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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' REPLY BRIEF IN SUPPORT OF
THEIR MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In August 1987, Gerald Levin, Time's chief strategist, stated the goal that would drive Time's management for the next two years: "secure" the company by a merger. "Securing" the company did not mean maintaining the current stockholders, or securing the jobs of editorial employees or enhancing shareholder values. As it turns out, "securing" the company really meant that Time's senior management would remain in control: Munro, Nicholas and Levin.

On March 3, 1989, Time's board approved a merger with Warner. In that merger, 62% of Time's voting stock would pass into the hands of Warner shareholders.

When Time's directors chose to merge with Warner, they chose to end Time in its current configuration. They chose to create a new debt-free global company with a different group of shareholders, new lines of business, and 12 new directors. The Time shareholders would own a minority interest in a very different entity. When they approved this change the Time directors lost the alternative of saying they were conducting "business as usual".

Accordingly, since at least March 3, 1989, Time's directors were obligated to consider and evaluate alternatives to their decision. They were obligated to ask if there were alternatives that might provide superior value to their shareholders. They were obligated to ensure that they were not choosing the Warner deal because it would make management secure and comfortable. They were obligated to remain open to the chance that the marketplace would provide a significantly better deal for Time's shareholders.

They did not do any of this. From the moment they approved the merger, Time's management took every step possible to ensure that no other alternatives could be raised and then to retreat from any that were raised. The directors were told that the merger would attract the attention of other bidders. Rather than welcoming this opportunity for a marketplace test of their judgment of the company's worth, Time took every step possible to make sure that no other bidder would "intrude", including paying banks not to finance other bids, putting in place the Lock-Up Stock Swap, and imposing the Black-Out Provision. The board's only concession to fiduciary duties was the weak fiduciary out in the March 3 Merger Agreement (since evaporated in the Time Tender Offer), and that had value only because the March 3 Merger Agreement was subject to a shareholder vote.

Despite the efforts of Time and its army of advisors to prevent alternatives to the Time-Warner deal and to keep out intruders, Paramount made its offer.1/ Time's management and directors understood that the merger transaction approved on March 3 was finished; the shareholders would never approve it. Time's management did not take this opportunity to review Paramount's offer and see if it was better for the Time

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1/ Paramount's offer was announced on June 6, or less than two weeks after Time and Warner released the Joint Proxy Statement that first described the details of their arrangement.

shareholders or could be negotiated to become a better offer. They did not take this opportunity to seek an alternative transaction that could increase shareholder value. Instead Time's management, rubber-stamped by an acquiescing board, began to search for new ways to guarantee that some other form of a Time-Warner deal would <u>have</u> to go through. They closed their eyes and blocked their ears to everyone and everything except Warner. They attacked the Paramount offer on all fronts and worked feverishly to put together a new transaction that would finally put the Time-Warner deal irrevocably past anyone's ability to recall, no matter what alternatives the market could provide.

The directors' consistent refusal to recognize their obligation to consider alternatives for shareholders culminated in the board's decision on June 16. On that day Time's board was writing on a fresh slate. It could have chosen (1) to negotiate a new Warner deal, (2) to negotiate with Paramount, or (3) to consider other available alternatives. Rather than recognizing and investigating these three alternatives to see which would maximize shareholder value, the Time board persisted in its decision to pursue some form of the Time-Warner deal to the exclusion of all else. In the process, the new transaction lost most of the attributes that Time had so proudly trumpeted to its shareholders, to the press, to Congress, and to the President. Time has now tried to convince everyone that <u>both</u> forms of their marriage with Warner were the best conceivable deals for the Time shareholders.

The Time and Warner briefs ignore what is before this Court.[2/] Although the March 3 Merger Agreement is useful to explain the background of the board's refusal to consider alternatives, the relevant decision was reached on June 16. On that day the Time board made a decision, in the face of Paramount's offer, about which major reorganization of Time it would pursue. The board had a duty, imposed by a long line of Delaware cases culminating in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985) and MacAndrew & Forbes Holdings, Inc. v. Revlon, Inc. Del Ch., 501 A.2d 1239 (1985), aff'd, Del. Supr., 506 A.2d 173 (1986) to consider all relevant alternatives and to ensure that shareholder value was the driving force in its decision. The Time board chose instead to blindly pursue the Time-Warner combination, knowing that this would lock out any chance of a control premium from Paramount or very likely any other bidder. That decision was based on a desire to preserve The Time Culture and a bias in favor of a company they knew and were comfortable with, rather than the interests of the shareholders.

The major legal prop for their decision comes from a New York federal court applying New York law, not Delaware law.

2/ **References to defendants' briefs in opposition to Plaintiffs' motion for a preliminary injunction will be cited "Time Brief at __" or "Warner Brief at __." References to deposition testimony will be cited "Tr. at __"; for example "Munro Tr. at __." Exhibits introduced at depositions will be referred to as "Ex. at__"; for example "Munro Ex. at __." Documents introduced in an appendix to Plaintiffs' Opening Brief are referred to as "Paramount Appendix, Ex. __." Certain documents introduced in an appendix to this Reply Brief are referred to as "Paramount Reply Appendix, Ex. __."**

That decision pre-dates Unocal, Revlon, Moran, Macmillan and almost ten years of developing Delaware jurisprudence.

Current Delaware law, as opposed to ten-year old New York law, is quite different. Unocal and Revlon require heightened scrutiny when a board chooses one alternative in a contest for control, be it a defensive tactic or a management-approved transaction, because there is always the specter of entrenchment when management and directors choose the fate they feel comfortable with. Time's management and directors spent two years working out an arrangement with Warner. Time and Warner admit that the principal stumbling blocks in those negotiations were agreements insuring that senior management would feel comfortable with Warner in the long run. It is precisely this bias in favor of a management-approved deal that Unocal and Revlon warned about. It is precisely this bias that is driving Time's board and management here.

Time's management is opposing Paramount because they are convinced they have the right to choose who will run Time for the foreseeable future. They are convinced they enjoy a special dispensation from the rules of fiduciary duty because they are the "superintendents" of a "great American Institution", whose mere existence is reward enough for the shareholders. Time's shareholders must be content with "psychic" dividends. This arrogance -- which reveals itself in every step of their dealings with shareholders -- is driving the Time-Warner deal. It is this arrogance of established management that Unocal recognized mandates special scrutiny.

Applying Unocal to Time's June 16 decision to "launch the rocket" requires this Court to exercise its power -- since Time's board has admittedly abdicated all its powers -- to call that rocket back and ensure that it is the interests of Time's shareholders that are being considered by the board, rather than The Time Culture.

STATEMENT OF FACTS

In a total of 296 pages of legal briefs and hundreds more pages of affidavits, Time and Warner argue that this lawsuit is frivolous. They assert that: (1) the Time Tender Offer is simply "business as usual" for Time; (2) the Time Tender Offer is justified because it entrenches The Time Culture, rather than Time management[3/]; (3) the Time Tender Offer is justified because it does not entrench The Time Culture or Time's management; and (4) Paramount's $200 offer is inadequate. Each proposition is incorrect.

1. The Time Tender Offer Is A New Deal, Entered Into On June 16 In Reaction To The Paramount Offer; It Is Not Simply A Continuation Of The March 3 Agreement Or Of Time's Business Before The Merger

Paramount discussed the history of the Time Tender Offer, beginning with the discussions in 1988 through the March 3 Merger Agreement, because the negotiations clearly show that the driving purpose of the deal was to preserve Time's

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3/ Leaving aside the truth of this claim, Time does not explain how a shareholder who prefers $200 in cash to The Time Culture will be any happier to know that the Board is entrenching the Time Culture as opposed to entrenching a particular member of management. In either case, the shareholder is being deprived of $200 because of management's desire to perpetuate Time in the shape that they have grown comfortable with.

management, not to enhance shareholder value. Time and Warner, however, have seized on the March 3 Merger Agreement as the only issue before this Court. They would like this Court to rule on whether they were correct in adopting that Agreement, and then ignore everything that happened later.

The difficulty is that the Merger Agreement adopted on June 16 is not a carbon copy of the March 3 Agreement. It is a different transaction, entered into in response to Paramount's offer.

a. The June 16 Agreement Is Significantly Different From The March 3 Agreement

DIFFERENCES BETWEEN ORIGINAL MERGER AGREEMENT AND AMENDED MERGER AGREEMENT

ORIGINAL MERGER AGREEMENT	AMENDED MERGER AGREEMENT
A "grand old-style merger" which "will not create enormous debt," will not require that the Companies' assets be sold and, as a result of which, "no employees will lose their jobs."	A "tapped out" company with no ability to borrow any additional money, requiring the sale of substantial assets, including up to 100% of Warner's cable franchises, and cost savings that must necessarily involve firing some employees who do not have long-term contracts.
Conditioned on the affirmative vote of holders of a majority of Time's outstanding shares of Common Stock	No shareholders vote required or allowed.
Conditioned on Time's ability to obtain regulatory approvals	Enforceable regardless of Time's ability to obtain regulatory approvals
Eligible for "pooling of interests" treatment	Ineligible for "pooling of interests" treatment

A "fiduciary out" in case of a higher offer for Time.	Irrevocable, absent a Court order enjoining the transaction

Time's directors have now convinced themselves that this was the arrangement they wanted all along. Dubious as that proposition seems in the face of Time's media blitz about the wonders of the original merger agreement, it is clear from the testimony that this was a new agreement, negotiated during the period June 8 to June 16, and entered into by Time on June 16.4/

A transaction which Time argued involved the payment of only a "modest" premium to Warner has been transformed into an acquisition of Warner stock at $70 per share. According to Steve Ross, that offer is more than 50% over the after-tax break-up value of Warner. (Aboodi Ex. 7 at 13) According to Arthur Liman, one of Warner's attorneys, "not too long before the Time deal was announced, [Warner] had been selling for approximately $35, so the tender price of $70 was double" -- i.e., it represented a 100% premium over the market price of Warner's stock just before the original stock-for-stock merger was announced. (Id. at 19; see also Munro Tr. at 79-80)

Moreover, "acquisition of Warner by Time" is not a phrase that leapt to the minds of Warner's advisors at the time of the original merger. Indeed, when the transaction was presented to Warner's board, Lazard Freres & Co. made it clear that "in no way could it be considered that [Warner] is being

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4/ Defendants themselves admit that "[w]hatever the original Merger was, it is no longer." (Time Brief at 153) sold." (Aboodi Ex. 3 at 14) Warner's present attempt to explain away these statements is double-talk, pure and simple. Warner initially notes that the press release announcing the original merger "expressly set forth that Time was acquiring Warner" and states that Warner "understood this to be the fact." Warner Brief at 37. Then, buried in a footnote, Warner reaffirms that the original transaction was a "merger of equals" and that "neither party was acquiring the other." (Id. at 37-38n)

When Warner and Time jointly submitted a memorandum to the New York Stock Exchange -- following the announcement of Paramount's bid -- to justify cancelling a shareholder vote on the original merger, Time and Warner stated emphatically: "[I]t must be noted that the merger is not an acquisition of one company by another." (Levin Ex. 28 at WW508065) (emphasis added) Now, in deposition testimony, Time directors and advisors have tried to disown this memorandum. (See, e.g., Nicholas Tr. at 187; Wasserstein Tr. at 138, 142)5/

b. The June 16 Merger Agreement Was In Reaction To Paramount's Offer

Time and Warner, in their zeal to rewrite history so they will not be faced with the unpleasant task of trying to justify their conduct under the Unocal standard, have tried to

5/ Warner contradicts the testimony of Nicholas and Wasserstein. Although conceding that it spearheaded the submission to the New York Stock Exchange, Warner confirms that "Time agreed to join Warner in exploring with the NYSE whether the NYSE would interpret its rule so that no shareholder vote would be required for the original stock-for-stock transaction." (Warner Brief at 45) (emphasis added) to contend that the June 16 Merger Agreement was <u>not</u> a defensive reaction to Paramount's offer.

> "Time's decision to make a tender offer for Warner was not a defensive response to Paramount's effort to acquire Time." (Time Brief at 2)

> "The Time-Warner transaction was not concocted as a defensive tactic to thwart the Paramount offer." (Warner Brief at 8)

However, Time said exactly <u>the opposite</u> on June 16 -- the very day it rejected Paramount's offer and voted to approve a tender offer for Warner and a revised merger agreement. In Amendment No. 1 to Schedule 14D-9 filed with the SEC, Time represented:

> <u>In response to the serious threat posed by the [Paramount] Offer</u> to Time's effectiveness in furthering such strategic objective and corporate policies, including its ability to consummate the Original Merger, <u>the Board of Directors determined to modify the terms of the Original Merger</u> . . . .

(Paramount Appendix, Ex. O at 2) (emphasis added)

In making its "determinations" to reject Paramount's bid and to amend the merger agreement with Warner, Time's board said it had considered "a number of factors," including: (i) the "threat" posed by Paramount's bid to the "implementation, through the acquisition of [Warner], of Time's corporate strategies and policies," and (ii) the "perceived threat that consummation of the [Paramount] Offer may adversely affect the journalistic integrity of Time's publications and the independence of their editorial voice." (<u>Id.</u> at 2-4) Moreover, when Time launched its defensive tender, its directors expressly recognized that "pursuing and consummating the Merger . . . may adversely affect the ability of [Paramount] to consummate the [Paramount] Offer." (Id. at 4) (emphasis added) Now that Time has come to fully understand the problems it faces under Unocal, this language is apparently being disavowed just as Nicholas would like to disavow his "strapped to a rocket" statement.

2. The Time Culture: What It Is And What It Is Not

Both Time and Warner, but particularly Time, argue that the Time-Warner deal should be permitted because it preserves The Time Culture. Apparently shareholders must accept being deprived of a control premium as long as it is done in the service of entrenching an abstraction, rather than entrenching the individual managers who are the self-proclaimed guardians of that abstraction. Whatever the legal propriety of this "cultural exception" to a director's normal duties, it is factually incorrect. The only thing the June 16 deal guarantees is the continuation of Munro, Nicholas, and Levin. The rest of The Time Culture is being left to fend for itself.

Indeed, the best way to determine what constitutes The Time Culture is to look at what Time considered so important that it had to be preserved by written agreement.

a. The Time Culture Is Not Preservation Of Editorial Integrity

Time and Warner claim that the Time-Warner merger is structured in a way to "preserve" Time's journalistic integrity and independence -- its purported policy of separating "church" (journalism) from "state" (business). (See, e.g., Time Brief at 16, 147) Time also argues that because the Paramount offer "provides no such assurance," Time's directors "reasonably perceived the Paramount offer as a very serious threat to corporate policy and effectiveness." (Id. at 147-48)[6/]

Time's management, however, did not insist on written protections for "separation of church and state" or for the independence and integrity of the editorial staff.

Time says that the initial negotiations with Warner in 1988 broke off because Time's directors felt that Warner had not given sufficient assurances that Time's independence would be preserved, and specifically that Time's journalistic integrity would be protected.[7/] In fact, Time's management had negotiated protections in August, 1988 that were abandoned when the merger was approved in March, 1989. Nor were those protections revived in the June 16 agreement.

On August 4, 1988, Munro told Time's directors that Time had "successfully negotiated certain corporate governance arrangements." (Munro Ex. 15 at 19501) (emphasis added) Munro wrote that the "chief protection mechanism is through a supermajority voting requirement with respect to certain types of actions by the new Board." (Id.) Journalistic integrity would be protected by the creation of an "Editorial Committee" composed of four Time directors and two Warner directors. The

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6/ See Amendment No. 1 to Time's 14D-9 at 3 (Paramount's offer "may adversely affect the journalistic integrity of Time's publications and the independence of their editorial voice.") (Paramount Appendix, Ex. O)

7/ See, e.g., Affidavit of Donald S. Perkins, sworn to on July 7, 1989 ¶¶ 20, 21.

composition of the committee, as with other governance arrangements negotiated at that time, "could only be amended, rescinded or waived by a resolution approved by directors constituting at least two-thirds of the entire Board of Directors of Time/Warner Inc." (*Id.* at 19516) (emphasis added) Munro declared that the Editorial Committee would be "dominated by Time Inc. directors," and that the "delegation of authority to the Editorial Committee will continue to preserve the editorial integrity of our magazines." (*Id.* at 19510)

Even that protection was hollow, since Munro agreed that the Compensation Committee would be dominated by Warner directors. Thus, non-Time directors could cut the salaries of editorial employees who did not toe the company line. That threat apparently did not disturb any of the directors.

Indeed, the independence and survival of the Editorial Committee was apparently of no great concern to Time and its directors. When Time's directors approved the original Time-Warner merger on March, 3, 1989, they approved an agreement which did not require a two-thirds vote of the entire board to change the structure or composition of the Editorial Committee, or any similar vote for other major corporate decisions such as the filling of vacancies to the new Time-Warner board or the sale of assets of the newly constituted company.8/

8/ In August, 1988, Munro had described several other corporate governance arrangements which he said had been "successfully negotiated." For example, during the entire period before the resignation, retirement, removal or (continued...)

The only purported protection of The Time Culture and editorial integrity embodied in either the March 3 Merger or the June 16 Merger was a requirement that the employment agreements of Munro, Nicholas and Ross could not be terminated without a two-thirds vote of the Time-Warner board. (Munro Ex. 19 at A001680)[9]

Mr. Nicholas testified:

> Q. You had referred earlier to the discussions in '88 about certain requirements of super majority votes on the board of directors. The merger agreement as it stands only requires a super majority of votes to terminate the contracts of you, Mr. Ross, and Mr. Munro, correct?
>
> A. I think that's true.

(Nicholas Tr. at 130) Although Time director Donald S. Perkins claims that "[t]he employment contracts took the place of the two-thirds majority requirement" for altering the composition of the Editorial Committee (Perkins Aff. ¶ 35), it is clear that a two-thirds or supermajority voting requirement to change

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8/ (...continued) death of Steve Ross, if an existing Time director were to leave the Time-Warner board, the vacancy would be filled either by "(1) a majority vote of the remaining directors and a majority vote of the Existing Time Directors then in office or (2) a two-thirds vote of the remaining directors then in office." In addition, any "sale of a principal line of business of Time/Warner Inc." had to be approved by "at least two thirds of the entire Board of Directors of Time/Warner Inc." (Munro Ex. 15 at 19514-15) In March, 1989, these protections, like those for journalistic integrity, were dropped.

9/ Interestingly, at the Time board meeting on March 3, 1989, Time's managers clearly emphasized the importance of a two-thirds voting requirement for termination of the employment agreements. (See, e.g., Munro Ex. 19 at A001634, A001680-83) By contrast, Warner now downplays the significance of this protection, calling it "essentially meaningless." (Warner Brief at 27n) the management succession and governance arrangements was already part of the "arrangements" which had been "successfully negotiated" by Munro in August, 1988. (Munro Ex. 15 at 19514; Nicholas Tr. at 77-78)

Time's concessions demonstrate that preservation of editorial integrity meant preservation of Time's managers, and nothing else. The survival of Time's editorial integrity was left in the hands of Munro, Nicholas and Levin -- none of whom has a day of journalistic experience. Although extolling the virtues of Time's journalistic tradition, Mr. Munro has always worked on the business side of Time. (Munro Tr. at 8) ("I'm not a journalist. I don't pretend to be one.") Similarly, Mr. Nicholas has never worked as a journalist:

> Q. Did you ever serve as a writer for any Time publication?
>
> A. Never. Never. I mean it's -- I was once offered a job in the '60s as a writer by Time magazine, by executives or journalists at Time. I was quite flattered by the offer, but --
>
> Q. But did you take it?
>
> A. I didn't take it. It was one of those fantasies that everyone has that one would make a good writer.
>
> Q. Did you ever serve as an editor, at any time, of a publication.
>
> A. Never.

(Nicholas Tr. at 10-11) The one journalist on the board of directors, Time's Editor-In-Chief Jason McManus, did not receive a long-term contract or any other assurances that Time's editorial integrity would be preserved. Indeed, director Perkins states that it is unnecessary for the editorial employees to have any protection as long as the "management in charge of business operations" has long-term contracts. (Perkins Aff. ¶ 35) This is the equivalent of saying that judicial independence would be preserved if judges served at the whim of the administration, as long as the governor or president was guaranteed a long tenure in office.

b. The Time Culture Is Not A Focus On Journalism Or Publishing

In fact, the erosion of Time's commitment to journalistic integrity had begun long before the Time-Warner merger precisely because of Time's willingness to place the future of that commitment in the hands of its business managers. Outside director Luce, the son of Time's founder, described his perception of these changes in The Time Culture since the death of his father in 1967:

> [T]here has been a perception that some executives seem to be more interested in quick profits or short-term profits, rather than whatever profits might result from maintaining full high standards of quality in the product, that kind of thing.

(Luce Tr. at 8) When asked which "executives" seemed to be more interested in "short-term profits," Luce identified Munro, Nicholas and Levin -- the very people that Time directors now pray will save Time's journalistic tradition. (*Id.* at 8-9)10/

10/ Apparently, other board members were not receptive to Luce's concerns. Although former Time outside director Henry Goodrich now defends the long-term contracts of Munro and Nicholas and says the "Board believed that control was necessary to preserve the tradition of editorial independence at Time" (Goodrich Aff. ¶ 18), he seemed more preoccupied in the summer of 1988 with getting people like Luce off the new Time-Warner board. Munro's handwritten notes reflect Goodrich's telephone (continued...)

Luce is correct that The Time Culture has very little to do with magazines. Munro, Nicholas and Levin have no experience in journalism. Moreover, the "new" and "improved" Time-Warner will essentially be an entertainment company, with publishing left behind.

Warner saw through the "preservation of Time culture" facade put up by Time. Warner knows full well that the new board with 12 Warner directors will control Time and its publications. There are no functional limits on that power when Warner will have 12 out of 24 directors. Indeed, it was Steve Ross who made sure that the protections "successfully negotiated" by Munro in August, 1988 did not survive the final merger agreement approved in March, 1989. At the March 3, 1989 meeting of Warner's board, Warner's general counsel described:

> earlier drafts of the Merger Agreement that contemplated a special majority requirement of two-thirds action by the Board of Directors to make any changes to the charter, by-laws or plan of succession, but said that, <u>at Mr. Ross's request</u>, these provisions had been eliminated.

(Aboodi Ex. 6 at 22) (emphasis added)

Indeed, Warner's brief makes it quite clear that Warner does not even consider Nicholas' or Munro's long-term contracts to be an impediment to the board's power to fire protectors of The Time Culture. (Warner Brief at 27n)

<u>10/</u> (...continued)
call on July 28, 1988: "Only message was that we should consider experience when picking Board members for the new enterprise. <u>Had real problems with Luce</u>." (Munro Ex. 26 at 052813) (emphasis added)

c. The Time Culture Is Not The <u>Separation of Church And State</u>

Time's directors speak with an almost religious reverence about the "separation of church and state" that prevents crass business motives from intruding on the integrity of Time's reporting. The conduct of Time Editor-In-Chief Jason McManus contradicts that position.

As a Time director, McManus actively participated in the June board meetings -- while at the same time editing Time's coverage of the Paramount bid. This confluence of church and state did not trouble the Time board in the least. Mr. Opel testified:

> Q. So there has been no discussion at all as to whether Mr. McManus's participation on Time's board presently in any way might compromise the journalistic integrity of the stories that are being published about this transaction?
>
> A. I have certainly had no such concern.

(Opel Tr. at 94; <u>see id.</u> at 92-93, 219-20)

Munro tried to justify McManus's dual roles in this way:

> Jason -- I think the reason he is our editor-in-chief, that <u>there is basically a Chinese wall on his head</u>. I think he can sit in on board meetings and leave those board meetings, review copy, but I suspect does not influence it.

(Munro Tr. at 32) (emphasis added)

In fact, Time's magazine coverage of the Paramount offer suggests -- at best -- that McManus's Chinese wall has a porous quality to it. TIME magazine's initial coverage of that offer was downright hostile -- a fact that did not go unnoticed by the press. In an article in the Wall Street

Journal titled "Time Marches to New Tune When Time Inc. Is Involved" (Paramount Reply Appendix Ex. P), the paper stated:

> In Time's coverage od the srguggle, every story is read before it goes into print by a member of the company's board: Jason McManus, editor in chief of Time and its sister publications. He reads all majaor stories and defends Time's coverage as balanced. He says he would never remove himself form the editing process, even though he's a director and helps plan Time's strategy.

A clear example of how McManus has allowed Time to distort the coverage of this dispute can be seen in a quote from a recent article in Time:

> Journalists at Time Inc. were concerned because as reassuring as [Davis's public statements about insuring journalistic integrity] made in the heat of battle may be, they fall well short of the written, legal guarantees that had been cemented into the Warner merger

McManus knew better than anyone else at time that far from being "cemented into the Warner merger", important "written, legal guarantees" had been taken out of the Time-Warner merger at Ross's request. All that was left was an Editorial Committee that can be disposed of by a majority vote of the board of directors, long-term (at least ten-year) contracts that entrench business managers who lack any journalistic or creative experience, and an Editor-In-Chief with "basically a Chinese wall on his head" who does not have a long-term contract.11/

11/ When Munro was shown samplings of press coverage regarding the original Time-Warner merger and the Paramount bid, including numerous stories which reported the original merger as in effect an acquisition of Time by Warner, Munro was quick to remind Paramount's counsel: "I assume (continued...)

McManus also knows that Paramount has been in the publishing business for years, and that not one of Time's army of advisors, strategists or private investigators has been able to turn up anything suggesting that Paramount has ever interfered with the editorial integrity of any of the publishing companies owned by Paramount.

d. The Time Culture Is Munro And Nicholas

The Time Culture should be recognized for what it truly is -- a cynical and thinly disguised attempt to use the First Amendment as an anti-takeover device and a way for Munro and Nicholas to assure a long reign.

This is clearly demonstrated by the negotiations in 1988. The crucial point in all negotiations was a commitment by Ross to retire by a specific date and allow Nicholas to succeed him as sole CEO. In August of 1988, when Ross would not formally agree to such a commitment, the negotiations were terminated. (Time Brief at 39-40) They were not reinstituted until Ross was prepared to make that commitment. (Levin Tr. at 69-71; Munro Tr. at 64; Wasserstein Tr. at 25; Nicholas Tr. at 75; Goodrich Aff. ¶¶ 9-10; Horner Aff. ¶¶ 15-16; Perkins Aff. ¶ 21; Bere Aff. ¶ 14) Issues concerning board structure or the exchange ratio had not aborted negotiations. (Levin Tr.

11/ (...continued)
you are aware that all these are competitors of Time Inc. and would gouge our eyes out and would like to see us go away in the Hudson River." (Munro Tr. at 23) When shown story by FORTUNE, another of Time's publications, which reported that Davis "knows a good business strategy when he steals one," Munro allowed that the story was "slightly biased, though true." (Id. at 35)

76; Munro Tr. 155) Indeed, Levin was optimistic that agreement would be reached on the exchange ratio if the succession issues were resolved. (Levin Tr. 61)

Time's management was so determined to assure its "succession" that it was willing and is willing to trade the financial interests of Time's shareholders to obtain that objective. The euphemism for this "trade" was that Time was willing to pay a premium to "acquire" Warner. (Aboodi Tr. at 41; Levin Tr. at 60; Finkelstein Tr. at 99) An "acquisition" was defined in concrete terms only as the prevalence of Time's management. (Hill Tr. at 26-27; Wasserstein Tr. at 59; Levin Tr. at 60, 89; Munro Tr. at 69).

The unadorned reality of the trade Time's management was willing to make is set forth in the July 1988 notes of Levin. (Levin Ex. 17) In those notes, Levin recounts his suggestions to Munro concerning upcoming negotiations with Ross on July 8, 1988. The Time board first met to consider the negotiations with Warner on July 21, 1988. According to the notes, Levin recommended that "Munro should meet Ross alone" and, as to "Co-CEO succession," it was "inappropriate for Nick to hit head on, Munro must do it." The notes proceed to list "issues" to be discussed with Ross. The first item identifies demands concerning Ross' retirement and Nicholas succeeding Ross. The last item relates to the exchange ratio and reads:

> Should be market-to-market (currently .38) ... We should be flexible if Ross agrees to no. 1 [the management succession provisions].

(Id.; <u>see also</u> Levin Tr. at 221)

Levin calculated how much this "flexibility" would cost Time shareholders:

> Each one hundredth of a point is 1.6 to 1.8 million additional shares, so that .4, for example, is 72 million new shares - post Lorimar - whereas .38 is 68.4 million new shares). Their number is around .415 (although they say its .45).

(Levin Ex. 17)

Cost to the shareholders was irrelevant. (Finkelstein Tr. at 46) In light of this obsession about Nicholas' succession as the only true measure of a favorable business combination, the nature of Paramount's "threat" to The Time Culture becomes apparent. Paramount will not agree to guarantee Nicholas' future as head of the combined companies.

This was made apparent to Munro in a conversation with Martin Davis of Paramount. Davis testified that Munro "seemed to be obsessed with who was going to succeed him, and -- not who, but basically Nick Nicholas." Davis Tr. at 28-29. Davis forever condemned Paramount to being viewed as a "threat" to The Time Culture when he told Munro that it was not their prerogative to decide "who was going to succeed whom." (<u>Id.</u> at 29)

In the end, that is the only "threat" that the Paramount offer poses: the possibility that Nicholas may not succeed to the throne of the Time Culture. But that "threat" alone is enough to cause Time to conduct an all-out no holds barred campaign to block the Paramount Offer.

3. Time's Financial Advisors Varied The Value Of Time Depending On The Purpose Of Their Opinion

On March 3, 1989 Time's financial advisors told Time's board that Time's value fell in the range from $189.88 to $212.25 per share. However, when those same advisors were faced with the task of justifying the board's pre-determined unwillingness to even consider the Paramount $200 per share offer, they suddenly concluded that the value of Time was "greater than $250 per share." (Rossoff Affidavit at ¶ 31)

The advisors state that the valuations in March and June were for different purposes. That is correct. In March they were trying to justify the .465 exchange ratio, while in June they were trying to justify a rejection of Paramount's offer. As shown in the Reply Affidavit of Charles G. Phillips, sworn to on July 10, 1989, there is no other justification for the differing valuation ranges. The increase in valuation ranges is used by the board to justify their decision to refuse to deal with Paramount. In fact, the record demonstrates that the board never had any intention of talking to Paramount or considering Paramount's offer. The financial advisor's opinions were simply <u>post hoc</u> justifications of a pre-ordained result.

4. Time's Board Never Gave Any Serious Consideration To The Paramount Offer

The Time and Warner briefs show that they have finally come to understand that the Time board's refusal to give any thought to alternatives that might maximize shareholder value is indefensible. They dealt with the problem by rewriting history:

> After Paramount's bid, the "Time board once more reviewed the comparative merits of Paramount and Warner, and concluded that an acquisition of Warner was vastly superior." Time Brief at 2.
>
> "Time's board had met on both June 15 and June 16 to consider in detail Paramount's offer and the revised merger proposal." Warner Brief at 52-53.

The truth is quite different. Time's directors never investigated the merits of Paramount's offer. Their minds were made up long before they met on June 15 and 16. Paramount's bid -- negotiable in all respects (Munro Ex. 20) -- was immediately met with strident and determined opposition. Munro (with the aid of his speech writer and lawyers) immediately fired off the opening salvo on June 8, attacking Davis's "integrity and motives" and calling the all-cash, all-shares, premium offer nothing but "smoke and mirrors." (Munro Ex. 21 at 2) Nicholas's instinctive reaction to the offer was similar, terming it a "grenade." (Nicholas Tr. at 8)

Although not given the chance to approve Munro's June 8 letter, no outside director expressed opposition to it. Id. at 163-64. Indeed, Time's directors were unanimous in viewing the Paramount bid as an "intrusion"; they were determined from the outset not to consider Paramount's bid as an alternative to the Time-Warner transaction. Munro testified:

> Q. Did you ever consider picking up the phone, calling Mr. Davis, who I think you described before as a friend, and seeing whether you could find out whether the offer was for real or illusory as you put it?
>
> A. No, I didn't. We had made a deal with Warner that we were planning to conclude and we -- as we said before, we were not for sale. We had an agreement and we were going to pursue that agreement.

(Munro Tr. at 126) Nicholas testified similarly:

> Q. Did anyone at the [June 8] board meeting suggest that someone from Time should talk to someone from Paramount about the terms of the offer?
>
> A. No. Not to my recollection.
>
> Q. Did anyone suggest that it might be worthwhile to at least find out what terms Paramount would be willing to negotiate?
>
> A. You have to understand the situation. Time Inc. was proceeding to its -- with its acquisition of Warner, and Time Inc. was not for sale, and this last minute tender, two to three weeks before the Time Inc. shareholders were to vote, was clearly an intrusion on a strategy Time Inc. directors had considered over a couple of years. They had decided the company wasn't for sale. A hostile bid was offered by [Paramount], and the board decided to go ahead with its original transaction.

(Nicholas Tr. at 160-61) See also id. at 176-77, 215; Levin Tr. at 341, 344; Opel Tr. at 215-18 ("There was no purpose to meet with Mr. Davis to discuss anything.")12/; Dingman Tr. at 140-41 ("we were under a commitment to do a deal with Warner").

12/ When asked if he was the least bit interested at the time of the June 8 meeting in whether Paramount would increase its offer, Opel testified: "I don't recall specifically being interested in that at all." (Opel Tr. at 210-11)

By the end of the June 8 meeting, and before the purportedly detailed financial presentations to the board on June 15 and 16, Time director Finkelstein "had decided that they should continue on with pursuing the -- to see if they could pursue the Warner offer . . . . I had concluded if they could negotiate it, that it would lead to a much higher shareholder value." Finkelstein Tr. at 129. He further testified that as a result of the June 8 meeting:

> [T]he board members had each individually thought that one, the Paramount deal was so insufficient and that the Time-Warner deal, if it could be put on track, was so much more attractive, that it made no sense to deal with Paramount at all.

(Id. at 131-32) See also id. at 132 ("the board had no interest in the Paramount offer") and 133 ("I think it was not within anybody's imagination to consider why they would want to talk to Paramount.")

Although Time's attorneys devote most of their 170 page brief to extolling the virtues of The Time Culture, and the ways in which that Culture is supposedly protected by a Time-Warner merger and threatened by a Paramount bid, the truth is that Time's directors did not consider that matter in deciding to reject Paramount's offer. Munro testified:

> Q. Mr. Munro, did the Time culture as you've referred to it play any role in the Time directors' consideration of the Paramount offer?
>
> A. I don't think the board really got into that in any detail.

(Munro Tr. at 125) In short, the Time board's rejection of Paramount's offer on June 16 was a fait accompli. The Paramount bid was dead on arrival.

5. Time Has Encouraged Others To Sue Paramount And Bankrolled Their Efforts

Since announcing its offer on June 7, Paramount has aggressively pursued cable regulatory approvals at the federal, state and local levels. See Affidavit of Earl H. Doppelt, sworn to on July 10, 1989. Nevertheless, Time continues to claim that the consummation of the Paramount offer will be unreasonably delayed by the need to obtain cable approvals, all the while doing everything in its power to fulfill its own prophecy. Although approvals can be obtained, even in a hostile environment, Paramount could obtain them much faster without the interference of Time and its majority-owned cable subsidiary American Television and Communications Corporation ("ATC"). See Affidavit of Norval D. Reece, affirmed on July 10, 1989.

In his July 7, 1989 affidavit, Joseph J. Collins, ATC's Chairman and Chief Executive Officer purports to "explain" the actions taken by his company in response to Paramount's offer:

> Under many of its franchises, ATC was obligated to and did notify the [state and local] authorities of the Tender Offer. ATC also sent draft complaints and legal memoranda to certain officials to assist them in preparing filings if they determined that Paramount was acting in contravention of state and local law and the franchises.

(Collins Aff. at ¶ 22) Mr. Collins is too modest.

In addition to opposing Paramount's FCC application for the appointment of a voting trustee and causing ATC to sue Paramount in Connecticut, agents for Time and ATC have contacted at least 48 local government officials in some 42 geographic locations and asked them "to consider the commencement of litigation and a letter to the Federal Communications Commission . . . ." (ATC's Responses to Interrogatories dated July 3 and 5, 1989, Paramount Reply Appendix, Ex. G at 1) Furthermore, "ATC representatives contacted the offices of most state attorneys general to suggest that they write to the Federal Communications Commission to oppose Paramount's application to allow the transfer of Time, Inc. common stock to a trustee." (Id. at 2)

These "suggestions" were accompanied by do-it-yourself litigation kits, containing "form" letters, addressed to Chairman Dennis R. Patrick of the FCC, asking the FCC to deny or, "at the very least" defer action on Paramount's application. 13/ (Paramount Reply Appendix, Ex. H) Legal memoranda, draft complaints and other ready-made court papers were often enclosed.14/ Local counsel for Time and ATC also joined the brief-writing teams of several municipalities who

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13/ These form letters merely required the recipient's letterhead and rubberstamp. Many of the letters were adopted in toto by their recipients and sent out, unchanged, on the same or following day.

14/ As was mentioned in Paramount's opening brief, 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 that city's Corporation Counsel a draft complaint, a motion for a temporary restraining order and a proposed order enjoining the Paramount bid. (Paramount Appendix, Ex. A) South Portland's Corporation Counsel did not request any of these documents. (Id. at ¶ 9) Similar materials were sent to others. (See Paramount Appendix, Ex. B; Paramount Reply Appendix, Exs. I, J, M) accepted their invitation to sue. (See, e.g., Paramount Reply Appendix, Ex. J)

Significantly, a majority of these "care" packages were sent out between the 13th and 15th of June, notwithstanding the repeated claims by Time and Warner that Time's directors carefully considered the Paramount offer at the June 15 and 16 board meetings. (Perkins Aff. ¶ 52; Bere Aff. ¶ 36; Horner Aff. ¶ 28; Warner Brief at 52-53; Time Brief at 89) This further confirms that, despite their protestations to the contrary, Time's inside directors spent the period between June 7 and June 15 devising ways to torpedo the Paramount offer.15/

Time and its crusaders did more than just provide free legal advice. ATC's counsel confesses that "[i]n five instances, ATC's franchisors discussed with ATC whether ATC would indemnify the franchisors for any counterclaim that might be asserted as a result of any litigation commenced against Paramount by the franchisors . . . ." (Paramount Reply Appendix, Ex. G at 3) Moreover, in a June 19 memorandum to

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15/ The letter-writing campaign was instituted prior to Time's June 19 filing of Amendment No. 1 to its Schedule 14D-9. In that document, the Time board informed its shareholders that "obtaining [the cable franchise] approvals, consents and transfers could result in substantial delays in the consummation of the PCI Offer and, indeed, such approvals, consents and transfers might never be obtained." (Paramount Appendix, Ex. O at 3) What Time did not tell its shareholders was that it was furiously trying to derail the approval process. Time's efforts to sour the Paramount offer before its shareholders even had the opportunity to act on it (or on the board's recommendation) further evidences the board's utter contempt for the shareholders' right to choose.

the City Solicitor of Reading, Pennsylvania, Stevens & Lee, counsel for BerksCable -- a division of ATC -- states:

> BerksCable requests that the City bring an action to enjoin Paramount's hostile tender offer of Time. Because the City is the franchising authority under federal and local law, the City has standing to bring such an action, <u>whereas BerksCable may not. BerksCable will bear all costs and fees associated with this action.</u>

(Paramount Reply Appendix, Ex. K) (emphasis added)16/

The common law offense of champerty is defined as:

> the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it.

16/ <u>See also</u> draft agreement between Public Cable Partnership in Portland, Time, and ATC, in which the latter three agree to "pay the reasonable compensation of any attorney familiar with communications law selected by City to provide it with independent technical expertise, or who is determined by City to be necessary to prosecute an action or proceeding in a particular forum." (Paramount Reply Appendix, Ex. L at 7728226)

Donald K. Densborn, local counsel for ATC's Indianapolis affiliate, explained the "strategy" behind these agreements in a letter to the City of Indianapolis' legal division:

> ATC has made a strategic determination not to intervene in local litigation which has been instituted by cable franchisors on the basis that the interests which ATC seeks to protect are totally separate from those of the cable franchisors. Gardner Gillespie [Washington, D.C. counsel for Time] argues, and I would agree, that the cable franchisors have a clearer case than does ATC (or any of its subsidiaries), and ATC's intervention would confuse and divert attention from the arguments being made by the franchiser.

(Paramount Reply Appendix, Ex. M at 7728475-76)

(Ballentine's Law Dictionary 205 (3d ed. 1969)) Time has agreed to maintain a suit in consideration of a bargain to have some profit out of it: an injunction blocking Paramount's offer to Time's shareholders. Apparently, even resorting to champerty is appropriate to preserve The Time Culture of integrity and honesty.

ARGUMENT

Summary of Argument

The Time and Warner briefs go straight for the capillaries by prominently and courageously confronting an argument Paramount never made. We admit that they have conclusively established that a board of directors has the statutory power to authorize a tender offer without a shareholder vote. The difficulty here is that the Time board breached its fiduciary duties by using that power to begin a tender offer given the following facts and circumstances:

- The tender offer is designed to cram down a merger that had been scheduled for a shareholder vote.
- The vote was cancelled when Time realized the shareholders would vote the merger down.
- Paramount's offer gives Time's shareholders greater value than the merger and is well within the range of value ascribed to Time's stock by Time's own financial advisors when they were trying to accurately analyze Time's and Warner's true value -- *i.e.*, before Paramount's offer was made and before Time miraculously came up with inflated projections to discredit Paramount's offer.
- The primary motive of both the original and the revised merger is to "secure" the Time Culture -- not to enhance shareholder values.
- In order to "secure" the blessings of the Time Culture, Time's owners were short-changed and Warner's owners and management received a 100% premium. (The original merger gave Warner shareholders a "modest" 12% premium.)
- The Time directors did not even consider Paramount's offer.
- The Time directors did not talk to or negotiate with Paramount to try to improve Paramount's offer.

- Time's directors have stripped themselves of any power or discretion so that they now cannot negotiate, discuss, investigate or improve the terms of the Paramount offer, or any other offer. They have created a "fail-safe" tender offer.

- The price of Time's stock will drop, dramatically, if Paramount's offer is withdrawn, which it will be if Time's offer for Warner proceeds.

- The Time shareholders <u>want</u> Paramount's offer instead of no earnings for years to come, a lower stock price, billions of dollars in good will charges, and $7-14 billion in debt.

- Time's shareholders had no possibility of a referendum on any of this, even though one was promised.

- Because Time's directors have available every "state of the art" defensive device known to their army of advisors, they could have deferred Paramount's offer until they decided whether to offer their shareholders an alternative or simply let the shareholders choose between Paramount's offer and the benefits of the Time Culture.

- Since June 6, 1989, defendants' actions have had one paternalistic theme: that they know what is in the best interests of Time's shareholders, even if the shareholders do not.

Paramount is not saying that all tender offers require a prior shareholder vote or that all merger agreements mean that a company is "for sale." Paramount <u>does</u> argue that the facts and circumstances of this case show that the directors of Time breached their duties to their shareholders and abused their powers. Delaware directors are accorded broad authority to manage the corporation, but they are required to exercise that authority in the interests of their shareholders. Time's directors have not done so.

I. TIME'S DEFENSIVE TENDER OFFER MUST BE JUDGED UNDER UNOCAL AND REVLON

Defendants claim that their defensive tender offer in response to Paramount's competing offer is a mere continuation of a pre-existing business strategy. The only business strategy that Time's directors can identify is that "management succession" will be guaranteed. Every other element of Time's "long-term" strategy has, on one occasion or another, been sacrificed to that objective. The "extraordinary benefits" of the Time-Warner combination were rejected unless Nicholas was assured succession. The benefits of "pooling" have been discarded to avoid a shareholder vote. The "grave dangers" of leverage have been embraced in an effort to accelerate the Time-Warner combination. And the vision of a grand union of synergistic equals whose assets would not be put on the block to pay off "crippling debt," has been summarily scrapped in a "hell-or-high-water" agreement to ensure that a merger is completed.

In support of their claim that this defensive reaction is permitted, defendants have tried to set the clock back to a time when Unocal did not exist. Thus, they rely almost exclusively on cases that were either decided prior to Unocal, or that did not involve a defensive response to a threat to corporate control.

Defendant's labored attempt to justify their actions by comparison to Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690 (2d Cir. 1980), illustrates their dilemma in confronting the current law on directors' duties. That opinion is a dinosaur.

First, Crouse-Hinds was primarily concerned with the evidentiary inadequacy of a complaint in which plaintiffs had submitted no live testimony or taken any depositions. Second, the Second Circuit applied a New York business judgment rule analysis and did so before Unocal, Moran, and Revlon.

The Crouse-Hinds court thus made no determination of whether the target company's decision to unilaterally restructure its planned merger with a third party, a decision made in order to preclude shareholder choice, required heightened judicial scrutiny or constituted a reasonable response. Instead, the court squarely based its decision on the fact that the potential acquiror, Internorth, had not "carried its burden of demonstrating self-interest or bad faith on the part of the Crouse-Hinds directors." 634 F.2d at 702. As this Court is well aware, Delaware has addressed the obvious potential for director conflict in opposing a hostile takeover, "by placing upon the directors the burden of proving that they have not acted solely or primarily out of a desire to perpetuate themselves in office, that the threatened takeover posed a danger . . . and that the defensive measures adopted are reasonable in relation to the threat posed." Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1341 (1987)(citing Unocal). Indeed, the specter of conflict of interest in takeover situations is the very reason the Delaware courts have adopted the standard of review established in Unocal.

By asking this Court to apply the standards set forth in Crouse-Hinds, defendants are asking for nothing less than the reversal of Unocal based on a nine year-old decision applying New York law.17/

Warner's heavy reliance on Lowenschuss v. The Option Clearing Corp., Del. Ch., C.A. No. 7972, Brown, C. (March 27, 1985) -- another pre-Unocal case -- is similarly flawed. First, that court expressed severe doubts over whether the plaintiff, a dealer in "put" options, even had status in this derivative suit. Second, the primary holding of that case is that a board is not statutorily precluded from implementing a recapitalization in the absence of a shareholder vote -- a position Paramount has not challenged. Finally, Lowenschuss never addressed the central issue confronting this court: whether a preclusive, defensive transaction is a reasonable response to a takeover threat under the Unocal standard.

In an argument that is rich with irony, defendants cite to Doskocil Cos. v Griggy, Del. Ch., C.A. No. 10,095,

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17/ Notwithstanding the plain fact that Crouse-Hinds is thus fundamentally contrary to the precepts of Unocal, defendants attempt to salvage the case by arguing that Unocal "relied explicitly and importantly" upon the Second Circuit's decision. Time Brief at 129-130. Reality is more tame. Unocal contains a single reference to Crouse-Hinds in a line of seven string cites that support the noncontroversial proposition that the board has power to act to prevent harm to its shareholders, see Unocal, 493 A.2d at 954. It does not purport to make the Crouse-Hinds analysis of New York law the law of Delaware.

Berger, V.C. (Aug. 18, 1988) and to In re Anderson, Clayton Shareholders' Litig., Del. Ch., 519 A.2d 680 (1986), for the proposition that their defensive tender offer does not implicate Unocal duties. In fact, these decisions and their companion cases clearly state that even if an original plan to issue stock or enter into a merger should be judged under the business judgment rule, once those plans are altered and implemented as a response to a takeover threat, they must be judged under the strict test of Unocal.

In Doskocil, the court first evaluated whether the original July 1 decision of the target Wilson Foods to authorize the issuance of preferred stock, a decision that was made before the July 27 tender offer, should be enjoined. The court based its decision not to enjoin this prior action specifically on its conclusion that it was not made "in response to a perceived takeover threat." Slip op. at 16. The Board, however, had not actually issued the preferred stock; the court held that if the board decided to actually issue preferred stock, that decision would be made in the context of a tender offer and must be judged under Unocal. As the court stated: "From these facts, I am satisfied that any decision the defendant directors may make while the tender offer remains outstanding would be subject to the Unocal standards." Slip op. at 18-19.

Defendants have similarly distorted the crucial distinction between In re Anderson, and AC Acquisition Corp. v Anderson Clayton and Co., Del. Ch., 519 A.2d 103 (1986). In In re Anderson, this Court addressed, inter alia, the issue of whether a proposed recapitalization, authorized by the board well before any competing offer materialized, was entered into for "the sole or principal purpose of incumbent management." 519 A.2d at 688.[18] Because the initial recapitalization was conditioned on a shareholder vote, and was clearly not in response to any takeover threat, this Court had no grounds to even invoke a Unocal analysis.

In contrast, the board's subsequent actions were subjected to completely different analysis in the AC Acquisitions decision. By then, in a situation that is directly analogous to Time's actions, Anderson Clayton had responded to the plaintiffs' tender offer by modifying its original plan for a shareholder-approved restructuring plan to a self-tender offer that would accomplish the same functional result. Despite the fact the self-tender had its genesis in the original restructuring, because the board's actions were now obviously in response to a threat to corporate control, this Court determined Unocal must apply. [19] See also Robert M.

18/ The principal claims by the plaintiff stockholders went to corporate waste and proxy disclosure violations. 519 A.2d at 686.

19/ Specifically, this Court ruled:

> While this proposed stock repurchase derives from an earlier proposed recapitalization that itself may be said to have been defensive only in a general, preemptive way, there are elements of the present Company Transaction that are crucial to this case and that do not derive from the abandoned recapitalization. These elements are unmistakably reactive to the threat to corporate

(continued...)

Bass Group, Inc. v. Evans, Del. Ch., 552 A.2d 1227 (1988) (restructuring plan enjoined as unreasonable response to takeover threat even where it had been the subject of earlier consideration).

A. Paramount's Offer Poses No Threat To Time's Shareholders

Both Time's and Warner's briefs waste reams of paper discussing why, in their view, the Time-Warner merger is in effect a better transaction for Time than Paramount's offer. However, the defendants are curiously silent about the only relevant comparison: the value that Time shareholders will receive in both transactions. Indeed, in Time's entire 170-page brief, there is no discussion at all comparing the per share value of an acquisition of Time by Paramount (not an acquisition of Paramount by Time), with Time's tender offer for Warner.

Instead, Time has gone to great lengths to show why, in its view, Paramount is a second-place candidate in its choice of a strategic partner. This longwinded explanation is largely irrelevant. While it is true that in certain situations, a board may consider a variety of "circumstances" in evaluating a bid for control, see Mills Acquisition Co. v. Macmillan Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94, 401 at 92,597 n. 29 (Del. Supr. 1989), in considering its response to a tender offer for all outstanding shares, the focus of a

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19/ (...continued)
control posed....

519 A.2d at 112.

target board's inquiry must be on the adequacy of consideration and the nature of the choice offered to the shareholders. Id. at 92,597.

In City Capital Assocs. Ltd. v. Interco Inc., Del. Ch., 551 A.2d 787 (1988) this Court stated the rule as follows:

> [I]n the special case of a tender offer for all shares, the threat posed, if any, is not importantly to corporate policies (as may well be the case in a stock buy-back case such as Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964) or a partial tender offer case such as Unocal itself), but rather the threat, if any, is most directly to shareholder interests. Broadly speaking, threats to shareholders in that context may be of two types: threats to the voluntariness of the choice offered by the offer, and threats to the substantive, economic interest represented by the stockholding.

Id. at 797; see also Grand Metropolitan PLC v. Pillsbury Co., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,104 at 91,193 (Del. Ch. 1988) (in the absence of a threat to the "corporate enterprise . . . [w]hatever threat is involved relates entirely to the alleged 'inadequacy of the price offered'"). Time's brief erects a series of false and hypothetical "threats" as straw men, modeled loosely on the factors listed in footnote 35 of the Macmillan opinion, in order to distract the Court from reaching the issue of the fairness and adequacy of Paramount's offer.

The "first and foremost" threat that Time claims to face as a result of Paramount's all-cash, all-shares offer, is to the "company's long-term goal of becoming a global media company." This is an irrelevancy. Unlike the partial tender offer Time hopes to make for Warner, Paramount's offer is for all shares. Since the Time shareholders would be cashed out at a premium, Mr. Munro's or Mr. Nicholas' long-term vision for Time is not a valid constituency that can supersede shareholder interests. The real "threat" felt by the Time directors was that the Time shareholders would reject their long-term strategy of maintaining Time Culture in favor of $200 per share. Time's brief suggests that Paramount's offer has created a "misleading environment in terms of the Time shareholders ability to analyze the Time-Warner merger transaction" (Time brief at 120). If the Time directors were really concerned that their shareholders were being misled into choosing Paramount's offer over the superior merger with Warner, a reasonable response by Time would have been to postpone the shareholder vote on the merger until such time as the "misleading environment" was corrected.[20/] Time had enough defensive mechanisms in place to hold off the Paramount offer until this Court agreed that any "misrepresentations" had been corrected. But neither Nicholas nor any other Time director ever suggested that the vote on the original merger agreement simply be postponed to allow time for what they

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20/ Indeed Munro did not have any concern about Time's ability to communicate sufficient information to its shareholders to enable them to make an informed decision on the offer. Munro Tr. at 207.

considered to be a fair election. Nicholas Tr. at 189-90.21/ Instead, Time's board commenced a tender offer for Warner.

A second "threat" suggested by Time concerns the timing of Paramount's offer. Time argues that as a result of the shift of nearly 30% of Time's shares into the hands of arbitrageurs within two weeks of the annual shareholders' meeting at which the merger was to be approved, "there was a likelihood that there would not be enough affirmative votes to approve the combination." Time Brief at 143. How the inability of management to obtain a shareholder vote can be seen as a "threat" to the company is unclear. In any event, the reasonable response to this "threat" is clearly to change the record date and move the vote back, not commence a tender offer.

Time further states that the "legality" and the "feasibility" of Paramount's offer were threats to Time. These purported "threats" both stem from conditions of the Paramount offer that Time hypothesizes either will delay the offer, or won't be satisfied.

However, the conditional nature of Paramount's offer does not pose a threat to Time, because Time has the power to satisfy almost every one of the conditions. The only

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21/ Nicholas's reason for this had nothing to do with the purported inadequacy of Paramount's bid. It was just that Warner "didn't want to be left hanging out" and it would "take quite awhile before we could clarify the issues for the benefit of Time shareholders." Nicholas Tr. at 190.

condition[22] that is not exclusively in Time's control is the ability of Paramount to obtain all material cable franchise transfers. With respect to these transfers, Time's concerns are at best disingenuous. It should be well known to this Court by now that Time, its counsel, and its agents are doing everything in their power to discourage and impede Paramount's attempts to obtain cable franchise transfer approvals.

It is simply incredible that Time states to this Court, on the one hand, that it rejected Paramount's offer because it doubts whether it is "feasible" for Paramount to obtain the requisite cable transfer approvals, and on the other hand admits that it is supplying draft complaints to parties in order to prevent those same transfers.

Even if the "legality" and "feasibility" of Paramount's offer did pose a threat to Time or its shareholders, however, Time's response to this "threat" was far from reasonable. Time has state-of-the-art takeover defenses that could be used to protect itself against any threat posed by regulatory problems. In particular, Time could refuse to redeem its pill until the board was satisfied that the situation is settled. It is unreasonable to take an action

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22/ Although Time challenged Paramount's financing early on, neither Time nor Warner seriously suggests that Paramount will be unable to finance its offer for Time if the other conditions are met.

that completely precludes, as opposed to delays, any shareholder consideration of an alternative transaction.23/

Time raises the usual claim that Paramount's $200 all-cash offer is inadequate. And, as usual, Time advances a "revised" analysis of its financial advisors who have now concluded that Time is worth between $233-$274 per share. These are the same financial advisors who, three months ago, were willing to sell control to Warner at no more than $150 and who established a range of value for Time's shares of $189 to $212. See Phillips Reply Affidavit ¶ 3.

Even assuming that this Court were to find this "revised" financial analysis credible, a reasoned response to an inadequate offer would be to seek to negotiate a higher price with the offeror, not commence a highly leveraged, two tiered, no-outs tender offer for another company.

23/ Warner claims that Paramount has advanced "failure to negotiate" arguments which are inapposite because there is no legally cognizable duty to negotiate. (Warner Brief at 92-94). The significance of Time's steadfast refusal to discuss Paramount's offer with Paramount goes not to any duty to negotiate but to the board's duty to adequately inform itself of the nature of the threat posed by Paramount (if any). Under Unocal a board must make a reasonable investigation before undertaking a defensive transaction. Defendants were thus required to at least inform themselves as to the alternative offered by Paramount's offer, In re Anderson, Clayton Shareholders Litigation, Del. Ch., 519 A.2d 694, 697 (1986), before foreclosing that prospect "to the shareholders' detriment." Black & Decker, 682 F. Supp. at 784. See also UIS, Inc. v. Walbro Corp., Del. Ch., C.A. No. 9323, Allen, C. (Oct. 6, 1987); cf. Aronson v. Lewis, Del. Supr., 473 A.2d 805, 813 (1984).

B. Time's Defensive Tender Offer Is Clearly Unreasonable

Neither Time nor Warner has managed to locate any case which justifies their actions as reasonable under Unocal. Instead, defendants have resorted to attacking Paramount's authorities on the simplistic grounds that they should be dismissed as "poison pill" cases or cases in which the board chooses the "functional alternative" of the proposed tender offer. Unocal has not been applied in such a mechanistic or wooden manner. Nor does application of Unocal here require, as defendants suggest, that this court sacrifice all board prerogatives -- and require "board passivity" -- on the altar of "shareholder choice."

Unocal's proportionality test (and Revlon and Macmillan) provide a mechanism for balancing the competing demands of the board's fiduciary duties and the shareholders' fundamental rights. Within this framework, Delaware case law has established the fundamental paradigm that a board may not respond to the threat of a corporate takeover by unilaterally precluding shareholder choice on how to maximize values. In such circumstances, the shareholders' right to choose between competing alternatives can not be obstructed by any means, be it a poison pill, Grand Metropolitan PLC v. The Pillsbury Co., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,104 at 91,194, (Del. Ch. 1988); a coercive self-tender, AC Acquisition, 519 A.2d at 114; or a "cram-down" restructuring, Bass v. Evans, 552 A.2d at 1243-44.

Contrary to defendants' assertions, this Court implicitly recognized this paradigm in TW Services, Inc. Shareholders Litig., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,334 at 92,173 (Del. Ch. 1989). There, the court noted that Unocal had been employed to strike down preclusive defensive measures in the above-cited cases where respective boards had chosen to respond to a takeover threat by entering into a defensive restructuring or other "extraordinary transaction". Id. at 92,178-81. TW Services explicitly reserved judgment on whether a company could "just say no" to a tender offer in order to pursue a pre-existing business strategy. Id. at 92, 180. In any event, it is fatuous to suggest that Time's decision to make a $14 billion acquisition that will radically alter the structure and capitalization of its entire enterprise, is not an "extraordinary transaction." Where, as here, the Time board has clearly elected to pursue a defensive restructuring as a preemptive alternative to a pending all cash tender offer, the shareholders' essential right to choose has been unlawfully trammeled.

This Court's decision in Interco squarely addressed the parameters of appropriate board action in responding to a takeover threat. In ruling that a target's board of directors must redeem its "poison pill", the court observed that:

> the board, having arranged a value maximizing restructuring, elected to preclude shareholder choice. It did so not to buy time in order to negotiate or arrange possible alternatives, but asserting in effect a right and duty to save shareholders from the consequences of the choice they might make, if permitted to choose.

551 A.2d at 799.

Applying the same standards to the proposed restructuring, Interco determined that it was not unreasonable for the board, in response to the tender offer, to "realize the full market value" of an important asset. Id. at 801. This Courts' conclusion rested on three central tenets: First, since the proposed restructuring entailed the public sale of assets for which the other party could bid, rather than a crown jewel sale to a favored bidder, the court assumed that the company would receive in cash the fair market value of the assets. Second, because the value of the company would theoretically not change, shareholders were not adversely affected, nor was the bidder precluded from consummating the original tender offer. Finally, since "shareholder choice" was not precluded, this Court concluded the restructuring was not a "show stopper" insofar as the original offer was concerned. Id.

The court's decision in G.M. Sub. Corp. v. Ligget Group, Inc., Del. Ch. C.A. No. 6155, Brown, V.C. (Apr. 25, 1980), was also based on the same distinctive principles. In that case the court refused to enjoin the sale of a target company's division, where it was publicly auctioned, and where the company would receive a highly favorable cash value. Because the value of the target was maintained, if not increased, there was no harm to either the shareholders, or to the hostile bidder, which could still consummate its original offer.

In contrast to Interco and Ligget, Time's highly leveraged offer for Warner (1) fails to provide its shareholders with any immediate cash dividend or other value; (2) significantly reduces both the takeover value of Time and the value of Time shares; (3) "taps out" or exhausts the borrowing power of a combined Time-Warner; and therefore (4) constitutes a "show-stopper" perhaps for all bids and certainly for Paramount's $200 offer or for any transactions offering comparable value to the shareholders. Indeed, Time's tender offer for Warner effectively constitutes a cram-down recapitalization that leaves its shareholders with a stub equity share and massive debt while giving Warner the cash premium. In this respect, Time proposes a transaction that is even worse than that enjoined by this Court in AC Acquisitions, where at least the shareholders were being cashed out at a value comparable to the competing tender offer.

C. Revlon Requires That When The Board Institutes A Radical Change In The Nature And Control Of The Company It Must Leave Itself The Power To Consider Alternatives That Will Maximize Shareholder Value

In their rush to knock down strawmen, Time and Warner demolished a Revlon argument that Paramount never made. Time and Warner insist in apocalyptic terms that Paramount's Revlon analysis represents a "new," "radical," and "unprincipled" theory that, if accepted by this Court, will unleash a parade of horrors that will "sound the death knell" for stock mergers involving Delaware corporations.

Paramount's Revlon analysis is neither new nor radical. It rests on well-established principles of Delaware law. Certain, not all, extraordinary transactions, whether a sale, merger, or recapitalization, may result in such radical changes in the structure of company and may have such negative economic consequences for the company's shareholders that the board must, at the very least, permit shareholders to consider alternative transactions and must ensure that steps taken to defeat an unsolicited bid are designed to maximize shareholder returns. In short, a board must protect shareholder choice when the very nature of the shareholder's investment is being altered.

Defendants argue that this conception of a board's fiduciary duty has no support in the cases, because Revlon and its progeny dealt only with extraordinary transactions initiated in response to unsolicited offers, and where it was clear to the board that the company could no longer remain independent. The cases considering the scope of a board's fiduciary duties do, in fact, generally address reactive, defensive transactions. This is not surprising since in the absence of a rebuffed bidder, an extraordinary transaction is seldom challenged in court.

But the basic principle underlying these cases -- that the fairness of certain management and board-approved transactions must be tested by removing obstacles to alternative transactions -- is not limited to purely reactive transactions. Defendants read into the cases a magic word test, where the use of the word "sale" is dispositive. They refuse to recognize that other extraordinary transactions can also give rise to heightened fiduciary duties. But confronting shareholders with a management sponsored transaction that will fundamentally alter the structure of their company, deny them any opportunity to obtain a control transfer premium, guarantee long-term, enriched contracts for senior management management, and dilute their holdings, must trigger some obligation on the part of the board to ensure fairness for the shareholders.

Simply requiring a board to consider proposed alternatives and to not otherwise unfairly preclude shareholder choice in these circumstances poses no threat to the future of stock mergers involving Delaware corporations. A board need not conduct auctions or actively search out alternatives for every merger. Nor must a board permit every unsolicited offer or proposal to disrupt or preclude a planned merger. But in the circumstances presented here, the considerations of fairness that lie at the heart of Revlon demand that a board permit shareholders to consider alternatives.

II. PARAMOUNT AND TIME STOCKHOLDERS WILL SUFFER IRREPARABLE HARM IF TIME'S TENDER OFFER IS NOT ENJOINED

If Time completes its planned purchase of Warner, Paramount will be precluded from pursuing its offer for Time and Time shareholders will be denied an opportunity to chose a premium alternative to the Time-Warner combination. Both

Paramount and Time shareholders will thus suffer irreparable harm. See In Re Holly Farms Corp. Shareholders Litigation, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,181 at 91,645 (Del. Ch. 1988).

In their briefs, both Warner and Time deny that either Paramount or the Time shareholders will suffer irreparable harm. But their denials have no basis in fact or law; the threat of irreparable harm is real and requires injunctive relief.

A. The Preclusive Effect of the Time Offer

Time and Warner both charge that Paramount will suffer no irreparable harm if Time purchases Warner because Paramount has never claimed that it cannot purchase the combined Time-Warner entity. Both defendants claim to find in the deposition testimony of Martin Davis evidence that Paramount has not yet decided what it will do if Time purchases Warner and thus, according to defendants, Paramount can make no claim of injury.

The record, however, provides no support for defendants' claim. All the record shows is that defendants' counsel posed several confusing hypothetical situations that elicited the response that Paramount would consider its alternatives if the hypothetical ever came to pass. Davis was absolutely clear that Paramount's offer for $200 per share would not continue if Time consummated the tender offer for Warner.

Further, the affidavit of Stephen M. Waters, sworn to on July 10, 1989 and submitted with this memorandum, clearly sets forth the financial effect of Time's purchase of Warner. As revealed in Amendment No. 5 to Time's Schedule 14D-1 filed with the SEC on June 28, 1989, Time will incur at least $8.35 billion in additional senior debt if it acquires Warner. Paramount Reply Appendix, Ex. A, ¶ 3. By incurring this debt, plus $2 billion of subordinated debt that Time anticipates issuing. Time will have exhausted its borrowing capacity. Waters Aff. ¶ 5. As a result, potential financial and leveraged buy-out bidders are precluded from making a bid for Time because such a bid would necessarily have to rely on the borrowing capacity of Time-Warner to finance the purchase price. Waters Aff. ¶ 7.

Moreover, there are few, if any, strategic corporate buyers that could finance an acquisition of Time-Warner. (Waters Aff. ¶ 8.) As a result, consummation of the Time-Warner transaction will have -- and seems designed to have -- the effect of precluding any subsequent acquisition of the combined entity. (Waters Aff. ¶ 9.)

Even if a strategic buyer did emerge, the acquisition price would be considerably lower than Paramount's current $200 per share offer. (Waters Aff. ¶ 9;) see Phillips Aff. (Paramount Appendix, Ex. C.) A $200 bid would require the unprecedented sum of $28 billion and would be the largest acquisition ever concluded. (Waters Aff. ¶ 9.) Although in theory a bid for Time-Warner is possible, as a practical matter no deal economically equivalent to Paramount's $200 bid could be consummated. (Waters Aff. ¶ 9.)

Time's acquisition of Warner will preclude Paramount's offer for Time and it will preclude the possibility of any offer at anything close to $200 per share. The harm flowing to Paramount from this result is clear: Paramount will lose its opportunity to pursue its bid for Time. The harm flowing to Time stockholders is also clear: They will lose for all time their only chance to be paid a substantial premium for their shares. (Waters Aff. ¶ 10.)

B. Neither Paramount nor Time Shareholders Accepted the Risk of Irreparable Harm

Both Warner and Time also claim that Paramount cannot complain about any harm caused by Time's acquisition of Warner because Paramount knew when it commenced its offer that Time and Warner had entered into a merger agreement. Defendants argument rests on the fallacy that the proposed March 3 transaction and the proposed June 16 transaction are the same transaction.

The two deals are separate transactions; the substantial difference between the two transactions are detailed in the Statement of facts. What is of particular importance here is that the first transaction provided for shareholder approval and the second transaction is to be forced on the shareholders. In fact, Paramount did not try to enjoin the original merger transaction because Time was offering its shareholders a choice. Paramount expected that

Time shareholders would chose between the merger transaction and Paramount's offer.

Paramount did not expect, and had no reason to know, that defendants would deprive Time shareholders of their choice by attempting to accomplish the Time-Warner combination through the unilateral and unlawful actions of the Time and Warner boards. Thus, defendants' claim that the harm created by Time's acquisition of Warner is "self-created harm," (Warner Brief at 116), is erroneous. Paramount's offer preceded the commencement of the illegal sale transaction and Paramount in no way accepted the risk of that later-committed wrong. Nor, obviously, did the Time shareholders, whose interests are generally ignored throughout the Time and Warner briefs, accept the risk that the Time board would breach its fiduciary duties.

C. The Balance of Hardships Weighs In Favor Of Paramount and Other Time Shareholders

Both Time and Warner claim that injunctive relief will work injury that outweighs any harm that will be suffered by Paramount and Time shareholders in the absence of such relief. But the injury asserted by Time is non-existent and the injury asserted by Warner has no claim to the equitable considerations of this Court.

Time claims in a single sentence that if injunctive relief is granted, the Time shareholders will be denied the supposed benefits of the Time-Warner combination. (Time Brief at 169.) Not surprisingly, Time offers no support for this proposition; Time management previously denied the shareholders an opportunity to vote on the Time-Warner combination. Since Time shareholders would have rejected the combination, it is disingenuous, at best, to claim that Time shareholders will be harmed if the combination is enjoined.

Warner's claim of injury is more impassioned, but equally specious: Warner would have this Court consider the "harm" to Warner shareholders who may be denied the $70 premium offer proposed by Time management. Again, Warner's arguments are premised on the fallacious assumption that the merger transaction and the sale transaction are one-in-the-same. Warner claims that it would be inequitable to deprive Warner and its shareholders of the benefits of a "very real, long-planned transaction." (Warner Brief at 125.) But the $70 offer has not been long-planned. Rather, that offer was born of last-minute negotiations on June 16, after Paramount made its own offer for Time.

Under the terms of the original merger transaction, Warner and its shareholders had no certainty of consummation. In fact, if the Time shareholders had rejected the merger transaction, Warner and its shareholders would have had no right to require Time to complete the merger by issuing Time shares in exchange for Warner shares. Moreover, the Lock-Up Stock Swap would be void once the Time shareholders voted the merger down at the annual meeting.

Now, Warner wants this Court to enforce a sale agreement entered into after the Paramount offer even though the agreement violates the Time board's fiduciary duty to its shareholders. Apparently, Warner believes that a fiduciary breach may not be remedied if an "innocent" third party is thereby denied the benefits of the breach. Warner's attempt to support this proposition with authority is disingenuous. For example, Warner quotes a passage from Jedwab v. MGM Grand Hotels, Inc., Del. Ch., 509 A.2d 584 (1986), where the court recognized the contract rights of a third party merger partner where a shareholder sought to enjoin a merger. But Warner omitted a telling footnote, which, in relevant part, recognized the "general principle that 'as between competing equitable claimants ... he that is prior in time is stronger in law'." (Id. at 600 n. 12.)

Here, of course, even assuming that Warner is an "equitable claimant," Paramount is prior in time, having made its offer for Time before Time made the $70 per share offer for Warner. Thus, neither Warner nor its shareholders can expect their alleged "harm" to weigh more heavily than the harm suffered by Paramount.24/

Moreover, Warner's role as an aider and abettor in the Time director's breach of fiduciary duty bars it from "equitable claimant" status. A knowing participant in a breach of fiduciary duty cannot be heard to complain about an

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24/ None of the other cases cited by Warner concern the rights of third-party shareholders.

injunction that would prevent the consummation of the illegal plan. See Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1344 (1987); Weinberger v. Rio Grande Industries, Del. Ch., 519 A.2d 116, 131 (1986).

Warner insists that Paramount must offer explicit proof that Warner had "actual knowledge" of the Time directors' breaches. (Warner brief at 104) In Deutsch et al. v. Cogan et al., Del. Ch. C.A. No. 8808, Hartnett, V.C., (April 11, 1989), however, this court held that to survive a motion to dismiss on a claim of aiding and abetting it was sufficient to "set forth facts, which if true, permit a reasonable inference that [defendant] was aware or should have been aware that the transaction, if in fact unfair, would benefit the fiduciaries at the expenses of [the] public stockholders. (emphasis added) (citing L.A. Partners v. Allegis Corp., Del. Ch., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,505 (Del. Ch. 1987). And as this court stated in Greenfield v. Tele-Communications, Inc., Del. Ch., C.A. No. 9814, Allen, C. (May 10, 1989), "It may be that some circumstances will arise in which the terms of the negotiated transaction themselves are so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust."

Here, there is ample evidence that Warner had knowledge of the Time directors' breach. Warner was well aware that the Time tender offer was structured as an assault on the Paramount offer and on the promised shareholders' vote on the Time Warner combination. Warner recognized that the Paramount Offer made it problematical as to whether the Proposed Merger under the Original Merger Agreement could be consummated within a reasonable period of time. (Warner Schedule 14D-9 at 7) (See also Aboodi Tr. at 180) Therefore, Ross and Aboodi actively participated in creating the means by which the certain defeat of the original merger could be averted.

On the night the Paramount offer was announced, before any Time board consideration could have possibly taken place, Aboodi met with Levin and received Levin's assurances that Time was committed to a deal with Warner. (Aboodi Tr. at 185) Having received this assurance and comforted with the knowledge that Time would never give the slightest consideration to the Paramount offer, Warner participated in the fashioning of the "hell-or-high-water" Time tender offer. Warner agreed to, and in fact insisted on, terms in the agreement that would preclude any choice for Time shareholders. After the New York Stock Exchange refused to permit Time and Warner to proceed with a stock-for-stock merger without a shareholder vote, Ross gave "marching orders" to Ed Aboodi, Warner's chief representative in negotiations with Time:

> I just gave Ed marching orders that regardless of anything else, that there can be no outs because we will be up on the block, on the chopping block the second they [Time] make this tender offer for us, so that nothing can be conditional. Otherwise, forget it.

Ross Tr. at 179; see also id. at 124 (Time "know we were not going to put ourselves in a position of putting ourselves on the block and have a conditional deal. The auction block that is."); Nicholas Tr. at 213 (Warner "insisted that there be no conditions other than the so-called act of God, et cetera, et cetera.") Thus, as Time was strapped to a rocket, the buckles were fastened with the help of Aboodi and Ross; Warner, therefore, cannot be considered an "innocent" third party.

III. THE DIRECTORS' USE OF THEIR POWERS TO MANIPULATE THE SHAREHOLDER VOTE IN ORDER TO DEPRIVE THE SHAREHOLDERS OF ANY SAY IN WHO WILL RUN THE CORPORATION, HOW IT WILL BE RUN, OR EVEN WHAT THE SHAREHOLDERS CAN DO WITH THEIR OWN STOCK, VIOLATES THEIR DUTIES TO TIME'S SHAREHOLDERS

Defendants' rationalization of the undeniable fact that Time's directors disenfranchised their stockholders in the face of the certain defeat of the original merger agreement is, essentially, that there is no harm done since Time was not obligated to let them vote in the first place. Such a position is untenable in the face of Delaware authority. As stated in Schnell v. Chris-Craft Industries, Del. Supr., 285 A.2d 437, 439 (1971) "inequitable action does not become permissible simply because it is legally possible."

Time states in its brief that Blasius Indus., Inc. v. Atlas Corp., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,965 (Del. Ch. 1988) is inapplicable to the Time directors about-face on the stockholder vote because

Blasius prohibits only director action which is "designed principally to interfere with the effectiveness of a vote." Time Brief at 165, citing Blasius at ¶ 90,484 Time argues that its "purpose was not to thwart the vote, but to accomplish its acquisition of Warner" in the face of Paramount's premium cash offer. Id.[25]

Time has not explained how these changed circumstances failed to make the stockholder vote on the four open positions on the Time Board equally impractical. Presumably, in that instance impracticality was outweighed by expediency -- Time knew the three inside directors and incumbent outside director could not be unseated. Nor has Time explained how it was appropriate to deny its shareholders a vote on the twelve new directors who will be joining the Time board. Apparently the Time shareholders are not to be permitted any say in who the new protectors of The Time Culture will be.

25/ Time insists it "had not concluded that it would have lost a shareholder vote", citing the testimony of Munro and Dingman. (Time Brief at 121, n.50) Other directors felt differently. Opel stated that "the proposed Paramount transaction seemed to preclude the WCI transaction". (Finkelstein Ex. 11 at 20) Finkelstein "thought there was a risk in going forward with the original transaction". (Finkelstein Tr. at 152) Luce agreed the original merger would have been defeated by the stockholders "if they had an opportunity to do so." (Luce Tr. at 203) Even Warner "recognized that the Paramount Offer made it problematical as to whether the Proposed Merger under the Original Merger Agreement could be consummated within a reasonable period of time." (Paramount Reply Appendix, Ex. C at 7.)

Finally, though defendants state repeatedly that the Time board was entitled to strap itself to the Nicholas rocket without stockholder approval, they would ask this Court to take into consideration the views of one particular stockholder, the Capital Group. (Warner Brief at 53n.; Affidavit of Gordon Crawford, sworn to July 6, 1989) A more representative Time stockholder might have been proffered. As Warner points out, the Capital Group also owns 7% of Warner's outstanding shares and so stands to profit by the Time tender offer at the expense of its fellow Time stockholders who are not so fortunate as to have cross-ownership.

CONCLUSION

For all the reasons set forth above and in Paramount's Opening Brief, Paramount respectfully submits that a preliminary injunction should issue enjoining the Time Tender Offer, enjoining the Amended Merger Agreement, and enjoining Time from further attempts to block Paramount's efforts to obtain regulatory approvals.

Dated: July 10, 1989

Respectfully submitted,

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