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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, CARDINAL HOLDINGS)
CORP., a Delaware corporation,)
CARDINAL ACQUISITION CORP.,)
a Delaware corporation,)

Plaintiffs,)

v.)

C.A. No. 10105

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 H. QUENON, WILLIAM E.)
CORNELIUS, MARILYN S. LEWIS)
and THOMAS H. O'LEARY,)

Defendants.)

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Chancery Court Chambers
Public Building
Wilmington, Delaware
Tuesday, November 1, 1988
4:31 p.m.

- - -

BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

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TELEPHONE CONFERENCE

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

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APPEARANCES (by telephone):

RODMAN WARD, JR., ESQ., and
ROBERT E. ZIMET, ESQ. (New York Bar)
Skadden, Arps, Slate, Meagher & Flom
for the Plaintiffs.

SAMUEL A. NOLEN, ESQ., and
THOMAS A. BECK, ESQ.
Richards, Layton & Finger

-and-

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

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P R O C E E D I N G S

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THE COURT: Hello.

MR. ZIMET: Yes.

THE COURT: Who is on the phone?

MR. ZIMET: This is Robert Zimet from
Skadden Arps, your Honor.

(Discussion off the record.)

THE COURT: Give me your names again.

I have got the Court Reporter with me now. And speak up.

MR. ZIMET: Robert Zimet from Skadden Arps.

MR. SCHWARTZ: Michael Schwartz from
Wachtell Lipton.

MR. WARD: Rod Ward from Skadden Arps.

MR. NOLEN: Sam Nolen from Richards,
Layton & Finger, and Tom Beck from Richards, Layton &
Finger.

THE COURT: Have you had a chance to
confer? I know you have been talking to Judge Farnan
and there hasn't been a lot of time since the last
time we talked. It's now approximately 4:30. Have
you had a chance to confer at all, however, with respect
to the subject matter at hand, which is Mr. Schwartz'
and Mr. Nolen's request that relief be afforded on

1 a very temporary basis against the plaintiffs?

2 MR. SCHWARTZ: If I may speak, your Honor,
3 just to state for the record that Judge Farnan asked
4 us to defer our conversation with him, so that did
5 not in fact occur as it had been scheduled when we were
6 before your Honor earlier. It has not happened yet.

7 We have received just moments before
8 this call the draft order from Skadden Arps. We are
9 preparing our counter draft. As I anticipated, it is
10 quite clear to us that we will not be able to resolve
11 essentially the substance of the order implementing
12 your Honor's decision.

13 THE COURT: I'm not surprised at that.
14 Indeed, I'm not really disappointed by it. It seems
15 to me that effective counsel will find themselves in
16 positions at times in litigation when that kind of
17 agreement just is not feasible.

18 For the record, however, I want to revisit
19 the conversations that we had earlier. I will ask
20 Mr. Schwartz to just briefly state your application
21 and the grounds for it, and then I will ask Mr. Zimet
22 to state the position of the plaintiffs.

23 MR. SCHWARTZ: Thank you, your Honor.

24 We would request that your Honor schedule

1 the conference contemplated on page 44 of your decision
2 of earlier today at the earliest time that is convenient
3 for the Court to consider the matter of an order
4 implementing the decision. I will advise the Court
5 that we would present at that same conference an
6 application for certification of an interlocutory appeal
7 and a motion for injunction pending appeal and for
8 a stay pending appeal.

9 The precise application this afternoon
10 is for an injunction against purchases under the tender
11 offer pending that conference, which is contemplated
12 by your Honor's decision of earlier today.

13 The injunction which we seek would,
14 therefore, be limited in time and in scope, and in
15 the earlier conference that was not on the record
16 I made clear that what we contemplated by such an
17 injunction was one that would be mutual and bilateral,
18 and we would in the same context be restrained from
19 proceeding to implement the restructuring in any fashion.

20 That's my application.

21 THE COURT: Thank you, sir.

22 Mr. Zimet or Mr. Ward.

23 MR. ZIMET: Your Honor, this is Robert
24 Zimet.

1 Our position, as stated earlier, is that
2 there is no -- we see no basis to enter any restraint
3 against us. None had been sought in the litigation
4 up until this point. There is no claim before this
5 Court that City Capital has acted in any way that merits
6 a restraint.

7 Further, there is nothing that would
8 occur merely by the fact that we were to purchase shares
9 that would preclude Mr. Schwartz from pursuing relief
10 with respect to -- either by way of appeal or with
11 respect to the entry of an order thereafter. If we
12 were to purchase shares tonight, it would be premised
13 on the assumption that implementation of the rights
14 plan will be primarily restrained with respect to any
15 merger transaction that we would pursue.

16 I had said that if there were to be
17 a restraint, as I understand Mr. Schwartz to have agreed,
18 that the status quo would be maintained during the
19 pendency of any restraint. But that is not to say
20 that we think that that would adequately protect our
21 interests. We think that shareholders -- that your
22 Honor's opinion stands for the proposition that
23 shareholders should have the opportunity to choose.
24 We have advised the Court that 77 percent of the shares

1 would be owned -- were available to be owned by us
2 as of last night. I don't know what the total would
3 be when our offer presently expires at midnight.
4 And I would respectfully request that no interim
5 restraint be entered.

6 THE COURT: Thank you, Mr. Zimet.

7 Gentlemen, I find myself in something
8 of a conflicted position here in the sense that I agree
9 with some of the positions stated by each side.
10 My predominating instinct at this moment -- and I use
11 the word "instinct" advisedly, because I have not had
12 a great deal of time to consider the matter -- is to
13 attempt to arrange things so that there could be
14 effective appellate review of this decision.

15 However, that instinct is not so strong
16 as to lead me past the point at which I think rights
17 of the plaintiff may be unduly harmed.

18 More particularly, the application this
19 afternoon is not the tougher question that Mr. Schwartz
20 says will be presented tomorrow concerning a stay of
21 the mandatory injunction referred to in the order
22 pending appeal, which could be a somewhat lengthy stay
23 and, in the face of a tender offer, might be quite
24 a significant order.

1 The question this afternoon is the one
2 whether an order will be entered to permit us to
3 consider the matter a little more advisedly tomorrow.

4 With respect to that question, I am
5 sympathetic to the position of plaintiff that no wrong
6 has been alleged against them in this Court, although
7 other courts have been asked to adjudicate alleged
8 wrongs, and that, therefore, this Court has no basis
9 to impose upon them and their offer in the way requested.

10 I agree that there is no affirmative
11 allegation of wrongdoing and, therefore, no basis of
12 that kind to support an order of the kind now sought.
13 However, plaintiff has come into this Court and has
14 sought the entry of equitable relief. In doing so,
15 plaintiff places before the Court a complex question
16 involving the evaluation of the overall equities in
17 the situation. This is conventional learning about
18 balancing of the equities, et cetera, in granting
19 injunctive relief.

20 This responsibility of the Court to balance
21 equities I think authorizes the Court not to impose
22 upon plaintiff affirmative obligations, a mandatory
23 injunction, if you will, of even short duration, but
24 it does authorize the Court to condition the granting

1 of such relief as in its view is otherwise authorized.

2 The combination of these two observations
3 prompts an instinct to want to preserve the status quo
4 at least until we can think about it under a little
5 less time constraint tomorrow, and the observation
6 that my only legitimate technique for effectuating
7 that is the conditioning of the granting of the
8 injunction, to the following conclusion:

9 The problem with doing this on the record
10 is, you have to make it up as you go along. I am not
11 precisely sure how to phrase this.

12 I will in no event restrain or enjoin
13 the plaintiff from closing this transaction on its
14 tender offer this evening, if it seeks to do so.
15 It, for example, may have so many shares tendered to
16 it that the underlying premise of the opinion issued
17 today that the existence of the stock rights as
18 a practical matter precludes them from closing,
19 it may render that incorrect. If that is the case,
20 plaintiffs may be in a position later tonight to
21 in effect close on this transaction whether or not
22 this Court issued its opinion today or issued the same
23 opinion tomorrow or Wednesday or Thursday.

24 If that is the fact, I don't think the

1 fact that the opinion came out today ought to be a basis
2 to require the plaintiff not to close on its offer.
3 The issuance of the opinion, then, is a coincidence
4 or a circumstance not directly relating to the decision
5 by the plaintiff to close or not close.

6 It is the entry of an order that itself
7 may create a right to an appeal and may have legal
8 consequences. That order would presumably require
9 the board to redeem the pill. But if plaintiff later
10 tonight does elect to close its tender offer, it seems
11 to me that it will imperil the entry of a preliminary
12 injunction of the kind contemplated by the opinion
13 today, because it will have shown that the entry of
14 such an injunction -- and here I really have to note
15 that while there may be a confident tone in my voice,
16 this is the way I'm viewing this at the moment, but
17 I have not had the time to deeply consider it, as
18 I said earlier. But it is the basis for this decision.
19 But it will have shown, I think, that the reasoning
20 of the opinion with respect to the preclusive effect
21 of the poison pill was incorrect. It will also, it
22 seems to me, affect my view of the equities that are
23 always balanced upon the entry of a preliminary
24 injunction.

1 Where that leaves plaintiff, I think,
2 is a question that they will have to mull over both
3 in light of a further review of the legal elements
4 in the case and in light of the number of shares that
5 are tendered. But I feel confident that there is no
6 basis now to enjoin closing by the plaintiff tonight,
7 but that there is reason to suppose that if the plaintiff
8 elects to close tonight, it may create a pertinent
9 fact with respect to the entry of a preliminary
10 injunction order.

11 In all events, I will hear the parties
12 tomorrow. I can do it any time. I am busy in the
13 morning first thing. Maybe it would be better to give
14 everyone a little time. Is there a reason not to do
15 it at, say, 1:30, Mr. Schwartz?

16 MR. SCHWARTZ: If we may, your Honor,
17 that may be a little late, depending upon the outcome
18 of I think some necessary further discussion in light
19 of the comments your Honor has just made on the record,
20 with your Honor's indulgence, perhaps, before we commit
21 to a time.

22 The reason I say that is, we may have
23 to be pursuing remedies in the Supreme Court of Delaware
24 perhaps even this afternoon. I want to be sure that

1 we are coordinated in that respect.

2 There are two points made in the course
3 of your Honor's statements which I feel constrained
4 to correct and suggest there's something that has to
5 be clarified here.

6 Your Honor stated that it was not your
7 decision today that would enable them to purchase tonight;
8 that they might have done that absent your Honor's
9 decision. With respect, your Honor, that is not
10 correct. There are only two ways they can get to the
11 decision to purchase tonight. One is that the so-called
12 rights condition to their tender offer, which I'll
13 read into the record in a moment, is satisfied. That's
14 one possible way. The other way is if they waived
15 that rights position.

16 If they were to waive it, I think all
17 counsel on the phone will agree under SEC rules and
18 practice they would have to extend their offer for
19 five business days in consequence of the waiver.
20 That would be a change in the terms that would require
21 an extension. And therefore they can't buy tonight
22 under a waiver. They would have to announce a waiver
23 and then give the market five business days to absorb
24 that.

1 And in this context it becomes relevant
2 to focus precisely upon the language of that condition,
3 which I will read, if I may -- it's only three lines
4 long -- from the Offer to Purchase. It is printed
5 in boldface type on the third page of text in the offer.
6 It reads:

7 "The rights condition. The offer is
8 conditioned upon the company redeeming the rights" --
9 and now the important language -- "or the purchaser
10 otherwise being satisfied in its sole discretion that
11 the rights are invalid or inapplicable to the acquisition
12 of shares pursuant to the offer or to the merger."

13 Just to express the operative language:
14 "... the purchaser being satisfied in its sole
15 discretion that the rights are invalid or
16 inapplicable"

17 What's significant is that the condition
18 as written does not require an injunction and, therefore,
19 your Honor's mere decision today could be the only
20 thing that would entitle them to buy tonight. And
21 with respect to, therefore, the failure to enter the
22 injunction that we requested -- and I want to speak
23 to the legal basis of that in a moment --but the failure
24 to enter it would leave them free, just based upon

1 your having issued this decision with no implementing
2 order, to buy tonight.

3 If what your Honor's comments earlier
4 meant was that should they buy, you would then withdraw
5 the decision as opposed to not entering an injunctive
6 order, then I think the condition would not be satisfied
7 and they would indeed be in peril of having bought
8 without satisfaction or waiver of the rights condition.
9 But it was not clear to me from your statement that
10 what you were saying was that should they buy, you
11 would consider that a factor in deciding to withdraw
12 the decision. And unless you were to say such a thing,
13 I think the problem that prompted our initial
14 application, your Honor, would still exist.

15 THE COURT: I'm not sure I quite understand
16 that, Mr. Schwartz. The legal consequence of "withdrawing
17 an opinion" -- I'm just not familiar with it.

18 The condition that you referred to said
19 that the buyer in its sole discretion is satisfied.
20 The buyer in its sole discretion could have been
21 satisfied, could it not, had I not issued the opinion
22 I did today?

23 MR. SCHWARTZ: The only event today which
24 would satisfy them would be your Honor's decision.

1 In other words, nothing else happened today that I think
2 anybody can point to.

3 THE COURT: Of course. We understand
4 that. But they couldn't close on their offer before
5 today, and no one knows if they would have closed on
6 their offer if I had not issued an opinion.

7 MR. SCHWARTZ: They could actually have
8 closed last night, your Honor, but since your Honor
9 had not ruled, they extended for an additional 24 hours.
10 I want to make sure that the record is clear on that.

11 MR. ZIMET: Your Honor, this is Robert
12 Zimet, if I may be heard for a moment.

13 THE COURT: Surely.

14 MR. ZIMET: I agree with much of what
15 Mr. Schwartz says. And with respect to the impact
16 of the SEC rule, I would agree, if we were to withdraw
17 the rights condition, then that would necessitate an
18 extension.

19 And again with respect to the impact
20 of your Honor's opinion, my clients' willingness to
21 proceed tonight is premised on the assumption that
22 even if an order were not entered today, an order giving
23 effect to your Honor's decision would be entered in
24 the near future and would accomplish the invalidation

1 of the rights plan, as it would be an obstacle to
2 a merger. And absent that, we would not be contemplating
3 closing.

4 As I heard your Honor's comments earlier,
5 I became -- I was going to say to the Court that --
6 that we cannot take a chance, because of the impact
7 of the rights plan on us, if it were in effect, to go
8 out and purchase shares and then see what would happen.
9 And if your Honor was suggesting that if we were to
10 purchase shares tonight, that that would somehow --
11 as one seeking equity, we assume certain obligations --
12 that there might be some risk that the injunction that
13 we thought was going to ensue might not, because in
14 some respect our purchase of shares tonight would be --
15 I wouldn't say "inequitable," but it would not be
16 consistent with the spirit with which we sought relief,
17 then I was going to say that there's no way that we
18 could assume that business risk, and in that
19 circumstance wouldn't buy shares.

20 THE COURT: It seems to me that Mr. Zimet
21 is close to resolving this, because that's exactly
22 what I was saying.

23 MR. ZIMET: And so, your Honor, having
24 understood you, if I may, then, I think the parties

1 should see you tomorrow. We can see if we can resolve
2 the form of an order between now and then between us.
3 And failing that, it will get dumped in your lap.

4 THE COURT: Yes. And, of course, I regard
5 the more substantive problem tomorrow is this one that
6 we're talking about, except we are not talking about
7 24 hours. That is --

8 MR. ZIMET: I understand. That would
9 be an injunction pending appeal from your point of
10 view -- excuse me. I didn't mean to interrupt.

11 THE COURT: No, no. Go right ahead.
12 I was just going to say, "a stay of the order." And
13 I hope you all have time to present something to me
14 that helps me on that.

15 What time during the day, then?

16 Mr. Schwartz, you had thought that sometime
17 earlier was necessary at some different point in our
18 conversation. What is your view now?

19 MR. SCHWARTZ: Let me clarify the position.
20 I don't have that problem. So that I would think that
21 if, say, noontime was available to your Honor, that
22 might be a good time, to give us all a chance to confer
23 and get some papers before you.

24 MR. ZIMET: Later in the day would be

1 better. It would give us a chance to see what we can do.

2 THE COURT: Why don't we do it at 2:00
3 o'clock. I will be in a better frame of mind if I have
4 had my lunch.

5 MR. SCHWARTZ: Okay.

6 THE COURT: And I'll drink coffee so
7 I can stay awake.

8 All right. Is there anything else that
9 we need to talk about this afternoon?

10 MR. SCHWARTZ: I don't think so.

11 Just one moment, please. (Pause)

12 Thank you very much, your Honor. We will
13 see you at 2:00 o'clock tomorrow.

14 MR. ZIMET: Your Honor, I take it, though,
15 that the status quo will be maintained at least until
16 then.

17 THE COURT: I understand that the defendants
18 have undertaken to facilitate their positions here
19 with respect to all of these matters to maintain the
20 status quo with respect to their restructuring, at
21 least until things are further resolved. Is that not
22 correct?

23 MR. SCHWARTZ: That is correct, on the
24 understanding that we read their statements to your

1 Honor meaning that they will not purchase shares tonight.

2 THE COURT: Yes.

3 All right. We are all together, then.

4 MR. SCHWARTZ: Thank you very much, your
5 Honor. We will see you at 2:00 o'clock tomorrow.

6 (Telephone conference concluded at 5:00 p.m.)

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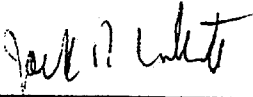
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C E R T I F I C A T E

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3 I, JACK P. WHITE, Official Reporter
4 for the Court of Chancery of the State of Delaware,
5 do hereby certify that the foregoing pages numbered
6 2 through 18 contain a true and correct transcription
7 of the proceedings as stenographically reported by
8 me at the hearing in the above stated cause, before
9 the Chancellor of the State of Delaware, on the date
10 therein indicated.

11 IN WITNESS WHEREOF, I have hereunto set
12 my hand at Wilmington this 2nd day of November 1988.

13
14 
15 _____
16 Official Reporter for the
17 Court of Chancery of the
18 State of Delaware

18 Transcribed by:
19 Ann B. Nolan
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21
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