

SPN
11/3/88 87
5:00

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CITY CAPITAL ASSOCIATES :
LIMITED PARTNERSHIP, et al., :
Plaintiffs, :

vs.

Civil Action
No. 10105

INTERCO INCORPORATED, :
et al., :
Defendants. :

- - -

Chancery Court Chambers
Public Building
Wilmington, Delaware
Thursday, November 3, 1988
3:15 p.m.

- - -

BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

TELEPHONE CONFERENCE ON FORM OF ORDER

APPEARANCES:

PAUL L. REGAN, ESQ. (by telephone)
ROBERT E. ZIMET, ESQ., of the New
York Bar (by telephone)
Skadden, Arps, Slate, Meagher & Flom
for Plaintiffs

SAMUEL A. NOLEN, ESQ. (by telephone)
Richards, Layton & Finger
-and-

MICHAEL W. SCHWARTZ, ESQ., of the
New York Bar (by telephone)
Wachtell, Lipton, Rosen & Katz
for Defendants

CHANCERY COURT REPORTERS
135 Public Building
Wilmington, Delaware 19801
(302) 571-2447

1 THE COURT: This is Chancellor Allen.
2 Who is on the line?

3 MR. ZIMET: This is Robert Zimet from
4 Skadden Arps, Your Honor.

5 MR. SCHWARTZ: Michael Schwartz of
6 Wachtell Lipton.

7 MR. NOLEN: Sam Nolen from Richards
8 Layton. And I was just handed a message that Paul
9 Regan, who was on the line, has fallen off the line.
10 If I can impose upon you, Your Honor, maybe I can
11 just dial him back in.

12 THE COURT: All right.

13 MR. NOLEN: I think we are all now
14 here.

15 THE COURT: Who would like to go
16 first?

17 MR. ZIMET: Your Honor, this is
18 Robert Zimet, if I may.

19 THE COURT: Yes, sir.

20 MR. ZIMET: The parties are in
21 agreement as to all provisions of the order except
22 for Paragraph 3. Yesterday, when we were with the
23 Supreme Court, the Supreme Court has scheduled
24 argument on the appeal for November 30. And one of

1 the facts that was brought to the Court's attention
2 by both sides with respect to the 30th was the fact
3 that the financing that we, City Capital, has
4 arranged for its offer, at least one-half of the
5 financing, will -- the commitments on that financing
6 run out on December 15. And so the discussion that
7 the parties have had with respect to Paragraph 3 is
8 to try and devise a method for the concern that we
9 have that assures us that we are not -- we don't find
10 ourselves in a predicament where the Supreme Court
11 affirms either on the 30th or shortly thereafter and
12 then, because the Interco board decides to run an
13 auction, enough time lapses that the billion, nearly
14 a billion-four in financing that is necessary for our
15 offer, the commitments disappear.

16 The status of those commitments are,
17 we have paid approximately \$15 million for those
18 commitments. We do not have the right to have them
19 extended. That would be a decision that would be
20 made at the time by Drexel Burnham and by the
21 other -- which has subscribed to about 600 million of
22 that amount, and 700 million by other preferred stock
23 purchasers.

24 And so what our Paragraph 3 was

1 attempting to do was to provide a mechanism to assure
2 at this point that the tender offer is not defeated
3 simply because events have changed and we are unable
4 to replace the financing.

5 We proposed two methods of assuring
6 that, and that is what is reflected in the bracketed
7 language in Paragraph 3. One would be to provide now
8 an outside time limit of December 9 by when the
9 rights would have to be redeemed, or alternatively,
10 to reflect that the parties would appear before the
11 Court and the Court, in light of the circumstances
12 that were prevailing after the Supreme Court ruled,
13 would determine how the time period would work.

14 The second aspect of our Paragraph 3
15 is to make explicit that the board can now, if it
16 elects to, explore the possibility of an auction and
17 even pursue an auction if they care to do so,
18 notwithstanding the other status quo-maintaining
19 provisions of the form of order.

20 The point from our perspective is
21 that as we get closer to the 15th, the board ought to
22 have the flexibility, because of the significance of
23 the deadline of December 15, if they felt that they
24 were running out of time, that they could begin the

1 auction so that they could inform themselves even
2 while the case was on appeal and even while the
3 preliminary injunction was otherwise in place.

4 For the reasons I stated yesterday,
5 we are very much concerned that when our commitments
6 run out, there is no assurance that we would be able
7 to have the financing to complete the offer, and we
8 would not want shareholders deprived of that choice.

9 Those are the essential reasons why
10 we would advocate our formulation of Paragraph 3, and
11 that is why we would ask that our form of order be
12 entered.

13 THE COURT: Thank you, Mr. Zimet.

14 Mr. Schwartz, may I hear from you,
15 please.

16 MR. SCHWARTZ: Thank you, Your Honor.
17 Just by way of preface, I think it might be helpful
18 to give you a brief report on the proceedings before
19 the Supreme Court yesterday afternoon after we left
20 Your Honor's courtroom.

21 We went over and were heard by three
22 judges of the Supreme Court, including the Chief
23 Justice, and after we discussed accepting the
24 interlocutory appeal, there was then discussion of a

1 briefing schedule. And it is, indeed, accurate, as
2 Mr. Zimet says, that the matter of this December 15
3 date was before the Justices at that time. Mr. Zimet
4 urged a short briefing schedule, contemplating the
5 completion of briefing next week and argument next
6 week.

7 The Justices considered that and
8 rejected that and thought that in light of the
9 issue -- I don't want to read their minds, but
10 obviously thought -- made a statement to the effect
11 that there was, you know, important issues and a
12 fuller briefing schedule was necessary. And that led
13 to a briefing schedule where our brief will go in
14 next Friday, theirs the following Friday, the 18th,
15 reply just before Thanksgiving and argument in Dover
16 on November 30. In other words, that schedule was
17 set by the Supreme Court with full knowledge of this
18 December 15 date to which Mr. Zimet makes reference.

19 Now, with that background, let me get
20 back to the matter of Paragraph 3 and the conflicting
21 versions. I have been supplied by your court
22 reporter, Your Honor, with the portion of yesterday's
23 transcript before you in respect to your ruling and
24 particularly with respect to this Paragraph 3 matter.

1 And it is quite clear to us that you contemplated, as
2 we contemplated, that we would have an opportunity
3 after the Supreme Court acts, assuming that the act
4 is an affirmance, to determine whether to conduct an
5 auction and, if so, to do that. And it would be
6 after the Supreme Court acts. And that is on Page 8
7 of yesterday's transcript.

8 There was concern which Your Honor
9 expressed in two respects. One was, shouldn't the
10 board be doing something in the interim to permit
11 themselves if they are going to conduct an auction to
12 act expeditiously. And two was, shouldn't our form
13 of order perhaps include some specific dates rather
14 than the formulation that we had yesterday of a
15 reasonable time. And I think those are the issues
16 that were left open for the parties to try to
17 negotiate out.

18 In the spirit of trying to negotiate
19 those out, we have done the following: We have
20 changed Paragraph 3 from the form in which you had it
21 yesterday, so that whereas yesterday it said that our
22 determination whether to conduct the auction would
23 have to be made "in a reasonable time," we changed
24 that, and it now says, as you will see, looking at

1 Page 3 of our draft this afternoon, that we "shall
2 promptly determine" whether to conduct an auction.

3 And I can tell Your Honor in that
4 connection that, as Your Honor had requested, we will
5 be, and will so state in a 14D-9, in the meantime
6 exploring in an exploratory way the possibility of
7 dealing with third parties. That is to say, "in the
8 meantime" means during the pendency of the appeal
9 process. That will enable us, then, to make that
10 determination promptly upon the action of the Supreme
11 Court.

12 THE COURT: Well, let me ask you,
13 Mr. Schwartz, what is the objection to the language
14 "notwithstanding the other provisions of" this
15 paragraph, "during the time specified in Paragraph
16 2(b)...Interco may conduct an auction"?

17 MR. SCHWARTZ: Well, I will tell you
18 what the problem is, Your Honor. I mean --

19 THE COURT: Well, that's why I asked
20 you.

21 MR. SCHWARTZ: We are concerned that
22 what will happen here is -- let me back up a step. I
23 have conferred with our client and with my corporate
24 partners and so on. Pragmatically, it would be

1 impossible to actually conduct an auction during this
2 period without it either being an ineffectual
3 auction, because it is hypothetical, or it being a
4 real auction but we, in effect, frustrate our appeal
5 and lose the chance to pursue the appeal. I mean,
6 you can't go to people and say give us this but we
7 won't act on it. And conversely, if we go to people
8 and say give us this and we will act on it, then we
9 have been forced to do the auction and lost our right
10 to have a meaningful appeal.

11 We would undertake, as Your Honor
12 suggested on the record yesterday, to do everything
13 we could in the intervening period so that the
14 auction process, should the board, you know, embark
15 on that, could be quick and we would be in a position
16 to act quickly. But to actually conduct an auction,
17 which is what their "notwithstanding" sentence calls
18 upon us to do --

19 THE COURT: No, it doesn't. It says
20 "may."

21 MR. SCHWARTZ: I know, but, I mean,
22 what we may -- they are saying you may do something.

23 THE COURT: Correct.

24 MR. SCHWARTZ: But then, you see, if

1 we don't do it, they will then be arguing after the
2 hypothetical affirmance that we could have and should
3 have. And I am being very upfront about this right
4 now before the whole process begins, that we really
5 can't.

6 I appreciate that it says "may," but
7 the financial and business dilemma that I just
8 briefly sketched out for Your Honor means that we
9 really can't. You just can't conduct an effective
10 auction when you are not in a position to sell, which
11 is the position we would want to be in if we are
12 going to preserve our appellate remedy as a
13 meaningful alternative.

14 Conversely, if you are in a position
15 to conduct a meaningful auction -- i.e., you are
16 prepared to sell -- then there goes your appeal.

17 We really are not trying to drag this
18 thing out. And if we are disappointed by the Supreme
19 Court and there is an affirmance, we would act very
20 expeditiously. And to that end we also wrote into
21 this morning's draft or this afternoon's draft that
22 there would be a specified period of two weeks to
23 conduct that auction and that either party could
24 apply to the Court in light of whatever the

1 circumstances were to modify that period if
2 necessary.

3 What bothers us about the plaintiffs'
4 order apart from what I have just said concerning the
5 "notwithstanding" sentence is that the second
6 alternative in brackets, particularly --

7 THE COURT: Seven-day period.

8 MR. SCHWARTZ: The "such period" one,
9 "not to exceed seven days" and so on?

10 THE COURT: Yes.

11 MR. SCHWARTZ: And then there is a
12 cap, so to speak, of December 9. If the Supreme
13 Court should rule on November 30, that is one thing.
14 But the Supreme Court might well want to take some
15 time to consider this matter, and it might happen,
16 therefore, that we would lose the thing which I think
17 Your Honor agreed we ought to have yesterday, which
18 is the opportunity to conduct this auction after an
19 affirmance.

20 I mean, this bracketed alternative,
21 the second one, I think, you know, with no disrespect
22 to my adversary, really cuts back on the basic point
23 we had agreement on yesterday: That we have a right
24 to do this after the Supreme Court acts.

1 Now, as to the first alternative they
2 suggest, which would leave it open for Your Honor to
3 set the time period after the appeal is decided, I
4 don't want to speak very strongly against that. I do
5 want to say that we think it is much preferable for
6 the board to know now, during this exploratory
7 process, what the time frame will be after the
8 appeal, and again, subject to the opportunity of any
9 party to come before the Court to seek modification.
10 We think that works in the direction of expedition to
11 have this matter settled now and not then.

12 Let me by conclusion speak briefly to
13 the matter of this December 15 problem, though I do
14 at the risk of repetition want to underscore that the
15 Supreme Court set its schedule knowing full well of
16 this date and the problem that Mr. Zimet is
17 describing to Your Honor.

18 You know, on our side, Your Honor,
19 with respect to the recapitalization, we, too, have
20 financial commitments and so on, and we, too, by
21 virtue of the mutual stay are going to find ourselves
22 obliged to either renegotiate or extend or modify or
23 whatever in light of the mutual stay of both sides,
24 and focusing, of course, on our side. I mean, that,

1 to me, is the integral part of the decision to let
2 the appeal go forward that, you know, the parties are
3 going to have to modify their business arrangement
4 somewhat. It is no less true on our side than on
5 theirs, Your Honor.

6 That being so, we would urge that
7 Your Honor enter our form of order. Again, in the
8 spirit of not wanting to protract this, I am not
9 saying that two-week period we have written in is
10 cast in concrete. If Your Honor thought a 10-day
11 period or something was more appropriate -- but some
12 specified period so we know what we have to do during
13 the interim period to be sure we can meet that
14 commitment is what we think is appropriate here.

15 THE COURT: All right. Mr. Zimet?

16 MR. ZIMET: Your Honor, I have
17 several points. They already, as Your Honor found in
18 the opinion, have been out there testing the market
19 at least with respect to LBO's. We know they have
20 provided information on a confidential basis. There
21 is a lot that can be done without formally having an
22 auction to advance the process and facilitate the
23 process should they be called upon to do so.

24 They can supply information. They

1 could increase the awareness of bidders as to the
2 properties. They can provide people with access to
3 information, so that if we are called upon to have an
4 auction in a very short period of time, that
5 flexibility is there. And that should be an option
6 that the board should have.

7 I find myself in a position of
8 arguing that the Interco board should have
9 flexibility to deal with a changing situation as it
10 evolves and find counsel for the board of directors
11 volunteering to have their hands handcuffed.

12 With respect to their fees, we have
13 reviewed their financing arrangements, and they are
14 very different than ours. First, there are two
15 deadlines, as I understand their bank arrangements.
16 One is that they have to sign up their bank -- they
17 have to negotiate the terms of the lending by
18 November 15. They have already paid the commitment
19 fees, and obviously, they would be incurring no
20 additional obligation by negotiating the definitive
21 loan arrangements between now and the 15th, and they
22 certainly can do that.

23 The time by which they have to draw
24 on those loan arrangements is December 31, which is

1 much later than the time period -- than the deadline
2 that we face.

3 I think what the concern I have, and
4 what I would suspect is the hope of Interco here, is
5 that we would be backed into a position where our
6 financing disappears and we are unable to proceed.

7 So I think that the order that we
8 present, which provides flexibility, and certainly
9 the one which would allow a period to be determined
10 when we know whether we are dealing with an order
11 that gets entered by the Supreme Court on the 30th of
12 November or the 8th of November, is the right way to
13 go and would urge that the form of order we presented
14 be entered and would have no objection to either
15 bracketed language.

16 MR. SCHWARTZ: I don't want to
17 protract this, but what Mr. Zimet says Your Honor
18 about our financing arrangement is not accurate.
19 Under our arrangements we have to sign by the 15th,
20 and upon signing, there is an additional fee of \$20
21 million to be paid. And if we were to try to extend
22 that, I can't, knowing banks, imagine they are going
23 to do so for nothing. And we are going to have a
24 problem on our side.

1 I don't know that we can exactly
2 weigh and compare the two sets of problems, but the
3 factual statements just made are not accurate.

4 So far as wanting to have our hands
5 tied or something like that, that is not at all true.
6 We will do whatever we can do during the intervening
7 period, and our 14D-9 disclosure on that subject
8 obviously will so state.

9 We are not trying to protract the
10 process. We do think it is preferable to have a
11 fixed period set in the order today for us to conduct
12 the auction. If Your Honor would rather leave that
13 matter to be resolved after the Supreme Court acts or
14 their first alternative bracketed language -- as I
15 have said, I am not strenuously arguing against that,
16 but I don't think it is the preferable way to go.

17 And as I stated before, I don't think
18 that "notwithstanding" sentence adds anything here,
19 because we can't take advantage of it. We just
20 can't. We can't conduct an auction in the way that
21 that would contemplate.

22 THE COURT: All right. Gentlemen,
23 one of the things that will be argued before the
24 Supreme Court and one of the things that I was quite

1 conscious of in writing this opinion is the degree to
2 which the Unocal approach to matters that it governs
3 requires or permits judicial decisions predicated on
4 substantive wisdom or appropriateness of business
5 decisions. The opinion reflects that the Unocal
6 approach must be applied with extreme caution, I
7 believe. And I am concerned whenever I am required
8 or asked to make decisions that relate immediately to
9 the substantive exercise of discretion.

10 While the defendants will argue
11 contrary-wise before the Supreme Court, as is their
12 professional responsibility in the circumstances to
13 do, I have struggled to apply an approach here that
14 limits the occasions in which the Unocal approach
15 would lead to the issuance of an injunction. In
16 shaping a form of order I am also concerned by these
17 same matters.

18 I am sensitive to plaintiffs'
19 concerns about their financing. A \$15 million
20 commitment fee is a large amount of money, even in a
21 very large transaction such as this one. And more
22 importantly, the world is an uncertain place, and
23 what events will be like in the middle of December
24 economically speaking are impossible to know. And so

1 it is clear that their interest is in trying to bring
2 this matter to a conclusion before their financing
3 runs out.

4 However, each of the alternatives
5 that they suggest in Paragraph 3 involve the Court in
6 decisions relating to the conducting of a
7 hypothetical future Revlon style auction in a way
8 that I don't think is necessary or appropriate for me
9 to be involved.

10 What is appealing to me about the
11 approach of the defendants' order is, it is one that
12 they have put forth and that they have represented
13 implicitly at least is consistent with their own
14 ideas of what would be necessary and appropriate to
15 manage the company should the eventuality of an
16 affirmance occur.

17 I frankly think that it is in
18 plaintiffs' interest in seeking an affirmance that
19 this Court's judgment and the order that implements
20 it does appear to be moderate and sensitive to the
21 board's responsibilities to the extent my judicial
22 obligations permit. Therefore, I will adopt the
23 language of defendants' 3, except I will put in the
24 "notwithstanding" language.

1 I can assure defendants that if this
2 case were to come back before the Court, I would not
3 have the courage to make one of my colleagues or ask
4 one of my colleagues to take it, and so I would be
5 the judge that has responsibility for it. And the
6 argument that you posit that you are unable to begin
7 a Revlon process before an affirmance and, therefore,
8 you ought not to have the two weeks that Paragraph 3
9 contemplates shortened would be an argument that I
10 would understand. And I don't want to prejudge
11 anything, but what I am saying is, I am sensitive to
12 the point that you make.

13 The only reason I suggest putting it
14 in or I will put it in is, it seems to me once more
15 that it makes clear that the Court is not here
16 substituting its judgment for the judgment of
17 Interco's board. If the Interco board seeks to do a
18 Revlon-style auction for any reason, it may do so,
19 and this simply makes it clear.

20 I understand that so long as the
21 board seeks to have this Court's order reversed, that
22 it would be a practical mistake from a number of
23 points of view, not the least of which is the
24 advocate's point of view, to start publicly doing

1 such an auction prior to the affirmance. But I do
2 want to make it clear that I don't purport to limit
3 the board's authority should it seek to do that in
4 the future.

5 Therefore, I will simply modify
6 Paragraph 3 of defendants' submission to include the
7 last sentence of plaintiffs' submission for Paragraph
8 3, and I will sign that this afternoon and have it
9 entered.

10 Is there anything else, gentlemen?

11 MR. ZIMET: No, Your Honor, I don't
12 believe so.

13 THE COURT: All right. Thank you
14 very much.

15 MR. NOLEN: Thank you very much,
16 Chancellor.

17

- - -

18 (Court adjourned at 3:45 p.m.)

19

- - -

20

21

22

23

24

CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware and Notary Public, do hereby certify that the foregoing pages numbered 2 through 20 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 3rd day of November, 1988.

Official Reporter for the
Court of Chancery of the
State of Delaware

