Munro Ex. 12 at 18-19; Munro Ex. 13; A 1121-22, 1130-31.) Munro and Levin testified to subcommittees of the United States Senate that one of the key aspects of a Time-Warner merger was the absence of enormous debt. They noted that such debt impedes the ability to secure long-term growth. (Munro Ex. 12 at 19; A 1122.)

On May 24, 1989, Time mailed an extensive proxy statement to its shareholders. It scheduled a vote on the Original Merger for the June 23, 1989 annual shareholders' meeting and disclosed that Time had set a May 1 record date for the meeting. It also described in considerable detail the background of the negotiations and the anticipated economic effects of the Original Merger. The proxy statement extolled the virtues of the Original Merger as a non-leveraged, stock-for-stock, pooling of interests merger. (Collins Aff., Ex. A.)

On June 6, 1989, after the investment community had had three months to review the proposed Time-Warner merger generally and two weeks to review the information contained in Time's proxy statement, Time's shares were trading on the New York Stock Exchange ("NYSE") at $126 per share.

E. First Time's Management and Then Time's Board Rejects the Paramount Offer Without Any Effort to Negotiate or Investigate the Offer.

On June 7, 1989, Paramount commenced a $175 per share all-cash, all-shares tender offer for Time and included an offer to negotiate "all aspects" of the bid, including price. (Slip op. at 25; Munro Ex. 21; A 1230.) The $175 was $49 per share above the prevailing market price of Time stock (for an aggregate premium of approximately $2.8 billion). The day after Paramount announced that offer, Time stock gained $44 per share to close at $170. (Slip op. at 27.) In the week that followed, Time stock rose to over $182 per share. (Id.)

Despite Paramount's expressed willingness to negotiate all aspects of the offer, defendant Munro, without his board's approval, immediately rejected Paramount's offer. (Slip op. at 27-28; Munro Ex 21; A 1230.) In doing so, Munro "never considered exploring what Paramount might be willing to do on a negotiated basis." (A 1230.) The rejection came in an angry and threatening letter sent to Paramount's chief executive the day after the announcement of the Paramount offer in which Munro impugned his integrity and declared war against Paramount. (Munro Ex. 21; A 1230.)

On June 16, Time announced that its board, on the advice of its investment bankers, had rejected Paramount's $175 offer as "inadequate." (Slip op. at 29-30.) The directors reached this conclusion without any inquiry of Paramount. They were advised by Wasserstein that there was no need to discuss with Paramount or anyone else whether a transaction with Paramount or anyone else could be devised that might serve the interests of Time stockholders better than the Original Merger. (Slip op. at 28-30.)8/

8/ The Time directors called the $175, fully negotiable offer inadequate, even (continued...)

The advice given the Time board in June by management's hand-picked financial advisers contrasted sharply with the advice given by that adviser in connection with the Original Merger. In their March 3, 1989 presentation to Time's Board, Time's advisers, in connection with the board's approval of an exchange ratio, estimated a range of value for Time of between $189.88 to $212.25 per share. (Slip op. at 31.) In the June 15, 1989 presentation to the Time board, Wasserstein and Shearson, utilizing the same methodologies they employed in March, estimated a per share range of $233-$274. (Hill Ex. 5, p. W 202553; A 1026.) By contrast, on March 3, Wasserstein ascribed to Warner a per share range of $64.39 - $72.87 (Finkelstein Ex. 7, p. A 1728; A 839), and three months later, on June 15, Wasserstein found Warner's value per share range to be $68.40 - $77.12. (Hill Ex. 5, p. W 202696; A 1026.) Time's value range had thus increased during the 3-month period by 22.7% - 29.1%, while Warner's increased only 5.8% - 6.2%, although both companies are in the media business.

In rejecting the Paramount offer without negotiation or investigation, the Time board also purported to consider that Paramount had conditioned its offer on getting "the approvals for the transfer of control of local cable television franchises" and that satisfaction of this condition could delay consummation of Paramount's offer "for, at a minimum, some months or as much as a year." (Slip op. at 33.) But, in fact, Time's management and board saw "this point . . . less as a problem than as an opportunity." (Id.) Indeed, "Time has been active in trying to impede Paramount's ability to satisfy this condition." (Id. at 33-34.)

8/ (...continued)
though Time and Wasserstein had valued the 62% of Time stock that Time had proposed transferring to Warner under the Original Merger at $150 per share. (That is, $70 divided by 0.465.) Time and Wasserstein thus insist that the transfer of 62% of Time's shares to Warner stockholders at $150 per share was "fair", but that Paramount's $175 offer was inadequate.

As before, Time's board did not act at any point in June through a special committee of independent directors to consider Paramount's offer or other alternatives. (Finkelstein Tr. at 110; Opel Tr. at 238-239; A 791, 1311-12.) Nor did the independent directors select their own financial advisers and lawyers in deciding how to respond to Paramount's all-cash, all-shares, fully negotiable offer. (Id.) Instead, the independent directors relied on management's financial advisers and lawyers in deciding how to respond to the circumstances created by Paramount's offer. (Slip op. at 29-30.)

F. Convinced That Its Shareholders Will Vote Against the Original Merger, the Time Board Scraps the Original Merger and Responds to the Paramount Offer by Adopting a New Transaction.

Time's board concluded that in light of the Paramount offer, Time's shareholders would not approve the Original Merger. (Slip op. at 37.) Rather than run the risk of a negative shareholder vote, on June 13, 1989, Time sought approval from the New York Stock Exchange ("NYSE") for a modification of its rules in order to permit Time to proceed with the Original Merger without obtaining shareholder approval. (Levin Ex. 28; A 1065.) When the NYSE rejected this effort on June 15, Time's board decided to abandon the Original Merger. The decision to do so "must be seen as a reaction to the effect that emergence of the Paramount offer could be expected to have on the shareholder vote." (Slip op. at 37.) As an additional response to Paramount's bid, on June 16, Time waived the five-day notice requirement and, as contemplated by the Share Exchange Agreement, issued 7,080,016 shares (11.1%) of Time to Warner in exchange for 17,292,747 shares (9.4%) of Warner.

The new transaction ("New Transaction") with Warner is vastly different than the Original Merger in the following principal ways.

(1) The merger consideration was transformed from a stock-for-stock exchange involving no debt to a cash tender for 51% of Warner plus some mix of cash or securities for the remainder. As a consequence, Time exchanged favorable "pooling of interests" accounting treatment for purchase accounting treatment, which would require Time to amortize about $9 billion in "goodwill" for years to come. Time will also incur at least $7 billion of new debt, and perhaps as much as $10 billion, and will have reduced ability to support substantial additional borrowing. (Slip op. at 39.) Due to the new debt and goodwill charges, Time is not expected to report earnings for the next several years. (Slip op. at 40.) In approving the New Transaction, Time is losing the very benefits of the Warner combination Time had previously emphasized.

(2) Without the previously contemplated vote by Time shareholders, Warner executives would take over many senior Time positions and designate half of Time's board of directors following the consummation of the tender offer. Time executives will receive the same employment contracts negotiated in connection with the Original Merger.

(3) Time gave up its "fiduciary out." (Slip Op. at 38-39.) In addition, Time's directors agreed not to redeem its poison pill unless ordered to do so by a court. Time's board therefore cannot escape from the New Transaction even if someone makes a bid for Time that is far in excess of what has been deemed "fair" by Time's hired advisers. (Nicholas Tr. at 217-18; A 1286-87.) Having chosen to reject Paramount's offer in favor of the Warner deal, Time's board has removed any flexibility to respond to changing conditions or new information. (Munro Tr. at 44; A 1084.) Mr. Nicholas candidly described Time's self-inflicted predicament to the Wall Street Journal: "We're strapped to a rocket that just left Cape Canaveral." (Nicholas Tr. at 230-31; A 1289-90.)

One similarity between the Original Merger and the New Transaction is the process by which each was negotiated and approved. The New Transaction was negotiated for Time by Time executives who then had, if anything, a greater personal interest in protecting the combination with Warner. These same executives participated in the board's deliberations regarding the New Transaction. Independent directors neither participated in the negotiations with Warner nor selected their own investment bankers and lawyers to advise them.

G. Time's Board Rejects Paramount's $200 Offer Even Though It Is Economically Superior to the New Transaction.

On June 23, "Paramount, not having been able to induce Time to engage in negotiations, unilaterally increased the cash price of its offer to $200." (Slip op. at 40.) Paramount again offered to negotiate all aspects of the offer, including price.

Time's board promptly rejected the $200 offer, on the advice of management's financial advisers, without even attempting to discuss or negotiate the offer with Paramount. Since there was no "fiduciary out" in the New Transaction, they were in any event contractually obligated to stick with the New Transaction. (Slip op. at 41.)

The directors rejected Paramount's $200, fully negotiable offer as "inadequate",9/ even though they knew the market price of Time's stock after the

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9/ This is despite the substantial evidence that $200, which clearly was not Paramount's last offer, is within a range of fair value for Time. Not only did Time's advisers indicate that as of March 3, $200 was within the $189-$212 range of value given (Finkelstein Ex. 7 at 1788; A 802), but several other Wall Street analysts viewed $200 as within the range of a fair value for Time. (Morgan Stanley Presentation to Paramount's Board of Directors Meeting, Hope Ex. 8, P. P2342; A 1029.) Salomon Brothers, Inc., in March 1989, opined that the private market value of Time is $180-220 per share. (Exhibit B to the Affidavit of Barbara MacDonald,
(continued...)

New Transaction will be substantially less than $200 for the foreseeable future. The best evidence may be the market itself. Before the announcement of the Paramount offer on June 7, and three months after the announcement of the Original Merger, Time stock was trading at $126 per share. After Paramount's offer, the market jumped to as high as $182. But following announcement of the Chancery Court's decision, the price of Time stock dropped on the NYSE to $145.

All the investment bankers involved in this case agree that the trading value of Time stock in the foreseeable future will be substantially less than $200 per share. Wasserstein testified "that the stock of Time-Warner would trade at around $150 per share." (Slip op. at 32.) Dillon, Read, one of Paramount's financial advisers, believes that the stock of the combined Time-Warner will trade in a range of between $90 and $140 per share. (Phillips Aff. dated July 3, 1989 and Reply Affidavit dated July 10, 1989; A 374-85, 1492-503.) There are a number of prominent independent analysts who agree with Dillon, Read that the price will not be higher than $140 per share and could be substantially lower. (Phillips Reply Aff. dated July 10, 1989 at ¶ 15; A 1502. See also, Nagy Affidavit of July 7, 1989 at ¶ 10 (using data generated by Time's advisors), "Time's estimated trading range will not exceed $118." Stephen M. Walters of Morgan Stanley & Co., another of Paramount's financial advisers, testified that Time stock, after the New Transaction, would be a $120-$130 stock. Waters Tr. at 242. Time's own advisors estimate a broad range of $106-$188 for 1990. (Slip op. at 32.)) There is no question that at least for the next year or two, Time's trading value will be many billions less than Paramount's $200 per share offer would provide.

9/ (...continued)
p. LP 100134; A 295.) Shareholder plaintiffs' investment banking expert also opined that $200 in cash is fair to the Time shareholders. (Nagy Affidavit ¶¶ 8, 12; Nagy Rebuttal Affidavit ¶ 2; A 1629, 1636, 1666.)

Time's board, advised by Wasserstein and Shearson, apparently believes that the trading price of Time stock may increase substantially over the next four years. (Slip op. at 33.) But if the discount rate of 24% used by Shearson to discount Paramount's bid is applied to these prices, even the highest numbers predicted by Wasserstein for 1992 and 1993, never exceed $174.10/ Dillon, Read, believes that given inter alia, the leverage and volatility of the entertainment business, investors would apply discount rates of 25% to 30%. (Phillips Aff. at 9; A 1500.) Applying these discount rates and even accepting Wasserstein's aggressive cash flow projections and multiples to reach Wasserstein's claimed trading range at the end of 1990 of $106 to $188 per share, Paramount's financial adviser concludes that at the end of 1990, "the resulting range of market prices would be $75-$135. . . ." (Id.)

H. The Time-Warner Merger Precludes a Tender Offer for a Post-Merger Time at Prices Equal to or Near $200.

As Morgan Stanley puts it, "consummation of the Time-Warner transaction will have -- and seems designed to have -- the effect of precluding any subsequent acquisition of the combined entity." (Waters Aff. at 6; A 342.) An acquisition of a combined Time-Warner at the price of $200 per share would "rank by a wide margin as the largest acquisition ever attempted." (Id. at 7; A 343.) More critical to the shareholder plaintiffs, even if theoretically possible, an acquisition of a combined Time-Warner will cost them billions since it "certainly could not be at a price equal to or near the price that could be obtained for the sale of Time alone." (Id.)

10/ See Nagy Affidavit, Ex. O, and Nagy Rebuttal Affidavit, Ex. 3.

The shareholders of Time are facing an immediate and enormous loss unless this Court intervenes. Paramount's $200 per share offer provides an aggregate premium to Time's shareholders that exceeds the market's current valuation of the combined Time-Warner by approximately $2.85 billion using a market price of $150 per share. If the low range of the Wasserstein's numbers is utilized ($106 per share), the potential loss would exceed $7.9 billion.

ARGUMENT

STANDARD AND SCOPE OF REVIEW

The standard of review applicable here is whether the Chancery Court abused its discretion. Daniel D. Rappa, Inc. v. Hanson, Del. Supr. 209 A.2d 163, 166 (1965). Application of an erroneous legal standard in assessing the merits amounts to an abuse of discretion.11/ Pitts v. White, Del. Supr., 109 A.2d 786, 788 (1954). Thus, the legal standard applied by the Chancery Court in assessing the movant's probability of success on the merits is a question of law, subject to de novo plenary review by this Court. Fiduciary Trust Co. v. Fiduciary Trust Co., Del. Supr., 445 A.2d (927, 930 (1982). Moreover, where the lower court bases its decision entirely on a documentary record, this Court may review the entire record and reach its own conclusions if the findings of the trial judge either are not supported by the record or are not the product of an orderly and logical deductive reasoning process. Mills Acquisition v. Macmillan, Inc., supra, at 39; Levitt v. Bouvier, Del. Supr. 287 A.2d 671, 673 (1972). Finally, if the legal conclusions reached by the trial court are inconsistent with the court's own factual findings, its decision to deny a preliminary injunction will be reversed. Id.

11/ Mills Acquisition Co., v. Macmillan, Inc., Del. Supr., Cons. Nos. 415 & 416, Moore, J. (May 3, 1989) Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985).

Thus, whether the Chancery court erred (i) by ignoring evidence that the directors of Time failed to fulfill the procedural requirements of Unocal and (ii) by applying an incorrect legal standard in sustaining the Time defendants' decision to respond to Paramount's bid by bidding for Warner, are issues fully reviewable by this Court and, if affirmatively answered, provide independent bases for reversing the decision below.

I. THE CHANCERY COURT ERRED BY IGNORING THE UNCONTROVERTED EVIDENCE THAT THE DIRECTORS OF TIME FAILED TO FULFILL THE PROCEDURAL REQUIREMENTS SET OUT BY THIS COURT IN UNOCAL.

As noted above, Unocal and other cases have mandated or suggested a variety of procedures to ensure that the actions taken by a board of directors in response to a takeover offer serve the broad interests of the stockholders generally and not the narrower interests of incumbent management. Those procedural steps include: making a reasonable assessment of the nature and extent of the threat;12/ formulating a reasonable array of alternatives;13/ reposing decision and authority in

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12/ Unocal, Del. Supr., 493 A.2d at 955 (directors responding to threat must show "reasonable investigation"); Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., Cons. Nos. 415 & 416, Moore, J., slip op. at 7, 9, 10 n.7, 16 (May 3, 1989) (hereinafter, "Mills") (likening management's failure to inform the board fully to "domination," approving the Chancellor's observation that the board did not engage in a reasonable investigation of the Bass Group, and criticizing the board for taking no steps to uncover the facts); Robert M. Bass Group v. Evans, Del. Ch., 552 A.2d 1227, 1240 (1988) (hereinafter, "Macmillan I") (where the board decides to resist a takeover, Unocal requires a reasonable investigation made in good faith); UIS v. Walbro, Del. Ch., C.A. No. 9323, Allen, C., slip op. at 6 (Oct. 6, 1987) (duty of care includes duty to inform oneself).

13/ Mills, slip op. at 10 (noting with approval that, despite the various charts presented to the board, the Chancellor had found that all restructuring plans clearly contemplated that management would retain control); UIS v. Walbro, slip op. at 5-6 (failure to explore whether bidder would have made higher offer before taking defensive steps was worthy of further study); City Capital Associates Limited Partnership v. Interco Inc. (hereinafter "Interco"), Del. Ch., 551 A.2d 787, 796, appeal dismissed, 556 A.2d 1070 (1988) (in light of non-coercive bid, board exercises its business judgment by negotiating on behalf of stockholders, instituting
(continued...)

outside, independent directors, or a special committee where management is interested in the control transforming transaction;14/ and having independent, outside directors oversee negotiations that could effect changes in control.15/ In this case, those charged with the management of Time failed to take any such procedural precautions.

A. The Directors of Time Failed To Make a Reasonable Assessment of the Nature and Extent of the Alleged Threat

Before directors can claim the protections of the business judgment rule under the heightened scrutiny of Unocal they must first engage in a reasonable assessment whether such a threat exists. In the present case, no such reasonable assessment was made. Time's directors never inquired of Paramount, directly or indirectly "what Paramount might be willing to do on a negotiated basis." (Slip op.

13/ (...continued) Revlon-style auction, or arranging alternate value-maximizing transaction); Macmillan I, 552 A.2d at 1241-42 (reasonable response would have been to develop more valuable economic alternatives and, if the directors determined the company was not for sale, to propose a non-coercive transaction that would offer shareholders higher value).

14/ Unocal, 493 A.2d at 950 (eight outside directors meeting separately from management directors recommended the rejection of Mesa's coercive offer and the adoption of a self-tender); Mills, slip op. at 11-12. See also Dynamics Corp. v. CTS Corp., 637 F. Supp. 406, 411-12 (N.D. Ill.), aff'd, 805 F.2d 705 (7th Cir. 1986) (district court emphasized that plan was adopted without any independent investigation by outside directors); S. Simpson, The Emerging Role of the Special Committee -- Ensuring Business Judgment in the Context of Management Leveraged Buyouts and Other Corporate Transactions Involving Conflicts of Interest, 43 Bus. Law. 665 (1988).

15/ Mills, slip op. at 53. n.32 (criticizing the board's "abandonment of its oversight functions" that allowed self-interested managers to act without restraint); Revlon, Inc. v. MacAndrews & Forbes Holdings, Del. Supr., 506 A.2d 173, 183 (1986) (quoting favorably Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 277 (2d Cir. 1986), which criticized the board of Smith Corona for having "failed to ensure thensure that alternative bids were negotiated or scrutinized by those whose only loyalty was to the shareholders").

at 28) Instead, the directors permitted Time management to make the rejection of Paramount's bid a foregone conclusion.

Immediately following the making of Paramount's bid on June 7, 1989, without the approval of the Time board, Munro fired off an angry missive to Paramount's chairman that, in effect, declared war.16/ Between June 13 and June 15, 1989, after the Time board had first met to consider the Paramount offer, but before it had decided to reject the Paramount offer, Time and its subsidiaries began contacting local governments to urge them to consider commencing litigation against Paramount. When the Time board convened to make a decision on the Paramount bid, it was writing on a thoroughly marked-up slate.

Nor did the board, in spite of the path charted by management, embark on its own independent inquiry. Although the Time board was advised by lawyers and investment bankers, those advisers and bankers were management's and their presentations did not provide the board with an accurate, unbiased picture on which the outside board members could reasonably rely. For example, Wasserstein, was serving pursuant to a February 14, 1989 agreement that provided it with a $5 million "kicker" if a deal with Warner were consummated.17/ As in Interco, therefore, Wasserstein had "a rather straightforward and conventional conflict of interest when it opine[d]" as to the bid that management opposed. See id., 551 A.2d at 793.18/ That agreement, though later revised to eliminate the obvious

16/ Opel Tr. at 197-98; see also Luce Tr. at 125-26; Finkelstein Tr. at 135-36.

17/ Wasserstein Dep. Ex. 1.

18/ See also Dynamics Corp., 805 F.2d 705, 716 (7th Cir. 1986) (under Delaware law, compensation scheme by which investment adviser received incentive fee if favored bidder succeeded cast doubt on good faith of board); Oesterle & Norberg, Management Buyouts: Creating or Appropriating Shareholder Wealth, 41 Vand. L. Rev. 208, 251 (Mar. 1988) ("[T]o insure procedural and price fairness . . . , buyout proposals should be accompanied by at least one fairness opinion drafted by (continued...)

conflict of interest it originally engendered, was not revised by Time management until June 15, 1989 (after litigation had commenced and after Wasserstein had already completed many presentations to the board on the inadequacy of the Paramount bid) and was not approved by the board until June 16, 1989 (after the board had rejected the Paramount bid and approved the New Transaction with Warner).

Furthermore, at the same time that Wasserstein, was discounting the value of Paramount's offer because of delays caused by the need for regulatory approval, Time's management and its outside legal advisers "sought to cause delay" in obtaining those approvals). (Slip op. at 28) Instead of the board's receiving independent legal advice, management's selected counsel was plotting a strategy designed "to impede Paramount's ability to satisfy" the regulatory conditions to its offer. (Slip op. at 34.)

B. Before Determining How To Respond To An Alleged Threat, A Board Must Consider A Reasonable Array Of Alternatives

Decisions of this Court and the Chancery Court establish that before determining whether or how to respond to a reasonably received threat, the board of directors must consider a reasonable array of alternatives. In the present case, it is indisputable that Time's board of directors had a wide range of options open to them between June 8 (when they first met to discuss the Paramount bid), and June 16 (when the board ultimately decided to reject that offer and proceed with an acquisition of Warner). The Time board could have:

- just said "no" to Paramount's opening bid, explained the benefits of the Warner transaction and the risks of the Paramount offer to Time

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18/ (...continued)
reputable financial advisors who are paid without respect to the success of the buyout and who have no financial stake in the buyout itself") (emphasis added).

stockholders, and proceeded with the June annual meeting and vote on the Original Merger;

- just said "no" to Paramount's opening bid, postponed the June meeting to provide additional time to communicate with Time shareholders, and then proceeded with an annual meeting and vote on the Original Transaction Merger;

- explored the possibility of achieving their strategic objectives without coercing Time shareholders or depriving them of any current value by having Warner acquire Time at an attractive fair price;

- opened talks with Paramount to determine whether -- despite the benefits and synergies of the combination with Warner -- Paramount would be willing to buy Time at a price that would exceed not only the short-term but the projected long-term values of remaining independent or combining with Warner and maintain "Time culture" by having the same succession arrangements;

- directed independent financial advisers to assess, and perhaps pursue, other financial or structural alternatives to the values offered by Paramount's bid.

Although either of the "just say no" courses of action described above were, perhaps, the most obvious choices for the Time board at that point, neither was adopted. The reason for rejecting those options was not that the directors decided, decided, as in Shamrock, that shareholders could not be adequately and accurately informed of the costs and benefits attendant to various options.19/ The Time directors did not -- except for briefly considering whether to launch a "Pac-Man" attack on Paramount -- assess any alternatives but for the one that would most easily allow them irrevocably to support management by "cramming-down" a dubious transaction on the Time shareholders to preclude them from accepting any Paramount bid.

19/ Cf. Shamrock Holdings, Inc. v. Polaroid Corp., Del. Ch., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,340, at 92,223-24, Berger, V.C. (Mar. 17, 1989). In Shamrock, the Chancery Court found Polaroid's response to a hostile tender offer reasonable because, in part, Polaroid was about to enter the damage phase of a trial with Kodak that could yield it $6.4 billion in damages. No such unusual circumstances exist in the current case. The future value of a company will always be a inherently debatable proposition.

C. Where Management Has A Material Interest In The Transactions At Issue, Outside Directors Should Act Independently Of Management And Management's Advisers To Preserve The Interests Of Shareholders.

A third procedural problem in this case was the failure of the outside directors to act independently of Time's management directors. The record indicates that -- despite the evident conflict of interest of Messrs. Munro, Nicholas, and Levin -- when the board met to consider how to respond to the Paramount bid it met with those officers, and the financial and legal advisers those officers had selected. Although a special committee of independent directors was authorized on March 3, 1989, that committee never met. The independent directors did not select and retain their own independent financial advisers and counsel. Thus, in every meaningful way, Time's shareholders have been deprived of independent deliberations by their non-management directors.

D. Negotiations That Could Effect A Change In Control Should Be Conducted Or Overseen By Independent, Outside Directors So As To Ensure That Management Will Not Act Unduly To Maintain Control.

Finally, and related to the last procedural point, the independent directors failed to oversee the negotiations that from their outset were understood to likely result in a possible challenge to their control of Time. The record is clear that -- despite their remarkable careers elsewhere -- the outside members of Time's board exercised no oversight whatsoever. In light of management's substantial personal interest in seeing the Warner transaction (and only the Warner transaction) consummated. The support given management by its hired advisers throughout the negotiations and later, and the lack of separate and independent advisers to advise or represent Time's outside directors, the interests of Tim'es shareholders were wholly subordinated to those of management.

II. THE CHANCERY COURT INVENTED AND APPLIED AN ERRONEOUS STANDARD IN SUSTAINING THE DECISION OF TIME'S DIRECTORS TO RESPOND TO PARAMOUNT'S BID BY BIDDING FOR WARNER

The Court's conclusion that the tender and other defenses were "not overly broad" and was "only what was necessary to carry forward a preexisting transaction," Op. at 76, is clearly contrary to the evidence and is not the product of an orderly, deductive process. There were several less intrusive alternatives available to the board, see pp. 24-25 supra. And, even with respect to the New Transaction, the Court inexplicably ignores that Time unnecessarily took the ultimate preclusive step when it contractually bound itself with no fiduciary out even if presented with a more favorable alternative. This is hardly a proportionate or reasonable response to an arguably superior Paramount bid, particularly when Paramount offered to discuss all terms including price.

At bottom, the Chancellor's decision rests on the foregoing conclusion -- explained in just two paragraphs near the very end of a 78-page opinion --20/ that, under Unocal, a board that has formulated and is pursuing a long-term "strategy" it believes may prove beneficial to its shareholders over time, has the power to preclude its shareholders from considering an all-shares, all-cash, fully negotiable tender offer, even if the present value of that offer exceeds the directors' most optimistic expectations for the preexisting "strategic course."

This is an invented standard, inconsistent with all Unocal precedent and policy. It is, moreover, dangerous. It not only applies a clearly erroneous standard, it reversed the burden of proof established by Unocal.

The only nexus between the invented rationale of the decision below and established precedent is an attenuated one related to two cases cited by the Court

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20/ Op. at 76.

for the otherwise unremarkable proposition that an offeror has no right to freeze a target, or force it to alter course just to accommodate or facilitate its offer. Neither decision supports or justifies the conclusion reached below.

The first case cited by both the Chancellor and the defendants is UIS, Inc. v. Walbro Corp., Del. Ch., C.A. No. 9323, Allen, C. (Oct. 6, 1987) in which UIS, having made a coercive partial tender offer, sought a temporary restraining order to enjoin Walbro first from concluding a sale of selling preferred stock to a third party and next from spending (in then yet unproposed transactions) any of the proceeds. The Chancellor denied UIS the temporary restraining order because final relief other than rescission was possible even if UIS ultimately succeeded on the merits. The Chancellor also stated that "a board, if it acts in good faith and with due care, may . . . take steps to defeat a [coercive] tender offer that it finds to be unfair to some shareholders." UIS Inc., at 8.21/

The other opinion court noted was Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980). That decision is fundamentally inapposite on at least three grounds. First, as the Chancellor conceded, (slip op. at 69-70), Crouse-Hinds turned on New York's self-dealing exception to the business judgment rule, precisely the standard rejected by far enhanced Unocal standard that controls this case and does not require such proof. Second, the actual holding of Crouse-Hinds is that plaintiff, not even having taken discovery, not surprisingly failed to carry its evidentiary burden of showing that self-interest did motivate the directors. Third, given the underlying facts, which are extraordinarily different from this case, the actions taken by the defendants there would likely pass muster under Unocal.

21/ Interestingly, regarding the directors' duty of care, the court observed: "Defendants' failure to explore to any extent whether UIS would make a higher offer for all shares surely is worthy of further inquiry. A board's duty is to act with due care and that duty includes the responsibility to reasonably inform oneself of alternatives." UIS Inc., slip op. at 5-6.

InterNorth, like UIS, had made a coercive, front-end loaded, partial tender offer for 54% of Crouse-Hinds stock at a price just $2 over market, with a freeze-out, back-end merger. 634 F.2d at 693. The market price quickly surpassed the tender offer price, but InterNorth neither raised its bid nor expressed a willingness to negotiate price. Id. at 694 n.5. Crouse-Hinds did not have in place any antitakeover measures with which it could protect its shareholders against the coercive InterNorth threat. It responded by commencing an exchange offer for shares of Belden. But its directors did not abdicate their fiduciary responsibility by precluding themselves from considering and accepting any better deal that might emerge, nor did they attempt to lock-up its transaction by an exchange of newly issued shares with Belden or attempt to "dry-up" sources of financing to preclude any alternate transactions. In sum, even applying Unocal, what Crouse-Hinds did was proportionate to a cognizable threat of coercion.

There is, under Unocal, vitality to the notion that a coercive bidder, such as in Wallbro and Crouse-Hinds, may not obtain an order freezing a corporation's pursuit of proportionate activity, strategic or defensive. But where there is no such cognizable threat that rule is inapplicable. Moreover, where there is no binding obligation to pursue a strategy, its pursuit in response to an intervening non-coercive tender offer must still be reasonably related to the nature of the threat, and if a new transaction of commitment is to be made -- as it was here -- its reasonableness should not be determined solely by the fact that it is a variation of a previously considered business plan. See Robert M. Bass Group, Inc. v. Evans, Del. Ch., 522 A.2d 1227, 1239 n.31 (1988) ("Macmillan I"). Cf. Shamrock Holdings v. Polaroid Corp., Del. Ch., Fed. Sec. L. Rep. ¶ 94,176, Berger, V.C. (Jan. 6, 1989) (Polaroid I) (modification and adoption of previously considered ESOP plan was reviewed for "entire fairness"). When Time reacted to the Paramount tender offer by cancelling a shareholder vote,22/ in order to "cram down" a revised Warner transaction,23/ that was neither staying the strategic course, nor was it a proportionate response under Unocal.

III. HAD THE CHANCERY COURT APPLIED THE SETTLED UNOCAL SUBSTANTIVE STANDARDS, THE APPLICATION OF PLAINTIFFS FOR A PRELIMINARY INJUNCTION WOULD HAVE BEEN GRANTED

The application below was for a preliminary injunction restraining Time from (1) pursuing its tender offer for Warner, (2) enforcing its dry-up agreements and (3) abiding by its committments to Warner not to provide information to bidders. Plaintiffs did not seek to require the defendants to "lift-the-pill" or surrender to Paramount. Nor do they now. This matter is not yet at that "end phase."24/ It was instead plaintiffs' hope and expectation that if Times directors were enjoined, based upon an opinion concluding that its "irrevocable" decisions constituted a premature and disproportionate response under Unocal and its progeny, reached through a faulty process, Time's directors would comply with their Unocal obligations and reevaluate what is in the best interests of Time's shareholders.

Less than three months ago, this Court wrote an opinion in Mills that makes quite clear that the directors acted inappropriately in responding to

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22/ Cf. In re Anderson Clayton Shareholders Litigation, Del. Ch., 519 A.2d 680 (1986) (Anderson Clayton II).

23/ Cf. TW Services, Inc. v. SWT Acquisitions Corp., Del. Ch., C.A. No. 10427, Allen C. (Mar. 2, 1989).

24/ Plaintiffs did not below and do not here suggest that the moment is ripe to address the question whether Time's shareholders ultimately might be entitled to an order "lifting the pill" and declaring Section 203 inapplicable. Since we made an effort to be quite clear about that, it was disturbing to read suggestions to the contrary throughout the Chancellor's opinion. It was not there is not here our view that Time's directors, having yet failed to examine impartially and thoroughly the alternatives, can or should be expected to decide now to whom to sell Time if anyone.

Paramount's bid.25/ The essential similarities between the Mills facts and those here are startling. It is thus all the more disturbing, we submit, that the parties here, strayed so far from the clear teaching of Mills, which in the following material respects relevant here broke no new ground. In both cases:

> for over a year before a bid arose, management had planned and implemented a strategy designed to protect themselves and their corporation from an uninvited challenge to their business strategy and control;
>
> the board was kept up to date about the progress of that planning, albeit selectively, over the course of the year;
>
> in developing those plans, management focused substantially, and primarily, on assuring that its interests were adequately protected before moving to secure final board authorization;
>
> when the feared all-cash, all-shares, fully negotiable uninvited bid came, the chairman, and then the directors, responded negatively before any inquiry;
>
> their response was the implementation of a variant of the transaction contemplated as part of the strategic plan that had been under consideration for over a year, a key feature of which was assuring management's tenure;
>
> the terms of the original, and ultimately implemented transaction, were developed by management with input from investment bankers they hired, and those same investment bankers were looked to by the Board for advice and guidance;
>
> the uninvited bid led to substantial last minute restructuring of management's original proposal, and required the corporation to incur enormous transforming indebtedness;
>
> management's investment banker counseled adoption of management's favored proposal without the directors having been provided, or having otherwise sought, an adequate basis to assess the value of the transaction against other available alternatives;
>
> the investment banker management had hired advised the directors that the transaction management favored as a

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25/ In Mills, this Court expressed concern that the parties there had not behaved as the Court had reason to expect in light of its earlier rulings. See Mills, slip op. at 57.

response and alternative to the uninvited bid was better, even though it had a lower present value than the uninvited bidder, because of the potential for an out-year appreciation to be created by management (which had a successful record in that regard at least comparable to Warner's);

the responsive alternative was coercive, as well as economically inferior, in the short run;

management's bidding partner was provided substantial advantages in the process, including information not provided to the uninvited bidder, a break up fee and a lock-up; and

the ultimate transaction was adopted prematurely and irrevocably, without the reservation of any discretion in the event the company, as it did, received more attractive alternatives, thus effectively requiring judicial intervention to protect the shareholders.

Obviously, if the Chancellor had applied to these common facts the same substantive standards this Court applied itself in Mills, and approvingly noted that the Vice Chancellor had applied in Macmillan I, the application for preliminary injunction would have been granted. That he did not was plain error. Although Mills alone thus could suffice as a basis for overruling the Chancellor, there follows a systematic presentation of the inconsistency between the opinion below and the entire body of law that comprises Unocal and its progeny.

A. The Paramount Offer Posed No Reasonable Threat To Time Shareholders

Under the line of cases commencing with Unocal and culminating with Mills, the "omnipresent specter that a board may be acting primarily in its own interests" in response to a takeover proposal dictates that Time's reaction to Paramount's bid must meet a two-part test to merit the protections of the business judgment rule. First, Time's board must show that the bid to which it reacted constituted a reasonably perceived threat to corporate policy and effectiveness. Second, Time's board must show that the tender for Warner and other actions taken in response to the proposal were reasonable "in relation to the threat posed." Unocal, 493 A.2d at 954-55. The actions taken by the Defendants fail both tests. Accordingly, Time's tender offer for Warner should be enjoined.

1. The Paramount offer was not coercive and posed no threat to Time shareholders

The Unocal line of cases have recognized two type of "threats to corporate policy and effectiveness": coercive offers and inadequate ones. Paramount's June 6, 1989 proposal proposed to acquire all of the outstanding shares of Time for $175 cash per share, and was by its terms non-coercive.26/ What is more, Paramount offered to meet with representatives of Time to negotiate about all items of the transaction, including price. The Chancellor did not find that offer was inadequate or coercive. Nor do we understand Defendants to assert it was coercive, although they do debate its "adequacy" while ignoring that it exceeded by $25 per share the $150 per share value for Time shares implied in the New Transaction.

26/ See Interco, 551 A.2d at 797; see also Shamrock Holdings, Inc. v. Polaroid Corp., Del. Ch., C.A. No. 10582, Berger, V.C., slip op. at 29-31 (Mar. 17, 1989) ("It is difficult to understand how, as a general matter, an inadequate all cash, all shares tender offer, with a back end commitment at the same price in cash, can be considered a continuing threat under Unocal. Certainly an inadequate coercive tender offer threatens injury to the shareholders. . . . An inadequate, non-coercive offer may also constitute a threat for some reasonable period of time after it is announced. The target corporation (or other potential bidders) may be inclined to provide the shareholders with a more attractive alternative, but may need some additional time to formulate and present that option. During the interim, the threat is that the shareholders might choose the inadequate tender offer only because the superior option has not yet been presented. . . . However, where there has been sufficient time for any alternative to be developed and presented and for the target corporation to inform its shareholders of the benefits of retaining their equity position, the 'threat' to the shareholders of an inadequate, non-coercive offer seems, in most circumstances, to be without substance.") (citations omitted) (emphasis added).

Moreover, assuming arguendo that Paramount's initial offer was somewhat below, its current $200 offer is well within, the ranges of estimated values for Time expressed by a wide array of independent and for-hire investment bankers. Time is estopped from presuming that the initial offer was a threat by its refusal to hold discussions with Paramount. Vice Chancellor Jacobs held in Macmillan I:

> "The defendants argue that the $64 Bass offer was reasonably perceived as a threat, because it was substantially" below the values that their financial advisors, Lazard and Wasserstein Perella, had opined was fair. If that price were firm, the argument might have a plausible factual basis. Cf. BNS. Inc. v. Koppers Co., 683 F. Supp. 458, 475 (D. Del. 1988). However, the $64 offer was only an opening bid, by its own terms subject to negotiation. Management here had no desire to negotiate. They chose to close their eyes and to treat the offer as firm and unalterable."

Id. 552 A.2d at 1240.27/

Even if coercive or inadequate, Paramount's offers still posed no threat to Time's shareholders in light of the ample defenses Time had in place prior to June 7, 1989. As the Court noted in Macmillan I, "in determining whether and to what extent the Bass offers constituted a threat, the Board was required to consider the antitakeover devices already at its disposal." 552 A.2d at 1241. Insofar as that test applies, Time already had in place virtually every takeover protection known to corporate America.

To begin with, as a Delaware corporation, Time is protected by 8 Del. C. § 203, which prohibits business combinations with any stockholder who acquires 15%

27/ See also Grand Met, where the bid price was 60% higher than the closing price prior to the making of that bid. Justice Duffy found that bid fair and adequate based, in part, on reasonable inferences from the market. Grand Met, slip op. at 21. Justice Duffy also viewed with some skepticism the value Pillsbury placed on its own restructuring, noting, in a comment fully applicable here, that the company's ambitious assumptions and that "expectancies over a four or five year period out into the nineties are subject to economic and competitive conditions which are beyond Pillsbury's control." Id. at 22-23.

or more of the corporation's stock without board approval. As noted above, Time also had in place a recently toughened Shareholders' Rights Plan, or poison pill." Time also has a super-majority "fair price" provision in its charter, providing additional protection against front-end loaded, two-tiered offers. Time's by-laws prohibit the calling of a special meeting by shareholders or shareholder action by written consent.

2. The claimed threat to Time's ability to consummate the Original Merger is not a cognizable threat under Unocal in the context of an all-cash, all-shares tender offer

The Chancellor found that Time's tender for Warner and the other measures challenged by plaintiffs were undertaken as a reasonable response to the "threat" Paramount's tender offer posed not to Time's shareholders, or to Time's existing businesses, but solely to Time's ability to fulfill a dramatic strategic ambition via the Original Merger. Op. at 75-76.28/ That is, as noted, an extraordinary and novel conclusion for a wide variety of reasons. Here we remind the parties that under Unocal a legally-cognizable threat to corporate policy and effectiveness does not arise in the face of an all cash, all-share, fully negotiable bid.29/

28/ Amendment 1 to Time's 14D-9 asserts that those measures were in reaction to Paramount's threat to Time's "longterm strategic objective to become a worldwide media and entertainment company, id., Item 4(a), and to its "long-held corporate policies to protect and preserve the journalistic integrity and independence of its publications," id., these assertions appear hollow given Paramount's great success as a film producer, and its worldwide reach.

29/ Interco 551 A.2d at 797 ("Turning to the first element of the form of analysis, it is appropriate to note that, in the special case of a tender offer for all shares, the threat posed, if any, is not importantly to corporate policies (as may well be the case in a stock buy-back case such as Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964) or partial tender offer case such as Unocal itself), but rather the threat, if any is most directly to shareholder interests.") As the Chancellor earlier explained in TW Services, Inc., supra, slip op. at 29-30; (the conceptual notion [behind the allocation of responsibility between the board and the (continued...)

If all Time's shareholders were to tender their shares to Paramount, they will retain no interest, whether Time is a "worldwide media and entertainment company" or its "journalistic integrity and independence" of Time's publications is protected, although we imagine that Paramount would then have the same interest as Time's management. However, much of the directors of Time wish to pursue these strategies, the director's first duty to the shareholders precludes that ordering of priorities under well reasoned, settled law. In finding that Paramount's offer constituted a threat to a preexisting business plan, the Chancery Court also ignored the nature of the Original Merger. In response to Paramount's bid, Time scrapped the Original Merger. In doing so, it abandoned its long-term plan of doing a stock-for-stock pooling of interest merger. The New Transaction is a fundamentally different transaction. Management's decision to pursue the New Transaction in the face of the Paramount offer was a <u>departure</u> from the preexisting plan, not a continuation of it.

On the other hand, it is important that Time and Warner could have had their cake and eaten it too. They could have revised their Original Merger Agreement, in accordance with its substance, to provide that Warner would purchase Time. That the parties are able to consummate their desired marriage, and preserve <u>all</u> the alleged strategic objectives <u>without any economic injury to Plaintiffs</u> was revealed on July 7, 1989 when Time obtained $27 billion in commitments to fund its $14 billion acquisition of Warner, based on the assets and cashflow of the combined entities. The remaining $13 billion, divided by Time's 57 million shares would fund

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<u>29/</u> (...continued)
shareholders is that) tender offers essentially represent the sale of shareholders separate property and such sales -- even when aggregated into a single change in control transaction -- require no "corporate" action and <u>do not involve distinctly "corporate" interests.</u>)

a non-coercive offer to purchase all Times shares at over $228 per share by Warner, or a redemption offer by Time.

In any event, whatever alternatives Time's directors may have been able to develop had they proceeded properly and reasonably, their fear of the impact of Paramount's offer on their preexisting strategic goals are, under Unocal, of no legal relevance to the protection of Time shareholders ready and willing to tender their shares in response to Paramount's non-coercive all-cash offer for all shares.30/

B. The defensive actions taken by Time constituted an unreasonable response to the Paramount offer

In Macmillan I Vice Chancellor Jacobs aptly defined the nature of a reasonable response, recognizing the duty of directors to serve the interests of stockholders in the following terms:

> "A reasonable response [to an all cash, all shares, ask-us-for-more bid], then, would be to develop a more valuable economic alternative. That alternative might take several different forms. For example, if the directors concluded that the company should be sold, it would be reasonable to solicit higher bids from other bidders, as well as the original offeror. If the company was not to be sold, the directors might propose a non-coercive transaction that would offer shareholders higher value, whether immediate or long term, while also enabling them to retain their equity in the corporation."

Macmillan I, 552 A.2d at 1241-42 (emphasis added).

In light of the non-coercive nature of the Paramount offer and the ample defenses that Time had in place, and the absence of any reasonably perceived legally cognizable threat, the decisions by the directors to restructure and irrevocably proceed with the New Transaction without any vote, to issue 11% of

30/ Cf. Mills, supra, at 48 n.29 (in weighing value of bid and bidder's responsibility, non-stockholder interests may be considered only if they bear rational relationship to those of the owners).

Time's shares to Warner, to cancel the shareholders' vote on the Original Merger, and otherwise to mount an all out war against Paramount solely in defense of the New Transaction constituted a wholly disproportionate, unreasonable response.

1. The New Transaction Injures The Public Shareholders

The decision of the directors to bring Warner back to the negotiating table was not an unreasonable first step. But what happened at that table was. Instead of negotiating a transaction with Warner -- such as a Warner tender for Time at more than $200 per share -- that would compare favorably to the Paramount bid Time did the opposite. As the Chancellor found below, the Revised Merger did not enhance shareholder value over the Paramount bid. Instead, it materially injured the public shareholders by coercing them to accept what is concededly a currently inferior economically alternative and precluding their ability to accept another bid, no matter how fabulous. Nagy Affidavit at D's 8-12.

It was found by the Chancellor and is conceded by Time that if the Warner Merger is consummated, Time shares are expected to trade at significantly less than $175 and $200 per share that Paramount has already bid. (Op. at 2.) The most likely upper end of the range appears to be $150 per share, the price at which Time shares traded immediately before the Chancellor's decision. A drop to $126, the price the day before Paramount's initial bid, is more likely than that. A further drop to $106, the bottom of Wasserstein's range is perhaps most likely. Thus the expected loss of value to Time's shareholders ranges from between $2.8 to $7.9 billion. This potential loss is unprecedented. It is unacceptable. No Delaware law or decision requires, or permits, this catastrophe, especially since all this is to be achieved by reason of the actions of directors whose duties are to protect and enhance shareholder interests depriving the public shareholders any say in the matter except by their day in this Court. Worse still, the New Transaction precludes a real prospect that Paramount or some other bidder will offer more yet.

It was precisely for those reasons that in Macmillan I Vice Chancellor Jacobs preliminarily enjoined the management restructuring of Macmillan undertaken in response to a perceived threat from a quite comparable bid by the Bass Group for that company. In rejecting the director defendants' proffered justification for the restructuring, which included the year or more it was under study, the Court wrote,

> "But these rationales, even if accepted, do not justify forcing shareholders to accept an economically inferior transaction while, at the same time, precluding them from considering an economically superior one. The directors certainly were free to propose the restructuring to their shareholders. However, as fiduciaries they were not free to "cram down" that transaction in order to "protect" their shareholders from a non-coercive, economically superior one. Under Unocal the directors were obligated to give the shareholders a choice. The restructuring, because it deprives them of a choice, is manifestly unreasonable."

Macmillan I, supra, 552 A.2d at 1243-44.

In sum, Defendants seek approval here of a defensive response that no court applying a Unocal standard has heretofore deemed reasonable: requiring the stockholders to take an economically inferior alternative to a superior all cash offer for all shares. Cf. Mills, Interco, Macmillan I, and AC Acquisition, in which the Chancellor concluded that a defensive partial self-tender at $60 per share was not a reasonable response to an any-and-all offer at $56 when the self-tender was structured to be economically coercive. He there stated:

> "a defensive step that includes a coercive self-tender timed to effectively preclude a rational shareholder from accepting the any and-all offer cannot, in my opinion, be deemed to be reasonable in relation to any minimal threat posed to stockholders by such offer."

AC Acquisition, 519 A.2d at 114.

If there is a difference between the foregoing cases and the present case it is that the injury to the shareholders in this case is much worse. In Macmillan I, as in Anderson Clayton, it at least could be said that the director's defensive decision to incur billions in debt was to be followed by some distribution of cash to their own shareholders. Here, in contrast, all the cash goes to Warner. Perversely, noting precisely that difference the Chancellor attempts to justify a different standard -- since in all those cases the defensive reaction was restrained. He distinguished those cases as involving "functional alternatives," but because Time's defensive borrowings are used to buy shares (or assets) he asserts there is a legal difference. However, there is no setting aside the legally functional difference. The response of the Time directors is equally coercive and less reasonable than the reaction invalidated in Anderson, Clayton comparable in almost all respects to that enjoined in Macmillan I and unquestionably a disproportionate defensive response that should not survive analysis.

2. The New Transaction Is a Disproportionate Response to the Paramount Offer Because There Were a Number of Less Restrictive Alternatives Available to the Time Board.

Perhaps the most extraordinary part of the Chancellor's decision is the cursory and conclusory manner in which he held that Time's response to the Paramount bid was reasonable. After devoting pages of its opinion to the facts and to other legal issues, the Chancery Court decides this determinative issue in several conclusory sentences at the top of page 76 of its opinion. In reaching this conclusion, the court ignored other, less restrictive alternatives available to Time outlined at pp. 24-25 supra.

But rather than exploring -- much less adopting -- any alternatives, Time's board prematurely compelled Time shareholders to accept what all concede is an economically inferior alternative. In light of the availability of these alternatives, none of which foreclosed the achievement of Time's strategic objectives some of which could have assured it without any cost to Time shareholders, the Time board's decision to proceed with the New Transaction was patently unreasonable.

The Chancery Court not only ignored the existence of other, less restrictive alternatives available to Time's board; its analysis also was based on a finding not supported by the record. In concluding that the New Transaction was a reasonable response to Paramount's bid, the Court noted that "while effectuation of the Warner merger may practically impact the likelihood of a successful takeover of the merged company, it is not established in this record that this is foreclosed as a practical matter." (Op. at 76.) Earlier in its opinion, the Court stated that "[i]t does seem reasonable to assume, however, that effectuation of the merger would, as a practical consequence, reduce the likelihood of such a transaction substantially." (Op. at 61.) But most importantly, the Court fails to address the uncontroverted evidence that in the unlikely event a post-merger takeover developed, any takeover "certainly could not be at price equal to or near the price that could be obtained for the sale of Time alone." (See page 20 supra.)

3. The Directors' Abdication of Their Duties Was a Per Se Violation.

Perhaps as important as the adverse impact on Time's shareholders of the irrevocable Tender Offer, the Revised Merger, the irreversible share exchange31/

31/ Given the subsequent shift in values of the shares of the two companies, the share exchange constitutes a break-up fee ranging in value between two astounding numbers: $410 million to $800 million.

(continued...)

and the waste of assets it entails is the substantial jurisprudential risk that, if the widely publicized defensive decisions of Time's directors are not restrained, the precedent set here will open the door to enormous abuse.

Defendants here have, not unexpectedly, invoked the business judgment rule. They urge this Court to defer to the directors' judgment that their decisions here, whether or not clearly in the best interests of Time's shareholders, should not be restrained by the Court. Implicitly, invocation of the business judgment rule rests on several judicially honored presumptions that are thought to justify great deference to directors. Among them are these. Duly elected non-management directors not only have the mandate from their stockholders, they also have greater familiarity with the context of corporate business decisions, greater experience to bring to bear and more time and resources to devote to the consideration of the issues than do judges, even of this Court. Accordingly, for all those and other reasons, the business judgment rule is one permeated with presumptions of judicial restraint.

In the circumstances of this case, however, Time's directors deliberately and prematurely acted to deprive themselves, and this Court, of any basis to utilize that presumption. Time's directors thus should be deemed to have forfeited their right to invoke the business judgment rule in this case. By electing to sign away all their discretion at a very early phase of this control contest, without any

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31/ (...continued)

At least since Mills, it not Revlon, that decision cannot be justified under the law. The issuance of that 11% bloc provided no benefit to Time shareholders; it injured them. It did not bring a new bidder to the table. It was intended to create substantial barriers to any bidder other than Warner. Not only did it not induce an improved bid from Warner but also the New Transaction is devastatingly less attractive than both the Original Merger and the first and second Paramount bid. The Supreme Court recently re-admonished control contest professionals of the impermissibility of this type of action in Mills, slip op. at 57.

inquiry of Paramount or any consideration of alternatives, the directors wrongfully forced the Court to intervene at a premature stage -- not the end phase -- and virtually dared it to substitute its judicial judgment for that of the directors. This turns the underpinning of the business judgment rule upside down.

Time's directors abdicated in that fashion when, on June 16, 1989, they unanimously elected to give up all discretion and commit Time irrevocably to the New Transaction. That action, taken without negotiation or even indirect discussion with Paramount, without seeking to evaluate any alternatives, was a premature and irresponsible decision. That abdication was a wrong not just to Time's shareholders, but to the fabric of the business judgment rule. By irrevocably committing Time at that stage to the New Transaction, the directors surrendered all discretion to deal with a new offer, no matter how superior. They then and there abdicated all their responsibilities on all the crucial issues now before the Court.

In the view of the plaintiffs, that was the height of directorial irresponsibility. It was an assault on the time honored allocation of responsibilities that underlie the business judgment rule itself. We urge the Court to address that abdication in this case in a fashion that will discourage any future similar actions lest Time's directors do very substantial injury to the delicate balance of societal interests that inhere in the business judgment rule.

* * *

In summary, ignoring altogether the benefits granted to management in this New Transaction, the conduct of the Time directors in responding to the Paramount proposal by prematurely committing Time irrevocably to the New Testament fails under Unocal and its progeny because it coerces the shareholders to accept an economically inferior result, and precludes them from any opportunity to choose Paramount's offer or others that may arise, and is unacceptable because it rests on an abdication of the director's duty to retain discretion long enough to exercise their business judgment.

IV. THE TIME DIRECTORS VIOLATED THEIR FIDUCIARY DUTIES UNDER REVLON BY ERECTING UNREASONABLE BARRIERS TO THE TAKEOVER BIDS WHICH THEIR OWN ACTIONS INVITED.

The New Transaction can and should be enjoined on Unocal grounds. If this Court agrees, there is no need to test the conduct of the Time directors under the Revlon line of cases. But Time's directors also violated their fiduciary duties under Revlon, and those violations provide a separate, independent ground for the injunction sought below.

Although the Chancellor concluded otherwise, Time's March 1989 decision to combine with Warner was a "sale" within the meaning of Revlon. First, a contract to transfer over 60% of Time's shares to Warner's shareholders accompanied by provisions to give Warner 50% of the seats on Time's board, several of the senior executive officer positions and the power to block a third party takeover via the share exchange and Time super majority provisions is objectively a sale of control.32/ Second, when the Time directors approved and announced the Original Merger, they knew full well that the transaction would be viewed as the functional equivalent of an acquisition of Time by Warner and that the

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32/ Revlon duties are not limited to those instances in which the board of directors has, in effect or actually, agreed to put the company up for sale. For example, during Macmillan I, the first phase of the litigation in Mills, the management-led restructuring provided the company's executives with only 39% of one of the restructured entities but blocking power. Macmillan I, at 1235; Mills, slip op. at 17. Nevertheless, the Supreme Court noted that "[b]y any standards this company was for sale [at the time of the restructuring]. Mills, slip op. at 55. See also Black & Decker Corp. v. American Standard, Inc., 682 F. Supp. 772, 780-81 (D. Del. 1988); Freedman v. Restaurant Associates Industries, Inc., Del. Ch., C.A. No. 9212, Allen, C. (Oct. 16, 1987); and Edelman v. Fruehauf Corp., 798 F.2d 882, 884-86 (6th Cir. 1986).

announcement would put Time "in play." They acted accordingly by adopting various defensive measures, including the lock-up Share Exchange Agreement, a no-shop clause, and dry-up agreements. Third, Time's directors also knew that the Original Merger would by its very size make a future takeover of Time either impossible or extremely difficult. (Waters Aff.) Indeed, one of the reasons for pursuing the Original Merger was to make Time so large that it would as a practical matter be invulnerable to a hostile takeover. In short, when Time's directors approved the Original Merger, they set in motion a course that has made a "sale" of Time "inevitable" and thrust Time into the Revlon mode.33/

In rejecting plaintiffs' Revlon argument, the Chancery Court ignored the facts of this case. The Court recognized that "under some circumstances a stock for stock merger could reflect a transfer of corporate control." (Op. at 59) But in finding no objective change of control here, the Court failed to consider that Warner directors would constitute 50% of Time's board and that Warner officers would occupy key officer positions at Time following the merger as well as the ability of Warner to conserve its 11% of Time with the insiders shares to block a third party transaction under Time's super majority provision. Nor did the Court address the reality that Time's directors knew they were in effect putting a "for sale" sign on Time in approving the Original Merger.

The Chancery Court's handling of Plaintiffs' "more subtle" Revlon/Unocal argument is equally flawed. Plaintiffs argued that Revlon duties are triggered when a company engages in a transaction designed to make it takeover proof, thereby eliminating the prospect of the shareholders realizing a takeover premium for their

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33/ Time's protestation that it was not for sale is not at all determinative. As the Chancery Court noted, "it now appears resolved that a subjective disinclination to sell the company will not prevent that [Revlon] duty from arising where an extraordinary transaction, including, at a minimum, a change in corporate control is involved..." (Op. at 51) shares. The Court noted that while the Original Merger "did not legally preclude or impede a later sale or change in control transaction, [i]t does seem reasonable to assume . . . that effectuation of the merger would, as a practical consequence, reduce the likelihood of such a transaction substantially." (Op. at 61) But having reached this conclusion, the Court nevertheless refused to apply Revlon, because applying Revlon "would dramatically restrict the functioning of the board whenever an offer was made." (Op. at 63) The Chancery Court apparently concluded that plaintiffs' reading of Revlon would impermissibly "stay the exercise of director power under Section 141 pending the resolution of an attempt to acquire control." (Op. at 61)

The Chancery Court has misread plaintiffs' argument. Contrary to the Chancery Court's suggestion, plaintiffs are not contending that an offeror can involuntarily thrust a company into the Revlon mode. That issue is not involved in this case. Time voluntarily entered the Revlon mode when it approved the Original Merger. Under these circumstances, the exercise of the directors' power is limited by the requirements of Revlon. But that limitation on director power is not the result of action by Paramount; it is the result of a decision by the Time board to pursue the Original Merger. Applying Revlon here thus would not be an "expansion" of Revlon as claimed by the Chancery Court. (Op. at 63). Here, as in Revlon and Mills, it was action by the directors, and not by an offeror, that has made a "sale" inevitable.

In contending that Revlon applies to the conduct of Time's directors, plaintiffs have not contended that Time's board immediately had to commence an auction for Time. As the Chancery Court observed in TW Services, Inc. v. SWT Acquisition, Del. Ch., C.A. No. 10298, Allen, C. (Mar. 2, 1989), "the so-called Revlon duty is not necessarily a duty to conduct an 'auction' . . ., rather it is the duty to exercise judgment (in good faith and prudently) in an effort to maximize immediate share value." TW Services, slip. op. at 21. Nor do Plaintiffs contend that the directors had to shop Time or solicit alternatives to the merger before submitting it to Time's shareholders. But under Revlon, the Time directors had a duty not to erect unreasonable barriers to any bids for Time that might emerge in response to the Original Merger. For that reason, the New Transaction, as well as the Share Exchange Agreement was impermissible.34/

Even at this stage in the process, Revlon does not mean that Time must conduct an auction. What it does mean is that the decisions of the Time board must consider options for immediate share value maximization in its deliberations. The tender offer for Warner does not satisfy that test by any measure and is therefore impermissible. The record is replete with evidence that if the New Transaction is completed, instead of value maximization, shareholders will suffer billions in immediate devaluation. (Op. at 45-46; see pp. infra.)

V. THE PLAINTIFFS AND THE OTHER TIME SHAREHOLDERS WILL BE IRREPARABLY INJURED IF THE TENDER OFFER, THE NO-SHOP CLAUSE AND DRY-UP AGREEMENTS ARE NOT ENJOINED.

Unless Time's tender offer for Warner, and the no-shop and dry-up agreements are enjoined, the Plaintiffs and other shareholders of Time will be

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34/ The impropriety of the Share Exchange Agreement is made clear by the recent decision of the Supreme Court in Mills, where the Court there chided the parties, reminding them that its prior holding in Revlon distinguished the potentially valuable uses of lock-ups from those that are impermissible:

> [W]hile those lock-ups which draw bidders into a battle benefit shareholders, similar measures which end an active auction and foreclose further bidding operate to the shareholders detriment.

Mills, supra, slip op. at 57, citing Revlon, 506 A.2d at 183. See also Greenfield v. National Medical Care, Inc., Del. Ch., Cons. C.A. Nos. 7720 & 7765, slip op. at 9-10, Berger, V.C. (June 6, 1986).

irreparably injured. Defendants have made perfectly clear their intention to proceed with all these defenses unless this Court enjoins them from doing so. Indeed, they have irrevocably committed themselves to the tender for Warner.

If the tender offer closes, the shareholders of Time will irretrievably lose the $200 cash Paramount offer and equally important, the possibility of realizing even higher values. Depriving shareholders of an opportunity to consider a better offer constitutes irreparable injury to the shareholders. Macmillan I, 522 A.2d at 1247; Interco, 551 A.2d at 800; In re: Holly Farm Corporation Sharehodlers Litigation, Del. Ch., C.A. No. 10350, Hartnett, V.C., slip op. at 17 (Dec. 30, 1988); Mills Acquisition Co. v. Macmillan, Inc., Del. Ch., C.A. No. 10168, Jacobs, V.C., slip op. at 50 (October 17, 1988), aff'd, Mills, Del. Supr., Cons. Nos. 415 & 416, Moore, J. (May. 3, 1989).

If Time consummates the Tender Offer, its entire financial structure will be irreversibly changed. Time will have purchased for cash 100 million shares of Warner at a very high premium and incurred from $8 - $10 billion in debt to finance the takeover of Warner. When that happens, the Court will be powerless to protect Time's shareholders if they prevail at trial, for the Court will be unable to retrieve the cash payments from Warner's shareholders or to undo the staggering debt and related incumbrance of Time's assets.

In Robert M. Bass Group, Inc. v. Evans, Del. Ch., C.A. Nos. 9953 & 9909, Jacobs, V.C. (June 10, 1988), facing essentially the same circumstances, the Court found irreparable harm to all shareholders:

> because the restructuring will irretrievably alter [the target's] capital and corporate structure and would adversely affect the quality of the shareholders' investment and prevent or drastically reduce the shareholders' opportunity to realize greater value for their shares . . . all without any opportunity for the shareholders to have any say.

Robert M. Bass Group, Inc. v. Evans, Del. Ch., C.A. Nos. 9953 and 9909, Jacobs, V.C. (June 10, 1988) (bench ruling) transcript at 9. (Emphasis added).

In its later written opinion, Robert M. Bass Group, Inc. v. Evans, Del. Ch., 552 A.2d 1227 (1988) the Court explained the irreparable harm arising from the contemplated borrowing of $1.7 billion in order to pay shareholders a special dividend. This aspect of the irreparable harm was described as follows:

> . . . Macmillan will incur enormous bank debt, about $1.7 billion, if the restructuring goes forward. The proceeds of the borrowing will be distributed to shareholders as a dividend, and would be irretrievable. Virtually all of the assets of Macmillan will be pledged to secure the bank debt. There will be no practical way to lift the burden of this debt from the resulting companies if the restructuring is later declared invalid.

(552 A.2d at 1246-47; footnotes omitted)

Indeed, despite all of the flexibility traditionally reposed in the Court of Chancery to formulate an effective remedy, effectuation of the Time New Transaction will render Time a Humpty Dumpty which cannot effectively be put back in its original position. Macmillan I, 552 A.2d at 1246. This is an archetypical case of irreparable harm.35/

CONCLUSION

For the reasons stated, the court should enter a preliminary injunction prohibiting Time from implementing the Revised Warner Merger and from

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35/ Black & Decker, 682 F. Supp. at 788 (unequal bidding conditions, intricate financial structure, dispersal of assets through pension and severance plans present immense obstacles to meaningful legal remedy); Revlon, 506 A.2d at 185 (complexity of transaciton and obstacles to meaningful llegal remedy sufficient to show need for injunction).

maintaining those obstacles that preclude the development and consideration of other alternatives to the Revised Warner Merger.

Respectfully submitted,

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July 17, 1989

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I, Barbara MacDonald, hereby certify that I have caused two copies of the Joint Opening Brief of Shareholder Plaintiffs and Compendium of Unreported Opinions to be served on July 17, 1989, by hand delivery, on the following counsel:

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