IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PARAMOUNT COMMUNICATIONS INC. and KDS ACQUISITION CORP., Plaintiffs, v. TIME INCORPORATED, TW SUB INC., JAMES F. BERE, HENRY C. GOODRICH, CLIFFORD J. GRUM, MATINA S. HORNER, DAVID T. KEARNS, GERALD M. LEVIN, J. RICHARD MUNRO, N.J. NICHOLAS, JR., DONALD S. PERKINS, CLIFTON R. WHARTON, MICHAEL D. DINGMAN, EDWARD S. FINKELSTEIN, HENRY LUCE III, JASON D. McMANUS, JOHN R. OPEL, and WARNER COMMUNICATIONS INC., Defendants.	)	C.A. No. 10866

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The management and directors of Time Inc. ("Time") have abdicated their responsibilities to the Time shareholders in favor of "The Time Culture". This phrase, created by management and adopted by the directors, permeates every aspect of this case. While it is imbued by Time witnesses with many lofty characteristics, the Time Culture appears to involve little more than the preservation and enhancement of Time senior management positions.

In their zeal to preserve The Time Culture, the directors embarked upon a path that led to the situation at hand -- embracing an unfair deal that denies Time shareholders their vote and deprives them of any ability to accept Paramount's $200 per share offer, while rendering Time's directors powerless to take any steps to enhance shareholder value. This cannot be permitted.

STATEMENT OF FACTS

One theme runs through the negotiations and transactions that Time has been part of since late 1987: Time management must remain in control. Other considerations, such as the absence of debt or assurance of editorial integrity, have fallen by the wayside. No expense was spared to reach that goal. Time's management agreed to a compensation package for Steve Ross that would pay him more than $190 million over 10 years, plus grant him stock options that could amount to more than 3% of Time's outstanding stock. Time's management accepted an exchange ratio in the original merger that was

beyond Warner's wildest dreams, a ratio so favorable to Warner that its shareholders gained approximately 62% of the voting power of the combined company.

All of these sacrifices were acceptable to Time management and the Time board, as long as "management succession" was guaranteed; as long as Time President Nicholas J. Nicholas and Time Chief Executive Officer Richard Munro would stay in power. When some directors objected to this tactic, they were called and pushed and pulled until they agreed to keep silent about their objections.

The facts set forth below show a management-led and management-negotiated deal. When that deal began to come apart in the face of Paramount's offer, the outside directors did not assert themselves and seek to take an active role in analyzing alternatives. Instead, based upon a few anecdotes from management and an inflated set of numbers from their investment bankers, the outside directors acted to insure that they would never be able to do anything that might oppose management's preservation of The Time Culture.

I. MANAGEMENT'S LONG-TERM STRATEGIC OBJECTIVE: SECURE THEIR POSITIONS

From 1983 to 1989, Time's managers frequently expressed their fear that Time was an attractive acquisition candidate. Management was more concerned about this

possibility than were some outside directors. (Temple Tr. at 56-57)[1/]

Arthur Temple was an outside director of Time beginning in 1973. He resigned on April 19, 1989. (Temple Ex. 1) He testified that Munro and Nicholas:

> frequently would say I think we're a target. A lot of people have us in their sights.
>
> I said I think that's vanity speaking. I don't think anybody's got you in their sights.

(Temple Tr. at 76-77) (emphasis added).

Munro admitted to being "occasionally, modestly concerned" about a possible takeover, but added "if you worked at Time and were awake, you were aware that a lot of people thought we were a takeover target and it was in the press continuously." Munro at 47-48[2/]

A. First Tactic: Adopt Anti-Takeover Devices

Time's management responded to this "threat" by hiring an army of M&A tacticians and legal advisors. These strategists put into place every "shark repellent" available. Temple at 58.

1/ References to deposition testimony will be cited "Tr. ". For example "Munro Tr. at --". Exhibits introduced at depositions will be referred to as "Ex. at "; for example "Munro Ex. 6 at --" Certain documents are being introduced in an appendix to the memorandum and are referred to as "Paramount Appendix Ex. "

2/ Excerpts do not do justice to the level of concern that Munro truly feels towards preserving the Time Culture at any expense. It permeates his deposition transcript and his handwritten notes. See, e.g., Munro Tr. at 11-13, 64-65; Munro Ex. 26 (handwritten notes).

In December, 1983, Time added Article V to its Restated Certificate of Incorporation. This requires a supermajority vote on certain business combinations involving any owner of 20% or more of the voting power of Time's stock. Any such combination requires the affirmative vote of at least 80% of all shares entitled to vote in the election of directors and the affirmative vote of a majority of the combined voting power of all shares held by "disinterested shareholders." (Exhibit F to Plaintiffs' Appendix in Support of Motion for Temporary Restraining Order ("TRO Appendix"))[3/] The supermajority voting requirement was presented "as an anti-takeover device." (Temple Tr. at 48)

Simultaneously, Time (i) amended its Certificate of Incorporation and by-laws to provide for a staggered board of directors; (ii) added a by-law to require that nominees for the board be designated in writing 90 days in advance of the annual meeting; and (iii) added a by-law to require at least 50 days notice before any shareholder proposal can be put on the agenda for the annual meeting. (Exhibit F to TRO Appendix)

In 1986, Time's M&A tacticians pushed for the adoption of a "shareholder rights" or "poison pill" plan. At the annual meeting of Time's board on April 17, 1986, Time's management and legal and investment advisors spoke about a

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3/ When Warner and Time exchanged large blocks of stock on June 16, they took maximum advantage of this supermajority voting requirement. Warner now has an 11% block of stock. Combined with the voting power of Time's management and board (6.6% as of May 1, 1989), Time management and Warner can veto any future business combination. See discussion below.

poison pill. The presentation focused on "the current takeover activity in the media industry, and the business and financial characteristics that make the Corporation vulnerable to a hostile takeover." (Opel Ex. 1 at 9) Munro testified that "[l]ike most American corporation [sic], Time's stock price did not reflect its values." (Munro Tr. at 48)

The board adopted the poison pill on April 29, 1986.[4/] (Temple Ex. 2 at 2-3) The pill adopted in 1986 had an exception to the "flip-in" for an all-cash, all-shares, fair-price tender offer.[5/] Mr. Temple, who voted for the plan in 1986, but abstained from the amendment to the plan eliminating the all-cash, all-shares, fair price exception in January, 1989, agreed that the original pill was not designed to prohibit a fair cash offer: "I wouldn't have voted for it [in 1986] if I thought it would preclude a fair cash offer." (Temple Tr. at 78-79; see also Temple Ex. 3 at 18148) In Mr.

4/ One outside director, Henry Luce III, voted against adoption of the poison pill after expressing his desire that the matter be referred to a special committee of the board for further consideration. (Temple Ex. 2 at 4-5; Luce Tr. at 37-38) No such committee was formed.

5/ The poison pill, as adopted in 1986, provided for, among other things, (i) a purchase price of $200 for the rights, (ii) distribution of the rights either (a) the 10th day after announcement of the acquisition of 20% of common stock, or (b) the 10th day after announcement of a tender offer for at least 30% of common stock, (iii) a "flip-in" provision whereby if an acquiror's ownership interest exceeds 40%, all time shareholders other than the acquiror would be permitted to exercise a right to buy $400 of Time equity for $200, and (iv) a "flip-over" provision whereby if Time is merged into an acquiror after the rights have been triggered, Time shareholders would have the right to purchase $400 of the acquiror's equity for $200. See Ex. E to TRO Appendix.

Temple's mind at least, such offers are not coercive, nor do they threaten any corporate interest of Time because they are "in the interest of the shareholders." (Temple Tr. at 84-86)

Management knew that the pill -- no matter how stringent -- could not prevent someone from successfully acquiring Time. (See, e.g., Opel Tr. at 38-39; Finkelstein Tr. at 78; Opel Ex. 1 at 11). The pill was presented to the directors -- some of whom had reservations about such devices (see, e.g., Dingman Tr. at 11-12) -- as a way to encourage potential acquirors to negotiate with the board, and to protect the shareholders from abusive takeover tactics such as partial or two-tier tender offers. (Opel Ex. 1 at 10-11; Temple Ex. 3 at 18145). Time's adoption of the pill was meant only to give its board "some additional flexibility" to consider possible takeover proposals. (Opel Tr. at 37-38; Finkelstein Tr. at 78, 81; Levin Tr. at 174-75)

B. Second Tactic: "Secure" the Company by a Merger

Even with these defenses, Time's management remained concerned that it was an attractive acquisition candidate. (Temple Tr. at 52-53, 56) Time's management recognized that Time could not hope to remain secure without becoming larger.

Gerald M. Levin, Time's Vice-Chairman, has been Time's chief strategist and planner for several years. (Levin Tr. at 5-6) On August 11, 1987, he sent a confidential memorandum to Munro and Nicholas outlining his concerns and strategic thinking. (Levin Ex. 11) He stated that Time's "primary long-term objective should be to bring about the

strategic consolidation of Time Inc., Warner Communications and [Turner Broadcasting System]." (Id. at 1) He explained that:

> While size alone is no guaranty of independence, this company should be relatively secure and able to narrow the spread between its private and public market values.

(Id. at 1) Munro agreed with Levin's statement. (Munro Tr. at 56-57)[6/]

Mr. Levin then raised the key question: "An overriding question would still be: have we secured the company? Is sheer size sufficient protection, or will we still need a large block of stock in friendly hands?" (Levin Ex. 11 at 4) (emphasis added).[7/]

The notion of "securing" Time by some business combination soon became the dominant focus of Time's senior managers. It stayed the focus for the next year and a half. (Levin Tr. at 51-54, 77, 80-81)

II. TIME MANAGMENET PURSUES ITS INTERESTS: PRELIMINARY MERGER TALKS WITH WARNER

Exploratory discussions began in 1987 among Munro, Nicholas, Levin and Steve Ross of Warner. At first they talked about possible combinations of Time and Warner businesses, including a joint venture in cable, programming and films.

6/ When Munro and Nicholas spoke to Opel about possible combinations with Warner in July 1988, Opel said they did not need to say that a combination would lessen the chance of a takeover: "I mean obviously the bigger you are, the more difficult it is to acquire you." (Opel Tr. at 70)

7/ Ironically, Levin concluded that if a union with Warner was not possible, Time should explore a combination with Paramount (then Gulf+Western). (Levin Ex. 11 at 4)

(Levin Tr. at 51-52; Aboodi Tr. at 20-21; Ross Tr. at 8-10, 14-16; Nicholas Tr. at 17-21)

By the summer of 1988, discussions among Munro, Nicholas and Ross had intensified. A complete business combination of the two companies, not simply a joint venture, was now the focus. (Nicholas Tr. at 21-22; Ross Tr. at 19-20) As discussions proceeded and Time's outside directors were lobbied by management to support the deal, at least four issues came to the forefront: (1) preserving Time's "culture", (2) securing for Time's top executives well-paid long-term positions in the newly-merged entity, (3) avoiding the perception that Time was selling itself or selling control of itself to Warner, and last and least (4) negotiating a price, or appropriate exchange ratio for a stock-for-stock merger.

A. Preservation Of Time's "Culture" Meant Preservation Of Time Management

In the summer of 1988 discussions between Time and Warner were devoted to negotiations over guarantees about which chief executive would run the combined company and how long each executive would stay in control. (Levin Tr. at 64-73, 76) In anticipation of a July 8, 1988 meeting between Munro and Ross, Levin ranked as a top priority the establishment of Ross and Munro as Co-CEOs, and the succession of Nicholas as Co-CEO once Munro retired. (Levin Ex. 17) Levin noted 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 agreed to share power and retire soon. (Id.)

Henry Luce III, an outside director and the son of

Time's founder, was concerned about the high salary and eight year contract then being discussed for Ross: "[I]t was a long time, at very high levels of compensation, a very long commitment for any board to undertake, and it took him past the usual retirement age of 65." (Luce Tr. at 60-61; Luce Exs. 6, 8) Such long-term contracts were not part of Time's tradition. (Luce Tr. at 61; Wharton Tr. at 75-76)[8/] Arthur Temple also felt that the compensation packages being considered for Munro and Nicholas were excessive. He told fellow director James Bere that Munro and Nicholas were "fleecing their nests." (Temple Tr. at 121; Munro Ex. 26 at 052814; see also Munro Tr. at 175-76, 234-35)[9/]

The length of Munro's employment contract, as finally agreed upon in March, 1989, was also a problem for Temple: "I couldn't see the necessity to continue some of those arrangements past retirement inasmuch as retirement would be early retirement in the case of Dick Munro." (Temple Tr. at 28)[10/]

8/ Luce was unaware of the full amount of Ross' final compensation package until he was told about it at his deposition. (Luce Tr. at 33, 172-73)

9/ Temple's comment to Bere was recorded by Munro in a phone call on July 27, 1988. (See Munro Ex. 26 at 052814) Temple testified that the comment accurately reflected his view in the summer of 1988 and added at his recent deposition: "I still think so." (Temple Tr. at 121)

10/ Temple criticized the final packages for Munro and Nicholas as "excessive." (Temple Tr. at 25) By contrast, Munro testified that he agreed to remain and accept his new compensation package only at the Board's insistence. (Munro Tr. at 229-31)

Temple saw that these discussions centered around succession and compensation issues, not price. The "quid pro quo" for the shareholders took a backseat to the employment negotiations. (Temple Tr. at 92)

Temple testified that: "I'll have to confess that I wasn't particularly concerned about the order of succession. * * * It seemed to me there was more discussion about that than there was about the content of the financial deal." (Id.)[11/]

B. Time Management Was Willing To Sell Time Shares At A Discount To Ensure That Time Management Would Control The Corporation

At first, Time executives envisioned a "market to market" exchange of shares with no premium paid by either Time or Warner. (E.g., Levin Exs. 15, 17; Levin Tr. at 200; Temple Tr. at 111) When he prepared his strategic memorandum in August 1987, Levin had written: "Assuming that the combination of Time and Warner could be accomplished through a no-premium merger, shareholder value would be enhanced without the insanely pricey dilution so prevalent in the purchase of assets today." (Levin Ex. 11) (emphasis added) On July 21, 1988, the Time board met to hear presentations by Shearson Lehman and

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11/ Rather than addressing such concerns, Munro and Nicholas focused on eliminating opposition from within. Thus, Munro and Michael Dingman, an outside director who was described as "loyal" (Temple Ex. 9), conferred with each other about how to "neutralize" Temple. (Munro Ex. 26 at 052816; Temple Tr. at 125) Munro paid a visit to Temple in Texas on August 10, 1988 and, after a long conversation, could report: "I'm afraid I didn't make the sale but he's wavering and I think we have a slightly better than 50% shot at getting his support. And if we don't get it, I don't see Arthur mucking things up behind the scenes." (Munro Ex. 26 at 052798) (emphasis supplied).

Wasserstein about a possible merger with Warner. The board was told that Time now had an opportunity to purchase Warner at a "small or no premium." (Temple Ex. 7 at S105674)

The idea of paying any premium was not well-received by many of the directors. Outside directors felt strongly that even when using a market-to-market share exchange ratio, Warner would be getting more than they were receiving.

On July 26, Michael Dingman, one of the outside directors, relayed his own and Arthur Temple's thoughts on the premium issue to Munro: "On the no premium point, he emphasized the inherent value of Time - a 'double.' Warner getting lot more than they're giving. A premium demeans the deal." (Dingman Ex. 4 at 052817; Dingman Tr. at 24, 28-29; Temple Tr. at 127-8) Temple testified that a premium was not justified because "Time was -- is such an outstanding company that there really wasn't any justification for paying a premium at that Time [sic], I thought" and because "Time was a lot more company than Warner." (Temple Tr. at 128) Dingman himself had contacted someone on the Warner negotiation team to say, among other things, "no way there should even be considered a premium." (Dingman Ex. 4 at 052817; Dingman Tr. at 39-40)12/

This opposition to a premium was troubling, since Time management was negotiating first and foremost to preserve The Time Culture by ensuring that Nicholas and Munro would run

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12/ On March 2 or 3, Time's management agreed to a substantial premium, specifically a .465 exchange ratio that Warner's investment bankers told a meeting of Warner directors was a "hell of a deal." (Aboodi Ex. 3 at 14)

the combined company. This could well require paying a premium in return for such assurances. (Finkelstein Tr. at 99; Wasserstein Tr. at 68)

In order to bring the outside directors around to his way of thinking, Munro called each of the directors and personally lobbied them in favor of the merger. (See Munro Ex. 26; Levin Tr. at 57) Munro or Nicholas met personally with several directors to "sell" them on the deal, travelling from Vermont to Texas. (Opel Tr. at 64; Dingman Tr. at 63, 142; Levin Tr. at 57; Temple Tr. at 134-35)

On August 4, 1988, Munro sent a letter to the directors telling them about an agreement on "governance" issues. (Munro Ex. 15) That agreement provided for Nicholas to succeed Munro as co-CEO, and for Ross to step down after five years. It provided that Warner would get 12 out of 24 seats on the newly constituted board. However, to preserve The Time Culture, an editorial integrity committee was established that would be led by Time directors. That committee would have supervisory power over publications, and a 2/3 vote of the board was required to change the structure of the committee. A 2/3 vote would also be required to terminate the contracts of Munro, Nicholas or Ross. (Id.; see also Nicholas Tr. at 77-78)[13/]

Munro and Nicholas tried to foster the perception that Time was not "for sale" and that Time was buying Warner.

13/ Warner, however, received control of the compensation committee, with three directors.

(Temple Tr. at 104-05). However, it was obvious that the announcement of a merger would signal that both companies would "be in play." (Temple Tr. at 106; Wharton Tr. at 48; Wasserstein Tr. at 105; Munro Tr. at 134; Munro Ex. 26 at 052822; see also Nicholas Tr. at 47, 52)

The merger negotiations between Time and Warner broke down in August, 1988. (Levin Tr. at 76, 129; Ross Tr. at 24-25) The predominant reason was management: Ross refused to promise to retire within five years after the merger. (Nicholas Tr. at 74-75; Wasserstein Tr. at 25, 32; Levin Tr. at 76, 243; Opel Tr. at 106-07; Levin Ex. 24) That was enough to cancel the entire deal, without any further discussion about the economic benefits, if any, of this combination to Time's shareholders.

C. Time Resumes Negotiations And Erects New Defenses

Time continued to be an attractive acquisition candidate. Time's management reopened negotiations with Warner in January 1989. (Ross Tr. at 45-46, 48; Nicholas Tr. at 80-81; Levin Tr. at 82, 148, 162-63)

On January 19, 1989, while Time's senior executives were negotiating in earnest with Warner, Time's board voted to amend the poison pill plan. (Levin Ex. 10 at S105292) They: (1) lowered from 20% to 15% the percentage of stock ownership that causes a distribution of the Rights certificates; (2) lowered from 30% to 20% the percentage of stock sought in a tender or exchange offer that will result in a distribution of the Rights certificates; (3) eliminated the "all cash, all

shares, fair price tender offer" exception to the "flip-in"; (4) reduced from 40% to 20% the percentage of ownership that triggers a "flip-in"; and (5) increased from $200 to $300 the Purchase Price of the Rights. (Temple Ex. 4; Ex. E to TRO Appendix)[14/]

Negotiations continued between Time management and Warner management. Levin and Nicholas negotiated on behalf of Time. (Levin Tr. at 155, 161) Ross and Oded Aboodi, a Warner advisor, negotiated on behalf of Warner. (Id. at 154, 156-58)

The first issue for this team was to negotiate the succession (Ross Tr. at 55; Ross Ex. 6) and the terms of their own contracts. (Levin Tr. at 161; Ross Ex. 7 at WW008759) They were able to work this out profitably for all concerned.

Nicholas and Levin then negotiated the exchange ratio. (Nicholas Tr. at 87-88) On March 3, the parties agreed on .465 shares of Time stock for each share of Warner stock. This was significantly higher than the market-to-market ratio.

Nicholas negotiated the final .465 exchange rate in one meeting. He did not have his investment advisor present. (Nicholas Tr. at 91) He did not receive a specific number from his investment advisor, only a "range" of numbers. (Nicholas Tr. at 93-94; see also Hill Tr. at 41) He made no

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14/ Three outside directors, Messrs. Dingman, Temple and Wharton abstained from voting on the amendment. (Levin Ex. 10 at S105292; Dingman Tr. at 10-12) The pill has apparently been further amended to provide that the rights shall not be distributed until the Time board decides that they should be distributed.

attempt to trade off any corporate governance issues for a more favorable exchange rate. (Nicholas Tr. at 88-89)

The .465 ratio was far more than Warner expected to get. In fact, Warner's financial advisors advised Warner that anything over .40 was fair and anything over .45 would be "a hell of a deal". (Aboodi Ex. 3 at 14)

III. THE ORIGINAL TIME-WARNER "MERGER" AGREEMENT

With the exchange ratio set, the directors of both companies approved the Merger Agreement on March 3, 1989. (See Finkelstein Ex. 6 at 11; Ross Ex. 8 at 28-29) They also approved the Time Warner Share Exchange Agreement ("Lock-Up Stock Swap") (Finkelstein Ex. 6 at 20; Ross Ex. 8 at 29) Finally, they approved employment agreements with Messrs. Munro, Nicholas and Ross.

These contracts guaranteed Nicholas or Munro would stay in power for ten years after the merger was completed. The contracts could not be modified or terminated without a 2/3 vote of the new Time Warner board. (Paramount Appendix, Ex. O at 40-41)

Munro received a ten-year contract, even though he plans to take early retirement as Chairman and Chief Executive Officer in May 1990. This would extend his present contract by seven years. Nicholas would also receive a ten-year contract, which would extend his contract by 7 years. Ross would also receive a 10 year contract. Nicholas and Ross would be compensated as advisors for an additional five years after the

end of their ten-year contracts. (Munro Ex. 19 at A001680-83; Paramount Appendix, Ex. O at 40-41)

Warner executives would be in power below Nicholas and Munro, however. The general counsel of Warner, Martin D. Payson, would become the general counsel of Time and the Chief Financial Officer of Warner, Bert W. Wasserman, would become the Chief Financial Officer of Time. (Finkelstein Ex. 6 at 41)

The Editor-in-Chief, Jason McManus, did not get a long-term contract, nor did any other editorial employee.15/

A. Time Agrees To Merge At A Discount

Under the terms of the Merger Agreement, the proposed merger was a stock-for-stock transaction. Warner shareholders would have received newly-issued Time shares in exchange for their Warner shares, and Warner would have merged with a wholly-owned subsidiary of Time. Although Time and Warner announced the deal as a "merger of equals" the merger would have radically altered Time's corporate structure and fundamentally affected the rights and interests of Time shareholders by transferring control of Time to Warner shareholders at a discount. (Wasserstein Ex. 13 at 1)

Indeed, Time and Warner discussed changing the structure of the deal so that Time would merge into Warner, with Warner issuing shares to Time shareholders. If that had occurred, it would have been clear that Warner was buying Time

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15/ Indeed, Time's much vaunted editorial integrity was not at its best in covering Paramount's bid for Time. (Munro Tr. at 13-37)

at a discount. (Aboodi Ex. 6 at 8; Ross Tr. at 93-96; Rinaldini Tr. at 105-06)

Under the terms of the merger, each outstanding share of the common stock of Warner would have been exchanged for 0.465 of a share of newly-issued Time stock. Instead of owning 100% of Time, the shareholders would now own less than 40% of the outstanding shares of the newly constituted company. (Munro Ex. 19 at A001618, A001667-68; see also Dingman Tr. at 105; Ross Tr. at 67-68, 79; Wharton Tr. at 92; Affidavit of Steven M. Waters, sworn to on June 6, 1989, submitted in connection with Plaintiffs' Motion for a TRO (the "Waters Aff.") ¶ 5, Paramount Appendix, Ex. D)[16/]

In addition to transferring control to Warner shareholders, Time shareholders would have suffered a more immediate economic loss: they would have received a disproportionately small percentage of the combined entity. For the year preceding the Time-Warner transaction, the exchange ratio for an equal exchange of shares based upon the respective market prices of Time and Warner ranged from 0.30 of a Time share for each Warner share to 0.42 of a Time share for each Warner share. However, in order to secure their own future, Time management agreed to an exchange ratio of 0.465, a severe penalty to Time even when compared to the 0.420 high. (Waters Aff. at ¶ 6, Paramount Appendix, Ex. D)

16/ Despite the significance of the exchange ratio, the outside directors knew almost nothing about how the 0.465 exchange ratio was reached. (Opel Tr. at 116; Finkelstein Tr. at 98; Temple Tr. at 147-48)

In Warner board meetings on March 2 and 3, Felix Rohatyn and other members of Lazard Freres & Co., Warner's financial advisors, told the Warner board what a wonderful deal this was for Warner's shareholders:

-- Any exchange ratio "above .45 would be a 'hell of a deal,' but, in the opinion of Lazard, anything above .4 would be 'fair' to the shareholders of [Warner]' (Aboodi Ex. 3 at 14);

-- At an exchange ratio "of .4 or more, the [Warner] shareholders would own more than 50% of Time Warner following the Merger, and thus 'in no way could it be considered that [Warner] is being sold" (Id. at 14);

-- Using "relative revenue and share equity values, [Warner] shareholders would be getting greater percentage of the revenues and shareholder equity" (Ross Ex. 8 at 7); and

-- Based on the "historical ratio of stock prices of each company, which has been approximately .34 to .37 over the past three years, an exchange ratio in excess of .4 will result in a premium being paid to [Warner's] shareholders, while Time's shareholders will be, in effect, merging at a discount" (Id. at 6-7).

After pointing out that the price of Time stock was undervalued and that the ratio of the market price of WCI stock to that of Time over the past year was .35, Mr. Rohatyn concluded that the actual exchange ratio of .465 made this "an even more fantastic transaction" for Warner. (Id. at 25)[17/]

The resolutions adopted by Warner's board in agreeing to the merger were even more telling. The board declared, as a fundamental reason for entering into the transaction, that "the

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17/ Expressing the common perception that Time was now in play, Mr. Rohatyn advised the Warner board that if they did not proceed with this transaction, "the Time deal will be done with another party." (Aboodi Ex. 3 at 10-11)

shareholders of [Warner] would, after the business combination, own a greater equity interest in the combined business than the existing shareholders of Time." (Id. at 28)[18/] The board also declared that the negotiation and the execution of the Merger Agreement did not reflect any determination by the board that Warner "should be sold." (Id.)

The Time board, for its part, was told clearly that the majority of the equity of the new Time Warner would be owned by Warner shareholders. (Munro Ex. 19 at A001667-68)

B. The Parties Agree That "Corporate Governance" Is Nothing More Than Long-Term Contracts For Management

The March 3 Merger Agreement also gave up protections for editorial integrity. On August 4, 1988 Munro had previously written Time's directors that management had

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18/ Warner Cable Communications ("Warner Cable"), a wholly-owned subsidiary of Warner, told local governments that because a majority of the equity of the new Time Warner would be owned by Warner shareholders, there was no change of control in Warner or Warner Cable as a result of the merger. Warner Cable argued in several letters to local governments:

> As a function of the merger and the exchange of shares described above, the current owners of Warner Communications Inc. publicly-traded stock will acquire and own sixty percent (60%) of the combined entity which will be called Time Warner Inc. Conversely, the current owners of Time Inc. publicly-traded stock will own forty percent (40%) of the Time Warner combined entity. Because the current owners of Warner Communications Inc. stock will continue to own an aggregate sixty percent (60%) of the merged entity, Warner Cable believes that upon completion of the merger, there shall have been no change of control in Warner Cable.

(Dingman Ex. 7 at 03630; Ross Tr. at 107-08; see also Ross Ex. 11)

"successfully negotiated" certain corporate governance arrangements, including the creation of an Editorial Committee of the board made up of a majority of existing Time directors that would oversee publications. (Munro Ex. 15 at 19510, 19513-516) It would take a 2/3 or supermajority vote to change the composition of that committee or abolish it. (Id. at 19516) Other significant board decisions such as filling vacancies or asset sales were also subject to a 2/3 or supermajority vote requirement. (Id. at 19510-15)

The 2/3 or supermajority vote requirement for most board action was left out of the March 3, 1989 Merger Agreement -- at Ross's request. (Aboodi Ex. 6 at 22; Nicholas at 77-78)

The agreements between Warner and Time do have one 2/3 vote requirement, however. Under the amended long-term employment contracts approved by both boards on March 3 and reaffirmed on June 16, a 2/3 vote is required to fire Munro, Nicholas or Ross. (Finkelstein Ex. 6 at 6, 42; Munro Ex. 19 at A001680; Nicholas Tr. at 130)

Nicholas proudly recalled that Time's management demanded "supermajority" protections in the summer of 1988:

> My recollection is that at least on two issues, and likely more, that the committee structure of the board could not be changed without perhaps a two-thirds -- I don't remember the exact percentage, but a two-thirds vote by the directors, and I also believe that the governance provisions, the broad governance provisions of our -- the arrangement we were trying to negotiate was that those could not be changed without a super majority vote of the board.
>
> In fact, the board was clearly left in command here, but we wanted to make sure and so did Steve, that there were appropriate protections built in so that the agreements would be honored.

Nicholas Tr. at 77-78 (emphasis added). Less proudly, Nicholas conceded that, under merger approved on March, 3, 1989, and under the present deal with Warner, all the supermajority protections -- with the exception of those maintained for the employment contracts for Munro, Ross and himself -- were dropped. Id. at 130.

C. Time's Board Puts The Company In Play

Despite the attempt by Time's management and its advisors to hide the fact that Time was "in play" as a result of the merger, Mr. Temple testified that everyone knew otherwise:

> It was very obvious that if this deal were made, it would immediately be perceived that, quote, the company or companies were in play; and that point was made several times.
>
> Now, I don't want to imply that anyone made a legal judgment that the companies were in play or were for sale. But it was definitely a consideration that if we went ahead with the merger, both companies would be in play.

(Temple Tr. at 106-07) (emphasis added).

Mr. Temple specifically recalled what Bruce Wasserstein had told the Time board at the March 3, 1989 meeting to approve the merger:

> Q. . . . Mr. Temple, did you ever hear Mr. Wasserstein say at any time that he thought Time would be put into play?
>
> A. Yes.
>
> Q. When did he say that?
>
> A. At the March meeting.
>
> Q. What did he say?

A. Essentially, that, if -- I told you earlier in my deposition that Bruce and perhaps others said that if we proceeded with this deal -- the merger, that is -- that he thought you ought to know that it would be perceived that Time and even Warner were in play.

Q. Did he say why, why there would be that perception?

MR. MADSEN: If you recall.

A. I don't remember. I don't think anybody quarreled with that. I don't remember any questions as to why.

(Temple Tr. at 132-33) (emphasis added); see also Wasserstein Tr. at 103; Finkelstein Tr. at 31-33)

D. "Structural Safety Measures"

As early as July 1988, Time's sophisticated M&A tacticians realized that this transaction could put "Time in play". Those advisors suggested several "structural safety measures" that would protect the deal, and stop any "intruder" from offering another deal to Time's shareholders.19/

Among those "structural safety measures" was (i) an exchange of blocks of stock or options and (ii) amassing a major line of credit that would be used to buy blocks of stock in Warner, or perhaps in the intruder. (Levin Ex. 3 at S105675)

These safety measures were adopted, with some particularly effective twists, by the board on March 3, 1989.

19/ In August 1988 Time's accounting firm, Ernst & Whinney, addressed the impact of the "structural safety measures", stating: "Both companies have indicated a desire to either grant an option for the exchange of shares in each other in the event of a takeover attempt by an unfriendly third party during the merger process, or to actually exchange approximately 18% of each others shares to prevent such an unfriendly takeover." (Paramount Appendix, Ex. T)

1. The Lock-Up Stock Swap

Any question that the Lock Up Stock Swap was intended only for defensive purposes is put to rest by Munro's remarks at the March 3 board meeting:

> We have both agreed to exchange newly issued common stock with each other. This exchange . . . is intended to dissuade any potential raider from disrupting our plans by putting one or both of us 'in play.' Defense issues will be thoroughly discussed later (Munro Ex. 19 at A001649).
>
> * * *
>
> As a defensive measure, the two companies have agreed to exchange shares (Id. at A001676).

See also Munro Tr. at 133-35.

Although Time's senior managers have more recently tried to suggest other purposes for the Lock-Up Stock Swap,[20/] clearly these new reasons were not the ones given to the board in March, 1989. Director Temple testified that no other reason was given for the Lock-Up Stock Swap other than "[t]o make it more difficult for a third party to succeed in a hostile bid."

20/ Specifically, after the SEC required some explanation of the Lock-Up Stock Swap, Time and Warner stated in their Joint Proxy Statement that it "was entered into with a view towards and in furtherance of the parties' commitment to the consummation of the Merger." (Ex. C to TRO Appendix at 69) Mr. Levin testified that it was independently justified as an investment by each company in the other. (Levin Tr. at 116-17) Although these were not the purposes given to Time's board of directors, they are instructive in one sense: they imply strongly that Time thought its own stock was worth no more than $150 per share, not greater than $200 per share as it now claims in rejecting Paramount's offer. Since Warner shares are valued at $70 in Time's Tender Offer, and one share of Time is allegedly worth .465 shares of Warner, one share of Time appears to be worth $150: $150 x .465 = $70

(Temple Tr. at 45-46; see also Finkelstein Tr. at 92, 141-42, 179; Opel Tr. at 161; Wharton Tr. at 45)[21/]

2. Dry-Up Fees To Major Banks

The July 21, 1988 Wasserstein presentation suggested that as a "structural safety measure" Time establish a major line of credit that could be used to buy back Time stock or purchase the stock of an intruder.

This tactic was adopted by Time in 1989 with a pernicious twist. The banks would be paid for "highly confident" letters, rather than commitment letters, and they would be required to sign agreements promising not to finance any bid for Time. Time's management ultimately paid over $5 million to banks for such assurances.[22/] (Paramount Appendix, Ex. J at B015768-96)

These fees did not take the place of the fees that Time would have to pay for commitment letters if Time ever actually wanted the money. (Nicholas Tr. at 124-25) Rather than asking for a commitment from banks, Time sought only a "highly confident" letter from each bank and "more importantly, that they would not finance anyone else." (Munro Ex. 19 at A001676-77)

21/ Mr. Opel also testified that "it was a desire on the part of Warner that we enter into this kind of transaction." (Opel Tr. at 160)

22/ The Time board was told that "[i]f needed, Time will be able to use this credit facility to purchase additional Warner shares in the open market. Or, Time can purchase its own shares which would raise Warner's percentage ownership of Time." Munro Ex. 19 at A001676-77.

Management's decision to pay shareholder funds for these dry-up fees was not conveyed to Time's board of directors. Mr. Opel said he did not "think it's proper for me to -- anyone to tell a bank who they should lend money to". (Opel Tr. at 170-71) He testified that he was unaware until his deposition on June 26 that Time had sought and paid for such assurances, even though it was disclosed in the May Joint Proxy Statement. (Opel Tr. at 172-73) Similarly, Mr. Temple testified that he did not know about "dry-up" fees until he had read about them in the newspapers, that he does not recall them being discussed at the March 3 board meeting, and that he has never heard of such a thing being done. (Temple Tr. at 158-60) Mr. Finkelstein also did not know about the dry-up fees at first. However, he had no problem with management's actions, since he believes that any tactic is appropriate if it works, since he does not place "any moralistic value on doing tactical things like that." (Finkelstein Tr. at 101-02; see also Luce Tr. at 151)

Nicholas suggested that these fees were "normal", and were only meant to insure that banks would not misuse confidential inside information. He admitted, however, that Time had never before asked its banks to provide such written commitments, nor had Time ever before paid for such written commitments. (Nicholas Tr. at 126-27)

3. Black-Out Provisions

Despite the contention that Time was simply making an acquisition, on March 3 the Time board recognized that it had

some duty to its shareholders not to ignore other bids for the company. The Merger Agreement contained a fiduciary out. That provision, however, is extremely weak.

The Agreement also contained the kind of "no shop" clause condemned by the Delaware Supreme Court in Macmillan. No one at Time, or its army of advisors and agents, is allowed to:

> solicit or encourage (including by way of furnishing information), or take any other action to facilitate, any inquiries or the making of any proposal which constitutes, or may reasonably be expected to lead to, any takeover proposal, or agree to or endorse any takeover proposal. (emphasis added)

(Ross Ex. 10 at 16-17; Nicholas Tr. at 157) Time can listen to an unsolicited phone call, but cannot say anything more than "hello."

The "fiduciary out" for this clause is harsh: unless another party buys over 10% of Time's shares (pre-existing ownership does not count) or makes a tender offer for over 25% of Time's shares, the Black-Out provision is in full force. Thus, no matter how friendly an offeror may feel, it was not possible to approach Time without launching an unsolicited tender offer. (See Levin at 287-88)

Under the Black-Out provision, even after a tender offer is launched, Time is still not free to talk. Time must still consult with Warner about proposed responses. After such consultation Time is free to respond, but it still cannot terminate the Agreement. Only Warner can terminate the Agreement in such a case. (Ross Ex. 10 at 18)

IV. TIME ANNOUNCES THE GREATEST DEAL EVER MADE

After approving the Merger, Time and Warner proceeded to trumpet in every forum the virtues of the Merger. Particularly important was the absence of debt, because this was a stock-for-stock deal.

In a March 4, 1989 letter to President Bush, Ross and Munro stated:

> In the domestic policy arena, we are pleased that this transaction strengthens our ability to meet the increasingly complex challenges of a world economy without the often devastating effects of an LBO or hostile takeover. We will do so without dismantling our companies or incurring a crippling debt structure that would subvert our ability to secure the long term growth of our businesses.

(Munro Ex. 13)

In testimony before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary, Ross and Munro testified:

> We are particularly pleased we could structure an aggressive response without suffering the often devastating side effects of highly leveraged buyouts. This is a grand-old-style pooling of interests merger. The very form of the transaction itself signals that it is a merger destined for growth. . . .
>
> * * * *
>
> . . . By not borrowing, selling or firing, we're going to create a company that starts from day one on a rock-solid footing, with the combined financial and creative resources to make Time Warner Inc. an even better competitor in existing markets and an innovative force in new markets.

(Munro Ex. 12 at 18-19)

Levin testified before the Senate Subcommittee on Antitrust, Monopolies & Business Rights that:

> On March 4, Time Inc. and Warner Communications announced that the companies planned to merge. . . .
>
> * * * *
>
> We are particularly pleased that these goals will be accomplished without the often-devastating impact of a highly leveraged buy-out. The merger will not create enormous debt. The companies' assets will not be broken up and sold for short-term profits. No employees will lose their jobs. This grand old-style merger will have no negative impact on our employees or the communities in which we operate.

(Paramount Appendix, Ex. M)

The ability of Time's management to believe whatever they wish to believe is starkly demonstrated by their embrace, less than three months later, of a highly leveraged deal that could require selling off significant assets of Time and Warner, and may involve significant "cost-savings" that may involve firing employees who do not have long-term contracts, such as editorial employees. (Wasserstein Ex. 18 at S200113-114; Luce Tr. at 182-84)

V. PARAMOUNT "INTRUDES" BY OFFERING TIME'S SHAREHOLDERS $175 PER SHARE

Paramount announced its $175 per share offer on June 6. (Paramount Appendix, Ex. N) It announced an increase to $200 on June 23. The Time board met to consider the situation on June 8, June 11, June 15, June 16, and June 26.

At no time since the Paramount offer was announced has a Time director or a Time advisor suggested that Time should talk to Paramount about its bid. At no time since the Paramount offer was announced has a Time director or Time advisor suggested negotiating with Paramount to see if conditions could be removed or the price further increased. At

no time has any Time director or advisor ever suggested considering the Paramount offer, or a revised Paramount offer, as an alternative to the Time-Warner deal. (Munro Tr. at 126-28; see, e.g., Nicholas Tr. at 159-62) As one outside director noted, "There was no purpose to meet with Mr. Davis to discuss anything." (Opel Tr. at 217)

Discovery has shown that instead of considering the Paramount offer, Time's management immediately rejected the bid and began taking every step in Time's power to block the Paramount offer. In that context, Time's board chose the current Time Tender Offer because it offered a guarantee that the Time-Warner deal, with its guaranteed management succession and preservation of The Time Culture, would succeed no matter what Paramount did.

A. Paramount's Offer

On March 4 Time publicly revealed that it was willing to transfer 62% of the voting stock of the company, and at a bargain basement price. Paramount was interested in Time, as it had been for several years, because of the excellent fit between Time and Paramount. (Hope Tr. at 59-60) However, due to the "Black-out" provision in the Merger Agreement, Paramount could not contact Time and suggest a friendly deal without facing a tortious interference suit by Warner. The Merger Agreement left Paramount no choice but to begin an unsolicited offer.

On June 7, Plaintiffs commenced their all cash tender offer for all the outstanding shares of Time at $175 per share,

a premium of $49 (or 38.9%) over the closing price of $126 per share on June 6, and a premium of nearly $66 (or 60.4%) over the March 3, 1989 market price. (Paramount Appendix Ex. N) The offer received immediate approval from the financial market; the price of Time stock jumped to $170 per share in one day.

The Offer to Purchase candidly states that it is subject to a number of conditions. Other than rescission of the Lock Up Stock Swap, obtaining financing and regulatory approvals, all the conditions can be satisfied by the directors removing obstacles to the Paramount offer.

With respect to financing, Paramount had a commitment from Citibank to loan $1 billion. Citibank stated that it was "highly confident" that it could raise the additional funding needed to purchase all of Time's shares. (Coppola Ex. 1 at 3)[23/]

In order to enable Paramount to purchase the Time stock before receiving all licenses from the Federal Communications Commission (the "FCC"), Paramount requested the FCC to approve a voting trust to be administered by former Secretary of Defense Donald Rumsfeld. In addition, by June 9, Paramount had retained local counsel in all jurisdictions in which a majority-owned subsidiary of Time owns or manages a significant cable system to begin the process of reviewing

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23/ Since June 6, seven other banks have committed to lend $1 billion each, and there have been expressions of interest by other banks that exceed the remaining $6 billion needed to finance the offer. (Paramount Appendix, Ex. W)

major franchises and preparing required transfer applications.

B. The June 8 Board Meeting: Time's Board Effectively Rejects The Paramount Offer Within A Day After It Is Announced

On June 7, Martin S. Davis of Paramount wrote to Munro and offered to negotiate all terms of the offer, including price. (Munro Ex. 20) Davis stated that Paramount is "prepared to negotiate all aspects of our proposal" and "seeks no favored status or inside track, no exclusive dealing rights or lock-up arrangements." He concluded: "We look forward to meeting with you and your board shortly. With your cooperation, we are confident that a transaction can be concluded which will be in the best interests of both our companies." Id.

On June 8, the chairman of Time's board of Directors responded. (Munro Ex. 21) Munro did not offer to negotiate for the benefit of Time's shareholders. He did not offer to disclose information that could justify a price increase. Instead, he effectively rejected Paramount's offer:

> . . . I regret you've chosen to stake your company's future on an ill-conceived deal that is cynical if not downright deceptive. You've changed the name of your corporation but not its character: it's still "engulf and devour."
>
> * * *
>
> Your tender offer raises serious questions about your integrity and motives. It smacks more of spite than strategy . . . .
>
> Hostile takeovers are a little like wars: once they start, it's impossible to tell where they may end. The full effect of what you've set in motion remains to be seen . . . . (emphasis added).

Munro attacked Paramount's bid as offering Time's shareholders nothing but "smoke and mirrors." (Id.) He attacked Paramount's conditions of financing and regulatory approvals; he implied that Paramount's offer constituted a threat to Time's "journalistic integrity."[24/] He effectively rejected the offer -- before the Time board could even consider it.

Munro testified that the letter was written by his speech writers, was reviewed by his M&A tacticians. (Munro Tr. at 155-56) It was sent before it was shown to the directors.

Time's outside director John Opel testified:

> Q. When did you first see [Mr. Munro's letter]?
>
> A. I don't have a precise date.
>
> Q. Do you believe you saw it after he sent it?
>
> A. I don't know. I know I saw it after he sent it.
>
> Q. Did he read it to you before he sent it out?
>
> A. No, he did not.
>
> Q. Did he ask for the approval of Time's board before he sent it?
>
> A. Not that I recall.

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

Although the board had not been able to review Paramount's offer, and had not received a detailed presentation

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24/ There is absolutely no basis for the charge that Paramount would not respect the journalistic integrity of Time's publications. Paramount has stood ready to make whatever assurances are necessary to guarantee Time's editorial integrity. (Oresman Tr. at 164-65)

from their financial advisors on the offer, the board rubber-stamped management's angry response to Paramount's "intrusion" into the deal with Warner. (Finkelstein Tr. at 135-37)

Although a Special Committee of Outside Directors had been created on March 3, they were not asked to act on this matter.[25/] (Finkelstein Tr. at 110, 112-13) No independent financial advisor or legal counsel was retained to advise the Special Committee or the outside directors. The directors consulted with management's financial and legal advisors.[26/]

No one at the June 8 meeting suggested talking to Paramount to see if the offer could be changed to remove conditions or to increase the price. No one at the June 8 meeting suggested that the board should consider negotiating a transaction with Paramount as an alternative to the Time-Warner deal. (Munro Tr. at 126-28; Opel Tr. at 217)

25/ The Special Committee was formed on March 3, made up of Finkelstein, Opel and Kearns. Each of those directors had been enthusiastic about the Warner deal since it was first discussed in 1988. This special committee was hand-picked by Munro. (Finkelstein Tr. at 109-13; Finkelstein Ex. 6 at A003351)

The Special Committee has done nothing. It has never met, never acted, never hired counsel, never hired financial advisors, and has no intention of doing anything. Indeed, some directors had never even heard of the Special Committee. (Finkelstein Tr. at 110, 112-13; Opel Tr. at 238-39)

26/ During discovery, Time took the position that it will not and does not rely in this action on the claim that its directors relied on the advice of counsel. Time specifically refused two invitations from counsel for Paramount to disclose and put into issue the legal advice, if any, received by the directors. (See Paramount Appendix, Ex. V)

The presentations of both Time's management and its financial advisors at the June 8 meeting was almost exclusively devoted to the "highly conditional nature" of the offer, particularly the claimed difficulty in obtaining approvals for the cable TV franchises. (Opel Ex. 5 at 9) Both Time management and representatives from Wasserstein warned the board that allegedly long approval delays demanded a steep discount on the present value of Paramount's bid.

The skewed manner of presentation was clear from Shearson's estimates of a discount rate to put a present value of Paramount's offer. Mr. Hill of Shearson explained:

> that if one assumes there is a twelve month delay before the tendering stockholders receive payment and a 12% annualized interest rate is used, the offer is worth $155 per share rather than $175 per share, and, if a 24% annualized rate is used, the offer would be worth $135 per share.

(Id. at 11) Hill offered no justification for using a twelve-month delay or for using 12% or 24%. The specious nature of those rates is shown by Time's use of a lower rate of interest (9%) to Warner shareholders in connection with Time's tender of $70 per share for 100 million shares of Warner stock. Hill offered no reason for choosing these high rates. (Opel Tr. at 185-87)

The twelve-month delay period was also without foundation. Indeed, Time's management admitted that the cable approvals could be done in 3 to 6 months. (Opel Ex. 5 at 9)

The board discussed the upcoming shareholder vote. At least one director, Opel, suggested that the Paramount offer seemed to "preclude" the original merger. (Id. at 20) There

is no record that anyone said anything at the June 8 meeting that disagreed with Opel's comment. No one suggested a solution to this problem at the June 8 meeting.

Finkelstein left the June 8 meeting having made up his mind to pursue Warner to the exclusion of the Paramount offer. (Finkelstein Tr. at 129) Dingman testified that the consensus view among directors generally was that "there was really no advantage to talking when we were under a commitment to do a deal with Warner." (Dingman Tr. at 140)

Time's management had already decided to reject the Paramount offer, and was already beginning to do everything in its power to block the offer.

C. The June 11 Board Meeting

The Time board met again on June 11. Again, no one suggested that anyone from Time should talk to Paramount and see if the offer could be increased or conditions removed. No one suggested that the board should seriously consider the Paramount offer as an alternative to the Time-Warner deal.

The financial advisors made another presentation, again focusing on the "delays" resulting from cable franchise approvals, and using the 12% and 24% discount rates. (Levin Ex. 30 at 5-6) The focus of this meeting was on whether the original merger agreement could be carried out without having a shareholder vote.

The financial advisor presentations dealt with the possibility of changing the merger agreement to a partial tender offer for Warner, for cash, with a back-end merger at

the same price. This would avoid the problem of the shareholders' unwillingness to approve the merger agreement as approved by the board on March 3. (Levin Ex. 30 at 17, 21-22)

In analyzing the proposed tender offer for Warner, not a single director or advisor suggested that the board should consider negotiating with Paramount to find an acceptable alternative for Time's shareholders. By the end of the June 11 meeting, before Time's financial advisors had prepared any detailed analysis of the value of various transactions or given an opinion on adequacy, the Paramount offer was no longer being seriously considered as one of "the options available to the Board." (Levin Ex. 30 at 21-22)

D. Between June 8 and June 15 Time's Management Takes Every Step Possible To Block The Paramount Offer

The board did not officially reject the Paramount offer on June 8 or June 11. Time management, including Nicholas and Munro, acted as if the Paramount offer had been rejected, and swung into action to block the offer. In particular, Time management tried to use Time's cable franchises as an anti-takeover device.

Time's major theme since June 6 has been the alleged delays that Paramount will face in closing its offer because of the need for FCC and local regulatory approval of the change of control of Time. Time management began to issue statements to the press that it would be at least 9 to 12 months, and perhaps much longer, before Paramount could receive the approvals necessary for it to purchase shares under the offer.

Paramount applied to the FCC for the appointment of a Voting Trustee. Although this would not affect the local approval process, the Voting Trustee would allow Paramount to purchase Time shares before obtaining final FCC approval of a transfer of control from Time to Paramount. Almost immediately after the June 8 meeting, Time's management tried to block FCC approval of the voting trust. On June 13, Time filed a brief in opposition to Paramount's request for approval of the voting trust. (See Paramount Appendix, Ex. S)

Time's attempts to block Paramount's offer did not stop with filing a brief with the FCC. On June 13, Mr. Nash, one of Time's lawyers in Washington, D.C., wrote the attorney general of West Virginia and urged him to oppose the voting trust because it purportedly would:

> effectuate the transfer of control of [Time's] West Virginia cable operations to the trustee without the requisite approval by local authorities, as required by both federal and local law.

(Opel Ex. 6 at 2)[27/] Mr. Nash enclosed a "form" letter to be sent to the FCC Chairman. Id. [28/] Time's management knew and approved of the soliciting of the attorneys general (Nicholas Tr. at 165-66). Typically, its outside directors did not. Nor

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27/ Of course, Mr. Nash (and Time) knew this was incorrect. They knew that Paramount's applications were intended only to speed payment to Time's stockholders without waiting for approval of the transfer of FCC licenses held by Time subsidiaries.

28/ That Mr. Nash used his own "form" solicitation was reflected in his closing argument that Paramount's "clever scheme" was designed to "preclude Illinois authorities from protecting their cable subscribers. . . ." (Opel Ex. 6 at 2) (emphasis added).

were they asked to approve such tactics. See, e.g., Opel Tr. at 198-99 ("I read about that in the paper.").

By June 14, Time's 82% owned subsidiary, ATC, had prepared papers to file suit against Time in Connecticut state court, alleging that Paramount's tender offer would interfere with ATC's contracts and damage ATC's shareholders. Nicholas knew of this and approved. (Nicholas Tr. at 172-73)

E. Time and Warner Ask The New York Stock Exchange To Let Them Force The Merger Through Without A Shareholder Vote: The Exchange Declines

It was clear to Time's management that the shareholders would not approve the Merger. In an attempt to avoid this problem, counsel for Time and Warner sent a joint letter to the New York Stock Exchange asking that Time and Warner be excused from the rule requiring a shareholder vote on the merger. (Wasserstein Ex. 13)

The letter explains that the Exchange Rule should not apply, since the Merger Agreement is neither a Merger nor an acquisition. Id. at 2. In a remarkable concession, subsequently disavowed by Nicholas (Nicholas Tr. at 187), the letter points out that the original merger agreement was not an acquisition of Warner by Time. The essence of the letter is that if the issue is forced to go to a shareholder vote, it will be voted down.

The New York Stock Exchange refused the request. (Nicholas Tr. at 186; Aboodi Ex. 7 at 3-5)

F. Time's June 15 and June 16 Board Meetings: Rejecting Paramount Without Consideration And Choosing Warner At Any Cost

The Time board met again on June 15. They considered the Paramount offer and rejected it. During the board meeting, the directors received a letter from Mr. Davis of Paramount. He asked again for a meeting to discuss the Paramount offer and stated:

> At any such meeting, we would, of course, be prepared to review any non-public information which you believe could justify a higher price than we have offered and to discuss with you any other elements of our proposal which you believe relevant.

(Munro Ex. 22)

The Time board did not respond to this request. (Levin Tr. at 297-98, 342; Finkelstein Tr. at 131-33) No director or advisor even suggested that Time talk to Paramount.

Time's board cited many grounds for the rejection, but the two basic grounds were the opinions by Shearson and Wasserstein that $175 was "inadequate" and the supposed conditionality of the offer.

Apart from financing and the removal of Time's defenses, the only "condition" in Paramount's offer was cable approval. Time management had already indicated, however, that it does not believe it was necessary to receive all regulatory approvals in a change of control situation. Consummation of the Warner Merger Agreement was predicated upon local cable approvals for only 50% of the combined subscribers to the two companies' basic cable service where approvals were necessary.

(Ross Ex. 10 at 23) And the Time board knew that this could be done in as little as three months, since Time and Warner were proceeding to obtain approvals. Moreover, on the same day that the Time board rejected Paramount's offer, it approved the Time Tender Offer, which is not conditioned on receiving any regulatory approvals, even though it will most definitely affect a change in control of Warner and its cable subsidiaries.

Time's financial advisors presented a detailed financial analysis of the value of various Time transactions at the June 16 board meetings. Those analyses included significant increases over the number presented at the March 3 board meeting. (Compare Finkelstein Ex. 7 at A001788 with Munro Ex. 29 at 051235)

G. Time's Board Chooses The Warner Option

Warner triggered the Stock Swap on June 15. Under the terms of the Merger Agreement as Amended, this gave Time the absolute ability to walk away from the Merger Agreement. (Nicholas Tr. at 177) Thus, on June 16 the Time board was looking at a clean slate. They could choose to pursue a deal with Warner. They could choose to negotiate with Paramount. They could pursue another option.

The board gave no consideration to pursuing negotiations with Paramount. Although Paramount was an attractive candidate for a combination, as Levin stated in his 1987 strategic memorandum (Levin Ex. 11 at 4), no director or advisor suggested talking to Paramount to negotiate a friendly

merger. No one suggested talking to Paramount about a stock-for-stock transaction. No one suggested talking to Paramount about any kind of transaction.

Indeed, Time's management and Wasserstein had already determined that "the option of acquiring WCI would be the focus" of this presentation. (Levin Ex. 29 at 12)

The reasons for this single-minded zeal are clear from discovery. The three top officers of Time were utterly opposed to an unsolicited acquisition of Time.

Nicholas testified that it was "inconceivable" that Paramount could be permitted to acquire Time, that the cultures "could never mesh successfully." (Nicholas Tr. at 144-45, 155) He testified that "Warner . . . is a lot like Time Inc. in that it highly values creative people as a nurturing kind of a company, and our belief is that the Gulf & Western environment is a much harsher one." (Nicholas Tr. at 270)

Munro agreed that it was "inconceivable" that Paramount could buy Time, and that it is improper for anyone to make a takeover bid for an "American institution" like Time. (Munro at 9-10, 11-13) Levin agreed that it was "unthinkable" that Paramount could acquire Time. (Levin Tr. at 266)

Discovery shows that from June 6 to June 16, no one at Time gave any consideration to negotiating a transaction with Paramount. Although they were free to walk away from the Warner deal and pursue a higher-value alternative, the Time board pursued a combination with Warner with a single-minded zeal that precluded consideration of any other alternative.

On June 16 the Time board approved a revised Merger Agreement and a tender offer for 100 million shares of Warner at $70 per share. As part of the revised Merger Agreement, Time agreed that it would not redeem its poison pill to favor another offer. (Paramount Appendix, Ex. U) The Stock Swap was consummated, and Time traded approximately 7 million shares of Time stock for approximately 17 million shares of Warner stock.

The Time directors agreed to pay a substantial premium for Warner shares in the Time Tender Offer. The sole purpose of the high price was to discourage competing bids for Warner that might leave Time without its favored partner. Steve Ross has admitted publicly that he is not concerned about another bid for Warner, because $70 per share is more than any analyst's public estimate of Warner's break-up value. He also was quick to point out to his board on June 15 that "not many companies would be prepared, even though they are acquiring us, to have equal Boards and Co-CEOs for the first five years . . . ." (Aboodi Ex. 7 at 18)

H. <u>The Time Tender Offer: No Way Out</u>

The Time Tender Offer has virtually no conditions. The only material conditions to the Time Tender Offer are a tender of the requisite number of shares and the absence of a permanent injunction that prevents Time from proceeding with its scheme. It is not subject to financing, nor does it require approvals of the transfer by the FCC or any local cable

regulators.[29/] (Ross Tr. at 123, 141; Finkelstein Tr. at 174-75) Ross described it to his board this way: "[I]t was a firm deal -- no outs, unless the transaction is set aside by the courts . . . ." (Rinaldini Ex. 26 at 11)

Time admits that it may have to sell off assets to pay for the Time Tender Offer. The financial presentation by Wasserstein was based upon the assumption that Time would sell anywhere from 50% to 100% of Warner's cable franchises, as well as Time's Scott-Foresman textbook publishing subsidiary and other significant assets. (Wasserstein Ex. 18 at S200113; Wasserstein Ex. 19 at 056101; Levin Ex. 29 at 24-25; Luce Tr. at 184)

Time will not wait for any necessary cable franchise approvals, no matter how important those franchises may be to Time. (Munro Tr. at 110-11) Thus, even if it turns out that completion of the Time Tender Offer will result in the loss of every cable franchise Warner holds, the deal must go through.

The risk of proceeding without approvals is apparently acceptable to Time in order to get the Warner deal

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29/ Time's Amendment No. 1 to Schedule 14D-9, Exhibit (a)(1) at 46 states:

> If the Offer or the Merger is consummated without obtaining approvals in cases where such approvals are found to be required, the possible consequences, if any, vary depending upon the terms of the franchise under which the relevant system operates, and such consequences may in some cases include fines and other penalties, including the possible revocation or non-renewal of certain franchises.

(Paramount Appendix, Ex. O)

done. Curiously, on June 16 Time caused its subsidiary, ATC, to sue Paramount in Connecticut. ATC claims that the possibility that Paramount's offer will close without approval by every regulator in every state will subject ATC to irreparable injury. ATC alleges in its Connecticut action that the mere prospect that a change of control might occur will cause such irreparable injury that the Paramount offer should be enjoined. (Paramount Appendix, Ex. Q) ATC is strangely silent about Time's "hell or high water" commitment to close the Time Tender Offer whether or not appropriate regulatory approvals are obtained.

There is no "fiduciary out" in the Time Tender Offer. Time's board cannot escape from the Time Tender Offer even if someone makes a bid for Time that is "fair" in the eyes of Time's hired advisors. Thus, even if an offer of $500 a share for Time stock were made (conditioned upon the Time Tender Offer not going through), the board would have no choice but to reject that offer. (Nicholas Tr. at 217-18) 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) They have abandoned all pretense of exercising business judgment in favor of a rigid insistence on merging with Warner at any cost.

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) Mr. Opel, an outside director, was equally candid about

what Time had done. The company had adopted "hell or high water" approach:

> [W]hat we tried to do is find a way to consummate our original desire to commingle with Warner as rapidly as we possibly could. And to do without creating any kind of obstacles on our own part, to that ultimate arrangement. That means that you really indicate by virtue of the kind of agreements you draw and the kind of actions you take, that you are committed to this transaction.

By doing so, Opel testified: "And to that extent that you're engaged in a hell or high water kind of transaction, you inhibit or you give up, I suppose, some of your fiduciary out." (Opel Tr. 143) See also Luce Tr. at 150 ("We were riding this deal now and in orbit and there was no place to get off.")

I. Time's Board Took The Transaction Away From The Time Shareholders Because They Would Not Approve It

Time announced in March 1989 that the Time/Warner Merger would be submitted to the shareholders. Part of that Merger was to be a new board of directors, with 12 directors from Warner. However, that Merger Agreement was to have been put to a vote at the annual meeting. If a stockholder did not approve of the newly constituted board, including the 12 new Warner directors, all that stockholder had to do was vote against the merger.

Thus, during the time when it was possible to nominate opposing slates of directors, Time assured its shareholders that they would have a chance to vote on (i) the merger and (ii) the newly constituted board of Directors at the Annual Meeting. If they disapproved they did not have to run opposing slates; all they had to do was vote "no."

Paramount's offer was a rude awakening to Time's management, who were faced with a stockholder vote that they knew they would lose. Mr. Luce testified:

> Q. As I understand your testimony before, you thought that the Time-Warner merger would have been defeated by the Time shareholders, correct?
>
> A. Yes.
>
> Q. Did you also think that a majority of the Time shareholders would accept the Paramount offer?
>
> A. I suppose if they had an opportunity to do so.

(Luce Tr. at 203)

They never intended that, and could not accept it. Accordingly, Time pulled the merger from the shareholders. Instead, the board would approve the merger. The board, however, did not call a new annual meeting and allow the shareholders to run slates in opposition to the group that controlled the board. Instead, they postponed the meeting one week to June 30, while retaining the same record date. The Time board admits that substantial numbers of shares have changed hands in recent weeks. It is "impractical" for shareholders to suddenly run proxy campaigns, particularly with the obsolete record date. It is also "impractical" under the by-laws Time's management so carefully put in place, for any other directors to be nominated. (See, e.g., Nicholas Tr. at 189; Opel Tr. at 228)30/

30/ Time's refusal to allow its shareholders to vote on this transaction contrasts sharply with the stated belief of outside director Dingman that "shareholders should have a good say in who the directors of the company are, and the election of the management of the company through directors." (Dingman Tr. at 11)

Mr. Temple, the former outside director of Time and a major shareholder of Time, testified with respect to a shareholder vote:

> Q. Do you recall that the merger agreement provided for a shareholder vote every time?
>
> A. Yes.
>
> Q. And did you believe that the shareholders should vote on whether the merger should go forward?
>
> A. I just told you I think that any major move of this -- of that significance, I felt, should be done with the blessing of the shareholders in a Democratic vote.

(Temple Tr. at 151-52) Finkelstein agreed that "[o]n major matters, I think its very, very important that the shareholders decide." (Finkelstein Tr. at 187)

J. After June 16: Time's Management Continues To Use Every Available Tactic To Block The Paramount Offer

Time's Opposition to the Paramount offer did not end with approving the "hell or high water" Time Tender Offer. As noted, Time caused its approximately 82% owned subsidiary ATC to sue Paramount in Connecticut. ATC and its attorneys then embarked on a campaign to promote the filing of lawsuits by cities to block Paramount's bid on the grounds that the tender offer should not be completed until cities had reviewed and approved a change in the control of their cable franchise holders.

For example, local attorneys for ATC and Public Cable Company, a partially-owned subsidiary of Time through ATC and the cable franchise holder in the City of South Portland, Maine, sent a draft complaint, a motion for

temporary restraining order and a proposed order to the Corporation Counsel for the City of South Portland. (See Attachment A to the Affidavit of Martin J. Robles, sworn to on June 27, 1989 ("Robles Aff."), Paramount Appendix, Ex. A) The proposed order would, if adopted by the court, enjoin Paramount from proceeding with its bid. Worse, ATC's lawyers included an indemnification agreement which purported to obligate ATC and Public Cable to indemnify the City of South Portland for its litigation expenses. Id. None of these documents was solicited by the Corporation Counsel. Id. at ¶ 9. Nor is this an isolated incident. (See Cordle Affidavit, sworn to on July 2, 1989, Paramount Appendix, Ex. B) Even Munro was troubled by the business ethics of providing indemnities. (Munro at 115-18)

Although disclaiming any knowledge of offers to pay for such lawsuits, Time's management was well aware of the effort to encourage lawsuits against Paramount. As Mr. Nicholas put it euphemistically: "We have suggested to localities that they protect their rights." (Nicholas Tr. at 174) Once again, Time's outside directors were kept in the dark. (See, e.g., Opel at 153, 155; Finkelstein Tr. at 179)31/

31/ Another such lawsuit was filed in federal court in Florida by the City of Casselberry seeking to enjoin Paramount's bid on the grounds that Paramount's bid would violate a local ordinance requiring prior approval for a change in control in the franchisee (owned by ATC) and would cause the franchisee to materially breach its contract with the city. ATC immediately put out a press release announcing the filing of the lawsuit. (Paramount Appendix, Ex. Y) On June 22, the federal court denied a temporary restraining order (Paramount Appendix Ex. X), and on June 29 denied a preliminary injunction on) the record.

As to Time's general strategy to impede cable approvals, Munro testified: "Impede might be too strong a word but we certainly have -- yes, we have been involved in that process." (Munro Tr. at 199)

K. Time's June 26 Board Meeting: Rejecting $200 Per Share

On June 23 Paramount increased its offer to $200 per share. The offer was conditioned upon the rescission of the Stock Swap and upon the Time Tender Offer not being completed.

Time's board met on June 26 and rejected the offer. They did not consider talking to Paramount or negotiating. They did not review new analyses from their financial advisors, relying instead upon the same inflated numbers they discussed on June 16. (Opel Tr. at 176) ("I think the numbers were exactly the same.")

L. The Annual Meeting

Time held its annual meeting on June 30, despite the "impracticality" of holding a proper shareholder vote that had caused the board to withdraw the Merger from the shareholders. At that meeting Munro, Nicholas, Levin and Perkins were re-elected.

ARGUMENT

It is axiomatic that the directors of a Delaware corporation owe their shareholders two fundamental duties: a duty of loyalty to act in the best interests of those shareholders and a duty of care to discharge their responsibilities with requisite attention. In the case of

defensive reactions to unsolicited offers (such as Paramount's), Delaware courts scrutinize the discharge of these duties with particular attention because of the omnipresent specter of entrenchment; Unocal v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946, 954 (1985). In Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173, 179 (1980), and Mills Acquisition Co. v. Macmillan, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,401 at 92,601 (Del Supr. 1989), the Delaware Supreme Court imposed a heightened scrutiny on the discharge of these duties in the context of extraordinary transactions involving fundamental and far-reaching changes to the shareholders' interest in a corporation. Both cases (and their progeny) address certain common concerns: (i) that shareholders be given a choice between extraordinary transactions affecting their equity investment, (ii) that directors not unreasonably and blindly foreclose alternatives without appropriate investigation, and (iii) that the actions of directors be guided by one primary and overriding objective: the best interests of the shareholders.

There is another thread to the cloth of director-shareholders relations. The directors have a duty not to manipulate the procedural power available to them under the corporation law in a fashion that undercuts shareholder voting rights. Blasius Indus., Inc. v. Atlas Corp., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,965 at 90,483-87, Allen, C. (Del. Ch. 1988); Schnell v. Chris Craft Indus., Del. Supr., 285 A.2d 437 (1971). These cases teach that corporate power or

authority cannot be exercised arbitrarily, without concern for whether an action is unfair or inequitable. This duty arises not from a director's duty of care or loyalty, to which the business judgment rule applies, but from the duty that the law imposes to preserve the essence of corporate governance -- shareholder democracy.

The conduct of Time management and directors in response to the Paramount tender offer has violated all of these precepts. In their uncompromising and single-minded pursuit of a combination of Time and Warner (which involved an explicit contractual commitment to "entrench" top management), the directors of Time have:

> (i) resolutely refused to inform themselves of the alternatives available to Time and its shareholders represented by the Paramount offer;
>
> (ii) embarked upon an irrevocable defensive transaction (the Time tender offer) that the directors cannot undo, that works an extraordinary financial and corporate change to Time, and that precludes the Paramount offer;
>
> (iii) aborted a transaction that they had previously recommended to their shareholders and upon which the shareholders were about to vote; and
>
> (iv) structured a "two-step" transaction that postponed a potentially necessary shareholder vote to a date when the shareholders will be forced to approve the economic fait accompli wrought by the directors.

Whether measured under Unocal, Revlon, Macmillan, Blasius, or Schnell, the conduct of the Time directors is fundamentally wrong. At a minimum, the shareholders of Time are entitled to make their own choice about Time's future --

a choice previously available to them but suddenly withdrawn. Time's hastily and ill-conceived defensive tender offer should be enjoined either to permit a shareholder vote, or to permit the shareholders to tender their shares to Paramount if they are so inclined.32/

I. THE TIME TENDER OFFER FOR WARNER IS AN UNREASONABLE RESPONSE TO THE PARAMOUNT OFFER FOR TIME

The "omnipresent specter" of self-interest inherent in board action designed to defeat a change in corporate control formed the predicate, explicitly, for the intermediate level of judicial review formulated in Unocal Corp. v. Mesa Petroleum Co., 493 A.2d at 954. See also Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1341 (1987); City Capital Assocs. v. Interco, Inc., Del. Ch., 551 A.2d 787, 796, appeal dismissed, 556 A.2d 1970 (1988) ("Unocal recognizes that human nature may incline even one acting in subjective good faith to rationalize as right that which is merely personally beneficial. Thus, it created a new intermediate form of judicial review to be employed when a transaction is neither self-dealing nor wholly disinterested") (emphasis in original). The proportionality test of Unocal represents an accommodation of

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32/ As a knowing participant in a breach of fiduciary duty, Warner cannot be heard to complain about an injunction that would prevent the consummation of the illegal plan. See Ivanhoe Partners v. Newmount Mining Corp., Del. Supr., 535 A.2d 1334, 1344 (1987) (one who knowingly joins in breach of fiduciary duties is also liable for breach); see also Weinberger v. Rio Grande Industries, Del. Ch., 519 A.2d 116, 131 (1986).

the principles of loyalty and competence, on the one hand, and the need for shareholder protection, on the other.

The facts of this case present not simply the "omnipresent specter" of entrenchment, but present a defensive reaction which contains explicit contractual terms "entrenching" management for a period of 10-15 years. It presents a history replete with an extraordinary concern for "management succession" as a prerequisite to any transaction with Time. It presents evidence suggesting that in July of 1988 the top management of Time expressly considered being "flexible" on an exchange ratio (to the disadvantage of Time shareholders) in exchange for agreement on management succession. Under these facts, the heightened scrutiny mandated by Unocal is particularly important.

A. The Paramount Offer Is No Threat

Time undoubtedly will argue that the Paramount offer was a "threat" to the long-term business strategy of Time and the preservation of the Time Culture. Assuming without conceding that such non-shareholder specific concerns are cognizable threats and that the Time Culture has meaning beyond its only tangible expression (employment contracts for top management), this argument remains a fundamental misconception.

The Paramount offer is not a threat to Time's long-term business strategy. That strategy was embodied in the original Merger Agreement on which the Time shareholders were to vote. When Paramount announced its offer, it stated

that it would not conduct any proxy contest opposing that merger and that the Paramount offer would not proceed if the Time shareholders approved the Warner merger. Time was free to continue to pursue its long-term business strategy. The only "threat" to that strategy was the risk that Time shareholders might vote against it. But that "threat" does not justify the directors' dictatorial response.

In fact, the only conceivable threat presented by a cash tender offer for all shares is not to "corporate policies", but to "shareholder interests." City Capital Assocs. v. Interco, Inc., Del. Ch., 551 A.2d 878, 897, appeal dismissed, 556 A.2d 1970 (1988). As this court recently noted, such potential threats can be broadly divided into (1) structurally coercive threats that directly impinge on shareholder choice, and (2) substantive threats from "inadequate" but non-coercive offers. Id. 33/ Neither "threat" can be said to be implicated by Paramount's offer for Time.

1. Paramount's All-Cash Offer Is Not Coercive

Paramount's $200 per share tender offer is an all-cash, all-shares tender offer, with a back-end commitment at the same price in cash. The offering price is $65 per share more than the highest price per share at which the market had valued Time in anticipation of the Time-Warner merger, and it

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33/ See also Gilson & Kraakman, Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 Bus. Law. 248, 259 (1989).

is $91 per share higher than the market price of Time's shares immediately prior to the announcement of the proposed combination of Time and Warner in March of 1989. Moreover, Davis' letters proposing both the $175 and $200 offers to Time specifically invited negotiation over price.

It is well-established that such an all-cash, high-premium offer does not constitute the sort of coercive proposal that threatens to remove shareholder choice. Robert M. Bass Group, Inc. v. Evans, Del. Ch., 552 A.2d 1227, 1239 (1989) ("takeover bids found to be a threat have typically involved a coercively structured proposal, such as a two tiered, hostile tender offer"); AC Acquisition Corp. v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103, 112 (1986) (no evidence that all-cash tender offer was coercive or threatened injury to the shareholders or the enterprise.)

2. Paramount's Offer Is Fair and Adequate

Time has attempted to brand the Paramount offer as a "threat" by having its investment bankers opine that it is "inadequate." This incantation is offered by advisors who have an obvious bias. It was they who gave the advice that caused the directors to strap themselves to a rocket.

Balanced against this biased and unexplained "inadequacy" opinion is the unbiased judgment of the marketplace, major Time shareholders who have sued Time, and the earlier valuation of Time by these same investment bankers. In March, 1989, Shearson, Wasserstein and Lazard each valued Time and Warner. The Paramount offer falls

within the range of values for Time as established by this troika in March: $189-$212. Hill Ex. 4 at A001788. By June 16, however, the value of Time shares had, mysteriously, escalated to more than $225. The explanation is that the valuation of Time in March was done for an entirely different purpose than the valuation done in June. Levin Ex. 30 at 10.

There is other evidence that Paramount's offer is adequate. The Time offer for Warner has been declared "adequate." That offer represents a 54% premium over Warner's market value of $45.25 on March 3. Rinaldini Ex. 13 at 507631. Paramount's offer represents a 83% premium over Time's market value of $109 on March 3. Id. Yet, the bankers have declared that the Time offer is adequate and the Paramount offer is not.

Also, when Time's board approved the original Time-Warner Merger, it approved the sale to Warner's shareholders of Time stock at an implied value of $150 per share: $150 x .465 (share exchange ratio) = $70. Thus, when Time's management wanted to approve a deal, its bankers were willing to opine that $150 per share was "fair." But now, Time's investment advisors have concluded that $200 per share is "inadequate."

Time's own actions have demonstrated that Paramount's $200 offer is more than adequate. Because both the market and Time shareholders understood that Paramount's initial $175 offer represented a substantial premium over the

value offered by the Time-Warner merger, Time recognized that its shareholders would never approve the original merger agreement. It was this fact, and this fact alone, that compelled Time to scrap the original merger for a transaction that is specifically designed to preclude all shareholder choice.

Nor is there evidence that any other aspect of Paramount's offer makes it in any way inadequate. The Offer to Purchase states that it is subject to a number of conditions. Other than the Lock-Up Stock Swap and the Time tender offer, only two of those conditions -- financing and regulatory approvals -- cannot be satisfied by the director defendants themselves.

With respect to financing, which is almost always a condition for the consummation of a tender offer, Paramount announced last Thursday, June 29, that it has received commitments of $1 billion each from all seven banks approached by Citibank to serve as co-agents in the bank syndicate. In addition, Paramount announced that the company had received expressions of interest from other banks totalling well in excess of the $6 billion needed to complete the syndicate. See Amendment No. 14 to Paramount's Schedule 14D-1, Paramount Appendix, Ex. W.

With respect to obtaining FCC approvals, Paramount has requested the FCC to approve a voting trust in order to enable Paramount to purchase the Time stock before such approvals are received. In addition, by June 9, Paramount

had retained local counsel in all jurisdictions in which a majority-owned subsidiary of Time owns or manages a significant cable system to begin the process of reviewing major franchises and preparing required transfer applications. Paramout Appendix, Ex. Z. Most important, the only substantial obstacle to Paramount's cable approvals is Time's determined efforts to block this process by sponsoring a massive disinformation campaign and unfounded if not champertous litigation. It is hardly credible for Time to argue that the "conditional" nature of Paramounts's offer poses a "threat" when Time management has done its utmost to make this threat a reality.

3. Time Has Other Defenses to Inadequate Offers

Even if Paramount's offer can arguably be perceived as "inadequate", this is but one element in the determination of whether a tender offer poses a threat to shareholder interests. Before determining whether and to what extent a tender offer constitutes a threat, a board is required to consider the antitakeover devices already at its disposal; Robert M. Bass Group, Inc. v. Evans, 552 A.2d at 1241. In Bass, the existence of several poison pill devices, staggered director terms, golden parachutes and the ability to issue preferred stock with disproportionate voting rights led the court to conclude that: "Clearly the Macmillan board was well equipped to respond to any threat posed by the Bass Group. Even if, arguendo, the Bass offers were hostile,

coercive and/or unfair, the board scarcely need to fear any threat to corporate policy and effectiveness. " Id.

It is undisputed that prior to Paramount's June 7 offer the Time management and board had already implemented a formidable array of defenses, including (1) a flip-in poison pill; (2) a supermajority voting provision; (3) a staggered board; and (4) a share exchange agreement with Warner. In choosing an appropriate response to Paramount's offer, the Time board thus had fully effective measures to: (1) negotiate a more attractive offer; (2) shield the company while it pursued alternative transactions; or (3) ensure itself time to convince shareholders, if possible, not to tender but to seek "long-term value" under present management. Thus, the board had no basis to fear any threat to corporate policy or shareholder interests. Robert M. Bass Group, Inc. v. Evans, 552 A.2d at 1241.

The potential "threat" of an inadequate offer was also dismissed as unfounded in Shamrock Holdings, Inc. v. Polaroid Corp., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,340 at 92,215, Berger, V.C., (Del. Ch. 1989), where the court explained:

> 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 stockholders . . . 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 stockholders 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 stockholders 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 stockholders of the benefits of retaining their equity position, the "threat" to the stockholders of an inadequate, non-coercive offer seems, in most circumstances, to be without substance.

¶ 94,340 at 92,223 (citations omitted).

B. Even Assuming That Paramount's Offer Posed a "Threat" Within the Meaning of Unocal, Time's Defensive Tender Offer For Warner Is An Unreasonable Response To Paramount's Tender Offer

Under the "proportionality test" of Unocal, Time must also satisfy the Court that its response was reasonably related to whatever threat was posed by Paramount's offer. 493 A.2d at 955. It is evident that Paramount's offer is not structurally coercive. At most, it could only be a threat in the minimal sense that the proposal is less than the absolute highest price that the defendants' financial advisors now believe might be obtained if the Warner transaction is consummated or the company were put up for sale. See Robert M. Bass Group, Inc. v. Evans, 552 A.2d at 1241; see also City Capital Assocs. v. Interco, Inc., 551 A.2d at 799 (only threat was that "Wasserstein Perella may be correct in their respective valuations . . . and a majority of the company shareholders may not accept that fact and may be injured as a consequence").

A persuasive argument can be made that where the only threat is that a structurally non-coercive offer is substantively inadequate, there exists no rationale for defensive measures. See Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819, 841-65 (1981). At a minimum, Unocal demands that Time justify its defensive tender for Warner, which will absolutely preclude its shareholders from accepting Paramount's $200 offer.

1. Time's Offer for Warner Is a Preclusive Defensive Measure

Time's own words and deeds have established that its new tender offer for Warner is a defensive measure intended to bar its shareholders from considering the Paramount offer. Time's new offer is indeed a "rocket" that has taken off and cannot be called back.

On March 3, 1989, Time and Warner announced their original "merger of equals." Between March 3 and June 6, Time's senior management loudly proclaimed that this unique combination of two symbiotic companies would create a powerful new conglomerate capable of ensuring American participation and even dominance in the international media market. Essential to Time's strategic vision was that this non-leveraged merger would not be hampered by "crippling levels of debt" or the necessity to sell off prize assets, and thus could aggressively pursue new opportunities on a global scale.

The second central element to the proposed "merger of equals" was the preservation of both shareholder choice and Board flexibility. Thus, in the Joint Proxy Statement filed on May 23, 1989, Time shareholders were formally invited to approve the proposed merger at an annual meeting scheduled for June 23, 1989. Equally important, the terms of the agreement permitted the Time board to negotiate with another party if a bid were launched for Time and provided a "fiduciary out" (albeit a highly constricted one) to approve an alternative transaction.

Within nine days of Paramount's June 7 offer, both tenets of this purported "long-term business strategy" had been eviscerated. Having determined that the old merger was "impractical to consummate" because Time shareholders would reject it in favor of Paramount's offer, Time announced that there would be no shareholder vote and postponed the annual meeting one week until June 30, keeping the original record date.

Time also assumed the "crippling" burden of debt it had railed against only weeks earlier -- $14 billion worth -- in order to finance its purchase of Warner. The highly-leveraged new entity will lack the capacity to finance the ambitious expansion contemplated by the first merger. Moreover, in order to pay off debt Time will most probably be forced to sell those very assets -- such as Warner Cable -- that it had earlier proclaimed as the heart of its synergistic merger.

In addition to stripping the shareholders of any vote and revising the merger terms, the Time tender offer also precludes the board from considering any alternative transactions. The only material conditions to the Time tender offer are a tender of the requisite number of shares and, presciently, the absence of a permanent injunction that prevents Time from proceeding with its scheme. It is not subject to financing, nor does it require approvals of the transfer by the FCC or any local cable regulators. Nor will Time wait for any necessary cable franchise approvals, as it required previously, no matter how important those franchises may be to Time. Thus, even if completion of the Time tender offer results in the loss of every cable franchise Warner holds, the deal will still be consummated. Time has committed itself to the tender offer even if it has to destroy Time to pay for it. 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."

2. Time May Not "Cram Down" A Transaction that Permanently Blocks Its Shareholders From Choosing Paramount's Offer

Time's unreasonable response cannot withstand scrutiny. Courts have upheld or condemned defensive measures depending on whether the measures were employed to maximize shareholder values or to preclude choice. Thus, a board threatened by a coercive takeover attempt has the authority to implement poison pills and other defensive measures as long as they are employed to negotiate a higher bid, shop the

company or otherwise maximize shareholder value by developing alternative transactions. See, e.g., CRTF Corp. v. Federated Dept. Stores, Inc., 683 F. Supp. 422, 439 (S.D.N.Y. 1988) (use of pill approved to fend off coercive offers or to run an auction); Facet Enterprises, Inc. v. Prospect Group, Inc., Del. Ch., C.A. No. 9746, Jacobs, V.C. (April 15, 1988) (court allows poison pill to give target reasonable opportunity to conduct and complete an auction). Conversely, courts will not sanction defensive measures that preclude rather than preserve a board's flexibility, and which impede all shareholder choice.34/

This Court's decision in AC Acquisition Corp. v. Anderson Clayton & Co., 519 A.2d 103, in which the target company responded to an all-cash tender offer by adopting its own partial tender offer, is highly instructive and directly

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34/ See also Gilson & Kraakman, supra at 261-62 n.25, where the authors posit that the strongest rationales for defensive tactics are the claims that management needs leverage to negotiate with a hostile bidder or needs time to "shop" the company. Conversely, the most problematic rationale for defensive tactics is management's claim that it can better the price offered by a hostile bidder by preserving the target's independence and generating value internally. The authors conclude that invoking the target's intrinsic value to justify continued independence in the face of a premium is always a delicate argument given that the market has already assessed management's ability to maximize value, and may have undervalued corporate assets precisely because shareholders mistrust management policies. Indeed, in the present case, Time management for several years has tried but been unable to raise the value of Time shares to anything approaching Paramount's $200 offer. Time's offer for Warner, its most recent "best" deal, comes nowhere near $200 a share in value for Time shareholders. See Phillips Affidavit.

on point. While noting that the proposed stock repurchase derived from an earlier proposed recapitalization that was "only defensive in a general, preemptive way," the court determined that crucial elements of the present transaction were "unmistakably reactive to the threat to corporate control" posed by the other tender offer. Id. at 112. Specifically, the court found that the timing of the new transaction, as well as its specific structure, was obviously fixed in reaction to the competing tender offer. Id.

The record in the present case demonstrates that Time's senior management has long been preoccupied with its perceived vulnerability to a takeover. This bunker mentality resulted in the adoption of a wide range of potent defensive measures, and was also a major rationale for the original merger with Warner. However, while the original merger with Warner may be said to be "only defensive in a general preemptive way," the timing and structure of the new offer for Warner, which summarily removed a shareholder vote while locking the company into a radically altered transaction, was "clearly reactive to the threat of corporate control" posed by the Paramount offer. Id. at 112. Whether or not Time's new tender offer preserves any of its "long term business strategy," it clearly represents a defensive measure that must be judged under Unocal.

In terms that foreshadow the present controversy, the target company in AC Acquisition also justified its self-tender not as a defensive measure, but as creating a

shareholder option to retain equity in a newly-structured, highly-leveraged company. While the court recognized that it is reasonable for a target company to create an option that permits a continued shareholder interest, it firmly rejected any proposal that would preclude shareholder choice:

> A defensive step that includes a coercive self-tender timed to 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 shareholders by such offer.

519 A.2d at 114.

The court employed a similar analysis in Bass, where the purported "threat" consisted of an offer from the Bass Group proposing a consensual acquisition of Macmillan at a negotiated price of at least $64 in cash per share. In response to the Bass Group's proposal, the Macmillan board approved a restructuring of the company, which was valued by Wasserstein Perella at a marginally superior price. Again, the alternative transaction was justified as preserving a continued equity stake for the shareholders. The restructuring was not made subject to a stockholder vote, and its consummation would have effectively rendered Macmillan takeover-proof by permanently entrenching management through their acquisition of a controlling block of stock.

Noting that the Bass Group's proposal to acquire Macmillan could only be viewed as a minimal "threat" even if Wasserstein's financial analysis was in fact correct, the court observed that a reasonable response would be to develop a more valuable economic alternative. Robert M. Bass Group,

Inc. v. Evans, 552 A.2d at 1242. This could have been accomplished by either shopping the company or proposing a non-coercive transaction that offered shareholders higher value while preserving their equity interest. Id. Because the company's restructuring was specifically designed to preclude shareholder choice, it was deemed patently unreasonable:

> The directors were certainly 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 noncoercive, economically superior one. Under Unocal the directors were obligated to give the shareholders a choice. The restructuring, because it deprives them of that choice, is manifestly unreasonable.

552 A.2d at 1243-44.

The same protective principle regarding shareholder choice was propounded in Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984 (E.D. Wis.), aff'd, No. 898-1581 (7th Cir. May 24, 1989) (per curiam). The federal district court, applying Unocal, concluded that a company could not permanently preclude shareholder choice solely on the basis of its own perception of the inadequacy of the offer. Thus, the court determined that the proportionality test required that:

> If no other threat is posed to the corporation and shareholders, a board must at some point allow shareholders to choose between the offer and some alternative. Whether the alternative is to remain independent and reap the future benefits with the company, as the board proposes here, or a financial restructuring as proposed in Pillsbury, or an auction of the company as was done in Revlon, the shareholders must at some point be allowed to

choose. To do otherwise is to disenfranchise the shareholders.

Id. at 1014-15. See also Southdown, Inc. v. Moore McCormack Resources, Inc., 686 F. Supp. 595 (S.D. Tex. 1988) (target company enjoined from pursuing restructuring plan without vote of shareholders); Elias v. Wilson Foods Corp., Del. Ch., C.A. Nos. 10107, 10108, 10109 and 10110, Berger, V.C. (Aug. 4, 1988) (preferred stock plan enjoined as a "substantial impediment to any potential acquiror" where there was no mechanism to cancel the redemption option if the board was presented with a more attractive acquisition offer) slip op. at 3-4.

3. Time Shareholders, Not Management, Must Be Allowed to Chose Between Alternatives

Where, as here, Paramount's offer provides a substantial premium over market value, Time cannot be permitted to justify shareholder disenfranchisement on the speculative basis that management's chosen transaction will yield superior long-term values. While Delaware law affords a board considerable discretion in developing alternative transactions that reflect concern for long-term values, it will not permit the implementation of a plan that results in a substantial loss in current stock value while permanently barring other value-maximizing alternatives.35/

35/ The present corporate struggle does not implicate the issue of whether a board simply implementing an ongoing business strategy can use its concern for long-term values to preclude shareholders from the option of currently maximizing their values. See TW Services, Inc. v. SWT Acquisition Corp., Del. Ch., C.A. No. 10427, (continued...)

This precise issue was resolved against the target board in Grand Metropolitan PLC v. The Pillsbury Co., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,104 at 91,188, Duffy, J., (Del. Ch. Dec. 16, 1988), where the target company responded to a tender offer by approving an alternative restructuring that included various spin-offs and asset sales. Central to the target's defense was its assertion that since the minimum present value of this restructuring was $68 per share, it was clearly superior to the $63 tender offer.

The Pillsbury court appropriately framed the "bottom line" in the dispute as a choice between a tangible offer for current value and the company's ambitious predictions for future value. ¶ 94,104 at 91,194. Noting that "expectancies over a four or five year period out into the nineties are subject to economic and competitive conditions which are beyond [the company's] control," the court found that a shareholder could well decide that the

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35/(...continued)
Allen, C. (Mar. 2, 1989), slip. op. at 23-25. As this Court noted in TW Services, slip op. at 23-26, this issue is raised when a company has not opted for an alternative or "extraordinary transaction" in response to a tender offer. Here, Time's new offer for Warner is clearly an "extraordinary transaction" that was enacted as a defensive response to Paramount's bid for control. If Time's management merely wanted to preserve the benefits of a previously negotiated merger, the proper course would have been to allow the shareholder vote on the merger to take place as scheduled on June 23. See also Amanda Acquisition v. Universal Foods Corp., 708 F. Supp. at 1014-15 (a board cannot "just say no" to a tender offer in order to protect its long-term business strategy).

current tender offer was preferable to a "future hypothetical value." Id. In ruling that the company was required to redeem its poison pill to allow shareholder choice on the competing alternatives, the court concluded that the only "threat posed" was the significant loss to all Pillsbury shareholders if the tender offer were rebuffed and the company stock returned to its prior levels. Id. See also Gilson, A Structural Approach, supra at 856-59.

The same principles must be applied to enjoin Time's defensive tender for Warner. The crux of the choice is between Paramount's concrete $200 offer and Time's hopeful predictions of bettering that value at some point in the future. Indeed, the analyses of Time's own financial advisors indicate that the maximum value its post-merger stock would trade at in 1990, assuming the form of consideration in the Time tender offer and back-end merger consists of 75% cash/25% preferred stock, is $188, with the minimum value at $106. See Wasserstein Ex. 19 at 056101. More important, there is independent, disinterested evidence that should Paramount's offer be blocked, Time's shareholders will suffer a tremendous loss as their post-Time tender price drops to somewhere between $90 and $140. See Phillips Affidavit at ¶ 4.

Time can point to no evidence that its offer for Warner was intended to serve the permissible purpose of preserving flexibility in order to negotiate or arrange possible alternatives. Nor may Time assert a "right and

duty" to unilaterally determine how the long-term interests of its shareholders will best be served. Interco, 551 A.2d at 799. Where, as here, Time has structured an alternative transaction to deliberately circumvent other value-maximizing options, its tender offer for Warner clearly violates the requirements of Unocal.

II. THE TIME BOARD CANNOT RADICALLY CHANGE TIME'S ECONOMIC STRUCTURE WITHOUT PERMITTING SHAREHOLDERS TO CONSIDER AN ALTERNATIVE TRANSACTION

The essential principle of the Revlon cases is that when the directors of a Delaware corporation seek to radically change the economic structure and control of a corporation, at a loss to the corporation's shareholders, they owe a duty to permit their shareholders to consider proposed alternative methods of realizing value for their shares.

When the Time board approved the original Time-Warner Merger Agreement on March 3, the board approved a transaction that would have fundamentally altered the structure of the company. It would have imposed a new board with 50% new directors, a new co-CEO, new businesses, and a new ten-year mandatory chain of leadership "succession." Most significantly, it would have reduced the ownership interest of Time shareholders from 100% to 38% and deprived the shareholders of any chance to receive a control transfer premium.

Whether or not it is viewed as a "sale", the agreement certainly would have resulted in a massive change of control over Time and would have had a serious adverse effect on the economic interests of Time shareholders. The board therefore had a responsibility to "scrupulously adhere to ordinary principles of fairness" to ensure that the interests of Time shareholders were enhanced rather than diminished.

This fiduciary responsibility, which flows from long and well-established principles of Delaware law requires, at a minimum, that the board consider proposed alternatives and take no action to preclude Time shareholders from considering such alternatives, including plaintiffs' all-cash premium tender offer. In launching the Time tender for Warner, which precludes plaintiffs' offer for Time, the board completely abdicated its responsibilities.

A. When the Time Board Agreed to the Original Merger Transaction It Triggered Its Fiduciary Duty to Scrupulously Adhere to Ordinary Principles of Fairness

Revlon rests on the fiduciary duties that directors owe to a company and its shareholders: care, loyalty, and independence. 506 A.2d at 180. These fundamental duties require that in the specific circumstances presented by Revlon -- an active bidding contest following an explicit decision to sell the company -- directors must conduct an unbiased auction. "Revlon requires that there be the most scrupulous adherence to ordinary principles of fairness [i.e., care, loyalty, and independence] in the sense that

stockholder interests are enhanced, rather than diminished, in the conduct of an auction for the sale of corporate control." Mills Acquisition Co. v. Macmillan, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,401 at 92,600 (Del. Supr. May 2, 1989) (emphasis added). Revlon manifests an application of the basic duties of a director to a particular situation in which the board had declared that it was selling a valuable asset, the company. This basic principle simply requires that the board recognize that the corporation and its assets are owned by the shareholders.

Revlon and subsequent decisions applying it recognize that there are extraordinary transactions other than an outright sale that also require scrupulous adherence to ordinary principles of fairness. The Revlon Court, for example, recognized that "a merger or buyout with a third party [is] a recognition that the company [is] for sale." 506 A.2d at 182 (emphasis added); see also In Re Holly Farms Corp. Shareholder Litigation, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,181, Hartnett, V. C. (Del. Ch., Dec. 30, 1988) (stock swap merger is sale under Revlon).

In Macmillan, the court made clear that the formal structure of the transaction does not control the determination of whether a board is required to scrupulously adhere to ordinary principles of fairness. Such adherence is required "whether the 'sale' takes the form of an active auction, a management buy-out, or a 'restructuring.'" Id. at 92,600. The essence of the inquiry is the effect of the

transaction upon the shareholders and the corporation. See also City Capital Assocs. v. Interco, Inc., Del. Ch., 551 A.2d 787, 802-03, appeal dismissed, Del. Supr., 556 A.2d 1970 (1988) ("fundamental" transactions implicating heightened responsibilities include recapitalizations, sales and mergers).

Other courts have emphasized that where the effect of a transaction is a change of control, Revlon responsibilities arise. For example, in Black & Decker Corp. v. American Standard, Inc., 682 F. Supp. 772 (D. Del. 1988), the district court analyzed a proposed recapitalization plan which, if implemented, would have reduced the percentage of common stock held by public shareholders from 92.6% to 45.5%. The court noted that under the plan "the shareholders are transferring control." Id. at 783 (emphasis added). This transfer triggered Revlon duties and "[c]onsequently, any action taken by the board must be directed at obtaining the highest price for the benefit of the shareholders." Id. at 784; see also Freedman v. Restaurant Assocs. Indus., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,502 (Del. Ch., Oct. 16, 1987) (Revlon obligation to maximize shareholder value arises "once it is clear to the board that the corporation is to be subject to a change in control"); compare Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Revlon not implicated where target company limits white knight to 49.9% interest).

A board may satisfy its duty to adhere to principles of fairness without conducting a traditional auction, but the duty remains. It must find an appropriate way to insure that the shareholders are receiving maximum value for their investment. Macmillan ¶ 94,401 at 92,601; Interco, 551 A.2d at 803. For example, a board may conduct a market check. See, e.g., In Re Fort Howard Corp. Shareholders Litigation, slip op. Or, a board may have to show that "steps taken to defeat a potential suitor [are] designed to maximize shareholder returns." Restaurant Assocs., ¶ 93,502 at 97,219. At a minimum, a board must explore the value of proposed alternative transactions; it may not simply ignore bidders proposing such transactions. Interco, 551 A.2d at 803 n.21.

The common thread running through these cases is that certain extraordinary transactions can cause such a fundamental change in a corporation that a board approving such transactions must scrupulously adhere to ordinary principles of fairness. The specific responsibilities arising from this fiduciary duty necessarily vary with the circumstances and the nature of the extraordinary transaction.

Thus, for example, while a stock swap merger undertaken in direct response to an unsolicited bid may trigger a specific responsibility to auction the target company, see Holly Farms, ¶ 94,181 at 91,463-65, not every merger will require the board to conduct an auction. See

Interco, 551 A.2d at 802. Depending on the nature of the merger transaction and its surrounding circumstances, some specific responsibility short of an auction -- either an affirmative act or a restraint on certain action -- may be necessary to protect the interests of the corporation and its shareholders.

The recognition by Delaware courts that certain merger transactions may give rise to specific responsibilities arising from a board's fiduciary obligations finds a parallel in the Delaware General Corporation Law. Section 203 of the Delaware Corporations Law, 8 Del. C. § 203, Delaware's business combination statute, prohibits for a period of three years material transactions between an acquiror and a Delaware target company unless certain conditions are met. In effect, § 203 provides a board with defenses against coercive takeovers.

Section 203(b)(6) provides, however, "that circumstances may arise where the best interests of its shareholders dictate that [an offeror] be freed of the restrictions imposed by § 203. This is particularly the case in an acquisition attempt by a third party or in a management-proposed transaction." C. Smith & C. Furlow, Guide to the Takeover Law of Delaware, Corporate Practice Series (BNA) at 46 (1988). Section 203(b)(6) is a legislative recognition and directive that in the case of a merger approved or not opposed by a majority of continuing

directors, the protections of § 203 do not and should not apply.

Obviously, the same considerations of fairness that underlie the holding in Revlon underlie this exception. A fundamental change in the corporate enterprise with the inherent possibility of a management conflict of interest must be tested against available alternatives. Revlon requires an auction in certain circumstances to test the fairness of management (and board approved) transactions. The § 203(b)(6) exception provides a similar test by removing obstacles to alternative transactions. In both cases, the added responsibilities or lessened protection triggered by the board's approval of a merger transaction are intended to ensure that "stockholder interests are enhanced, rather than diminished." Macmillan, ¶ 94,401 at 92,600.

Under these principles, a merger in which the company's shareholders become minority shareholders at a discount, while senior management remains entrenched in enhanced lucrative positions, is an extraordinary transaction profoundly affecting shareholder interests. A board approving such a transaction must scrupulously adhere to ordinary principles of fairness. The specific responsibilities flowing from that duty require, at a minimum, that the Time board encourage, rather than inhibit, alternatives to the merger transaction and limit any defensive steps to those designed to maximize shareholder returns. This is a necessary requirement to promote fairness

and ensure that shareholder interests are enhanced rather than diminished.

B. The Board Cannot Avoid Its Fiduciary Duties By Declaring That "We Are Not For Sale"

The terms of the original Time-Warner merger transaction and the circumstances surrounding its approval required the Time board to consider alternative transactions, and to at least be able to talk with an unsolicited bidder who offers a premium alternative to the merger. The Time board also had an obligation to ensure that "steps taken to defeat a potential suitor . . . [are] designed to maximize shareholder returns." Freedman v. Restaurant Assocs. Indus., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,502 at 97,219, (Del. Ch., Oct. 16, 1987).

Time's management and board believe that they can avoid this obligation by repeating at every occasion "we are not for sale" and "the Merger was not a sale." Indeed, the record reveals an extensive effort by Time and its army of advisors to camouflage the true nature of the original Time-Warner merger transaction. They created a paper record describing how they and their advisors assured each other at every opportunity that the transaction was not a "sale" of Time to Warner, but a "merger of equals," intended to promote the long-term interests of Time.

Defendants' self-serving characterization of the transaction cannot hide its true nature. Merely calling a fundamental corporate change a merger or long-term business

plan does not protect it from scrutiny or economic competition. See 8 Del. C. § 203(b)(6).

In their briefs opposing plaintiffs' motion for a temporary restraining order, defendants harped on the continuity of senior management and directors. Their argument appears to be that as long as management stays in control, the transfer of 62% of the voting stock and the addition of 12 new Board members and a new co-CEO is irrelevant. Not surprisingly, defendants' argument ignores both authority, see, e.g., Black & Decker Corp. v. American Standard, Inc., 682 F. Supp. 772, 782 (D. Del. 1988) (change of control triggering Revlon responsibilities occurred where current management remained in power after recapitalization), and the interests of the Time shareholders.

From the perspective of Time shareholders, the transaction looks very different. Under the original transaction, the ownership interest of Time shareholders would have been reduced from 100% to 40%. Warner shareholders, on the other hand, would have become the majority owners of the new entity, and they would have acquired their majority interest at a discount. The discount would have represented a loss to Time shareholders. See Waters Affidavit at ¶ 6, Paramount Appendix, Ex. D.

Thus, the Time shareholders were surrendering their controlling interest at a loss. Since the original Merger and attendant protective devices were intended to deter bids for the new entity, the Time shareholders would have lost any

chance to achieve a control premium for their shares. This double loss would have been particularly egregious in light of both the discount the Warner shareholders received and the generous, new and improved employment and compensation packages locked-in for Time management.

Defendants cannot escape their fiduciary duties simply by asserting that oft-repeated incantation that Time was not for sale. Even if the Time board never thought it was selling Time, the extraordinary transaction they approved confronted Time shareholders with the same basic unfairness that the Revlon cases seek to remedy. The shareholders are on the short end of a transaction that favored management and management's preferred partner.

Scrutinized from the same perspective -- i.e., that of Time shareholders -- defendants' announced purpose for entering the original merger transaction cannot excuse a failure to meet their fiduciary obligations. Defendants claimed that the original transaction was the culmination of a long-planned business strategy to combine Time and Warner for strategic purposes. Even if that were the whole story (which it is not), the transaction created a radical change in Time's economic structure which required that the shareholders be permitted to consider alternative transactions.

In short, Time's offer is not designed to maximize shareholder returns. The offer therefore violates the board's Revlon responsibilities and must be enjoined.

III. LAUNCHING THE TIME TENDER OFFER IMPROPERLY STRIPPED TIME'S SHAREHOLDERS OF THEIR RIGHT TO VOTE ON THE TIME-WARNER TRANSACTION AND ON WHO WOULD SERVE ON TIME'S BOARD FOR THE NEXT THREE YEARS

By abandoning the original Merger Agreement and instituting the Time tender offer on the eve of the annual meeting, Time's directors deprived their shareholders of the opportunity to approve or disapprove the merger of Warner and Time, at a time when shareholder rejection of the proposed merger was certain. This last-minute maneuver, interposed in direct response to the Paramount offer, had the added effect of denying Time's shareholders any voice in the election of directors at the annual meeting and further threatens to saddle those shareholders with the Time-Warner board anointed by the Amended Merger Agreement.

Such interference with a stockholder vote, carried out for the sole purpose of avoiding an unwanted result, has been disallowed by this and other Delaware courts, even where the board's action was purportedly done in good faith. Moreover, efforts to manipulate a corporation's electoral process which have the effect of perpetuating management's incumbency constitute a breach of the duty of loyalty and have been repeatedly enjoined.

A. The Time Tender Offer Intentionally Took Approval of The Warner Merger Out of the Shareholders' Hands

The law in Delaware is clear. Action taken by a board of directors for the principal purpose of diluting or

destroying the effectiveness of shareholders' voting rights "constitute[s] an offense to the relationship between corporate directors and shareholders" and will not be countenanced. Blasius Indus., Inc. v. Atlas Corp., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,965 at 90,479 (Del. Ch., July 25 1988). See also Guiricich v. Emtrol Corp., Del. Supr., 449 A.2d 232, 239 (1982) (directing appointment of a custodian where "the right to vote for the election of successor directors and shareholders has been effectively frustrated and denied by the willful perpetuation of a shareholder-deadlock and the resulting entrench[ment of the] board of directors"); Schnell v. Chris Craft Industries, Del. Supr., 285 A.2d 437, 439 (1971) (enjoining board from rescheduling annual meeting in order to provide dissident group with less time to stage a proxy contest); Aprahamian v. HBO & Co., Del. Ch., 531 A.2d 1204, 1206-07 (1987) (restraining board from postponing annual meeting upon discovery that dissident group possessed proxies representing a majority of the corporation's outstanding shares); Phillips v. Instituform of North America, Inc., Del. Ch., C.A. No. 9173, Allen, C., slip op. at 23-24 (Aug. 27, 1987) (enjoining voting of certain stock issued for sole purpose of diluting the voting power of a controlling shareholder); Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906, 913-14 (1980) (invalidating board's rescheduling of annual meeting for date 63 days in the future where by-law required that the names of directorial nominees be submitted to board 70 days prior to meeting).

The reason for this rule is clear. As this court explained in Blasius, "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests." ¶ 93,965 at 90,483. A board's authority to act derives from its status as agent for the shareholders. Consequently, steps taken by a board to impair the shareholders' franchise in order to thwart the will of the majority are, by definition, attempts to expand the board's power beyond that which is authorized by the principal. Id. at 90,484.

Such attempts do not receive the deferential treatment of the business judgment rule. Id. at 90,484; Aprahamian, 531 A.2d at 1206-07. On the contrary, "[a] board impeding the exercise of stockholder voting power bears the 'heavy burden' of demonstrating a 'compelling justification' for such action." Blasius, ¶ 93,965 at 90,478.[36/] This principle was well illustrated in Blasius.

Blasius involved a challenge to action taken by the board of directors of Atlas Corporation at an emergency meeting during which the board voted to amend the corporation's by-laws to increase the number of directors from seven to nine. The

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36/ The business judgment rule is similarly inapplicable to the present case inasmuch as the defendant directors are not disinterested with respect to the challenged transaction. Revlon, 506 A.2d at 180; Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). As detailed above, Time's directors, through continued incumbency and other substantial monetary benefits, stand to gain handsomely from the Warner merger. See Packer v. Yampol, Del. Ch., C.A. No. 8432, Jacobs, V.C. (April 11, 1986) (holding that board action which increases likelihood of continued incumbency renders directors "interested").

Atlas charter authorized a maximum of fifteen directors. The emergency meeting and the action taken therein were in direct response to the delivery to Atlas by Blasius of a form of stockholder consent which sought to, inter alia, increase the size of the board to fifteen and elect eight new members.

In reviewing the acts taken by the Atlas board, the court noted that the "principal motivation" behind increasing the number of directors by two was to "preclud[e] the holders of a majority of the Company's shares from placing a majority of new directors on the board through Blasius' consent solicitation, should they want to do so." Id. at 90,480. The court further found that the board's actions were not motivated by self-interest, but rather constituted a good faith effort to avert a recapitalization of Atlas by Blasius which the board reasonably suspected would be detrimental to the company. Id. at 90,483. Nonetheless, this court set aside the action taken by the Atlas board, holding that "even [though] the action taken was taken in good faith, it constituted an unintended violation of the duty of loyalty that the board owed to the shareholders." Id. at 90,487.

1. Time cancels the vote

In response to the Paramount offer, Time's board acted with the singular purpose of squelching shareholder opposition to the Time-Warner merger. As noted earlier, the original Merger Agreement was expressly conditioned on shareholder approval prior to its consummation. This provision of the agreement was prominently featured in statements by both

Time and Warner. Accordingly, the Time board of directors placed the Warner merger on the agenda for the annual meeting so that the proposal could be submitted to Time shareholders for a vote.

However, once Paramount's offer was announced, Time management immediately understood that a vote was "impractical." Knowing that a shareholder vote would certainly scuttle its plan and still bent on a merger of Time and Warner, Time management acted quickly to preserve its self-interest. It simply cancelled the vote.

On June 16, just two weeks before the annual meeting, the board scrapped the initial Merger Agreement and instituted the Time tender offer, the terms of which are even more damaging to Time's shareholders than the original stock exchange scheme. In order to avoid disapproval by its shareholders, the board employed the simple expedient of taking the shareholders out of the loop and cavalierly proclaimed that the Time tender offer was not subject to shareholder approval.

This last-minute disenfranchisement of its own shareholders, carried out in direct response to the Paramount offer and perpetrated for the sole purpose of avoiding shareholder disapproval of the Warner merger, is precisely the type of board action condemned in Blasius. Like the Atlas board, the Time directors sought to foreclose effective decisionmaking by a majority of the shareholder electorate -- decisionmaking which Time's directors had every reason to

believe would result in the rejection of the plan to merge with Warner.

Nor can the Time board claim that its offer for Warner was simply a continuation of "business as usual" or that it was instituted for any purpose other than to thwart the shareholder vote. Analogous to the situation in Blasius, "[i]t is difficult to consider the timing of [the Time tender offer] . . . as simply coincidental with [the Paramount offer]." Id. at 90,481. Moreover, the Time offer signals such a severe departure from the original Merger Agreement, with the total absence of any shareholder approval and its highly leveraged and irrevocable nature, that it can not genuinely be viewed as a mere continuation of the previous plan. Instead, the connection between the board's realization that the Warner merger would never receive shareholder approval in light of the superior offer made by Paramount and the board's institution of the Time tender offer is "unmistakably clear." Id. See also Packer v. Yampol (holding that board's decision to issue newly-created series of preferred stock possessing supervoting rights to the board chairman and two outside corporations under the chairman's control which was made upon discovery of impending proxy contest had, as its primary purpose, the obstruction of that contest).

2. Time rigs the election

Time's offer for Warner also intentionally worked to ensure the Time board's continued incumbency. Up until two weeks before the annual meeting, Time shareholders were lulled

into believing that they would have an opportunity to either approve or disapprove the newly-constituted board contemplated by the original Merger Agreement.

Then, on June 16, the Time board reneged on its promise and announced that the shareholders would have absolutely no say in the decision to combine Time and Warner or to empower the new Time-Warner board. At this point, the Time shareholders had no time to run proxy campaigns or to nominate other candidates to oppose the four Time directors whose terms were expiring. The board made sure of this. While postponing the meeting one week to June 30, the board retained the same May 1 record date. Consequently, the group which presently controls the board entered the annual meeting unopposed.

The intended result of this maneuver was to deprive Time's shareholders of any meaningful opportunity to elect successor directors. This is more insidious when coupled with the provision of the Amended Merger Agreement which, if not enjoined, will automatically add twelve new Warner directors to the newly-constituted board which Time's shareholders will have never voted on.

Such a result is unconscionable.

> The subversion of corporate democracy by manipulation of corporate machinery will not be countenanced under Delaware law. Schnell v. Chris-Craft Industries, supra. Special scrutiny will be given a situation in which directors, bent on entrenchment, use their authority to restrict the ability of shareholders to replace them. Guiricich v. Emtrol Corp, Del. Supr., 449 A.2d 232 (1982); Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980).

Packer v. Yampol, slip op.

Time's tactics are reminiscent of those employed by the boards in those cases where efforts were made to frustrate impending proxy contests by manipulating the date of the annual meeting. See, e.g., Schnell, 285 A.2d 437; Aprahamian, 531 A.2d 1204; Lerman, 421 A.2d 906. Rather than suppressing the will of the majority by rescheduling the annual meeting, however, Time's board took even more effective action to cripple opposition to the Time-Warner juggernaut. It rewrote the agenda for the annual meeting. This "bait and switch" maneuver deprived Time's shareholders of any meaningful exercise of their voting rights.

The decisions in Schnell and Lerman recognize that shareholders intending to embark on a proxy campaign understandably gear their actions to the annual meeting date set by the by-laws, and are entitled to rely on their directors not to take action to interfere with their efforts by changing that date. Schnell, 285 A.2d at 439; Lerman, 421 A.2d at 914. Certainly, Time's shareholders were no less entitled to rely on the original agenda announced by their board of directors and to plan their actions accordingly. These principles do not change merely because Mr. Munro now views them as "impractical".

B. Time's Interference With the Exercise of Stockholder Voting Power Was Unjustified

Having purposely avoided shareholder disapproval of the Warner merger and the Time-Warner board, Time's board bears the "heavy" burden of demonstrating a compelling justification for its conduct. And, while this Court in Blasius stopped

short of adopting a per se rule of invalidity for board action which intentionally subverts the voting rights of shareholders, its decision makes clear that only "extreme circumstances" will permit a board to take action "for the sole or primary purpose of thwarting a shareholder vote." Id. at 90,485-86.

No such circumstances are present in this case. As discussed above, Paramount's non-coercive, all cash, negotiable tender offer posed absolutely no threat to the Time shareholders and left the Time board with several alternative responses short of suspending its shareholders' franchise. Nonetheless, rather than attempting to negotiate with Paramount for the best deal possible or seeking, through honest means, to persuade its shareholders to opt for the Time-Warner merger instead of the Paramount offer, the Time board just shut down the process.

Regardless of the board's reasons for favoring the Warner merger over the Paramount offer -- and the record establishes that these reasons were self-serving ones -- Time shareholders are entitled to disagree with the board's position and to express that disagreement through the exercise of their franchise. And, as this Court noted in Blasius, the shareholders are also entitled "to restrain their agents, the board, from acting for the principal purpose of thwarting that action." Id. at 90,487.

IV. TIME'S IMPROPER ACTIVITIES IN SEEKING TO BLOCK PARAMOUNT'S APPROVAL OF CABLE FRANCHISE TRANSFERS IS A BREACH OF THE BOARD'S DUTIES TO ITS SHAREHOLDERS

Time management's first reaction to Paramount's offer was to attack on as many fronts as possible. Part of that campaign has involved the use of Time's 82% owned subsidiary, ATC, to use every possible method to obstruct approval of the transfer of cable franchises to Paramount. Time has even offered to pay the legal expenses of localities who bring suit against Paramount. These questionable actions are meant only to entrench Time's management, with no conceivable benefit to Time's shareholders. They should be enjoined.

A. By Acquiescing to These Acts, the Time Board Breached Its Fiduciary Duty

It is clear that Time's board breached its duty of care by approving or acquiescing in management's hostile acts against Paramount with minimal knowledge or deliberation. Between June 8 and June 16, when the board formally rejected Paramount's offer, Time's management had already implemented its multi-front campaign to spend company resources and credibility to obstruct Paramount's approval process. During this same period Time's board met at length to discuss the appropriate response to Paramount's offer. Although Time's senior management expended considerable time detailing the "highly conditional" nature of Paramount's offer, there was minimal, if any, disclosure of their own efforts to impede Paramount's attempt to satisfy the conditions. Nor is there

any evidence that the board ever discussed whether management's attacks constituted a reasonable or necessary response.

Given Time's continued efforts to undermine Paramount's approval process at all costs, the board's complete failure to even address this central issue demonstrates a complete absence of "good faith and reasonable investigation," Moran v. Household Int'l, Inc., Del. Supr., 500 A.2d 1346, 1356 (1985); Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 873, 881 (1985); see also Dynamics Corp. v. CTS Corp., 637 F. Supp. 406 (N.D. Ill.), aff'd, 794 F.2d 250 (7th Cir. 1986), rev'd on other grounds, 481 U.S. 69 (1987) (invalidating poison pill where management immediately attacked tender offer before any consideration of fairness).

B. Time's Attempts to Undermine Paramount's Cable Franchise Approvals Was Grossly Unreasonable

Time's efforts to block Paramount's cable approvals are unequivocally defensive measures taken in direct response to Paramount's tender offer. As such, they must be judged, and ultimately condemned, as grossly disproportionate "in relationship to the threat posed" under Unocal. 493 A.2d at 955; City Assocs. v. Interco, Inc., 551 A.2d at 796.

Time has clearly stated that it perceives the primary "threat" posed by Paramount's bid for control as the "highly conditional" nature of its offer and the "uncertainty" with respect to Paramount's ability to consummate the transaction. (See Schedule 14D-9, at 3, Paramount Appendix Ex. O). Specifically, the Time board of directors claims that the

alleged long delays in obtaining approvals will result in a lower present value to Time stockholders and will result in great uncertainty and disruption for Time employees and stockholders. (Id.)

Even if these concerns were valid (which they clearly are not -- see Point I, supra), Time's cynical attempts to create the very threat it has highlighted are indefensible under any interpretation of Unocal. If Time shareholders are harmed because the present value of their shares will be diminished by a long delay in the offer's conclusion, it will be precisely because of Time's obstructionist tactics. And, if Time's employees, business contacts and ultimately, shareholders, are damaged by long delays and uncertainties over whether Paramount can obtain necessary approvals, it will be primarily due to Time's attacks.

Time's "scorched earth" policy toward its own assets and shareholders cannot be condoned. Courts in this jurisdiction and elsewhere have not hesitated to enjoin comparable tactics that bear little relation to the perceived threat. Elias v. Wilson Foods Corp., slip op. at 3 (preferred stock issued upon change of control would result in "financial implosion that would finally cripple the Company"); Minstar Acquiring Corp. v. AMF, Inc., 621 F. Supp. 1252, 1260 (S.D.N.Y 1985) (defending directors cannot purposely injure corporation in order to stave off tender offer); Southdown, Inc. v. Moore McCormack Resources, Inc., 686 F. Supp. 595 (S.D. Tex. 1988)

(target company enjoined from "scorched earth" restructuring plan).

Moreover, Time had other, far more appropriate responses to the purported "threat" posed by Paramount. Thus, Time could have legitimately employed its poison pill to fend off Paramount's bid until it was satisfied that (1) the approval process was proceeding quickly, or (2) that Paramount's offering price accurately reflected the time value of money. See, e.g., In Re Holly Farms Corp. Shareholders Litigation, ¶ 94,181, at 91,645 (redemption of pill was premature since pill could still play a role in maximizing shareholder values). Given the existence of a wide array of defenses at Time's disposal, its resort to destructive trench warfare is clearly unreasonable under Unocal. See Robert M. Bass Group Inc. v. Evans, 552 A.2d 1227, 1241 (1988); Shamrock Holdings v. Polaroid Group, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,340 at 92,223, Berger, V.C., (Del. Ch., Mar. 17, 1989).

V. PARAMOUNT AND TIME SHAREHOLDERS WILL SUFFER IRREPARABLE INJURY IF TIME'S DIRECTORS ARE NOT STOPPED IN THEIR ATTEMPTS TO PRESERVE THE "TIME CULTURE" COME "HELL OR HIGH WATER", NO MATTER WHAT THE COST TO THE SHAREHOLDERS

Paramount and the other Time shareholders will be irreparably injured if an injunction is not issued. Moreover, the balance of equities clearly favors an injunction.

A. Irreparable Injury

Courts considering challenges to anti-takeover devices have recognized that illegal anti-takeover tactics that defeat an offeror's ability to complete an acquisition threaten irreparable harm to the offeror. As this Court has explained, "unless [the offeror] is permitted to market its bid free of [illegal] restrictions . . . its acquisition effort is at an end." Revlon, 501 A.2d at 1251 (finding that a target's issuance of a lock-up option to a "white knight" irreparably harmed an offeror); see also Minstar Acquisition Corp. v. AMF, Inc., 621 F. Supp. at 1275 (if a "tender offer is defeated due to defensive tactics which are in fact illegal, the plaintiff will suffer irreparable harm"); Dynamics Corp. v. CTS Corp., 637 F. Supp. at 419 (same).

Other Time shareholders are also irreparably harmed if they are denied the opportunity to choose between selling their shares at a substantial premium and an acquisition which would saddle Time with massive debt and depress their stock value for many years to come. See AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A.2d at 115-16; Asarco v. Court, 611 F. Supp. 468, 480 (D.N.J. 1985); Amalgamated Sugar v. NL Indus., 644 F. Supp. 1229, 1239 (S.D.N.Y. 1986), aff'd, 825 F.2d 634 (2d Cir.), cert. denied, 108 S. Ct. 511 (1987).

Thus, the cases leave no doubt that irreparable harm occurs when "[i]n the absence of an injunction, [the offeror] will lose the opportunity to bid for [the target] and [the target's] shareholders will lose the opportunity to achieve the

highest value for their shares." In Re Holly Farms Corp. Shareholders Litigation, ¶ 94,181 at 91,645.

In Robert M. Bass Group, Inc. v. Evans, Del. Ch., C.A. Nos. 9953 and 9909, Jacobs, V.C. (June 10, 1988), this Court recently found irreparable harm where the target company, in response to an all-cash-for-all-shares tender offer, proposed a restructuring to be accomplished through the issuance of a stock and cash dividend. Management would emerge from the restructuring with a stock interest sufficient to deter acquisition proposals. The court found that the proposed transaction would result in irreparable harm to all shareholders, including the offeror, "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.

In a subsequent decision in the Bass case, the court set out several additional ways in which the plaintiffs would be irreparably harmed. The court found that if the anti-takeover device was carried out as planned, the target would "incur enormous bank debt, about $1.7 billion . . . . There will be no practical way to lift the burden of this debt from the resulting companies if the restructuring is later declared

invalid." Robert M. Bass Group, Inc. v. Evans, 552 A.2d at 1246-47.

The court further noted that if the target was successful in implementing its defensive device, its shares "may not meet the eligibility requirements for listing on the New York Stock Exchange; and while an over-the-counter trading market may develop, no assurance on that score can be given." Id. at 1247 n.43. Moreover, the target's shareholders would be irreparably harmed by the loss of an opportunity to choose the Bass Group's cash offer. Id. The court therefore concluded that "[t]hese potential consequences more than adequately establish the threatened irreparably injury required to warrant the remedy of an injunction." Id.; see also Black & Decker, 682 F. Supp. at 787-88; Revlon, 506 A.2d at 185.

If the Time offer is consumated, Paramount will have no choice but to withdraw its current offer for Time. (Davis at 257, 320.)

The Time tender offer therefore threatens irreparable harm to both Paramount and Time's stockholders. Paramount will be denied the opportunity to pursue its bid for Time and the shareholders will lose the opportunity to obtain the highest value for their shares. For, even if another buyer were able to assume the massive debt incurred by Time and the debt necessary to finance its own purchase, the price would be well below Paramount's current $200 offer. See Phillips Affidavit Paramount Appendix, Ex. C.

Monetary damages cannot adequately remedy the harm that will be caused by Time's purchase of Warner. As the court stated in Unocal:

> Given that purpose, it seems somewhat inconsistent to argue that the only harm to [the offeror] will be monetary. If [the offeror] is prevented from acquiring [the target] in part because of an unlawful exchange offer, it will have been deprived of a unique opportunity the loss of which is not adequately compensable in money damages. Nor does it appear that rescission would be a feasible alternative.

Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, Berger, V.C., slip op. (April 29, 1985), rev'd on other grounds 493 A.2d 946 (Del. Supr. 1985).

B. Balancing the Equities

In contrast to the irreparable injury that Paramount and Time shareholders will suffer, defendants can demonstrate no countervailing harm. All the grant of a preliminary injunction will do is slow down Nicholas' rocket until a trial on the merits or such time as the shareholders can choose between the two transactions.

CONCLUSION

Time's board concluded that its most important job was to preserve the "Time Culture" by preserving the long-term power of three members of Time senior management and a lucrative contract with Steven Ross to ensure that he would not get in the way of the preservation of the "Time Culture". They completely forgot about their obligations to the shareholders. When Paramount's offer made it clear that Time's shareholders

would not tolerate the assumption of Time's board that it knew what was best, the board responded by removing the issue not only from the shareholders but from itself as well.

Paramount respectfully submits that this Court must step in to protect the interests of the shareholders, since Time's board has made it clear it will not, and now cannot, do so. An order should be entered granting the relief prayed for in plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

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