Associates Limited v. Interco, Inc., Del. Ch., 551 A.2d 787 (1988); *Robert M. Bass Group, Inc. v. Edward P. Evans*, Del.

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Ch., 552 A.2d 1227 (1988); *AC Acquisition Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103 (1986). This question is discussed at p. 68-77 below.

IV.
Were the Time Directors Under an Obligation To Seek, in Good Faith, Only to Maximize Current Share Value on June 16?: Plaintiffs' Revlon Argument

A.

Plaintiffs' first argument,[17] restated most simply, is that the original merger agreement constituted an implicit decision by the board of Time to transfer control of the company to Warner, or more correctly its shareholders, and when the board decided to consider doing that, its duties changed from long-term management of the corporation for the benefit of the company's shareholders to the narrow and specific goal of present maximization of share value. That is, it entered a "Revlon mode." *See Revlon v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173, 182 (1986). The class action plaintiffs assert that any change in corporate control triggers this special duty. The individual

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shareholder plaintiffs urge a different theory as triggering the special Revlon duty. They contend that the original merger, if effectuated, would have precluded the Time shareholders from ever (that is, in the foreseeable future) realizing a control premium transaction, and thus, in its impact upon Time shareholders, the merger contemplated by the March 3 agreement would have implicitly represented the same loss of a control premium as would a change in control transaction with no premium. Thus, these plaintiffs assert that even if

17. This argument is advanced principally by the shareholder plaintiffs.

the stock for stock merger did not represent a change in control, the same duty to maximize current value should attach to it as to a "sale."

Plaintiffs, having purportedly shown that the board really was in a Revlon mode, then go on to argue that the board violated its Revlon duty by not seeking a *current* value maximizing transaction and by entering into a number of agreements that were intended to preclude or impede the emergence of current value maximizing alternatives. These agreements include the "dry up" fee payments, the Share Exchange Agreement and the restrictions on supplying information to or entering into discussions with anyone seeking to acquire control of Time.

Defendants respond first that the board did not consider that it was appropriate in March or thereafter to "sell" the company; the purpose of the original merger was quite the opposite in that it sought to preserve and improve the company's long-term performance. Second, defendants say that if something other than their subjective intention is relevant, it simply is not the case that the stock for stock merger they authorized represented a change in control. It is irrelevant in their view that some 62% of the equity of Time would be owned by former Warner shareholders after the merger, that Mr. Ross would serve as co-CEO or that half of the members of the enlarged board would be former Warner directors. There was no control block of Time shares before the agreement and there would be none after it, they point out. Before the merger agreement was signed, control of the corporation existed in a fluid aggregation of unaffiliated shareholders representing a voting majority—in other words, in the market. After the effectuation of the merger it contemplated, control would have remained in the market, so to speak.

As to the individual plaintiffs' theory, defendants say it is flawed in law and in fact. Legally, they contend that a transaction that is otherwise proper cannot be deemed to trigger the radical "Revlon mode" obligations simply because it has the effect of making an attempted hostile takeover of the corporation less likely. All manner of transactions might have that effect and our cases, it is said, have explicitly rejected the notion that a would-be acquiror can compel a target to maintain itself in status quo while its offer proceeds. *See, e.g.*, *USI, Inc. v. Walbro Corp.*, Del. Ch., C.A. No. 9323 (October 6, 1987; *City Capital Associates Limited v. Interco Inc.*, Del. Ch., 551 A.2d 787 (1988) at 800-01.

Factually, defendants claim that this record does not establish a reasonable probability that the initial merger, if it had been consummated, would have precluded a future change in control transaction. The merged Time-Warner company would be large, it is true (a "private market" value approaching $30 billion, it is said), but recent history has shown that huge transactions can be done. While such a transaction would be rare, if a leveraged acquisition of both participants was feasible before the merger, one cannot say that a stock for stock consolidation of such firms would necessarily preclude an acquisition of it thereafter, or so defendants contend.

[8] In *Mills Acquisition Co. v. Macmillan, Inc.*, Del. Supr., Nos. 415 & 416 (May 3, 1989), the Supreme Court, while noting that there was no need for it to address in detail the question when *Revlon* duties arose, did note that:

> Clearly not every offer or transaction affecting the corporate structure invokes the *Revlon* duties. A refusal to entertain offers may comport with a valid exercise of business judgment. *See Bershad*; *Ivanhoe* at 1341-42; *Pogostin*, 480 A.2d at 627; *Aronson*, 473 A.2d at 812-16. Circumstances may dictate that an offer be rebuffed, given the nature and timing of the offer; its legality, feasibility and effect on the corporation and the stockholders; the alternatives available and their effect on the various constituencies, particularly the stockholders; the company's long-term strategic plans; and any special factors bearing on stockholder and public interests. *Unocal*, 493 A.2d 954-56. *See also Smith*, 488 A.2d 872-78. In *Ivanhoe* we recognized that a change in corporate structure under the special facts and circumstances of that case did not invoke *Revlon*. 535 A.2d at 1345.

Mills Acquisition Co. v. Macmillan, Inc., *supra*, at p. 55, n. 35.

[9] Elsewhere in *Macmillan* our Supreme Court did indicate that a board may find itself in a Revlon mode without reaching an express resolve to "sell" the company:

> At a minimum, *Revlon* requires that there be the most scrupulous adherence to ordinary principles of fairness in the sense that stockholder interests are enhanced, rather than diminished, in the conduct of an auction for the sale of corporate control. *This is so whether the "sale" takes the form of an active auction, a management buyout, or a "restructuring" such as that which the Court of Chancery enjoined in Macmillan I. Revlon*, 506 A.2d at 181-82.

Id. at p. 56 (emphasis added).

[10] Thus, I do not find it dispositive of anything that the Time board did not expressly resolve to sell the company. I take from *Macmillan*, however, and its citation of the earlier *Macmillan I* opinion in this court, that a corporate transaction that does represent a change in corporate control does place the board in a situation in which it is charged with the single duty to maximize current share value. I cannot conclude, however, that the initial merger agreement contemplates a change in control of Time. I am entirely persuaded of the soundness of the view that it is irrelevant for purposes of making such determination that 62% of Time-Warner stock would have been held by former Warner shareholders.

[11] If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger. This in my judgment was the situation with respect to the original merger agreement. When the specifics of that situation are reviewed, it is seen that, aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of Mr. Nicholas, neither corporation could be said to be

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acquiring the other. Control of both remained in a large, fluid, changeable and changing market.

The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of "minority" stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders. But here, effectuation of the merger would not have subjected Time shareholders to the risks and consequences of holders of minority shares. This is a reflection of the fact that no control passed to anyone in the transaction contemplated. The shareholders of Time would have "suffered" dilution, of course, but they would suffer the same type of dilution upon the public distribution of new stock.

B.

More subtle is Literary Partners' argument that the preclusion of a future change in control transaction ought to be deemed to trigger Revlon duties, to which I now turn.

The argument, as I understand it, is that the original Time-Warner merger, even if it represented no change in control, precluded a future control premium or private market transaction and that as a consequence of that fact, the directors' fiduciary duties required them to capture a control premium now—to sell the company. This brief restatement lacks much of the subtlety of the individual plaintiffs' moderate and skillful advocacy, but is, I think, essentially the argument.

[12-13] It is plain that the original transaction did not legally preclude or impede a later sale or change in control transaction. It does seem reasonable to assume, however, that effectuation of the merger would, as a practical consequence, reduce the likelihood of such a transaction substantially. Our cases, however, have stated the obvious: a would-be acquiror (or the target company's shareholders) has no right to stay the exercise of director power under Section 141 pending the resolution of an attempt to acquire control. So long as the board acts in good faith and deliberately, its acts during such period will be undisturbed unless they are found to be defensive, in which event they must be shown to be reasonable in relation to a threat posed by the offer under *Unocal*. Thus, for example, in *USI v. Walbro*, *supra*, it was said at pp. 8-9:

> [I]t is well established that a tender offeror has no right to freeze the business he seeks to acquire while his offer goes forward. Not only has a board the responsibility to continue to manage the enterprise generally, but a board, if it acts in good faith and with due care, may also take steps to defeat a tender offer that it finds to be unfair to some shareholders. In taking such action, a board necessarily acts under the suspicion that it seems to protect its personal

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> interests. Thus, those actions must pass later judicial review as being reasonable in relation to a threat to corporate or shareholder welfare. But action designed to defeat a tender offer that the board finds to be at an unfair price—particularly an offer that is for less than all of the stock and has no announced second step at all—is not *ipso facto* invalid

> simply because it is effective and thus does deprive some shareholders of an option they might have taken. With these generalities in mind, it seems a stretch to seek to enjoin as yet unproposed transactions that may have the effect of making the Company a less desirable or less practically achievable target to a particular tender offeror.

In *Interco*, among the propositions addressed was the question whether the sale of a division should be enjoined pending completion of the contest for control that was going forward. A number of circumstances indicated that the transaction could be expected to have only modest impact upon the prospects of the pending offer. That fact compelled the conclusion that the asset sale there involved was reasonable under *Unocal*. The general formulation, however, has some bearing on the present argument:

> The question of reasonableness in this setting seems rather easy. Of course, a board acts reasonably in relation to an offer, albeit a noncoercive offer, it believes to be inadequate when it seeks to realize the full, market value of an important asset.
>
> * * * *
>
> I do understand that this step [the sale of a substantial division] complicates [the bidder's] life and indeed might imperil CCA's ability to complete its transaction. CCA, however, has no right to demand that its chosen target remain in status quo while its offer is formulated, gradually increased and, perhaps, accepted.

Interco, 551 A.2d at 801.

[14] The individual plaintiffs' argument is an argument for extension of the *Revlon* case beyond sales or other change in control transactions. I have earlier expressed the view that *Revlon* was not a radical departure from existing Delaware, or other, law (*i.e.*, it has "always" been the case that when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price), as well as the view that to be in a Revlon mode is for a director to be in a radically altered state. The suggested rule, however, would constitute an expansion of *Revlon* beyond the traditional principle alluded to above which underlies that case. Plaintiffs can cite no authority compelling or commanding this expansion, which would dramatically restrict the functioning of the board whenever an offer was made. Under our law, the validity of

"defensive" measures is addressed under a *Unocal* analysis, not under the narrower *Revlon* case.

V.
Did the Combination of Circumstances Existing on June 16 Impose Upon the Time Board a Fiduciary Obligation to Afford to Shareholders a Choice With Respect to Whether the Corporation Should be "Sold" or Managed for the Long-Term?

This is the second overarching question referred to above. Two legal theories are advanced by plaintiffs in support of their position that the board was under a duty to provide, or at least not practically preclude, a choice to accept the Paramount offer or another, higher offer for sale of the entire company now. The first, simpler, theory relates to the franchise; the second to the analysis of "defensive" corporate acts envisioned by the important *Unocal* case. *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985).

A. The recasting of the transaction in a form that avoided a shareholder vote when the vote seemed destined to go against management

[15] The principle is well established in Delaware law that manipulation of the corporate machinery for the accomplishment of inequitable purposes will not be countenanced. *E.g.*, *Schnell v. Chris-Craft Industries*, Del. Supr., 285 A.2d 437 (1971); *Frantz Manufacturing Company v. EAC Industries*, Del. Supr., 501 A.2d 401 (1985); *Canada Southern Oils, Ltd. v. Manabi Exploration Co., Inc.*, Del. Ch., 96 A.2d 810 (1953); *Aprahamian v. HBO & Co.*, Del. Ch., 531 A.2d 1204 (1987); *Blasius Industries, Inc. v. Atlas Corp.*, Del. Ch., C.A. No. 9720 (July 25, 1988).

Primary reliance is placed upon the recent decision in *Blasius v. Atlas*. There, a board acted in apparent good faith to prevent an already commenced consent solicitation from having the effect that it was intended to have by the consenting shareholders. Specifically, the board used its legal power to fill vacancies on the board so that the holders of a (presumed) majority of shares could not appoint the number of directors, through the consent "vote," necessary to confer effective control upon the consent-designated directors.

It was there held that such action, even if taken in the good faith belief that it was necessary to protect the corporate enterprise from likely harm from the untenable business plan espoused by the shareholders initiating the consent, involved the basic allocation of power between shareholders and directors; and that action, designed and effectuated to thwart the election of directors by consent, was not the sort of question that was entitled to the presumption of validity of the business judgment rule (*see* slip op. at 21-24), but required the board to demonstrate a compelling justification for such action. *See Blasius*, at 25-31; *Aprahamian*, 531 A.2d at 1206-07; *Phillips v. Insituform of North America, Inc.*, Del. Ch., C.A. No. 9173 (August 27, 1987) at 23-24. *But see American Rent-A-Car, Inc. v. Cross*, Del. Ch., C.A. No. 7583 (May 9, 1984). In *Blasius*, defendants were found to have offered no compelling justification for their action that in effect disenfranchised shareholders in the process of exercising the consent power.

[16-18] Plaintiffs' reliance upon *Blasius* is misplaced here. There are critical distinctions between the facts of that case and this one. There, the shareholders were in the process of exercising statutorily conferred rights to elect directors through the consent process. *See* 8 *Del. C.* § 228. In contrast, Delaware law created no right in these circumstances to vote upon the original Warner merger.[18] Indeed, a merger transaction requires board determination approving an agreement of merger. *See* 8 *Del. C.* § 251(b). I am aware of no principle, statute or rule of corporation law that would hold that once a board approves an agreement of merger, it loses power to reconsider that action prior to a shareholder vote. Equally fundamentally, Delaware law creates no power in shareholders to authorize a merger without the prior affirmative action of the board of directors. Thus, a board

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resolution rescinding approval of an agreement of merger and removing the matter from the agenda of an annual meeting is altogether different from a resolution designed to interfere with the statutory shareholder power to act through consent.

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18. Recall that it was only NYSE rules that prompted the proposed submission of that transaction to the Time annual meeting.

This case is closer to (indeed *a fortiori* of) *American Rent-A-Car, Inc.*, *supra*, in which this court declined to enjoin action authorized by a bylaw which was amended by the board at a time when it seemed quite likely to fail of stockholder approval.[19] *See also Lowenschuss v. The Option Clearing Corporation*, Del. Ch., C.A. No. 7972 (March 26, 1985) (failure to achieve shareholder approval of recapitalization of Phillips Petroleum Company did not provide basis to enjoin board authorized self-tender and buyback of shares that had similar financial effect).

I therefore conclude that plaintiffs have not shown that the June 16 decision to recast the transaction entailed any intrusion upon the effective exercise of a right possessed by the shareholders, either under our statutes or under the corporation's charter. The June 16 decision can therefore not

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be seen as implicating the policy of protection of the corporate franchise, which our law has studiously sought to protect.

B. The claim that the Warner tender offer is a disproportionate response to a non-coercive Paramount offer that threatens no cognizable injury to Time or its shareholders

1. Does Unocal apply?

Powerful circumstances in this case include the fact that the original Time-Warner merger agreement was, or appears at this stage to have been, chiefly motivated by strategic business concerns; that it was an arm's-length transaction; and, that while its likely effect on reducing vulnerability to unsolicited takeovers may not have been an altogether collateral fact, such effect does not appear to be

19. In *Blasius*, I noted my own view that judicial review of franchise issues does not fall into a business judgment format and noted that *American Rent-A-Car* indicated a contrary approach. That observation on form of review did not extend to the substantive holding of the case. *See Blasius*, slip op. at n. 5.

predominating.[20] Time urges that judicial review of the propriety of the Warner tender offer should involve the same business judgment form of review as would have been utilized in a challenge to the authorization of the original merger agreement. It cites the case of *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690 (2d Cir. 1980) as its authority for this position, and contends that the inclusion of that authority in a string of citations in the *Unocal* opinion supports the notion that the rearrangement of a preexisting transaction in reaction to a hostile takeover qualifies for "unenhanced" (by *Unocal*) business judgment review. Even the quickest review of *Unocal* demonstrates that in citing that case in the place that it did, our Supreme Court was not intending to implicitly, indeed silently, create an exception to the innovative and important rule that it there announced.

[19-20] Moreover, a rather lengthy list of cases from this court has construed *Unocal* to mean that its form of review applies, at the least, to all actions taken after a hostile takeover attempt has emerged that are found to be defensive in character.[21] *See, e.g.*, *AC Acquisition Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103, Allen, C. (1986); *Robert M. Bass Group, Inc. v. Edward P. Evans*, Del. Ch., 552 A.2d 1227 (1988); *The Henley Group, Inc. v. Santa Fe Southern Pacific Corp.*, Del. Ch., C.A. No. 9569, Jacobs, V.C. (March 11, 1988); *Doskocil Companies Inc. v. Griggy*, Del. Ch., C.A. Nos. 10095, 10106, 10107, 10108, 10116, Berger, V.C. (August 18, 1988), slip op. at 18-19. Thus, while the preexistence of a potential transaction may have pertinence in evaluating whether implementing it or a modified version of it after the board is under attack is a reasonable step in the circumstances, that fact has not been thought in this court to authorize dispensing with the *Unocal* form of analysis. The risks that *Unocal* was shaped to protect against are equally present in such instances.

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20. This fact distinguishes in a material way the case of *AC Acquisition Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103 (1986) which originated from a threat to the existing control arrangement. Other material distinctions are that the two transactions there involved were competing versions of a "bust up" plan for the corporation as it had existed and the board could not determine that either was inadequate.

21. When I say at the least, I refer to fact that the *Unocal* form of analysis will also be utilized when a preemptive defensive measure is deployed, where the principal purpose of the action (and not simply a collateral, practical effect) is defensive in a change of control sense. *E.g.*, *Moran v. Household International, Inc.*, Del. Supr., 500 A.2d 1346 (1985).

Factually it is plain, indeed Time's Schedule 14D-9 filing admits, that the reformatting of the stock for stock merger into a leveraged purchase transaction was in reaction to the emergence of the Paramount offer and its likely effect on the proposed Warner transaction. *See* pp. 36-37, *supra*.

2. Does the Paramount all cash, all shares offer represent a threat to an interest the board has an obligation or a right to protect by defensive action?

Unocal involved a partial offer for cash; consideration in the second-step merger was to be highly subordinated securities. Equally significant, the facts there justified "a reasonable inference" that the "principal objective [of the offeror was] to be bought off." Thus, the case presented dramatically and plainly a threat to both the shareholders and the corporation.

[21] In two cases decided during the last year, this court has held under similar circumstances that an all cash, all shares offer falling within a range of value that a shareholder might reasonably prefer, to be followed by a prompt second-step merger for cash, could not, so long as it involved no deception, be construed as a sufficient threat to shareholder interests to justify as reasonable board action that would permanently foreclose shareholder choice to accept that offer. *See Grand Metropolitan PLC v. The Pillsbury Company*, Del. Ch., C.A. No. 10319, Duffy, J. (December 16, 1988); *City Capital Associates v. Interco Incorporated*, Del. Ch., 551 A.2d 787 (1988). *Cf. Shamrock Holdings, Inc. v. Polaroid Corp.*, Del. Ch., C.A. Nos. 10075, 10079, 10582 and 10585, Berger, V.C. (March 17, 1989), slip op. at 29-32. Those cases held that in the circumstances presented, "whatever danger there is relates to shareholders and that concerns price only." *Pillsbury*, *supra*, slip op. at 17-18, or that "in the special case of a tender offer for all shares, the threat posed, if any, is not importantly to corporate policies . . . but rather . . . is

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most directly to shareholder interests." *Interco*, 551 A.2d at 796.

Plaintiffs argue from these cases that since the Paramount offer is also for all shares and for cash, with a promised second-step merger offering the same consideration, the only interests the board may legitimately seek to protect are the interests of shareholders in having

the option to accept the best available price in a sale of their stock. Plaintiffs admit that this interest would justify defensive action at this stage. The board may leave its stock rights plan in place to provide it time to conduct an auction or to arrange any other alternative that might be thought preferable to the shareholders. But, they say, this stockholder interest cannot justify defensive action (the revised merger) that is totally unrelated to a threat to shareholders.

In my opinion, the authorities relied upon do not establish that Time, as a corporate entity, has no distinct legally cognizable interest that the Paramount offer endangers. In each of those cases, the board sought to assure continued control by compelling a transaction that itself would have involved the sale of substantial assets, an enormous increase in debt and a large cash distribution to shareholders. In other words, in those cases, management was presenting and seeking to "cram down" a transaction that was the functional

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equivalent of the very leveraged "bust up" transaction that management was claiming presented a threat to the corporation.

[22] Here, in sharp contrast, the revised transaction, even though "reactive" in important respects, has its origin and central purpose in *bona fide* strategic business planning, and not in questions of corporate control. *Compare AC Acquisition Corp.*, *supra* (recapitalization had its genesis in a threat to corporate control posed by the imminent termination of trusts that had exercised effective control for years); *Robert M. Bass Group v. Evans*, *supra* (recapitalization under consideration prior to acquisition proposal would have shifted control to management group of a substantial portion of corporation's assets). To be sure, Time's management and its board had, at all times, one eye on the takeover market, considered that market in all they did, and took steps to afford themselves the conventional defenses. But I do not regard that fact as darkly as do plaintiffs. It is inevitable today for businessmen to be mindful of this factor. At this stage, I do not regard the record as establishing, as was done in *AC Acquisitions*, *Bass*, *Interco* or *Pillsbury*, that there is a reasonable likelihood that such concern provided the primary motivation for the corporate transaction. Nor is this transaction an alternative to the sale Paramount proposes (*i.e.*, the functional equivalent) in the way the enjoined transaction in the cited cases can be said to be equivalents of sales.

The more apt parallel than the cited cases is provided by the recent decision in *Shamrock Holdings, Inc. v. Polaroid Corp.*, Del. Ch., C.A. Nos. 10075 and 10079, Berger, V.C. (January 6, 1989). There, this court found "entirely fair" a transaction (the establishment of an Employee Stock Ownership Plan) that had a significant anti-takeover effect, largely because it was a transaction that had been planned prior to the emergence of the acquisition attempt, plainly could be thought to serve long-term profit maximizing goals, and did not appear motivated primarily as a device to affect or secure control.

Similarly here, I conclude that the achievement of the long-term strategic plan of the Time-Warner consolidation is plainly a most important corporate policy; while the transaction effectuating that policy is reactive in important respects (and thus must withstand a *Unocal* analysis), the policy itself has, in a most concrete way, its origin in non-defensive, *bona fide* business considerations. In this respect, the Second Circuit's opinion in *Crouse-Hinds* is instructive if not directly applicable. Moreover, the Paramount offer and the Warner merger are not, conceptually, alternative transactions; they are alternatives at the moment only because Paramount has conditioned its offer as it has.

[23] In my opinion, where the board has not elected explicitly or implicitly to assume the special burdens recognized by *Revlon*, but continues to manage the corporation for long-term profit pursuant to a preexisting business plan that itself is not primarily a control device or scheme, the corporation has a legally cognizable interest in achieving that plan. Whether steps taken to protect transactions contemplated by such plan are reasonable in all of the circumstances is another matter, to which I now turn.

3. Is the Warner tender offer a reasonable step in the circumstances?

This step requires an evaluation of the importance of the corporate objective threatened; alternative methods for protecting that objective; impacts of the "defensive" action and other relevant factors. In this effort it is prudent to keep in mind that the innovative and constructive rule of *Unocal* must be cautiously applied lest the important benefits of the business judgment rule (including designation of authority to make business and financial decisions to agencies, *i.e.*, boards of directors, with substantive expertise) be eroded or lost by slow degrees. *See Interco*, 551 A.2d at 796.

[24] In this instance, the objective—realization of the company's major strategic plan—is reasonably seen as of unquestionably great importance by the board. Moreover, the reactive step taken was effective but not overly broad. The board did only what was necessary to carry forward a preexisting transaction in an altered form. That "defensive" step does not legally preclude the successful prosecution of a hostile tender offer. And while effectuation of the Warner merger may practically impact the likelihood of a successful takeover of the merged company, it is not established in this record that that is foreclosed as a practical matter. Recent experience suggests it may be otherwise. *In Re RJR Nabisco, Inc. Shareholders Litigation*, Del. Ch., C.A. No. 10389 (January 31, 1989).

I therefore conclude that the revised merger agreement and the Warner tender offer do represent actions that are reasonable in relation to the specific threat posed to the Warner merger by the Paramount offer.

* * * * *

Reasonable persons can and do disagree as to whether it is the better course from the shareholders' point of view collectively to cash out their stake in the company now at this (or a higher) premium cash price. However, there is no persuasive evidence that the board of Time has a corrupt or venal motivation in electing to continue with its long-term plan even in the face of the cost that that course will no doubt entail for the company's shareholders in the short run. In doing so, it is exercising perfectly conventional powers to cause the corporation to buy assets for use in its business. Because of the timing involved, the board has no need here to rely upon a self-created power designed to assure a veto of all changes in control.[22]

[25-27] The value of a shareholder's investment, over time, rises or falls chiefly because of the skill, judgment and perhaps luck—for it is present in all human affairs—of the management and directors of the enterprise. When they exercise sound or brilliant judgment, shareholders are likely to profit; when they fail to do so, share values likely will fail to appreciate. In either event, the financial vitality of the corporation and the value of the company's shares is in the hands of the directors and managers of the firm. The corporation law does not operate on the theory that directors, in exercising their

22. Thus, in my view, a decision not to redeem a poison pill, which by definition is a control mechanism and not a device with independent business purposes, may present distinctive considerations than those presented in this case.

powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm. *See Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985); *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, 532 A.2d 1324 (1987).

In the decision they have reached here, the Time board may be proven in time to have been brilliantly prescient or dismayingly wrong. In this decision, as in other decisions affecting the financial value of their investment, the shareholders will bear the effects for good or ill. That many, presumably most, shareholders would prefer the board to do otherwise than it has done does not, in the circumstances of a challenge to this type of transaction, in my opinion. afford a basis to interfere with the effectuation of the board's business judgment.

* * * *

Having therefore concluded that plaintiffs have not shown a reasonable probability that they possess a right in these circumstances to require the board to abandon or delay the long-planned Warner transaction so that the stockholders might enhance their prospects of a control premium or private market transaction now, I need not discuss the issue raised by Warner concerning its rights as an intensely interested third party. The application shall be denied.

IT IS SO ORDERED.

STEPAK v. TRACINDA CORP.

No. 8457

Court of Chancery of the State of Delaware, New Castle

August 18, 1989

This action involves the 1986 transactions in which Turner Broadcasting System, through a subsidiary, acquired through merger all of the stock of MGM/UA Entertainment Company (MGM/UA) and simultaneously sold MGM/UA's United Artists Corporation subsidiary to a new entity controlled by MGM/UA's former controlling shareholder. A settlement agreement was reached with plaintiff's Delaware counsel after plaintiff's motion for class certification was granted in Delaware. Plaintiff submitted an application to the Delaware Court of Chancery to approve a form of notice to the classes on whose behalf the action was brought alerting the members of those classes of the proposed settlement, and to set a time for a

hearing on the fairness and adequacy of the proposal. Also pending was an application by a member of one of the classes to intervene and to stay the Delaware action in favor of a certified class action pending in the Superior Court of California.

The court of chancery, per Chancellor Allen, found: (1) the cash component of the settlement proposal was *de minimus* on a per share basis; (2) the settlement itself was no more than an occasion for plaintiff's attorneys to earn a substantial fee while the defendants achieved a broad release of claims; (3) no reasonable likelihood existed that the proposed settlement would be approved as fair and reasonable; and (4) it would not be necessary, therefore, to schedule a further hearing to evaluate the proposal. The chancellor also held that because the plaintiff took no steps to actually commence litigation in Delaware, while a related suit was proceeding in California, an order would be entered staying litigation of the minority shareholder claims in deference to the action pending in the Superior Court of California.

1. Compromise and Settlement ⟹ 17(1)

It is the typical practice of a court to set a motion for approval of a settlement of a class action down for hearing on the merits and to deter all consideration of the substance of such proposal until notice has been afforded and a hearing held.

2. Compromise and Settlement ⟹ 1, 7

Occasionally, the particulars of a case may warrant the expenditure of judicial time in making a preliminary assessment of a proposed settlement in order to determine whether it meets truly minimum standards sufficient to invoke the mechanism required by Rule 23(e). DEL. CH. CT. R. 23(e).

3. Compromise and Settlement ⟹ 7, 17(1)

Only when in the considered opinion of the court there is no reasonable likelihood that the proposed settlement would be approved following hearing that a court may, in the exercise of its sound discretion, refuse to conduct a full hearing on notice to the class.

4. Compromise and Settlement ⟹ 6(1)

Where property is suggested as settlement consideration, its value should be determined not by any "suggested retail price," but by what the property is worth in cash to the recipient. Property is worth, generally, what it can be sold for.

5. Compromise and Settlement ⟹ 6(1), 6(6)

In a proposed settlement, where the cash component of the proposal is *de minimus* on a per share basis and is meant to represent fair consideration for the shareholder claims, only if the court was able to conclude that those claims have only nuisance value could the proposed settlement conceivably be approved.

6. Federal Civil Procedure ⟹ 1696, 1699

Rule 23(e) mandates substantive court review, in part at least, because the class action form of action does make possible opportunistic behavior at the expense of absent class members. DEL. CH. CT. R. 23(e).

7. Federal Civil Procedure ⟹ 1699

Where there are two or more attorneys purporting to act on behalf of the same or overlapping classes, there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate, and a risk that the chosen plaintiff will be accommodating in exchange for an agreement that includes legal fees.

8. Courts ⟹ 28

Action ⟹ 69(2)

Where parallel litigations arising from a common set of facts and involving the same parties are proceeding in different jurisdictions, the first filed action should proceed where that court is capable of giving complete relief; a later filed action should, therefore, absent special circumstances, be stayed.

9. Action ⟹ 69(2)

Delaware law places substantial weight upon the objective factor of which of two parallel actions was first filed.

10. Action ⟹ 63

The formality of filing a complaint, while taking no step to actually commence litigation, cannot alone have significance.

11. Action ⟹ 63, 69(2)

Limitation of Actions ⟹ 118(2)

It is well established in Delaware that the commencement of litigation which will stay the running of a limitations period entails the filing of a complaint with a bona fide intent to prosecute and no unreasonable delay in commencing service of process.

12. Action ⟹ 63, 69(2)

Where a plaintiff takes no steps to actually commence his litigation by summoning the defendant to answer for a period of two years, while suit proceeds in another jurisdiction, a Delaware action cannot in any material respect be said to be the first filed action for purposes of determining in which jurisdiction the litigation should most appropriately proceed.

Thomas G. Hughes, Esquire, of Schlusser, Reiver, Hughes & Sisk, Wilmington, Delaware; and Harvey Greenfield, Esquire, of New York, New York, for plaintiff.

Allen M. Terrell, Jr., Esquire, and David L. Finger, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Andrew M. White, Esquire, J. Jay Rakow, Esquire, and Eric N. Landau, Esquire, of Christensen, White, Miller, Fink & Jacobs, Los Angeles, California, for defendants Tracinda Corp., Kirk Kerkorian, MGM/UA Entertainment Co., United Artists Corporation, Fred Benninger, Alvin Benedict, Barrie K. Brunet, Willie D. Davis, Cary Grant, Alexander M. Haig, Jr., Edward A. Horrigan, Jr., Alan Ladd, Jr.,

Arthur G. Linkletter, Frank E. Rosenfelt, Frank Rothman, Sidney H. Sapsowitz, Walter M. Sharp, Dinah Shore, Kenneth L. Treffetzs, Stephen D. Silbert, and Jerry Weintraub.

Edward B. Maxwell, 2d, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, for defendants Turner Broadcasting System, Inc., TBS Acquisition Corporation and R.E. Turner.

William Prickett, Esquire, and Elizabeth M. McGeever, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware; J. Michael Hennigan, Esquire, and James W. Mercer, Esquire, of Hennigan & Mercer, Los Angeles, California; and Patricia I. Avery, Esquire, of Wolf, Popper, Ross, Wolf & Jones, New York, New York, for objector and proposed intervenor.

ALLEN, *Chancellor*

Pending is an application (1) to approve a form of notice to the classes on whose behalf this action has purportedly been brought alerting the members of those classes of a proposed settlement of the action, and (2) to fix a time for a hearing on the fairness and adequacy of that proposal.

Pending also are applications by a member of one of the classes to intervene and to stay this action in favor of a certified class action pending in the Superior Court of the State of California in which he is a named plaintiff. The California action arises out of the same set of operative facts. The motion to stay involves the assertion that the proposed settlement is grossly inadequate; constitutes a "sellout" of the class claims in exchange for a promise by the defendants not to oppose a generous attorneys' fee award and does not present sufficient merit to justify the sending of notice and the holding of a hearing.

[1-2] It is the typical practice in this court, as elsewhere, to set a motion for approval of a settlement of a class action down for hearing on the merits and to defer all consideration of the substance of such proposal until notice has been afforded and a hearing held. This practice has the obvious advantage of efficiency. An alternative technique, although rarely invoked, is authorized. Occasionally, the particulars of a case may warrant the expenditure of judicial time in making a preliminary assessment of the proposed settlement in order to determine whether it meets truly minimum standards sufficient to invoke the mechanism required by Rule 23(e). *See Armstrong*

v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); *Johnston v. Mid Atlantic Toyota Distributors, Inc.*, 564 F. Supp. 1379, 1384 (D. Md. 1983); 7B Wright & Miller, Fed. Prac. & Proc. § 1797 (1986).

[3] In this instance, the history of the litigation in this court and in the Superior Court of the State of California, the remarkable terms upon which dismissal of the claims asserted would be released, and the existence of other counsel deeply involved in litigation of those claims who ardently resist the settlement, persuaded me, before engaging the ordinary machinery of class action settlements, to look more closely at the proposal than would ordinarily be the case. In addressing the questions thus raised, the court applies a test of truly minimum standards. It is, in my opinion, only when in the considered opinion of the court there is no reasonable likelihood that the proposed settlement would be approved following hearing that a court may, in the exercise of its sound discretion, refuse to conduct a full hearing on notice to the class.

Consideration of this matter leads me to conclude that there is, in this instance, no reasonable likelihood that the proposed settlement would be approved as fair and reasonable. Indeed, for reasons that emerge from what follows, I find the proposed settlement subversive of the policy sought to be served by Rule 23 and deeply offensive to the spirit of that rule. One is forced to conjecture, based upon the facts as they appear, that this settlement was not genuinely intended to serve any substantial interest of the class, but is an occasion for the attorneys who support the proposal to earn a substantial fee (plaintiff) and achieve a broad release of claims (defendants). A statement of the reasons for this conjecture and the related conclusion concerning the adequacy of the proposed settlement is set forth below under four headings: the claims asserted; the litigations; the settlement now proposed; and conclusions.

The Claims Asserted

This action arises out of a series of events culminating in a 1986 transaction in which Turner Broadcasting System, Inc., ("TBS" or "Turner") through a subsidiary, acquired through merger all of the stock of MGM/UA Entertainment Co. ("MGM/UA") and simultaneously sold that company's United Artists Corporation subsidiary to a new entity ("New UA") controlled by Tracinda Corporation which had been MGM/UA's controlling shareholder.

Turner was apparently never presented with the option to acquire all of the assets held by MGM/UA. Rather, it was given the option

to negotiate for the sale of either the MGM assets or the UA assets. It elected to buy the MGM assets and it was apparently understood from that time in the negotiations that if a deal was agreed upon, one element of it would be the resale of the UA assets by TBS at a price equal to $9 per MGM/UA share to New UA—an entity controlled by Tracinda.

After circumstances forced the renegotiation of the terms of the original August, 1985 agreement contemplating the two-part transaction, a final agreement was reached in early 1986. That agreement contemplated the acquisition by Turner of MGM/UA and the resale of the United Artists Corporation assets to New UA. The consideration per share was $20 in cash and one share of new Turner preferred stock with a liquidation value of $10.32. The simultaneous resale of United Artists Corporation to a new corporation controlled by Tracinda was to be at the price of, as earlier agreed, $9 per share.

Significantly, Tracinda offered to all MGM/UA shareholders, as of a September 9, 1985 record date, an opportunity to participate with it, on the same terms, in the purchase or "continuation" of the UA business. That is, each MGM/UA shareholder was offered one right to subscribe on terms stated, including the payment of $9, for one share of common stock of New UA for each share of MGM/UA they owned on the record date. This offer was made (and public shareholders were required to commit with respect to it) prior to the final fixing of the MGM/UA-Turner acquisition transaction which was renegotiated until early the following year.

This offering of subscription rights is obviously of great significance when the question involves potential liability of the controlling shareholder. Without this step, the acquisition of UA by a Tracinda-controlled entity was plainly a self-dealing transaction not saved from that characterization by the fact that TBS was involved as a "strawman."[1] Kirk Kerkorian, who owns Tracinda, and Tracinda would, putting other considerations aside, bear the heavy burden to establish that the sale to Tracinda was entirely fair to the minority—meaning that the price was fair (not less than the value that would be otherwise achievable in a transaction that maximized present value) and the transaction was otherwise fair (*e.g.*, not timed or structured to ad-

1. For purposes of this application, I state the facts in a way I am led to believe is correct; but this motion provides no occasion for fact findings that deserve or would support later preclusive deference.

vantage the controlling shareholder and disadvantage the minority). *Weinberger v. U.O.P., Inc.*, Del. Supr., 457 A.2d 701 (1983); *In Re Trans World Airlines, Inc. Shareholders Litigation*, Del. Ch., C.A. No. 9844, Allen, C. (October 21, 1988). But if one could assume that the rights offering procedure was an entirely fair technique that permitted shareholders to continue, with Tracinda, to participate in the UA business, the transaction could be seen as treating all shareholders similarly and thus to lose its self-dealing aspects. In that event, arguably it might be unimportant whether $9 per share was an "entirely fair" price for the UA business, since all shareholders were offered the opportunity to, in effect, sell or buy (hold) at that price.

Among the claims asserted—and the conceptualization of a claim that I find most coherent—is the claim that in a number of respects, Tracinda's September 9, 1985 offer to minority shareholders was not a fair, completely candid effort to afford an option to MGM/UA shareholders to continue their interest in UA, but was a complex pretext to permit the dominating shareholder to increase its proportionate ownership of the UA assets at a cheap price. It is charged that the shareholders were not told, nor put in a position to know, that the $9 price was a bargain (as it is asserted that it was and I will not allude now to the substance of that argument). Nor were things arranged, it is claimed, in a way designed to assist minority shareholders in maintaining their stock position if they wanted to do so. On the contrary, the charge is that Kerkorian and Tracinda, without sufficient justification, designed and implemented a complex, confusing procedure with the intention and effect of discouraging and impeding minority elections from continuing participation, thus permitting Tracinda to roll up its percentage ownership in UA at, in effect, a bargain price.

This theory does involve some novel circumstances in which the principle and duty construed in *Weinberger* would have to be applied. I do not at the moment, however, apprehend a fatal defect with the theory itself. Surely, if these facts were true, the claim that Turner paid such a fat price for the MGM business that the combined MGM/UA price was within a range of fairness, if true, would not, in my opinion, constitute a defense. *Cf. In Re Trans World Airlines, Inc. Shareholders Litigation, supra*, slip op. at 8-10.

Of the 24 million MGM/UA minority shares, some 11 million took the first step and sent in a required indication of intention to buy stock in New UA by December 2, 1985, the date fixed by Tracinda; of these some 7 million took the remaining steps to do

so. These shareholders placed themselves in the same position as Kerkorian and have been excluded from the definition of this class.

Given the evaluation that follows of the value of the consideration now proposed to be paid for release of the public shareholder claims, I find it unnecessary to evaluate the damage theories the proposed intervenor advances in California. It should suffice in this context to note that the proposed intervenor claims rescissory damages equal to the difference between the $9 price and the very substantially higher price at which Tracinda recently agreed to sell UA. While any such measure of recovery is fraught with difficulty for the class, *see Weinberger v. U.O.P., Inc.*, Del. Ch., C.A. No. 5642, Brown, C. (January 30, 1985) (court may consider effects of intervening events on value of company), the claimed damages, if a right to rescission were to be shown, would, for present purposes, have to be considered as substantial.

The Litigations

On February 25, 1986, (prior to the close of the TBS transaction) the *Rudd* action was filed in this court. Defendant Kerkorian moved to dismiss the complaint for want of personal jurisdiction.

On April 21, 1986, the now pending *Stepak* action was filed here. The complaint in *Stepak*, however, was not served for two years and it does not appear any activity occurred during that period.

On May 13, 1986, the *Rudd* action was refiled in California where Mr. Kerkorian apparently resides. The *Abzug* action—which was later certified as a class action—was filed in the California Superior Court at about that time as well. In the Superior Court action there was activity from the outset although depositions were not taken by plaintiffs until the spring of 1989. There was resistance to discovery by defendants but document production was arranged early on. The *Abzug* plaintiffs moved for class certification in December, 1987 (a fact I failed to appreciate when I certified this action as a class action). That motion was granted on February 10, 1989.

In Delaware, the *Stepak* complaint was finally served in April, 1988, after the *Abzug* plaintiffs moved for class certification in California and about two years after the complaint had been placed in the record. This time Mr. Kerkorian did not raise any question about personal jurisdiction in Delaware as he had in response to the original *Rudd* action.

In November, 1988, before initiating any discovery in this action, plaintiff here moved for class certification. That motion was resisted

but briefed rapidly. The parties waived oral argument and the motion was submitted to the court on January 9, 1989, and granted on January 23, 1989.

Settlement negotiations with counsel in the Delaware action were apparently commenced promptly after that determination. An agreement in principle was reached on March 14, 1989, subject to plaintiff's right to back out if later discovery indicated that was appropriate. That settlement, which was mooted by business developments, called for the payment of $690,000 cash plus either warrants to purchase New UA stock at $18,[2] or an additional $750,000 and 25,000 videotapes. I do not find in the record the attorneys' fee arrangement contemplated at that time. A modified proposal is the subject of the present application.

The Settlement Now Proposed

Plaintiff proposes to release and discharge all claims to compensation attaching to the 17 million minority shares of MGM/UA that did not purchase New UA shares, in exchange for (1) the payment of $2,190,000 cash (which is to be reduced by (a) reasonable attorneys' fees that the parties agree will not exceed $1,180,000, (b) disbursements of $100,000, and (c) notice and administration expenses of $150,000), and (2) the distribution of some 45,000 video cassettes on a non-*pro rata* basis.[3]

The cash component of this proposal, assuming the two courts involved awarded as reasonable fees the amounts the settling parties have agreed are reasonable, is *de minimus* on a per share basis. Assuming 17,425,000 shares in the UA class (that is, minority shares the holders of which did not elect to purchase New UA stock pursuant to the defendants' offer), the cash in the proposed settlement would be 4.5 cents per share. As proposed, the settlement could result in less cash per share in the event proofs of claim were submitted by

2. New UA stock closed at $17 1/4 per share on March 14, 1989.

3. Under the proposal, former MGM/UA stockholders—pension funds, banks, trusts, mutual funds, IRA's and mom & pop—will each have their choice among: *Poltergeist III*, *Spaceballs*, *Moonstruck*, *Betrayed* or *Child's Play*. The initial distribution is to be one per shareholder regardless of the number of shares held. Were this proposed settlement otherwise worthy of serious consideration, this condition would itself be sufficient to cause a supervising court to question the proposal. The parties have advanced no theory that would justify the non-*pro rata* distribution of settlement consideration in a shareholder action where the damage was incurred in proportion to share ownership.

shares held on the merger date by persons who acquired their stock after the New UA offer.

Were this cash component the only element of consideration in the proposed settlement, I would, given the context—meaning given the nature of the transactions attacked, the size of the transaction and the existence of what appear as litigable claims—be forced to conclude that the settlement represents an implicit agreement by the parties negotiating it that the case was totally without merit.

But additional consideration is proposed to be paid—the 45,000 video cassettes. In their brief, defendants claim that this "settlement [is] worth over $6 million." It is suggested, if not quite claimed by the settling plaintiff, that these video cassettes are each worth—have a "suggested retail price of"—$89.95:

> Even if one chooses to discount the suggested retail price by, say 25%, the total value of 45,000 cassettes represents over $3 million dollars to the plaintiff class.

Plaintiff's Opening Memorandum at 17.

[4] I conclude, however, that one—or several—video cassettes has so little real value to members of the class as to hardly merit serious consideration. The claims asserted are financial in nature. The remedy, if there is to be one, and if it is not to be a specially crafted equitable remedy, should be money. If property is suggested as settlement consideration, its value should be determined not by any "suggested retail price"—the perhaps fervent hope of a manufacturer—but by what the property is worth in cash to the recipient. Property is worth, generally, what it can be sold for. While 45,000 video cassettes no doubt do have a cash sale value to one in the business of selling or renting video cassettes, I am persuaded that one or two video cassettes in the hands of the financial intermediaries and individuals who constitute the class has minimal cash sale value.[4]

Thus, for these purposes, I regard the only material consideration offered in exchange for release of these claims as being approximately

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4. In my view, one (or two) new video cassettes in the hands of a single consumer is not even necessarily worth the price being asked for *used* video cassettes by retail establishments in the business of selling such property, although that is the closest approximation of realizable value that this record affords. (The record suggests that these titles are sold in a used condition at between $7 and $8 dollars (Jacobs Aff.) and between $20 and $30 (Zucker Aff.)). The record does not establish or even suggest that there is in fact a market in which these amounts may likely be realized by one seeking to sell one or two video cassettes.

12 or 13 cents per share, which reduces to less than five cents a share when costs and attorneys' fees that the settling parties contend are reasonable are netted out.

Conclusion

[5] In light of this conclusion, it is not necessary to engage in a subtle or detailed analysis of the expected value of such claims as the class may possess in order to conclude that this proposal is not worthy of serious consideration. Only were the court able to conclude that those claims have only nuisance value could the proposed settlement conceivably be approved. I cannot so conclude.

Without, of course, intending to make any determination of law but simply evaluating likelihoods at a preliminary stage of the litigation, it seems rather likely that the exclusivity of the appraisal remedy will not prove availing to defendants. *See Cede & Co. v. Technicolor*, Del. Supr. 542 A.2d 1182 (1988); *Rabkin v. Philip A. Hunt Chemical Corporation*, Del. Supr., 498 A.2d 1099 (1985). Nor does the fact, if I assume it to be such, that Turner paid a higher price for MGM/UA (taken together) than was prudent or higher than any other would have paid, preclude a recovery if it is the case (1) that Turner was really buying only the MGM assets, and (2)(a) that less than complete information was given to the MGM/UA minority about the adequacy of the $9 price, or (2)(b) the procedures adopted by Tracinda were burdensome to the minority in a way inconsistent with a duty of entire fairness that Tracinda appears to have borne in this transaction.

As to these substantive allegations of unfairness, I do not find the record so conclusively in defendants' favor as to justify or allow the conclusion that this *de minimus* settlement proposal could possibly fall within a range of reasonable judgment that it represents fair consideration for the claims asserted. It will therefore not be necessary to hold a further hearing to evaluate it.

* * * *

[6-7] Rule 23(e) mandates substantive court review, in part at least, because the class action form of action does make possible opportunistic behavior at the expense of absent class members. Where there are two or more attorneys purporting to act on behalf of the same or overlapping classes, there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate, and a risk that the blessed plaintiff will be accommodating in exchange for an agreement that includes legal fees. This obser-

vation has been made before. *See, e.g., City of Detroit v. Grinell Corporation*, 495 F.2d 448, 465 (2d Cir. 1974); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971); *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1125 (7th Cir. 1979).[5]

While I would not say without a more thorough investigation that such conduct has in fact occurred here, I note that the history of the prosecution of these matters seems consistent with that possibility. In all events, candor does impel me to say that the proposed settlement, alone among the many such applications I have been required to review, engenders disdain that is pronounced and lingers. It is frankly unimaginable that I could exercise my judgment to approve it as fair to the class. Moreover, approval of such a proposal would, in my opinion, threaten to hold the class action mechanism up to justifiable scorn and to charges, too frequently made without adequate grounds, that the stockholder class action mechanism represent nothing so much as a device for lawyers to enrich themselves while serving no practical interest of those for whom they are charged to act.

* * * *

I turn now to the question whether this court should stay its hand in deference to the Superior Court of California in the litigation of the minority shareholder claims.

[8] The rule typically employed by the courts of this State and, as I understand, widely applied in other jurisdictions, is this: where parallel litigations arising from a common set of facts and involving the same parties are proceeding in different jurisdictions, the first filed action should proceed where that court is capable of giving complete relief; a later filed action should, therefore, absent special circumstances, be stayed. *E.q., Parvin v. Kaufman*, Del. Supr., 236 A.2d 425 (1967); *ANR Pipeline Co. v. Shell Oil Co.*, Del. Supr., 525 A.2d 991 (1987). This approach, of course, seeks to preserve judicial resources in our federal system while affording to litigants a forum capable of effective adjudication of their dispute.

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5. These cases deal with negotiations by uncertified class representatives; their principle of course extends to the instances in which different courts certify different class representatives.

That policy is plainly implicated here. It makes little sense for this court, as well as the Superior Court of California, to invest judicial resources in resolution of the case; either court is fully capable of resolving the matter.

[9-12] Our law places substantial weight upon the objective factor of which of two parallel actions was first filed. *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, Del. Supr., 263 A.2d 281, 283 (1970). On a doctrinal level, applying our law, I am content that the *Abzug* action (and the other California actions) was "first filed" in this instance. I say that in recognition that the complaint in this action was filed some weeks before the complaints in California, but that complaint was not served for about two years. The formality of filing a complaint, while taking no step to actually commence litigation, cannot alone have significance. For example, it is well established in Delaware (as in many jurisdictions)[6] that the commencement of litigation which will stay the running of a limitations period entails the filing of a complaint *with* a bona fide intent to prosecute *and* no unreasonable delay in commencing service of process. *Lutz v. A.L. Garber Co., Inc.*, Del. Ch., 340 A.2d 186 (1974); *Russell v. Olmedo*, Del. Supr., 275 A.2d 249 (1971); *Giles v. Rodolico*, Del. Supr., 140 A.2d 263 (1958). Where plaintiff takes no steps to actually commence his litigation by summoning the defendant to answer for a period of two years, while suit proceeds in another jurisdiction, the Delaware action cannot in any material respect be said to be the first filed action for purposes of determining in which jurisdiction the litigation should most appropriately proceed.

Nor do other factors indicate that this would be so convenient or sensible a location for this litigation that this court should press ahead despite the fact that the California actions were first filed and have actively been litigated. The witnesses appear to largely be in California; while the law is Delaware law with which we, by reason of constant exposure, may be initially more familiar, the Superior Court is well able to construe that law. To the extent disclosure issues may be involved, the law is easy to state and equally difficult for all trial judges to apply in specific cases. To the extent questions of the entire fairness of procedure are involved, the ultimate judgment will be highly fact specific with little doctrinal guidance, I fear, beyond broad generalities concerning fairness or the duty to refrain

6. The cases are collected under "Limitation of Action" key numbers 118 and 119 in the West Digest system.

from using corporate power to the disadvantage of minority shareholders, etc. Thus, I do not presently apprehend that the application of Delaware law supplies a special factor in this instance warranting the inefficiency of pursuing parallel actions simultaneously.

For these reasons, I will enter an order staying litigation of this matter pending application of any party to lift the stay in light of changed circumstances. I see no reason now to address a motion to intervene by the representative of Mr. Abzug. However, notice of any motion to lift the stay of this action shall be provided to the proposed intervenor's Delaware counsel.

* * * *

For the foregoing reasons, it is this 18th day of August, 1989, hereby ORDERED that prosecution of this action is stayed pending further order.

WARNER COMMUNICATIONS, INC. v. CHRIS-CRAFT INDUSTRIES, INC.

No. 10,817

Court of Chancery of the State of Delaware, New Castle

July 21, 1989

(Revised July 24, 1989)

Defendants Chris-Craft Industries and its 57.5% owned subsidiary, BHC, brought this motion for a temporary restraining order to enjoin the plaintiff, Warner Communications, from enforcing the July 30, 1989 termination date of certain rights and thereby foreclose BHC from exercising the rights under an executed stipulation agreement. The defendants argued that the abandonment of the Time and Warner Communications merger agreement made it uncertain what rights the defendants were afforded under the stipulation.

The court of chancery, per Vice-Chancellor Jacobs, denied defendant's motion because: (1) the defendant's inability to elect among three valuable options available in the stipulation due to imperfect information did not constitute an actionable legal injury, and (2) the

defendant's recasting of the merits issue failed both procedurally and substantially.

1. Injunction ⟹ 14, 136(1)

On a motion for a temporary restraining order, the moving party must show a reasonable probability of success on the merits, irreparable injury if injunctive relief is not granted, and that the balancing of hardships tips in the moving party's favor.

2. Injunction ⟹ 134, 135

A court may, in appropriate cases, grant a temporary restraining order application, assuming all other requirements are satisfied, if it finds that the merit's claim is colorable, litigable, or raises questions that deserve serious attention.

3. Injunction ⟹ 135, 151

Whether or not a court applies the "probable success" standard or the less stringent "colorable claim" standard will depend upon factors such as the degree of the threatened harm, the adequacy and length of notice and opportunity to be heard, the nature of the claim, and the time available to the court for deliberation.

4. Injunction ⟹ 14

An assessment of imminent, threatened irreparable harm is one based upon the practical realities facing the litigants.

5. Injunction ⟹ 15, 136(1)

In evaluating a request for a temporary restraining order, a court attempts to evaluate what the economic and legal position of the moving party will be if injunctive relief is denied and the moving party later prevails on the merits of its claim. In that event, a critical inquiry is whether there are remedies that would make the moving whole and that would adequately redress the legal wrong determined to have been inflicted.

6. Contract ⟹ 65(1)

Injunction ⟹ 134

It is not the function of a court to resolve, nor do the moving parties have any general legal right to have resolved, all future legal uncertainties, so that they will be better able to evaluate their economic risks.

7. Injunction ⟹ 137(4)

The fact that a party, in electing among three valuable options under a stipulation, must evaluate risks and then act on that evaluation, does not constitute actionable legal injury.

Charles F. Richards, Jr., Esquire, William J. Wade, Esquire, Thomas A. Beck, Esquire, Gregory V. Varallo, Esquire, and Michael J. Feinstein, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; Eric M. Roth, Esquire, and Patricia Vlahakis, Esquire, of Wachtell, Lipton, Rosen & Katz, New York, New York; and Morris H. Wheeler, Esquire, of Davis, Polk & Wardwell, New York, New York, for plaintiffs.

Charles S. Crompton, Jr., Esquire, Donald J. Wolfe, Jr., Esquire, and Arthur L. Dent, Esquire, of Potter, Anderson & Corroon, Wilmington, Delaware; and Peter M. Fishbein, Esquire, and Aaron Stiefel, Esquire, of Kaye, Scholer, Fierman, Hays & Handler, New York, New York, for defendants.

JACOBS, *Vice-Chancellor*

Pending is an application for a temporary restraining order ("TRO") by the defendants Chris-Craft Industries, Inc. ("Chris-Craft") and its 57.5% owned subsidiary, BHC, Inc. ("BHC"). On May 5, 1989, Warner Communications, Inc. ("Warner") and Time Incorporated and its subsidiary, TW Sub, Inc. ("Time"), brought this action for declaratory and injunctive relief with respect to the parties' rights and obligations under a 1983 shareholders' agreement entered into among Chris-Craft, BHC, and Warner, and under a modifying agreement subsequently executed in 1986. Two weeks later, the parties settled this action and embodied their settlement

in a Stipulation that the parties executed and Chancellor Allen entered as a final order, on May 19, 1989 (the "May 19 Stipulation").

As explained more fully below, the May 19 Stipulation was predicated upon (*i.e.*, assumed) that the originally contemplated stock-for-stock merger between Warner and Time would take place. That merger, however, was abandoned when on June 16, 1989, Time and Warner amended their merger agreement and substituted in place of the merger a two-step acquisition, consisting of a first-step cash tender offer by Time for 51% of Warner's outstanding stock, to be followed by a second step merger. The consideration for the second-step merger was to be an as-yet undefined package of cash or debt or equity securities of Time, to be agreed upon by Time and Warner. The tender offer component of that amended transaction was the subject of a much heralded preliminary injunction proceeding in *Paramount Communications, Inc. v. Time Inc.*, Del. Ch., Consol. C. A. No. 10670, Allen, C. (July 14, 1989), which resulted in the denial of an application to enjoin the first-step Time offer. That ruling was appealed to the Delaware Supreme Court, which is scheduled to hear that appeal on July 24, 1989.

The above described amendment of the Time-Warner merger agreement made it uncertain whether, or to what extent, the defendants Chris-Craft and BHC would receive certain rights afforded them under the May 19 Stipulation. Accordingly those parties filed, on July 13, 1989, two motions for relief. The first was entitled a "Motion for a Declaration of the Parties' Rights Under the May 19, 1989 Stipulation and Order of Final Judgment." The second motion was styled as a "Motion for An Expedited Determination, Prior to July 30, 1989 [of the defendants' first motion for declaratory relief] or In The Alternative, For An Interim Stay of The July 30, 1989 Termination of BHC's Options Under The Stipulation Pending A Determination of Defendants' Motion For a Declaration of The Parties' Rights."[1] Those baroquely-titled motions were accompanied by a proposed expedited discovery schedule which presupposed that the Court would afford this matter priority above all else, and schedule a final hearing as well as render a decision on the merits of the dispute between July 13 and July 30, 1989.

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1. Although the May 19 Stipulation is, by its terms, a final judgment, its final paragraph provides that the Court shall retain jurisdiction to make further orders necessary and proper for the enforcement of, or performance under, the Stipulation.

A telephone scheduling conference on these motions was held on July 13, 1989.[2] At that conference the Court determined, for several reasons, that it would be impossible and inappropriate to schedule a merits hearing before July 30, 1989.[3]

Under these circumstances, I determined that the only practicable procedural course would be to treat the defendants' alternative "Motion for an Interim Stay of the July 30, 1989 Termination of BHC's Options Under the May 19, 1989 Stipulation" as a motion for a TRO to restrain Warner from enforcing the July 30, 1989 termination date for BHC's exercise of certain rights under the Stipulation.

The TRO motion was heard on July 20, 1989, following the submission of briefs and affidavits. This is the decision of the Court on the defendants' application for a temporary restraining order

I.

The pertinent facts are not disputed. Chris-Craft is a Delaware corporation engaged principally in the business of television broadcasting. Through its subsidiary, BHC, Chris-Craft owns several television stations. Warner and Time are also Delaware corporations. Warner is engaged primarily in the communication and entertainment business, through operations in films, recorded music, music publishing, cable television, and publishing and distribution. Time is engaged primarily in the publication of magazines and books, the distribution of pay television services, and the operation of cable television systems.

In December, 1983, Chris-Craft and Warner entered into a transaction whereby (i) BHC acquired Warner preferred stock representing more than 15% of the voting power of Warner's outstanding shares of capital stock, and (ii) in exchange, BHC issued to Warner,

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2. Chancellor Allen, to whom this case is regularly assigned, was unavailable, as he was then engaged in preparing an extensive preliminary injunction opinion in the *Time-Paramount* litigation, which had to be issued the following day. Thereafter, the Chancellor was to leave for a much-needed vacation for the balance of July.

3. The reasons were: (i) the hearing caseload and conflicting commitments of the members of this Court, (ii) the severely disruptive effects of such proceedings upon the plaintiffs, who were in the midst of conducting the *Paramount-Time* takeover litigation on an extremely expedited basis, and who would certainly be parties to predictable Supreme Court appellate proceedings that promised to be even more expedited, and (iii) the fact that the urgency was, to a large degree, of the defendants' own making, since they could have sought relief as early as June 16, 1989, but waited until July 13 to do so.

shares of BHC preferred stock that were convertible into 42.5% of BHC's common stock. The end result was that Chris-Craft owned 57.5% of BHC, Warner owned the remaining 42.5% of BHC, and BHC owned substantial stock of Warner. Simultaneously, and in connection with that transaction, Warner, BHC, and Chris-Craft entered into a shareholders' agreement that gave Warner, Chris-Craft, and BHC rights of first refusal in the event of a proposed sale by Warner or Chris-Craft of their BHC stock, or a sale by BHC of its Warner stock.

In February, 1986, Warner and Chris-Craft entered into a Modifying Agreement that (*inter alia*) provided that in the event of a "Significant Change" with respect to Warner, Warner's right of first refusal would terminate and BHC would be entitled to exercise certain options, including one that enabled BHC to require Warner to distribute all its BHC stock to its (Warner's) stockholders. Because BHC was a Warner stockholder, BHC would receive its *pro rata* share of its own stock in any such distribution. As a result, Chris-Craft's percentage ownership interest in BHC would increase as BHC retired its own stock received by it in the distribution.

The next significant event occurred on or about March 3, 1989, when Warner and Time executed a merger agreement that called for a stock-for-stock merger of a Time subsidiary into Warner. In that merger, Warner shareholders would receive Time shares in exchange for their Warner shares. Shortly thereafter, Chris-Craft advised Time and Warner that the March, 1989 merger agreement constituted a Significant Change under the February 6, 1986 Modifying Agreement.

On May 5, 1989, Warner and Time commenced this action against Chris-Craft and BHC, claiming that the March, 1989 merger agreement constituted a Significant Change under the 1986 Modifying Agreement, and that as a result, BHC was entitled to elect to require Warner to either (i) sell its BHC stock to BHC, (ii) use its best efforts to distribute its BHC stock to its (Warner's) shareholders, or (iii) effect some combination of both. As relief, plaintiffs requested this Court to direct BHC to make its election promptly. That relief was sought, because if BHC opted to require Warner to distribute its BHC stock to Warner shareholders before the Time-Warner merger closed, the merger exchange ratio would have to be adjusted to account for the reduction of Warner's net assets due to the earlier spin-off of Warner's BHC stock.

The May 19 Stipulation, which the parties executed two weeks later, was intended to resolve the parties' differences, in particular,

the question of when BHC would be required to elect among its above mentioned three options under the Modifying Agreement. In essence, the Stipulation provided that within 45 days Warner would notify BHC that (i) Warner was prepared to make a public offering of that portion of its BHC stock representing 23.5% of the total number of outstanding BHC shares (the "Subject Shares") at a price determined by Warner's investment bankers, or that (ii) Warner had received and was prepared to accept a *bona fide* offer for the Subject Shares from an independent party.

Under the May 19 Stipulation, that election by Warner automatically triggers a contractual obligation of BHC to elect, within thirty days, among three options, as follows: *First*, BHC may elect to purchase, at the price provided by Warner, either (a) the Subject shares (representing 23.5% of BHC's total outstanding stock), or (b) 28.5% of BHC's outstanding stock, or (c) all of the BHC stock owned by Warner (representing 42.5% of BHC's outstanding stock). *Second*, BHC may elect to have Warner sell its holdings of BHC stock in a registered public offering. *Third*, BHC may elect to require Warner to spin-off its BHC stock *after* the merger, to the stockholders of the combined Time-Warner entity.

Because the present controversy centers around the third (*i.e.*, the spin-off) option, some further discussion of that particular option is appropriate. The parties to the May 19 Stipulation knew that if Warner had distributed its BHC stock to Warner shareholders immediately after the Time-Warner merger agreement was executed on March 3, 1989, Chris-Craft's interest in BHC would have been increased by 4.6%, *i.e.*, from 57.5% to 62.1%. However, Warner and Time wanted any distribution of the BHC stock to be made *after* the merger. But, any post-merger distribution would necessarily be made to a much larger group of shareholders, namely the shareholders of the combined Time-Warner entity. In that event, Chris-Craft's *pro rata* distribution of BHC stock would necessarily be less than 4.6%, because Chris-Craft owned a larger percentage of Warner than it would own in the merged Time-Warner entity.

Therefore, as consideration and in exchange for BHC's agreement that any spin-off of the BHC stock could occur after the merger, the parties agreed that if BHC elected the spin-off option, Chris-Craft's interest in BHC would be increased by 4.6% to 62.1%. That was done to assure that Chris-Craft would attain the same relative ownership interest in BHC that it would have had attained in the absence of the Time-Warner merger. However, the parties further agreed that Chris-Craft would receive its 4.6% equity ownership

increase only if BHC did not sell any of its Warner stock to third parties before the merger. That condition was imposed, because Warner and Time did not want BHC to sell its Warner stock to third parties who might then attempt to interfere with the merger. Accordingly, the May 19 Stipulation provided that if BHC sells any of its Warner stock to third parties before the merger, Chris-Craft would lose a proportionate share of the additional 4.6% interest in BHC to which it would otherwise be entitled.

Critical to the parties' dispute is the mechanism by which this intricate spin-off arrangement (resulting in Chris-Craft owning 62.1% of BHC) would be carried out. That mechanism was a complex mathematical formula ("the formula"), an essential term of which was the number of Time common shares that the Warner stock owned by BHC on April 29, 1989 would represent after the merger. The formula was expressly predicated upon the March, 1989 Warner-Time merger agreement under which Time common stock would form the merger consideration. In other words, the formula was so constructed that if the merger consideration did not include Time stock, then the formula would not work. It is that feature that turned out to be the May 19 Stipulation's Achilles' heel.

On June 7, 1989, Paramount Communications Inc. commenced a $175 per share cash tender offer for all of Time's outstanding stock. On June 16, 1989, Time and Warner responded by abandoning their originally contemplated merger. Instead, Time and Warner amended their merger agreement, and substituted in place of the original merger, a "two-step" acquisition that would take the form of (i) a "front end" cash tender offer by Time for 51% of Warner's shares, to be followed by (ii) a "back end" merger involving consideration consisting of cash, or debt or equity securities of Time, as agreed by Time and Warner. The relevant effect of that amendment was to eliminate a critical term (the receipt of Time shares in the merger) upon which the formula was predicated, by making it uncertain whether (and to what extent, if at all) the merger consideration would include Time common shares.

Two weeks later, on June 30, 1989, Warner formally notified BHC that it was prepared to make a public offering of the "Subject Shares" *i.e.*, of that portion of its BHC holdings representing 23.5% of BHC's outstanding shares. That notification triggered BHC's obligation under the May 19 Stipulation to elect, within 30 days or by July 30, 1989, one of its three available options, *viz*, a purchase of some or all of Warner's BHC stock, a registered public offering

of Warner's BHC stock, or a post-merger spin-off of Warner's BHC stock to the Warner-Time stockholders.

* * *

It is that July 30 election deadline, and the inability of the parties to agree upon the application of the Stipulation's formula in these changed circumstances, that prompted the defendants to file their two July 13 motions. Specifically, it appears that Time and Warner have interpreted the Stipulation to require that if the merger consideration contains no Time common stock, and if BHC elects to require Warner to spin-off its BHC stock, then Chris-Craft would be entitled to only 57.5% of BHC. Chris-Craft and BHC strongly disagree, contending that interpretation would unfairly deprive them of their bargained-for rights under the May 19 Stipulation. Time and Warner apparently also take the position that even if Chris-Craft is entitled to the additional 4.6% of BHC, that 4.6% must be reduced to the extent that BHC tenders its Warner stock to Time. That position Chris-Craft and BHC also vehemently challenge. Those disagreements frame the merits of the parties' dispute, *i.e.*, they are the issues that the Court would have to decide if and when it reaches the merits of the defendants' Motion to Declare the Parties' Rights Under The May 19 Stipulation. However, those are not the issues presented on the instant motion.

II.

What the Court is presently being asked to decide is whether the defendants should be restrained, for a reasonable period, from enforcing the 30 day period ending on July 30, during which defendants are required under the Stipulation to elect among its three prescribed options. Stated differently, the defendants ask this Court, through the office of a temporary restraining order, to extend the July 30, 1989 option election deadline so that the Chancellor, upon his return and if he deems it appropriate, can determine the merits of the dispute in advance of the defendants having to make their election.

[1-3] On a motion for a temporary restraining order, the moving party must show a reasonable probability of success on the merits, irreparable injury if injunctive relief is not granted, and that the balancing of hardships tips in the moving party's favor. *Durkee Indus. Foods Corp. v. Reckitt & Colman, Inc.*, Del. Ch., C. A. No. 10727, Chandler, V.C. (April 10, 1989) at 9-10; *Hecco Ventures v. Sea-Land Corp.*, Del. Ch., C. A. No. 8486, Jacobs, V.C. (May 19, 1986) at

8. However, the opportunity to develop a record on a preliminary injunction application is normally quite limited. In recognition of that reality, this Court focuses primarily upon whether there is imminent, irreparable harm sufficient to warrant holding the *status quo* in place so that the record can be developed for presentation of a preliminary injunction motion; and, secondarily, upon the element of probable success on the merits. Although no hard and fast rule governs how intensively the Court will explore the merits in a TRO context, our decisions recognize that the Court may, in appropriate cases, grant a TRO application if (assuming all other requirements are satisfied), it finds that the merits claim is colorable, litigable, or raises questions that deserve serious attention. *Cottle v. Carr*, Del. Ch., C. A. No. 9612, Allen, C. (February 9, 1988), at 8; *Doskocil Cos. Inc. v. Griggy*, Del. Ch., C. A. No. 10095, Berger, V.C. (August 4, 1988) at 5-6.[4]

For the reasons now discussed, I conclude that the application should be denied.

III.

In situations of this kind, the moving party normally attempts to establish separately the elements of irreparable harm and probable success on the merits, advancing different arguments based upon the distinct considerations peculiar to each discrete element. In this case, however, Chris-Craft and BHC have artfully attempted to by-pass that analytical process by advancing what is, in reality, a single all-purpose argument that (they claim) satisfies both the irreparable harm and the "merits" requirements for a TRO.

The defendants' argument runs as follows: (1) by amending their merger agreement, Time and Warner rendered the formula unworkable, thereby making it impossible (at least at this stage) to determine how many BHC shares Chris-Craft would receive in a post-merger spin-off of Warner's BHC stock; (2) that uncertainty precludes the defendants from making an informed decision as to which of the three options to elect; (3) the defendants' inability to make an informed decision before the expiration of the 30 day option

4. Whether or not the Court applies the "probable success" standard or the less stringent "colorable claim" standard will depend upon factors such as the degree of the threatened harm, the adequacy and length of notice and opportunity to be heard, the nature of the claim (*e.g.*, whether or not it involves a purely legal question) and the time available to the Court for deliberation. *See Cottle v. Carr*, *supra*.

period constitutes imminent irreparable harm; and (4) that same inability to make an informed decision satisfies the requirement of establishing success on the merits, because (a) the May 19 Stipulation affords the defendants a contractual right to have all information material to an informed election in advance of their having to make that election, and (b) the record establishes at least a colorable, litigable claim in that regard.

That position, while commendable for its legal artistry, amounts to little more than that: an abstract legal painting, oblivious of the realities of the landscape that is its supposed subject.

A.

[4-5] I start with the unremarkable proposition that an assessment of imminent, threatened irreparable harm is one based upon the practical realities facing the litigants. To be specific, in this setting a court attempts to evaluate what the economic and legal position of the moving party will be if injunctive relief is denied and the moving party later prevails on the merits of its claim. In that event, a critical inquiry is whether there are remedies that would make the moving party whole and that would adequately redress the legal wrong determined to have been inflicted.

This case, at bottom, is a contract dispute involving the applicability of the formula to circumstances not expressly provided for in the contract. Because of that dispute, one of the parties must now take action under that agreement, (*i.e.*, make an election) without complete information, due both to changed circumstances and to certain legal positions being taken by the other parties to the contract. That situation is not unique in the annals of contract jurisprudence. Nor is it normally thought to entitle an aggrieved party to a full merits determination before that party is required to perform a condition required under that contract. Typically the aggrieved party in such circumstances will assess its situation—legal and economic—as best it can, will take a position, and will then seek legal relief that will be either granted or denied after the merits of the case are determined.

If this case is to be treated differently from that model, it is incumbent upon the moving parties to show why. That they have not done. Economically, what is at stake in this dispute is tangible and simple: whether, if Chris-Craft/BHC elect the spin-off option, Chris-Craft will own 57.5% of BHC, 62.1%, or some percentage in between. If the defendants' legal position on the merits is correct,

then any economic injury could be remedied by a post-election award of damages[5] or by an order of specific performance directing Warner to deliver additional BHC stock to Chris-Craft. And while they blithely brush these considerations aside, Chris-Craft and BHC do not dispute that those remedies are available to them. These being the legal and economic realities underlying the dispute, it would seem that the irreparable harm analysis should end at this point.

The defendants insist, however, that the true harm to them is not solely economic; rather, it is their inability to make an informed choice among the Stipulation "options" before July 30. They say that that harm would be irreparable, because even if through a subsequent merits determination would supply the needed information (*i.e.*, the meaning of the Stipulation in these changed circumstances), a poorly informed choice, once made, could never be undone.

[6-7] That argument, in these circumstances, strikes the Court as an exercise in legal abstraction. While it may be desirable for the defendants to make a choice based on perfect information, and while their inability to do so may be "harmful" in some sense, it does not constitute cognizable irreparable harm such as would warrant temporary injunctive relief. It is not the function of this Court to resolve, nor do the moving parties have any general legal right to have resolved, all future legal uncertainties, so that they will be better able to evaluate their economic risks.[6] *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103, 115 (1986). Evaluating risks is, as the Chancellor aptly put it, "what business persons do every day." *Newell Co. v. Wm. E. Wright Co.*, Del. Ch., 500 A.2d 974, 985 (1985). That the defendants, in electing among the

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5. Defendants themselves have fixed their damages as high as $83 million, if Chris-Craft is wrongfully deprived of the entire incremental 4.6% stock interest in BHC.

6. Nor, as discussed in part IV B, *infra*, do the defendants have any specific right under the Stipulation to have those uncertainties judicially resolved in advance of their having to make an election. In this connection the defendants' reliance upon *Sealy Mattress Co. of N. J., Inc. v. Sealy, Inc.*, Del. Ch., 532 A.2d 1324 (1987), is misplaced. In *Sealy* the Court pointed to the inability of minority stockholders to make an informed choice as to whether to accept a cash-out merger, to seek an appraisal, or to file a *Weinberger* type action, as being one of three different factors that, when taken in combination, created irreparable harm. The finding of irreparable harm in *Sealy* did not rest solely upon the stockholders' inability to make an informed choice. In addition, *Sealy* involved a fiduciary relationship, not a contractual arrangement arrived at by two corporations after arm's-length bargaining.

three valuable options, must evaluate risks and then act on that evaluation, does not constitute actionable legal injury. *Id.*

B.

Consistent with their argument that their inability to make an informed decision constitutes irreparable harm, the defendants have also attempted to redefine the "merits" issue as being whether they have a contractual right, under the May 19 Stipulation, to have all information essential to an informed election before they are required to make that election. If, in fact, that were the merits issue, then (it would appear) a showing of a "colorable," "litigable" argument that such a right exists would simultaneously (and serendipitously) satisfy the defendants' burden to show probable success on the merits and imminent irreparable harm.

Unfortunately for the defendants, the argument fails both procedurally and substantively. Procedurally it fails because the merits issues do not concern any asserted contractual right to pre-election information. Rather, the merits involve whether (and, if so, how) the formula should apply where Time common shares do not form all or a part of the merger consideration. It is that issue that the defendants, by recasting the "merits," have sought to sidestep.

But, on a substantive level the argument fails as well. Whether the applicable merits standard is "probability of success" or the more lenient "colorable claim" standard, the May 19 Stipulation clearly does not express any informational right of the kind claimed by the defendants here. Nor is any such right implicit in the parties' agreement. While it may be true that a definitive legal interpretation of the Stipulation would be required before the formula can be applied, nothing in the May 19 Stipulation entitles defendants to a merits determination before having to make their election. That election will have to be made without perfect information, and should defendants later be found to have been wrongfully injured, the available post-election remedies will be adequate to redress any harm to them.

Accordingly, the motion for a temporary restraining order is denied. IT IS SO ORDERED.

WEISS v. ROCKWELL INTERNATIONAL CORP.

No. 8811

Court of Chancery of the State of Delaware, New Castle

July 19, 1989

Defendants, directors of Rockwell International Corporation, submitted a proposed amendment to the corporation's certificate of incorporation authorizing the creation of a new class of common stock, which would cause disproportionate voting power to become concentrated in the hands of long-term Rockwell shareholders and thereby discourage an unfriendly takeover of Rockwell. The shareholders approved the amendment at an annual meeting. Plaintiffs, a class of Rockwell shareholders, sought to enjoin implementation of the amendment, citing proxy disclosure violations and fiduciary duty violations. In response, the defendants filed a motion to dismiss for failure to state a claim.

The court of chancery, per Vice-Chancellor Jacobs, granted defendant's motion to dismiss holding that (1) the certificate amendment shifting voting control from the public shareholders to the company savings plan was not to be treated as a gift or waste of assets, and thus shareholder ratification of the amendment cured any defects in the transaction; (2) none of the omitted information plaintiffs claimed were disclosure violations would have been viewed by a reasonable shareholder as significantly altering the total mix of information made available to shareholders; (3) directors are not required to disclose which stockholders they expect will support or oppose future management-sponsored proposals; and (4) three of plaintiffs' disclosure-violation claims could not be considered on a motion to dismiss because plaintiffs failed to allege them in their complaint.

1. Pleading ⟹ 342

Pretrial Procedure ⟹ 624, 644, 683

On a motion to dismiss for failure to state a claim, it must appear with a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action.

2. Corporations ⟹ 316(4)

The settled rule in Delaware is that where a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transactions normally must fail.

3. Corporations ⟹ 189(3), 316(4)

The effect of a valid shareholder ratification is to cure any defect in the ratified transaction, except where the transaction is claimed to involve a gift or waste of assets, fraud, or *ultra vires*; in such cases, only unanimous shareholder ratification is a complete defense.

4. Corporations ⟹ 69

Under the Delaware General Corporation Law, separate classes of stock having differing voting rights are clearly permissible. DEL. CODE ANN. tit. 8, § 151(a) (1983).

5. Pleading ⟹ 342

Pretrial Procedure ⟹ 679, 681

For a contention to rise to the status of a claim that will be considered on a motion to dismiss, it must be alleged in the complaint.

6. Corporations ⟹ 198(3), 198(4)

Even where the result of an amendment to a corporation's certificate of incorporation would be to entrench incumbent management and the board, a confession of corporate wrongdoing in the form of a statement that the directors' primary purpose is entrenchment, is simply not required in the proxy statement.

7. Corporations ⟹ 198(3), 198(4)

Directors are not required to disclose which stockholders they expect will support or oppose future management-sponsored proposals.

Norman M. Monhait, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for plaintiffs.

Allen M. Terrell, Jr., Esquire, C. Stephen Bigler, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendants.

JACOBS, *Vice-Chancellor*

Presently pending are: (a) the plaintiff's motion for class certification, (b) the plaintiff's motion to compel discovery, and (c) the defendants' motion to dismiss the second amended complaint under Chancery Court Rules 12(b)(6) and 23.1. Because the Court finds, pursuant to Rule 12(b)(6), that the second amended complaint fails to state a claim upon which relief can be granted, it becomes unnecessary to address the remaining two motions.

I.

A.

The procedural history of the case, and the facts relating to the Rule 12(b)(6) motion, are relatively straightforward. This action was brought on January 15, 1987, on behalf of a purported class of shareholders of Rockwell International Corporation ("Rockwell")[1] to enjoin the implementation of a proposed amendment to Rockwell's certificate of incorporation. That amendment would authorize a new class of common stock ("Class A" stock) having ten votes per share and limited transferability rights that would discourage or make more difficult an unfriendly takeover of Rockwell. The sole basis of the original complaint was that the individual defendants (*i.e.*, Rockwell's directors) had breached substantive fiduciary duties under Delaware law by submitting the proposed amendment to a vote of shareholders.

Concurrently with the filing of the complaint, the plaintiff moved for a preliminary injunction to prohibit the proposed certificate amendment from being submitted for shareholder approval at the forthcoming annual stockholders meeting. During the briefing on that motion, the plaintiff amended the complaint on February 1, 1987, to add (*inter alia*) a claim that certain disclosures in the proxy

1. Rockwell is a Delaware corporation and one of the nation's leading aerospace manufacturers. As of December 15, 1986, Rockwell had 147,395,734 outstanding shares of common stock that were traded on the New York Stock Exchange.

statement issued in connection with that meeting (the "proxy statement") were false and misleading. Following a hearing on February 6, 1987, this Court denied the plaintiff's motion for preliminary injunctive relief.

At the February 11, 1987 annual meeting, Rockwell's shareholders approved the certificate amendment. Thereafter, on April 13, 1987, the plaintiff filed a second amended and supplemental complaint which reflected the certificate amendment's adoption. The second amended complaint, which is the pleading presently under attack, seeks an order invalidating and rescinding the certificate amendment.

Between February and August, 1987, the plaintiff took discovery on the merits. During that period disputes arose over class certification and discovery, which led ultimately to the presentation of the pending motions that were argued on March 14, 1989. This is the decision of the Court on those motions.

B.

The purpose, the essential features, and the effect of the Class A common stock authorized by the amendment are disclosed in the proxy statement that forms the basis for plaintiff's disclosure claims and that is incorporated into the second amended complaint by reference. *Lewis v. Straetz*, Del. Ch., C. A. No. 7859, Hartnett, V.C. (February 12, 1986).

The purpose of the amendment was to serve the long term interests of Rockwell and its stockholders, and to afford Rockwell's Board of Directors and stockholders time in which to evaluate and properly consider any offers affecting the ownership and control of the corporation. That purpose was to be accomplished by issuing to Rockwell's stockholders a security (namely, the Class A stock) having disproportionately high voting power. The combined effect of that stock's peculiar conversion and transferability attributes would, over time, cause disproportionate voting power to become concentrated significantly in the hands of Rockwell's long term stockholders. Included within that category were Rockwell's Employees' Savings Plan which owned approximately 30% of Rockwell's outstanding common stock.

The attributes of the Class A common stock that would yield that result are as follows: (1) the Class A common stock entitles the holder to ten votes per share, (2) the Class A stock is freely convertible into regular common stock having one vote per share, (3) the Class