

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARAMOUNT COMMUNICATIONS INC. and
KDS ACQUISITION CORP.,

Plaintiffs Below-
Appellants,

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 Below-
Appellees.

No. 279,1989

Interlocutory Appeal
From The Court Of
Chancery Of The State
Of Delaware In And For
New Castle County
C.A. No. 10866

REPLY BRIEF OF PLAINTIFFS-APPELLANTS
PARAMOUNT COMMUNICATIONS INC. AND KDS ACQUISITION CORP.

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Table of Authorities | iii |
| Introductory Statement | 1 |
| Argument | 4 |
| I. TIME'S "LONG-TERM" STRATEGY IS NOT MEANT TO PROVIDE ITS CURRENT SHAREHOLDERS WITH HIGHER VALUES THAN PARAMOUNT'S OFFER; THE "LONG-TERM" STRATEGY IS TO MAINTAIN THE TIME CULTURE IN THE PERSON OF NICHOLAS J. NICHOLAS, JR. | 4 |
| A. Time's "Long-Term Strategy" Has Present Values Less Than \$200 Per Share | 4 |
| 1. The Time-Value Of Money | 6 |
| 2. Risks Of The Long-Term Strategy | 7 |
| 3. Time's Long-Term Strategy, Discounted To Present Value, Is Worth Much Less Than \$200 | 10 |
| 4. Time And Warner Have No Answer To The Board's Failure To Look At The Present Values Of Its Long-Term Strategy | 11 |
| a. The projections for 1993 are all the Time board was given, and were more than Warner's advisors believed were reliable | 11 |
| b. The only "uncertainty" about Paramount's offer is when Time will stop trying to delay it | 12 |
| c. Time's directors could not fairly reject a \$200 per share offer | 12 |
| B. Time's Only "Long-Term Strategy" Is For Nicholas To Succeed Munro | 13 |
| 1. Management Succession Was The Transcendent Aim Of Time's Management And Board | 14 |

| | <u>Page</u> |
|--|-------------|
| 2. Every Element of Time's Long-Term Strategy Has Been Sacrificed, Except For Nicholas' Succession | 15 |
| a. Preservation of editorial integrity was quickly and readily sacrificed | 16 |
| b. Time's long-term goal of a debt-free company was scrapped in an instant | 17 |
| C. Time's Board Did Not Fulfill Its Duty Of Inquiry Before Rejecting Paramount's Offer And Forcing A "Long-Term Strategy" On Time's Shareholders | 19 |
| 1. Paramount's Price: No Investigation | 20 |
| 2. Editorial Integrity: No Investigation | 20 |
| 3. Present Value Of Projected Trading Ranges: No Investigation | 21 |
| II. WARNER'S CONTRACTUAL RIGHTS DO NOT PRECLUDE THE ENTRY OF A PRELIMINARY INJUNCTION RESTRAINING THE TIME OFFER | 22 |
| A. Warner Aided And Abetted A Breach Of Fiduciary Duty | 22 |
| B. Warner Had Notice Of The Breach Of Fiduciary Duty Claims, And Its Rights Are Subject To Such Claims | 23 |
| III. PARAMOUNT AND THE OTHER TIME SHAREHOLDERS WILL BE IRREPARABLY INJURED IF TIME'S TENDER OFFER IS NOT ENJOINED | 23 |
| Conclusion | 25 |

TABLE OF AUTHORITIES

Page(s)

CASES

| | |
|---|-------------|
| <u>City Capital Assocs. v. Interco, Inc.,</u> Del. Ch., 551 A.2d 787, <u>appeal dismissed</u> , Del. Supr., 556 A.2d 1070 (1988) | 4 |
| <u>Deutsch v. Cogan, Del. Ch.,</u> C.A. No. 8808, Hartnett, V.C. (Apr. 11, 1989) | 22 |
| <u>Garner v. Pearson, 545 F. Supp. 549</u> (M.D. Fla. 1982) | 23 |
| <u>Grand Metropolitan PLC v. The Pillsbury Company,</u> [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,104, Duffy, J. (ret.) (Del. Ch., Dec. 16, 1988) | 4 |
| <u>In Re Holly Farms Corp. Shareholders Litigation,</u> [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,181 (Del. Ch., Dec. 30, 1988) | 25 |
| <u>Ivanhoe Partners v. Newmont Mining Corp.,</u> Del. Supr., 535 A.2d 1334 (1987) | 22 |
| <u>Jedwab v. MGM Grand Hotels, Inc.,</u> Del. Ch., 509 A.2d 584 (1986) | 23 |
| <u>Robert M. Bass Group v. Evans, Del. Ch.,</u> 552 A.2d 1227 (1988) | 19 |
| <u>Smith v. Van Gorkom, Del. Supr.,</u> 488 A.2d 858 (1985) | 5, 19 |
| <u>Unocal Corp. v. Mesa Petroleum Co.,</u> Del. Supr., 493 A.2d 946 (1985) | 3, 4, 7, 19 |
| <u>Weinberger v. Rio Grande Industries Inc.,</u> Del. Ch., 519 A.2d 116 (1986) | 22 |

OTHER AUTHORITIES

| | |
|---|----|
| <u>Restatement (Second) of Trusts,</u> § 297, Comment (a) (1959) | 22 |
|---|----|

Introductory Statement

In 100 pages of briefs, Time and Warner created and attacked a false dichotomy: long-term versus short-term interests. But they managed to virtually ignore a central issue: in response to a non-coercive, all-cash tender offer, Time's board is taking extraordinary actions that will force Time's shareholders to accept an alleged long-term strategy with a present value that is less than Paramount's offer.

Paramount's Position

This case is not about long-term versus short-term interests. A Delaware board clearly has the authority to manage for the long-term. The issue is how to place a rational value on "long-term strategies" so a court can reasonably and predictably review management's claims that it is acting in the shareholders' interests.

The lower court's opinion avoids this issue. The effect of the decision, however, is that as long as management says it is pursuing a "long-term strategy", and that strategy is not obviously suicidal, the board can bar shareholders from considering any alternatives to that strategy. If this is the law, any company that announces it has adopted a long-term strategy is takeover-proof.

Paramount is not arguing that a board must accept an offer simply because it exceeds the current market price. The board can conclude that the current market price does not accurately reflect predictable long-term values. Paramount does argue, however, that directors must manage the company for the benefit of current shareholders, not managers or a

hypothetical group of shareholders years in the future. When directors are presented with a choice between a "long-term strategy" and a current offer for control of the company, they must ask, "What is in the best interests of the shareholders?"

In order to answer this question when comparing a present offer to possible future benefits, the board must consider the difference in value between dollars today and possible dollars in the future. The board must consider the time-value of money and the risk that future dollars will never be received.

What Time's Board Did

The Time board did not make this comparison. It was presented with a negotiable offer for \$175 per share, and then a negotiable offer for \$200 per share. It rejected them both without even talking to Paramount. The Time board then forced upon Time's shareholders a long-term strategy that gives them less than \$175 in present value, even with optimistic projections and conservative discount rates.

There is no rational economic justification for this decision. But the lower court approved it. Indeed, under the lower court's analysis, it would not have mattered if Paramount had offered \$400 per share. The inferior long-term strategy would have prevailed.

Issue Presented

How can Delaware courts predictably enforce the basic principle that a corporation should be managed for the benefit of its shareholders? One of the preeminent virtues of Delaware corporate law is its predictability. Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985), although innovative, was built on existing case law and developed an objective test that could be used in advising clients as well as deciding cases. By allowing sloganeering about "long-term strategy" to prevail over objective economic reality, the lower court has returned Delaware to the days of subjective analysis. The decision will allow any board that is willing to use the proper slogans to insulate its decisions from judicial review.

That is not the law of Delaware. It should not become the law of Delaware. Directors in a Unocal situation must show that their decision was reasonably calculated to yield values for shareholders that are higher than the available alternatives. The Time board did not, and cannot, make that showing. The lower court's decision should therefore be reversed.

Argument

I. TIME'S "LONG-TERM" STRATEGY IS NOT MEANT TO PROVIDE ITS CURRENT SHAREHOLDERS WITH HIGHER VALUES THAN PARAMOUNT'S OFFER; THE "LONG-TERM" STRATEGY IS TO MAINTAIN THE TIME CULTURE IN THE PERSON OF NICHOLAS J. NICHOLAS, JR.

A. Time's "Long-Term Strategy" Has Present Values Less Than \$200 Per Share

Time says that its board saw a threat to Time's "long-term strategic plan." Time Brief at 34-37. But Time never bothers to define what that plan would mean for its shareholders in economic terms. For Time, "long-term strategic plan" is a slogan without content. But content matters. Under Unocal, the only "long-term" strategy that may be protected by a board, when presented with a non-coercive, all-cash offer, is one that leads to increased shareholder value. See City Capital Assocs. v. Interco, Inc., Del. Ch., 551 A.2d 787, 797 (only threat posed by non-coercive, all-cash-for-all-shares tender offer is to "shareholder interests"), appeal dismissed, Del. Supr., 556 A.2d 1070 (1988); Grand Metropolitan PLC v. The Pillsbury Company, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,104 at p. 91,194, Duffy, J. (ret.) (Del. Ch., Dec. 16, 1988) ("only 'threat posed' here is to shareholder value").

Unocal's proportionality test requires an objective comparison between (i) the value of Paramount's offer today and (ii) the present value of Time's long-range objectives. Time's directors have studiously avoided making that comparison -- on appeal, in the Chancery Court and in the Time board

room. Their blind acceptance, instead, of management's estimated trading ranges -- without question or discount -- violates Unocal and the basic duty of care outlined in Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 873 (1985).

When the Time board met to consider Paramount's \$200 offer on June 26, Wasserstein and Shearson Lehman said that if Time's long-range plan were achieved,^{1/} then each share of Time stock might trade in a range of \$106-\$188 in 1990, \$159-\$247 in 1991, \$230-\$332 in 1992, and \$288-\$402 in 1993. A 1477.

The Chancery Court recognized the significance of these undiscounted ranges. "[M]ore significantly, the board understood that immediately following the effectuation of a Warner merger, the stock market price of Time stock was likely to be materially lower than the \$175 then 'on the table,' perhaps \$150, but more likely, within the range of

^{1/} These estimated trading ranges assume that Time will meet ambitious and aggressive financial projections. Time must also achieve substantial, unspecified cost savings (\$50 million in 1990 and \$100 million per year thereafter), and sell significant assets at very favorable prices, and do this without hurting revenues. A 1477; see also A(S) 8-9. Despite serious doubts about the validity of these projections, Paramount will assume their correctness for the purpose of comparing the present value of Time's projected trading ranges with Paramount's offer. A 1501-02.

"A" refers to Plaintiffs Below-Appellants' Joint Appendix. "A(S)" refers to Plaintiffs Below-Appellants' Supplemental Joint Appendix. "B" refers to the Appendix to the Answering Brief of the Time Appellees. "BB" refers to the Appendix of Defendant-Appellee Warner Communications Inc.

\$106 - \$188." A 63-64 (Slip Op. at 45-46). See also A 20 (Slip Op. at 2), A 50-51 (Slip Op. at 32-33).

Devastating as this comparison is, it does not reflect the full gap between Paramount's offer and what Time's board was forcing on its shareholders. The estimated trading ranges provided by Wasserstein and Shearson on June 15 and June 26 were not discounted to present value, to reflect either the time-value of money or the risk that aggressive financial projections might not be achieved.

There is no evidence that any Time directors questioned this failure to discount to present value. There is no evidence that any Time director thought about discounting these future values for their risk. Indeed, there is no evidence the Time directors questioned any assumption underlying these inflated estimated trading ranges before using them to reject Paramount's bid. A 1832-33.

1. The Time-Value Of Money

A dollar five years from now is not the same as a dollar today, even if the payment five years from now is certain. When Time's financial advisors considered possible delays that Paramount might encounter in consummating its offer, Time's directors were quick to apply this basic principle to Paramount's bid. A 1774, A 1776.

J. T. Hill of Shearson told the board:

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

share, and, if a 24% annualized rate is used, the offer would be worth \$135 per share.

A 1776.^{2/} This discount for delay supposedly played a major role in the board's decision to reject Paramount's offers. A 485; A 1813. Yet these very same directors did not consider applying this basic financial analysis to the far more uncertain and distant returns from the Time Warner deal. Their unthinking opposition to Paramount and their unthinking acquiescence in management's position, is a vivid example of how the "omnipresent specter" of self-interest can corrupt a board's reactions to an unsolicited tender offer. Unocal, 493 A.2d at 954.

2. Risks Of The Long-Term Strategy

Time's board did not discount the Wasserstein ranges for the risk that the extremely aggressive income projections would not be reached. Charles Phillips of Dillon, Read stated that future values should be discounted by a rate of between 25% and 30% to reflect the rates of return that equity investors have required from other highly-leveraged companies. A(S) 5-7. That rate takes into account "the inherent uncertainty associated with Time's forecasts for Time-Warner." A 1499. Those uncertainties include, among other things, whether Time can meet its increased revenue projections while simultaneously making

^{2/} Mr. Hill offered the board no explanation for using a twelve-month delay or for using 12% or 24% discount rates. A(S) 54(b)-54(d).

substantial cost savings and asset sales. These uncertainties are exacerbated by the unpredictable nature of Warner's entertainment businesses.^{3/}

Phillips' 25% and 30% discount rates are lower than the 50% discount rate applied by institutional investors to highly-leveraged companies that do not have a track record of meeting projected results. A 1500. That, however, is the position Time Warner will be in following the merger. Indeed, Shearson demands a return on equity for highly-leveraged transactions in excess of 25%. A(S) 39-41.^{4/}

Henry Luce III, the son of Time's founder, admitted his uncertainty about meeting the income projections:

Q. Do you think the current tender offer [for Warner] is more attractive [than the March 3 merger]?

A. Frankly, I do not, no. I guess I do not because I can't -- I don't think we can be sure of Wasserstein's long-term projection and that's -- the future -- one never knows what the future holds.

And so it obviously has its risks and you carry this enormous debt, meanwhile, which is going to be a real burden.

A 1075-76 (emphasis added).

Louis R. Rinaldini of Lazard Freres & Co., Warner's

^{3/} The estimates for future cost cuts were supplied by Time management. They were not investigated or confirmed by Shearson. A(S) 35-38.

^{4/} Mack F. Rossoff of Wasserstein submitted an affidavit criticizing Mr. Phillips' 25 to 30% range, but he did not suggest his own "appropriate" discount rate; he refused even to admit that a discount rate should take into account the time-value of money. A 1526-28.

financial advisor, testified that predictions about Warner's performance beyond two years were inherently unreliable.

Warner does not produce such projections because:

significant portions of the company's business, i.e., the motion picture business and the recorded entertainment business, are of a nature which is not predictable much more than a year in advance and in some cases not even a year in advance.

. . . [W]hile the company, for its own internal purposes, attempts to make projections one or two years in advance, it is not its custom nor does it find it useful to making those projections more than one or two years in advance because of the hit-driven, uncertain nature of the business.

And to speculate on what motion pictures would be made two years from now and how successful they might be, or which recording artist would be successful two or three years from now, renders many of these projections meaningless from a practical point of view.

A(S) 56-58 (Rinaldini Dep.) (emphasis added).

This uncertainty is significant. Warner was expected to contribute more to cash flow than Time, and was a much more rapidly growing company. See e.g., BB 689.

The most astonishing thing about the record is that no one seemed to care about the unreliability of these numbers. Shearson, Wasserstein and Dillon, Read all agree that estimated trading ranges and valuations rest on Time-Warner's projected cash flow. A 1832; A 1525-26; A(S) 4-5. Yet the Time directors did not even consider discounting Wasserstein's estimates, although Mr. Luce and others knew that the projections were unreliable, and the further out into the future they went, the more unreliable they became.

3. Time's Long-Term Strategy,
Discounted To Present Value,
Is Worth Much Less Than \$200

The following chart takes the ranges of trading values given by Time's advisors (see A 1477) and discounts them to present value at 20%, 25%, and 30% discount rates. The figures for 25% and 30% are taken from the Phillips affidavit. A(S) 9-10. The 20% values were reached by a mathematical calculation, one that could have been done for Time's directors if they cared to ask. The table assumes, as did Mr. Phillips, that Time's projected cash flow figures will be achieved and that Time's projected long-range share prices will be reached. A(S) 9-10; A 1493.

If Time's board had asked, it would have learned that using Time's own assumptions and conservative discount rates, the "long term" values it claimed to be protecting were worth less than \$200:

Present Value of Wasserstein-Shearson Projections

| Year Ended | Projected Range | Present Value of Range Discounted At: | | |
|---------------|--------------------|---------------------------------------|-------------|------------|
| | | 20% | 25% | 30% |
| 1991 | \$159-\$247 | \$101-\$157 | \$91-\$141 | \$83-\$128 |
| 1992 | \$230-\$332 | \$122-\$175 | \$105-\$152 | \$92-\$133 |
| 1993 | \$288-\$402 | \$127-\$177 | \$106-\$147 | \$88-\$123 |

To reach a value today of \$200, discounted at 25%, Time's shares would have to trade at \$546 by 1993. That is almost 36% higher than the high end of the estimated range.

4. Time And Warner Have No Answer
To The Board's Failure To Look
At The Present Values Of Its
Long-Term Strategy

Time responds to these harsh economic realities with more generalities about how it must be able to protect a "long-term strategic plan", without saying what values that long-term plan will produce. Time Brief at 35-37. Only Warner tries a rebuttal. It makes three points, each mistaken. Warner Brief at 29-30.

a. The projections for 1993 are
all the Time board was given,
and were more than Warner's
advisors believed were reliable

Warner argues that Paramount "in essence assumes that the combined enterprise will cease to exist in 1993 and that there will be no growth thereafter." Warner Brief at 29. That is not true. 1993 is the last year for which Time's financial advisors gave the Time board any estimates of future trading prices. A 1477. Indeed, given the testimony of Lazard, Warner's advisor, that Warner's revenue projections more than two years into the future are "meaningless" (A(S) 56-58), it strains credulity for Warner to say that Paramount's analysis ended too soon.

- b. The only "uncertainty" about Paramount's offer is when Time will stop trying to delay it

Warner argues that Paramount fails "to discount Paramount's '\$200' per share offer to reflect delay and uncertainty of consummation." Warner Brief at 30. Warner knows -- as does the Chancery Court -- that Time's active opposition to Paramount's efforts to obtain cable regulatory approvals is the only reason to believe that consummation of Paramount's offer might be delayed. A 51-52 (Slip Op. at 33-34) ("In fact, it appears that this point [cable approvals] was seen less as a problem than as an opportunity. Time has been active in trying to impede Paramount's ability to satisfy this condition."). See also A 46 (Slip Op. at 28).

- c. Time's directors could not fairly reject a \$200 per share offer

Warner argues that Paramount mixes "'apples and oranges' when [it compares] the present value of anticipated future stock prices (which do not include a premium for control) with a '\$200' Paramount offer which presumably does include a premium for control." Warner Brief at 29-30. This is misguided for two reasons.

First, when the Time directors chose to preclude Time's shareholders from accepting the Paramount offer in favor of a "long-term strategy", they looked to future trading values, albeit undiscounted, to compare the two alternatives. When they made that comparison they did not

add an acquisition premium to any projected trading range to provide an "apples to apples" comparison. Second, they could have added a control premium. Had they done so, they would have seen the Paramount's \$200 per share today exceeds the present value of future trading ranges even if those future ranges were further inflated by a takeover premium.

In fact, \$200 per share is fair value for Time today, including any acquisition premium. When Wasserstein and Shearson opined that a .465 exchange ratio was fair to Time's shareholders in the original merger, they estimated Time's pre-tax segment value (or private market value) to be in the range of \$189.88 to \$212.25 per share. A 900. Paramount's \$200 per share offer falls squarely within that range. Those estimates increased dramatically in June -- after Paramount made its bid. A 1645.^{5/} If Time's directors had been concerned about the adequacy of Paramount's offer, they would have asked someone to talk to Paramount to learn what its offer might be in a friendly transaction. They never even bothered to do it.

B. Time's Only "Long-Term Strategy"
~~— Is For Nicholas To Succeed Munro~~

Time's strategy should have been to "maximize in the long run financial returns to the corporation and its

^{5/} Time and Warner refer to Morgan Stanley's pre-tax segment valuation of Time at \$218-\$248 per share. Because of Time's low income-tax basis in its assets, Time would sell at a substantial discount to that pre-tax value. See A 1498. The same was true for Warner. A 1928-29.

stockholders." A 36 (Slip Op. at 18). It was not. The objective analysis above shows that Time chose an inferior value for its shareholders.

Why has Time embarked on this obsessive journey to a merger with Warner? The lower court's decision and the record agree: to guarantee that Nicholas would control Time for the next five to ten years. Every other element of the "long-term strategy" is either an after-thought or has been willingly sacrificed in favor of the primacy of Nicholas's succession.

Most striking was the board's willingness to jettison its "long-term strategy" in a moment if Ross would not agree to step aside in favor of Nicholas. A 37-38 (Slip Op. at 19-20). Every other element of the strategy, including cable combinations, movie studios, international distribution, all were worth nothing to Time's board if Nicholas was not guaranteed ultimate supremacy in the new company.

1. Management Succession Was The
Transcendent Aim Of Time's
Management And Board

Time argued that its long-term strategy was the creation of a global, vertically integrated entertainment organization. But the Chancellor found that this goal was not "a transcendent aim of Time management or its board."

A 27 (Slip Op. at 9). The Chancellor found instead that:

More important to both, apparently, has been a desire to maintain an independent Time Incorporated that reflected a continuation of what management and the board regarded as distinctive and important

"Time culture."

A 27-28 (Slip Op. at 9-10).

The continuation of "Time culture" has nothing to do with shareholder values, yet the board was preoccupied with that goal. Time's magazines would account for only 20-25% of the revenues of the merged Time-Warner (TIME magazine is only a small fraction of that) (A 1102), but the board concluded that "The Time Culture" needed a guardian. Nicholas was the only candidate considered for the job.^{6/} But as the Chancellor observed:

maintaining a Time culture -- all the outside directors except Temple agree -- was the first and central requirement and could only be assured by securing the top job ultimately for Mr. Nicholas.

A 34 (Slip Op. at 16) (emphasis added).

2. Every Element of Time's Long-Term Strategy Has Been Sacrificed,
Except For Nicholas' Succession

Time's directors succeeded in ensuring that Munro and Nicholas and Levin have "long-term" protection through long-term contracts. A 496-501.^{7/} But other elements of this supposed long-term strategy have been abandoned.

^{6/} Mr. Nicholas was an odd choice for his role as guardian of the Culture. He had never worked on a magazine, never edited an article, never produced a television show or film. His background was in the financial divisions of Time. A(S) 53-54. Yet the Time board concluded that only Mr. Nicholas could guard the Time Culture. All other parts of the "long-term strategy" would be subservient to that goal. A 34 (Slip Op. at 16).

^{7/} Curiously, long-term contracts at high levels of compensation were not a part of the Time Culture. A 1071-72; A 1482-83.

a. Preservation of editorial integrity
was quickly and readily sacrificed

On August 4, 1988, Munro told Time's directors that Time had "successfully negotiated certain corporate governance arrangements." A 1132 (emphasis added). Editorial integrity would be protected by the creation of an "Editorial Committee" composed of four Time directors and two Warner directors. The composition of this committee could only be amended by a vote of at least two-thirds of the entire Time-Warner board. A 1138.

At Mr. Ross's request, this protection was not included in either the March 3 or June 16 Merger Agreements. A 1905. The preservation of editorial integrity was left to two men, neither of whom had any journalistic background. B 419; A(S) 53-54.

Director Luce identified Munro and Nicholas as executives who

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.

A(S) 43-45.

Even within Time the preservation of editorial integrity took a backseat to pushing the Warner merger. Time's Editor-In-Chief, Jason McManus, is a director. He participated in the June board meetings while he was editing Time's coverage of the Paramount bid. This conflict did not trouble Munro:

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

A(S) 50 (emphasis added). So much for "separation of church and state".

- b. Time's long-term goal of a debt-free company was scrapped in an instant

This Court should be skeptical of Time's protestations about its long-held goals. For three months after the original deal was approved, Time told everyone that its long-term goal was a debt-free combination with Warner. A 1121-22; A 1130.

On June 13, only three days before Time's tender offer for Warner was announced, Time and Warner were still willing to represent to governmental bodies that the debt-free aspect of the merger was crucial. Martin Lipton, counsel for Warner, and Samuel Butler, counsel for Time, wrote a letter to the New York Stock Exchange asking for permission to consummate the original merger without Time shareholder approval. A 1065. In that formal application to the Exchange, Mr. Lipton and Mr. Butler spoke in anguished terms about the devastating effects of forcing Time to engage in a leveraged acquisition. They argued that "the practical effect of requiring a Time shareholder vote on the proposed stock merger would be to favor highly-leveraged, risky acquisition structures." A 1067.

This apocalyptic rhetoric was a tactic, nothing more. Time now claims that it always wanted to do a debt-laden highly-leveraged transaction, without pooling-of-interests accounting. In fact, everything Time told the President, and the House, and the Senate, about Time's first long-term strategy has been forgotten.

A simple process of elimination discloses Time's only true "long-term strategy". The new Time-Warner will be a highly-leveraged company with significantly fewer assets. A 1078; A 1465; A 1477; A 1832-33. Thus, the long-term policy is not a debt-free merger, or one that will allow pooling of interests. It is not a merger that will allow Time to buy and keep cable companies. It is not a merger that will provide any guarantees that the 12 new Warner directors will not influence Time's editorial policy. It is not a merger that will leave TIME magazine a major contributor to the company. In fact, the "long-term strategy" is not a merger with Warner, since even that goal was dropped instantly in 1988 when Ross would not agree to step aside.

What then is Time's long-term strategy? It is management succession and preservation of the Time Culture. The Time board would settle for nothing less; it has given the shareholders nothing more.

C. Time's Board Did Not Fulfill Its Duty
Of Inquiry Before Rejecting Paramount's
Offer And Forcing A "Long-Term
Strategy" On Time's Shareholders

Time's directors should have had a reasonable basis for their decisions about (i) the value of the long-term strategy, and (ii) the comparable value of the Paramount offer. Unocal, 493 A.2d at 955; Smith v. Van Gorkom, 488 A.2d at 872; Robert M. Bass Group v. Evans, Del. Ch., 552 A.2d 1227, 1241 (1988). In fact, the directors did not care to investigate either issue. They preferred to protect the Time Culture, which apparently had nothing to do with providing rational economic values to Time's shareholders.

Time's directors responded with exceptional speed to Paramount's offers. They effectively rejected the \$175 offer one day after it was made. They formally rejected the revised \$200 offer three days after it was made. Particularly telling is the way that Time's board rejected the \$200 per share offer.

On June 23 Martin Davis wrote to Time's board. He said that Paramount was still willing to negotiate price. He also said that Paramount was willing to provide whatever assurances Time wanted about preserving journalistic integrity. A(S) 51.

Time's board rejected the offer and ignored the letter. Not one director suggested talking to Davis. The Time directors, fixated on their long-term strategy of preserving management and the Time Culture, did not concern

themselves with asking (i) how much Paramount might pay, (ii) what kind of guarantees of editorial independence Paramount might give, or (iii) what was the present value of the estimated trading ranges they were being given by management's financial advisors.

1. Paramount's Price: No Investigation

Time's board does not know if Paramount can be induced to go substantially higher than \$200 per share. They never asked. Paramount is not seeking to impose a duty to negotiate. But before Time's board launches on a voyage of no return, the directors of Time should have some idea what Paramount's final offer could be. They do not know; they never bothered to ask.

2. Editorial Integrity: No Investigation

There is nothing in the record to suggest that Paramount is unable to provide assurances of editorial integrity. Paramount's Simon & Schuster and Prentice Hall publishing subsidiaries have a long history of publishing without any suggestion that journalistic integrity has been compromised for business reasons. But it is clear from the record that it did not matter what Paramount offered in cash or guarantees. Paramount would not guarantee that Nicholas would be CEO. A 1487-91. Paramount thus would not guarantee the only part of the "long-term strategy" that mattered to Time's board. It was therefore "inconceivable" that Paramount could purchase Time's shares, at any price.

A 1038, A 1080-83, A 1269-71.

3. Present Value Of Projected Trading
Ranges: No Investigation

To properly compare the Paramount offer with their new and preclusive offer for Warner, Time's directors had to put a present value on the projected benefits of the Warner merger. Yet the Time directors never received such information, and apparently never asked for it.

The Time board does include executives of major companies. But conduct -- not status -- is what counts. The Time directors adopted a quiescent, passive attitude when presented with statements by management and management's advisors that the Paramount offer should be rejected in favor of "pie in the sky" projections. Their lack of investigation and lack of skepticism led them to decisions that are inconsistent with a rational judgment about the benefits to Time's shareholders of the available alternatives.

Time's directors left this rational analysis to the lower court. Unfortunately, the Chancellor deferred as uncritically to the Time directors as the directors did to Time's management. Unless the Time shareholders are to be deprived of \$200 per share through a chain of deference, ending in complete reliance on self-interested management and management's financial advisors, this Court should reverse.

II. WARNER'S CONTRACTUAL RIGHTS DO NOT
PRECLUDE THE ENTRY OF A PRELIMINARY
INJUNCTION RESTRAINING THE TIME OFFER

Although the Chancellor did not reach this issue, Warner argues that it would be improper to enjoin the tender offer, because of the impact on Warner's rights. Warner is wrong. First, Warner aided and abetted the Time directors' breach of duty. Second, Warner gained its rights fully aware of the prior claims of the Time shareholders, and its rights are subject to those prior claims.

A. Warner Aided And Abetted A
Breach Of Fiduciary Duty

A knowing participant in a breach of fiduciary duty cannot complain about an injunction stopping the illegal plan. See Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1344 (1987); Weinberger v. Rio Grande Industries Inc., Del. Ch., 519 A.2d 116, 131 (1986). This is not limited to those with "actual knowledge" of the breach. See Deutsch v. Cogan, Del. Ch., C.A. No. 8808, Hartnett, V.C. (Apr. 11, 1989) (Slip Op. at 7-8); Restatement (Second) of Trusts, § 297, Comment (a) (1959).

—Warner not only knew all the facts concerning the breach, it proudly asserts that some of the most egregious actions were at its urging. After the Stock Exchange refused to give Time an exemption from the rules, Ross gave "marching orders" to Ed Aboodi, Warner's chief negotiator, to get a "no outs" deal. BB 899, B 523. Aboodi succeeded, to the detriment of Time's shareholders. Warner is not an innocent

by-stander.

B. Warner Had Notice Of The Breach Of
Fiduciary Duty Claims, And Its Rights
Are Subject To Such Claims

Warner does not have to be an aider and abettor. Warner received its contractual "rights" knowing there were claims that Time's directors were breaching their fiduciary duties, and took subject to those claims. See Jedwab v. MGM Grand Hotels, Inc., Del. Ch., 509 A.2d 584, 600 n.12 (1986); Garner v. Pearson, 545 F. Supp. 549, 564 n.19 (M.D. Fla. 1982).

III. PARAMOUNT AND THE OTHER TIME SHAREHOLDERS
WILL BE IRREPARABLY INJURED IF TIME'S
TENDER OFFER IS NOT ENJOINED

Time, Warner, and the lower court blurred together two preclusive effects of the Time Warner deal: (i) preclusion of an offer anywhere near \$200 per share in the foreseeable future, and (ii) preclusion of an offer for Time at any price. Focusing on whether the Time Warner deal precludes any offer obscures an undisputed fact: in all the evidence submitted to the Chancellor on the preliminary injunction hearing, there was not one shred of evidence that there could be an offer for the combined Time Warner entity at \$200 per share or more in the foreseeable future.

Stephen Waters of Morgan Stanley stated in an affidavit that it was probable no offer could ever be made for the combined Time Warner, and it was certain no offer could be made anywhere near \$200 per share. A 1509-11. In

response, Frederick Seegal of Shearson said that it would be possible to raise enough money to make an offer for the combined company -- he did not say at what price. B 940-41. He completely ignored Waters's second point, that no offer could be made at anywhere near \$200. Indeed, no one from Time has ever suggested a price at which an offer could be made for the combined companies.^{8/}

The lower court recognized that the merger could block any offer. With respect to the original Time Warner merger, the court below said, "It does seem reasonable to assume, however, that effectuation of the merger would, as a practical consequence, reduce the likelihood of a [future control premium or private market] transaction substantial-ly." A 79 (Slip Op. at 61) (emphasis added). This applies with even greater force to the new transaction, which will add massive debt a company far less able to service that debt than a company such as RJR Nabisco. A 1509-11.^{9/}

If the lower court is not reversed, Paramount will have lost forever the opportunity to purchase Time in any-

^{8/} Three days after the preliminary injunction hearing, Jonathan O'Herron, an investment banker for Warner, submitted an affidavit that suggests, in highly speculative terms, that at some unspecified time in the future, some unspecified acquiror might be willing to pay \$200 per share for Time-Warner. BB 56-57. No one representing Time has supported this bit of speculation.

^{9/} Mr. Davis, after noting that he had not studied the issue, answered a series of hypothetical questions by saying he would have to see the financial situation before answering. This is hardly proof that a \$30 billion all-cash tender offer for Time Warner is possible.

thing approaching its current condition. See In Re Holly Farms Corp. Shareholders Litigation, [1988-89 Transfer Binder] Fed Sec. L. Rep. (CCH) ¶ 94,181 at 91,645 (Del. Ch., June 14, 1989) The other Time shareholders will have lost \$200 or more for their stock, a loss that may total billions of dollars. This is irreparable injury.


Conclusion

For all the reasons set forth above and in the opening brief, and in the pleadings and proceedings below, Paramount respectfully submits that the Order of the Court of Chancery should be reversed and its amended Motion for a Preliminary Injunction granted.

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Respectfully submitted,

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