7/27 (1)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CITY CAPITAL ASSOCIATES LIMITED PARTNERSHIP, a Delaware Limited Partnership,	
Plaintiff,	C. A. No. 10105
v.	
INTERCO INCORPORATED, a Delaware Corporation, HARVEY SALIGMAN, RICHARD B. LOYND, R. STUART MOORE, CHARLES J. ROTHSCHILD, JR., RONALD L. AYLWARD, DONALD E. LASATER, HARRY M. KROGH, LEE LIBERMAN, MARK H. LIEBERMAN, ROBERT E. QUENON, WILLIAM E. CORNELIUS, MARILYN S. LEWIS AND THOMAS H. O'LEARY,	
Defendants.	

COMPLAINT

As and for their complaint herein, plaintiff City Capital Associates Limited Partnership ("City Capital"), by its attorneys, alleges, upon knowledge as to itself and its own acts, and upon information and belief as to all other matters, as follows:

Summary Of This Action

1. As alleged more fully below, plaintiff has today proposed a merger (the "Merger") between City Capital and Interco Incorporated ("Interco") by letter to the board of direc-

tors of Interco (the "Merger Proposal"). Pursuant to the Merger Proposal, all shareholders of Interco will receive the same premium price of $64 for each of their Interco shares. In addition, plaintiff has advised Interco's Board that it is willing to negotiate the terms of its proposal, including price.

2. Acceptance of the Merger Proposal, which is at a premium price, would be in the best interests of Interco's shareholders. The Merger Proposal is nevertheless likely to be rejected by the entrenchment-minded defendant directors of Interco, who have an extensive history of ignoring shareholder interests and taking unilateral action to perpetuate their own control. Likewise, based on the directors prior conduct it is expected that the directors will reject plaintiff's efforts to negotiate a consensual transaction.

3. In rejecting the Merger Proposal, defendants can be expected to utilize all of the formidable defensive weapons which they have placed at their own disposal. These defensive weapons include, among other things, a "poison pill" rights plan which defendants originally adopted in September 1985 (the "Rights Plan") and which was amended in July 1988, (the "Amended Rights Plan") for the purpose of deterring unsolicited takeover attempts and usurping from shareholders the power to accept or reject a tender offer.

4. If defendants are permitted to utilize this weapon in connection with the Merger Proposal, plaintiff's acquisition of Interco may become economically unfeasible. Accordingly, the Merger Proposal will require, among other things, defendants taking such actions as are necessary to redeem the poison pill rights, or those rights otherwise being invalid or inapplicable to the acquisition of shares pursuant to the proposed Merger. In view of their history of entrenchment and single-minded devotion to the promotion of their own interests over those of the Interco shareholders, defendants are expected not to take those actions necessary to redeem the poison pill rights.

5. The hallmark of defendants' past conduct has been entrenchment. Among other things, as described more fully below:

- On September 23, 1985, Interco adopted the Rights Plan, which is designed to deter unsolicited takeover bids by creating the prospect of substantial dilution for any person attempting to effect a business combination with Interco, without approval of defendants. Interco adopted the Rights Plan to ensure defendants' perpetual control of Interco and ability to block any acquisition of the Company, no

matter how attractive the terms might be to Interco's shareholders;

- On July 11, 1988 Interco announced that it had changed the terms of the Rights Plan, adopting the Amended Rights Plan. The Company's announcement said that the new rights will be effective July 21 and that defendants had authorized the redemption of the rights existing under the original rights plan. The Company also disclosed little substantive information as to the nature or effect of the Amended Rights Plan and subsequently misleadingly stated that the Amended Rights Plan was "purely an update of [Interco's] former plan" when in fact the Amended Rights Plan is a more onerous takeover defense than the original Rights Plan.
- On July 15, 1988, Defendant Saligman announced that he intends to recommend a major restructuring of the Company at its next board meeting and stated that Interco is "undervalued". Defendants omitted to state that the intended effect of this proposed restructuring is to deny Interco's shareholders the opportunity to participate in any proposal that would prove more attractive than defendants' re-

structuring/entrenchment scheme, or to provide any details of this proposed restructuring.

6. The defendant directors have violated their fiduciary duty of candor by not disclosing to shareholders the precise terms of the Amended Rights Plan and the proposed restructuring and, most significantly, the consequential anti-takeover and entrenchment effects of these actions. Moreover, Interco has been undertaking a continuous program of repurchasing its shares in the market while disseminating selective information regarding the Amended Rights Plan and the proposed restructuring.

7. The purpose of this lawsuit is to prevent defendants from continuing their scheme of entrenchment by utilizing the Amended Rights Plan, the proposed restructuring, false and misleading public statements or Section 203 of the New Delaware Anti-Takeover Statute 8 Del. C. § 203 (1988) (the "Anti-Takeover Statute") to defeat the Merger Proposal. Unless injunctive relief is granted, defendants will continue to entrench and maintain themselves in office, will continue inequitably and illegally to deprive plaintiffs of their right to acquire the shares of Interco stock, will continue to mislead and misinform Interco shareholders and will deprive all other Interco shareholders of their right to realize a full and fair

value for their shares, at a substantial premium over the market place.

THE PARTIES

8. Plaintiff City Capital is a Delaware Limited Partnership with its principal executive offices at 3524 Water Street, N.W., Washington, D.C. 20007. City Capital is the beneficial owner of 3,140,300 shares of Interco common stock, representing approximately 8.7% of all Interco shares outstanding. City Capital purchased those shares in May, June and July of this year.

9. Defendant Interco is a Delaware corporation with its principal corporate offices at 101 South Hanley Road, St. Louis, Missouri 63105. Interco is a diversified company, primarily engaged in apparel manufacturing; general retail merchandising; footwear manufacturing and retailing; and furniture and home furnishings retailing. As of May 31, 1988, Interco had outstanding approximately 36,166,923 common shares, which are listed and traded on the New York and Midwest Stock Exchanges. Interco also has 367,208 shares issued of a Series D $7.75 Cumulative Convertible Preferred Stock, $100 stated value (the "Series D Preferred Stock") which is also listed on the New York Stock Exchange. Each share of the Series D Preferred Stock is convertible, at the option of the holder, into 4.3242 shares of the Company's Common Stock.

10. Defendants Harvey Saligman, Richard B. Loynd, R. Stuart Moore, Charles J. Rothschild, Jr., Ronald L. Aylward, Donald E. Lasater, Harry M. Krogh, Lee Liberman, Mark H. Lieberman, Robert H. Quenon, William E. Cornelius, Marilyn S. Lewis and Thomas H. O'Leary are members of the Board of Directors of Interco. As such, they owe the highest fiduciary duties of loyalty and care to Interco shareholders, including the duty to maximize shareholder wealth.

11. Defendant Saligman is also the Chairman and Chief Executive Officer of Interco; defendants Rothschild, Moore and Loynd are also Vice-Presidents of Interco. During fiscal year 1988, Defendant Saligman received $712,083 in salary and bonus. The equivalent fiscal 1988 compensation figures for defendant defendant was Rothschild, $369,288; defendant Moore, $452,342; and for defendant Loynd, $463,959.

FACTUAL BACKGROUND

A. The Rights Plan

12. On September 23, 1985, the board of directors of Interco approved the adoption of the Rights Plan. The Rights Plan was intended to deter any acquisition proposal for Interco unilaterally disfavored by defendants, and was adopted by them without the prior knowledge or approval of Interco's shareholders -- the intended beneficiaries of any acquisition proposal deterred by defendants' actions.

13. On July 11, 1988, the defendant directors adopted the Amended Rights Plan and declared that it would issue a dividend of one share purchase right per share of common stock (a "Share Purchase Right") effective July 21, 1988. The Company did not immediately disclose many of the substantive changes effected by the Amended Rights Plan that make that takeover defense even more onerous than the original Rights Plan, other than changes in the purchase price per share and certain of the triggering provisions of the Rights Plan.

14. The Share Purchase Rights are not exercisable or transferable apart from Interco's common stock until after the "Distribution Date" -- that is, the earlier of (i) 10 days following a public announcement that a person or group has acquired (or obtained the right to acquire) beneficial ownership of 20 percent or more of Interco's outstanding common shares (thereby becoming an "Acquiring Person"); or (ii) 10 days following the commencement or announcement of a tender offer which would result in the offeror becoming the beneficial owner of at least 20% of Interco's common stock (thereby also becoming an "Acquiring Person").

15. Upon the Distribution Date, the Share Purchase Rights become exercisable and can be transferred separately from the shares of common stock to which they are attached. Each Share Purchase Right, when exercised, entitles its holder

to purchase one common share of Interco stock at an exercise price of $160. The Share Purchase Rights may be exercised until July 31, 1998, unless earlier redeemed by defendants.

16. The $160 exercise price of the Share Purchases Rights greatly exceeds the economic value of the units of common stock into which they are initially convertible. Accordingly, the Share Purchase Rights were never intended to be used to purchase such common stock. Instead, the sole reason for the Share Purchase Rights is their "flip-over" and "flip-in" provisions, described below, which were designed to punish any offeror unacceptable to defendants by creating an insurmountable economic barrier to its acquisition of control.

17. Under the terms of the Amended Rights Plan, if Interco is acquired in a merger or other business combination which is not blessed by incumbent management, or the Acquiring Person engages in certain other "self-dealing" transactions, each Share Purchase Right "flips-over" and entitles its holder to purchase an amount of shares of the acquiring company's stock having a market value of <u>two times</u> the exercise price of the Share Purchase Right. In other words, a Share Purchase Right holder can purchase $320 worth of the acquiring company's shares for $160. If Interco is the surviving company in the unfriendly merger or other business combination, this same effect is accomplished by providing each Share Purchase Right

holder, other than the acquiring company, with the right -- the "flip-in" right -- to convert its Share Purchase Right into Interco shares at the same dilutive two to one ratio.

18. The Amended Rights Plan -- unlike the original Rights Plan -- further provides that the Share Purchase Rights "flip-in" if (a) a person or group acquires (or obtains the right to acquire) 30% or more of the outstanding common shares of Interco (unless that person or group first acquires 20% or more of the outstanding shares of Interco in an all-cash all-holders tender offer where the purchase of those shares increases that person or group's holdings to 80% or more of the outstanding common shares of Interco); or (b) after the appearance of an Acquiring Person, Interco undertakes a recapitalization, reorganization or reclassification of its securities which has the effect of increasing by more than one percent the proportionate share of Interco stock owned by the Acquiring Person. The Amended Rights Plan also allows the Interco Board to exchange each right for one common share of Interco Stock where a person or group acquires (or obtains the right to acquire) between 30% and 50% of the outstanding common shares of Interco.

19. The "flip-in" provisions of the Amended Rights Plan have the added feature that they can be amended at the sole discretion of Interco's directors, without the consent of

the holders of the Rights, such that the Rights will be triggereat a threshold as low as 15%.

20. The massive dilutive effect of the Share Purchase Rights ensures that no entity disfavored by defendants will dare to acquire a significant minority position in Interco, much less consummate a tender offer for, or attempt a merger or other business combination with, Interco, unless the Share Purchase Rights are first redeemed. In practical terms, this deters all unsolicited takeover attempts, because tender offers for a company the size of Interco nearly always are followed by a second-step merger. Insofar as offers are not so deterred, the device grants enormous power to the board to defeat the offer and achieve the entrenchment goals sought by the defendants.

21. To illustrate the dilutive effects of the Share Purchase Rights on a potential acquiror, if plaintiff was to purchase 90% of the outstanding Interco shares and associated Share Purchase Rights and thereafter to effect a merger with Interco, the exercise of the remaining 10% of the Share Purchase Rights by the non-tendering Interco shareholders would allow them to purchase sufficient Interco stock to reduce plaintiff's equity interest in Interco from 90% to 75%.

22. The deterrent effect of the potential dilution caused by the Share Purchase Rights has been acknowledged by

defendants, who admitted in an SEC Report on Form 10-Q dated July 13, 1988 that "[t]he Rights have certain antitakeover effects . . . [and] will cause substantial dilution to a person or group that attempts to acquire Interco on terms not approved by Interco's Board of Directors, except pursuant to an offer conditioned on a substantial number of Rights being acquired."

C. Interco and the Defendant Directors' Deceptive Conduct and Other Acts of Entrenchment

23. Interco and the defendant directors have taken actions which demonstrate their fierce commitment to keeping themselves entrenched in power. For example, Interco's certificate of incorporation and by-laws constitute formidable obstacles to a change of control. The certificate of incorporation and by-laws (i) provide for a staggered Board having three classes of directors; (ii) prohibit the calling of a special meeting unless a majority of the Board so decrees; (iii) prohibit shareholder action by written consent; (iv) require a 75% vote of shareholders for a merger or consolidation, unless a majority of the Board approves that transaction; and (v) authorize the Board to issue "blank check" preferred stock, with potentially disparate voting rights.

24. More recently, Interco has undertaken a scheme of strengthening its takeover defenses while at the same time severely limiting its public disclosures as to its actions so as to artificially increase the price of its stock. For in-

stance, Interco has been undertaking a repurchase program during the course of the past nine months pursuant to which the Company is repurchasing up to five million shares of its stock. Interco has reportedly purchased over 3.5 million shares pursuant to that program.

25. On July 18, the Company stated that it is "resuming" its open-market share repurchase program (apparently without previously having announced that it had "stopped" that program). The Company has not disclosed whether it will purchase more or fewer shares than the 5 million targeted in the original program, and gave no other explanations for the "resumption" of this program.

26. The Company also limited the information it disclosed in conjunction with the announcement of the Amended Rights Plan. The Company did not immediately disclose the substantive changes effected by the Amended Rights Plan other than certain changes in the purchase price per share and triggering provisions of the Rights Plan.

27. Specifically, Interco failed to disclose, inter alia, that the Amended Rights Plan (unlike the original Rights Plan) allows the Board in its sole discretion to lower certain triggering percentages such that the massive dilutive effects of that Plan will come into play when a person or group acquires as little as 15% of the shares of Interco stock.

28. Interco also failed to disclose that the Rights will "flip-in" if the company undertakes certain measures, including a recapitalization or reorganization, after an Acquiring Person appears. This provision, by which the Rights are effectively triggered once an entity acquires 20% of the shares of Interco (because the company may unilaterally at that time cause the massive dilutive effects of the Rights Plan to occur by causing a recapitalization) substantively changes the original Rights Plan, under which the Rights could be triggered only upon an entity acquiring 30% of the shares of Interco. Its omission was particularly misleading in light of the Company's statement that the Amended Rights Plan was "purely an update of [Interco's] former plan," and failure to disclose that the Amended Rights Plan is a more onerous takeover defense than the original Rights Plan.

29. On July 15, 1988, it was reported that defendant Saligman, the Chairman and Chief Executive Officer of Interco plans to recommend a "major restructuring" of Interco at the Company's next Board meeting on August 8, 1988, and that the recommended restructuring will include "the possible sale of [Interco's] faltering apparel manufacturing group." The Company announced the restructuring plan could include a special dividend to shareholders, a tender offer by the Company for its own shares or open market purchases of its own shares.

30. Defendant Saligman stated that the restructuring was being proposed simply "to narrow the focus of Interco's business lines and improve the price of the company's shares." This statement misleadingly failed to acknowledge the actual takeover-deterrent purpose of the restructuring.

31. Despite the fact that it had been actively repurchasing its shares in the market and that other Interco shareholders are actively buying and selling Interco shares, Interco failed to disclose material facts as to its proposed restructuring. Interco and the defendant directors omitted to state any details as to the proposed restructuring, or that the proposed restructuring was being created to serve as a deterrent to an unsolicited acquisition such as plaintiff's Offer and that this effect was precisely the impetus for the Company's announcement of the restructuring proposal.

32. Although Interco has not disclosed what actions it intends to take in connection with its restructuring, its announcement has had its intended effect of causing rampant speculation in the financial markets. Financial analysts are already placing values on that restructuring plan -- with one analyst placing a value on the restructuring plan of $65 share for the 36.2 million shares of Interco outstanding.

33. In an interview on July 15, it was reported that Interco's Chief Financial Officer, referring to the announce-

ment of the proposed restructuring, stated that Interco "tipped its hand early 'because of the unusual activity surrounding our stock'" -- a concession that Interco's disclosure of its proposed restructuring plan was a blatant attempt at market manipulation.

34. In fact, Interco and the defendant directors have known for months, if not years, that Interco has been widely viewed in the investment community as a potential takeover target. Defendants' actions in announcing the proposed restructuring are plainly in response to the perceived "threat" of an unsolicited tender offer to Interco's shareholders.

35. These material omissions as to the strengthening of Interco's defensive bulwark have had the effect of artificially inflating the price of Interco's common stock -- thereby benefiting Interco and the director defendants and damaging plaintiff and other Interco shareholders who purchased shares in a market deprived of materially negative information in the possession of Interco and the defendant directors.

D. Plaintiff's Merger Proposal

36. Pursuant to the Merger Proposal, which plaintiff made to the Interco board today, plaintiff has offered to purchase all of the approximately 36.2 million shares of Interco common stock which it does not now own at a price of $64 per share. The Merger Proposal price represents a significant

premium above the $47.77 average closing price at which Interco shares traded on the New York Stock Exchange during the 30 trading days before the Merger Proposal.

37. The Merger Proposal will require, among other things, the defendants' redemption of the Rights Plan or those rights otherwise being invalid or inapplicable to the acquisition of shares pursuant to the proposed Merger or tender offer.

38. If the Merger Proposal is accepted, plaintiff plans to purchase all shares of Interco at $64 per share, and to effect a merger between Interco and City Capital. In the Merger, all remaining Interco shareholders would receive the same premium of $64 for each of their shares.

COUNT I

(For Breach of Fiduciary Duty with Respect to the Restructuring)

39. Plaintiff repeats each of the foregoing allegations as if fully set forth in this paragraph.

40. Interco's hasty efforts to pursue a restructuring transaction have been undertaken to forestall a possible threat to management's control of Interco. Based on prior conduct, plaintiff believes that defendants will seek to impose their status-preserving restructuring on Interco shareholders without regard to the shareholders' best interests and specifically without regard to the prospect that greater value for

shareholders can be obtained through pursuit of a transaction with plaintiff.

41. Plaintiff has no adequate remedy at law.

COUNT II

(For Breach of Fiduciary Duty with Respect to Redemption of the Rights Plan)

42. Plaintiff repeats each of the foregoing allegations as if fully set forth in this paragraph.

43. The ostensible purpose of the Amended Rights Plan is to protect Interco's shareholders against unfair acquisition proposals that are for less than all the outstanding shares of the company, are at a price that does not reflect the values inherent in the company, or are "coercive" two-tier offers with cash up front and securities of a lesser value in the back end.

44. Nevertheless, the Amended Rights Plan was intentionally designed by defendants to apply indiscriminately to all acquisition proposals not approved by them, including those which, like plaintiff's Merger Proposal are premium price, all-cash offers for all shares, without any coercive element at all. Indeed, the Rights Plan adopted by defendants stands as an impediment to the unapproved accumulation of even a 20 percent minority position in Interco.

45. Defendants, by engaging in the conduct described

herein, have demonstrated to all the world that they will reject plaintiff's Merger Proposal, refuse to negotiate and refuse to redeem the Rights. Accordingly, absent judicial relief, Interco's shareholders will never have an opportunity to receive a premium price for their shares.

46. Defendants' anticipated refusal to redeem the Rights in the face of a noncoercive, all cash Merger Proposal such as plaintiff's, which will afford substantial benefits to Interco's shareholders, has no economic justification, serves no legitimate purpose, and is not reasonable in relation to any threat posed to Interco or its shareholders.

47. Defendants' likely refusal to redeem the Rights also will have the purpose and effect of entrenching them in office and insulating them from shareholder participation, all in breach of their fiduciary duties to Interco's shareholders under Delaware law.

48. Plaintiff has no adequate remedy at law.

COUNT III

(For Breach of Fiduciary Duty with Respect to the Anti-Takeover Statute)

49. Plaintiff repeats each of the foregoing allegations as if fully set forth in this paragraph.

50. By virtue of its potential three year prohibition on business combinations, the Anti-Takeover Statute gives

Delaware companies such as Interco a powerful defense to unsolicited takeovers. That statute would prohibit a merger or other business combination between City Capital and Interco for a minimum of three years unless the defendants agree in advance to "approve" such business combination or plaintiff's offer. The decision whether to exercise this defense is entirely within the control of the company's incumbent directors, who can opt out of the Statute or approve an unsolicited offer, and thereby exempt it from the Anti-Takeover Statute's three year blackout period.

51. Because the Anti-Takeover Statute stands as a barrier to takeover proposals which may benefit shareholders and can easily be misused by incumbent directors for the purpose of maintaining their control, the incumbent directors have a fiduciary obligation to make a good faith assessment of any takeover proposal and to determine whether they should take action to exempt it from the Anti-Takeover Statute. In discharging this duty, the directors are obligated to consider the best interests of shareholders and to refrain from acting to entrench themselves in office -- just as they would be in determining whether to implement any other antitakeover provision.

52. The defendant directors' history of entrenchment, including the actions described above, leave no doubt that they will utilize the Anti-Takeover Statute as an en-

trenchment device and that they will reject the Merger Proposal or take such other action as is necessary to permit an acquisition transaction to go forward, even though it is in the best interests of Interco's shareholders.

53. Defendants' probable refusal to properly consider the Merger Proposal and misuse of the Anti-Takeover Statute in this fashion constitutes a violation of their fiduciary obligations to shareholders under Delaware law.

54. Plaintiff has no adequate remedy at law.

COUNT IV

(For Breach of the Fiduciary Duty of Candor)

55. Plaintiff repeats each of the foregoing allegations as if fully set forth in this paragraph.

56. Interco owes to all its shareholders a duty of candor. Plaintiff is, and at all relevant times was, a shareholder of Interco.

57. The common law duty of candor is intended to insure that issuers and other fiduciaries not deny their cestui que trust that information necessary for them to make informed decisions as to the trust, including investment decisions.

58. Interco has made false and misleading statements in connection with the purchase or sale of Interco stock, as alleged above.

59. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff respectfully requests this Court to enter an Order:

(a) declaring that the individual defendants have breached their fiduciary obligations to Interco's shareholders under Delaware law (i) by refusing to redeem the Rights in response to the Merger Proposal; (ii) by undertaking the proposed restructuring and refusing to negotiate with plaintiff with respect to the Merger Proposal; (iii) by failing to take such other action as is necessary to exempt the Merger from the prohibitions of the Delaware Statute; and (iv) by disseminating false and misleading statements and omissions in connection with the purchase or sale of Interco stock;

(b) compelling defendants to redeem the Rights;

(c) preliminarily and permanently enjoining the defendants, their employees, agents and all persons acting in their behalf or in concert with them from taking any action with respect to the Rights, except to redeem them, and from adopting any other Rights Plan;

(d) preliminarily and permanently enjoining the

defendants, their employees, agents and all persons acting in their behalf or in concert with them from taking any action with respect to the proposed restructuring, and compelling defendants to negotiate with plaintiff with respect to the Merger Proposal and to provide plaintiff with all information necessary to facilitate presenting shareholders with that transaction which will provide shareholders with the greatest value;

(e) compelling defendants to accept the Merger Proposal or take such other action as is necessary to exempt any share purchases and the Proposed Merger from the prohibitions of the Anti-Takeover Statute;

(f) requiring that appropriate corrective disclosure be made in order to cure all of the false and misleading statements and omissions made by defendants in connection with the purchase or sale of Interco stock;

(g) awarding plaintiff its costs and disbursements in this action, including reasonable attorneys' fees; and

(h) granting plaintiff such other and further relief as the Court deems just and proper.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

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