

This memorandum is respectfully submitted on behalf of Interco Incorporated and its directors in support of the proposed form of order (the "Order") implementing this Court's decision of November 1, 1988 (the "Decision") which these defendants have filed today. For the reasons set forth herein -- as well as in defendants' accompanying papers in support of certification of an interlocutory appeal -- defendants submit that the Order is a fair and appropriate means of implementing the Decision.

As the Court will see from defendants' papers relative to their appeal, defendants respectfully believe that the Decision deviates from governing precepts of Delaware law as declared by the Delaware Supreme Court. Further, the defendants believe that, as a practical matter, the Decision puts directors of Delaware corporations in the untenable position of being ordered by a court to sell a company at a price they believe is inadequate, which their investment banker believes is inadequate and which, indeed, the bidding company has stated it is "willing to consider increasing." (The quoted language appears in Cardinal Acquisition Corp.'s October 17, 1988 letter to Interco's Board, reproduced at page 3 of Cardinal's Third Supplement to its Offer to Purchase.)

Accordingly, the proposed Order contains provisions designed to assure meaningful review by the Delaware Supreme

Court of the Decision. To assure that plaintiffs do not prevent the judicial process -- which they have made an essential element of their tender offer -- from stopping short of its full course, the Order provides for a stay of its first numbered paragraph. We submit that plaintiffs, having sought the aid of a court of equity to effect their transaction, and having never suggested that they would close their offer absent a favorable court ruling, cannot simply declare victory in the middle of the judicial process but must be deemed to have consented to the judicial process running its entire course. This is particularly so in this case where most of the arguments plaintiffs advanced in support of their motion were not accepted by the Court and the Court's Decision rather clearly breaks new ground in terms of Delaware corporation law.

For these same reasons, the proposed Order also prevents plaintiffs from purchasing shares pending Supreme Court review by way of an ancillary injunction. While, during yesterday's conference, this Court questioned its ability to enter such relief, we respectfully submit that its power to do so is clear and that it would be an appropriate exercise of power. From the very beginning and throughout this whole transaction, plaintiffs have chosen to make this Court an element of their tender offer, by in substance conditioning their offer on favorable action by this Court

and by never suggesting prior to the Decision that they might purchase without regard to this Court's actions. In light of this course of conduct by plaintiffs, it is as a practical matter clear that any possible purchase hereafter would be made on the basis of the Decision rather than as an independent business choice. Surely if plaintiffs had lost before this Court they would not have purchased and they would have deemed themselves entitled to pursue an appeal without prejudice to their business position. Interco ought to have the same right, i.e., to pursue Supreme Court review without prejudice to its business position. This is, we submit, a matter of fundamental equity deriving from the fact that plaintiffs -- not Interco -- chose to make a court of equity an actor in their offer.

The proposed Order also, in the spirit of equity, would prevent Interco from taking any further steps to implement its restructuring pending Supreme Court review. Thus, all parties' business positions would be frozen while the Supreme Court had a chance to look at the important and novel questions of Delaware law decided by this Court.

Under the case law, this Court clearly has discretion to grant a stay or injunction pending appeal. See Hughes v. Trans World Airlines, Inc., Del. Supr., 185 A.2d 886 (1962). Preservation of the status quo to allow review of a controversy is a well-recognized basis for such interim

relief. See Bayard v. Martin, Del. Supr., 101 A.2d 329, 332 (1953), cert. denied, 347 U.S. 944 (1954); State of Delaware Insurance Dept. v. Remco Insurance Co., Del. Ch., C.A. No. 8220, slip op. at 4, Allen, C. (Mar. 18, 1986) ("The fundamental interest that all appellants share is an interest in having effective appellate review") (Exhibit A hereto). Such relief is especially appropriate where -- as here -- an appeal would otherwise be meaningless. Grynberg v. Burke, Del. Ch., C.A. No. 5198, Brown, V.C. (Feb. 5, 1980) (Exhibit B hereto); Blaustein v. Standard Oil Co., Del. Super., 45 A.2d 533 (1945).

In Mills Acquisition Co. v. MacMillan, Inc., Del. Ch., C.A. No. 10168, Jacobs, V.C. (Oct. 18, 1988) (Exhibit C hereto), this Court recently enjoined the closing of a tender offer to prevent the offeror from taking control of the target and mooted any appeal. MacMillan involved a challenge to the procedures used by a target in connection with an auction. Among the actions challenged was the granting of a lock-up option to Kohlberg Kravis Roberts & Co. ("KKR"), the target's favored bidder. This Court declined to overturn the target's actions on a preliminary injunction motion but nevertheless enjoined KKR from proceeding with its tender offer pending appeal so as to preserve the plaintiffs' ability to seek effective review of this Court's order.

Other courts have similarly recognized the necessity for injunctions pending appeal where a tender offeror threatens to take control of a target before an appeal can be heard. See, e.g., City Capital Associates Limited Partnership v. Interco, Inc., No. 88-3643 (3d Cir. Oct. 11, 1988) (ORDER) (Exhibit D hereto); Newmont Mining Corp. v. Pickens, 831 F.2d 1448 (9th Cir. 1987); Life Investors, Inc. v. AGO Holding, N.V., [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,356 (8th Cir. 1981); Prudent Real Estate Trust v. Johncamp Realty, Inc., 599 F.2d 1140 (2d Cir. 1979).

In the instant case, Interco has an especially compelling case for a stay and an injunction pending appeal. First, the rule of law promulgated by this Court's November 1 decision -- that a board of directors must redeem a rights plan designed to resist an inadequate offer -- inadequate in the Board's view and in its advisors' view and, indeed, less than the bidder is willing to pay -- and to protect a higher valued restructuring alternative -- is a novel one deserving of appellate review. See Blaustein v. Standard Oil Co., 45 A.2d at 536-36 (granting a stay because the losing party had "the right to have adjudicated in the Appellate Court an important and hitherto undetermined question in this State"). See generally Defendants' Application for Certification of an Interlocutory Appeal (filed herewith).

Second, as noted, plaintiffs conditioned their tender offer on their "being satisfied in [their] sole discretion that the Rights are invalid" (Offer to Purchase, p.3) and proceeded to invoke the process of this Court to achieve that end. They expressly so advised Interco's shareholders. Id. at 4. They should not now be allowed to short-circuit this process. Full judicial review requires that Interco be given an opportunity to seek an interlocutory appeal in the Supreme Court. Plaintiffs have sought the assistance of a court of equity and must now be prepared to do equity -- which in the circumstances requires nothing less than full consideration of the issues involved.

Defendants argued in opposition plaintiffs' motion that uncertainty regarding the law did not constitute sufficient irreparable injury to warrant the issuance of a preliminary injunction and that plaintiffs were not entitled to invoke this Court's processes in pursuit of an essentially advisory opinion. See Newell Co. v. Wm. E. Wright Co., Del. Ch., 500 A.2d 974 (1985); FMC Corp. v. R.P. Scherer Corp., 545 F. Supp. 318, 323 (D. Del. 1982). The Court apparently rejected defendants' argument. (Opinion 34) However, having permitted the plaintiffs the look at the merits they convinced the Court they had a right to, defendants should now be accorded the right to seek a final determination of the merits in the Supreme Court -- a right that should not be

foreclosed by a bold decision on the part of plaintiffs to close their tender offer on the basis of this Court's decision.

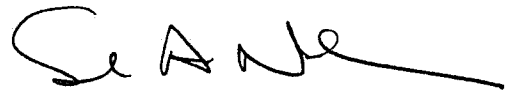
Finally, the proposed Order provides that if, contrary to our belief, the Supreme Court affirms this Court's Decision and holds that a rights plan cannot be relied upon to defend against an inadequate offer, the Interco Board should have an opportunity at that juncture to decide whether to seek to auction off Interco. As the Court's Decision notes, up to this point "the company is not in fact for sale" (p. 16) and the Board "has never made a determination that it [is] in the best interests of the shareholders to sell the company." (p. 38). If, however, the Supreme Court rules that the rights plan cannot be used to defend against this inadequate offer, the Board should have the opportunity to consider use of the rights plan for the quite different purpose -- recognized in footnote 14 of the Decision (p. 27) -- of using the rights plan "to permit the board to act as an effective auctioneer."

Accordingly, the proposed Order provides that, if the Decision is affirmed, the Board would have a reasonable time within which to decide whether to auction off the company and, if it does so, may use the rights plan for the sole purpose of facilitating such auction. The use of the rights plan for the purpose of increasing the value available

to shareholders if the company is to be sold is recognized by the Court as a proper purpose and is quite distinct from the purpose which the board has thus far had in view -- to protect the shareholders against an inadequate offer.

CONCLUSION

For the foregoing reasons, this Court should enter the proposed Order in lieu of the order proposed by plaintiffs.



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