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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PARAMOUNT COMMUNICATIONS INC., and KDS ACQUISITION CORP., Plaintiffs, v. TIME INC., et al., Defendants.	C.A. No. 10866
LITERARY PARTNERS, L.P., et al., Plaintiffs, v. TIME INCORPORATED, et al., Defendants.	C.A. No. 10935
IN RE TIME INCORPORATED SHAREHOLDER LITIGATION	CONSOLIDATED C.A. No. 10670

MEMORANDUM OF DEFENDANT WARNER COMMUNICATIONS INC. IN OPPOSITION TO PLAINTIFFS' APPLICATIONS FOR INTERLOCUTORY APPEAL

PRELIMINARY STATEMENT

This Court has now squarely ruled that plaintiffs have failed to establish a likelihood of success on their challenge to the Time Warner merger. The Court's ruling comes after extensive expedited discovery, full briefing, and lengthy oral argument. The Court's opinion recognizes that the Time Warner merger is a "thoughtfully planned

consolidation of the business of Time with that of Warner Communications" (Opinion 2); that "the achievement of the Time-Warner Consolidation is plainly a most important corporate policy" (Opinion 74); that such policy has its origins "in non-defensive, bona fide business considerations" (Opinion 74); and that the evidence does not establish that the Time Warner merger forecloses Paramount's bid (Opinion 75).

Plaintiffs now seek appellate review which can only cause to delay this business combination. Such review is unwarranted here. This Court's opinion squarely rejects each and every argument made by plaintiffs and does so on the basis of careful analysis of existing, well-settled legal principles. For all its fanfare, this case does not involve novel principles nor is this Court's decision remotely questionable. Indeed, the Court itself pointed out that it is a case of directors exercising "perfectly conventional powers to cause the corporation to buy assets for use in its business" (Opinion 77). Certification of an interlocutory appeal should be denied.

THIS COURT'S OPINION

In upholding defendants' position, this Court has carefully analyzed the facts and, indeed, devoted some 44 pages to discussion of those facts. The Court correctly found:

-- that this is a transaction that was carefully planned and which, from Time's perspective, was founded upon strategic business planning and goals; that Time "recognized a need to create for itself and thus own the video or film products that it delivers through its cable network (HBO) and cable franchise" (Opinion 8-9); and that Time's strategic business thinking included concerns for "the emergence of a deeply interrelated global economy" (Opinion 9).

-- that Time carefully considered many alternatives to accomplish its business objectives including the acquisition of "studios" such as Disney, Paramount, MCA-Universal, Columbia, Twentieth Century Fox, and obviously, Warner (Opinion 13). Warner was selected as the best "partner" for a number of sound business reasons described in the Court's opinion (at 13).

-- that Time and Warner negotiated a merger at arms-length which was "warmly received" in the marketplace (Opinion 27). That the merger agreement was approved by the independent boards of both companies after receiving expert advice (Opinion 21). That the parties carefully crafted governance provisions for Time Warner which, the record suggests, were based on legitimate concerns, including concerns "for the larger role of the enterprise in society". (Opinion 17).

-- that Paramount's offer followed. That based upon competent advice (Opinion 45), the Time board concluded that Paramount's $175 offer was inadequate (Opinion 29-30). The Court also found, however, that "[e]qually important, they concluded that given the circumstances . . . including the prospects that a Warner consolidation promised . . it was not in the long-term interests of the corporation or its shareholders to sell the corporation this time (Opinion 30). The Court's opinion details the deliberate consideration which the Time board gave to Paramount's offer (Opinion 29-33) and the opinion also notes that the Board considered

the non-financial terms of the offer, including the fact that Paramount's highly conditional offer "could be viewed as a 'request' to terminate the Warner deal and to grant Paramount a free option on the company" (Opinion 34) and that the Board concluded that there was a "poor fit" between Time and Paramount: "A key factor said to make Warner a far better vehicle . . . is 'the international distribution power of Warner'" (Opinion 34).

-- that the Time board "concluded that the pursuit of the original conception -- a merging of the business of Time and Warner -- was preferable to a present sale of the enterprise . . . or a negotiated consolidation with Paramount" (Opinion 35).

-- that the parties, Time and Warner, recast the merger transaction in an arms-length negotiation (Opinion 38), and that the "reformatted" deal "would accomplish the basic purposes of the initial merger transaction from Time's point of view" (Opinion 39). These purposes are detailed in the Court's opinion at 39.

-- that even after Paramount's increase in price to $200 per share, the factors earlier relied

> upon by the Time Board in rejecting Paramount's offer were still of critical importance to the Time directors: the continued possibility of delay, the presence of possible Paramount costs in the cable franchise approval process and the comparison of the new price with the [higher] ranges of sale values earlier discussed" (Opinion, 41).

On the basis of these key facts and others, this Court considered each and every legal doctrine advanced by plaintiffs: the Revlon/MacMillon "sale" doctrine; the "shareholder choice" doctrine embodied in this Court's Interco decision; the Blasius line of cases; and the application of the seminal Unocal decision. The Court squarely held that none of the well-settled principles of those cases, when applied to these facts, warranted a preliminary injunction. No new rule of law was announced.

The Court's ultimate conclusion in its Unocal analysis was that: "[I]n this instance, the [Time Board's] 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." (Opinion 76). Warner submits that that conclusion, and the decision of this Court is, unassailable on the record of plaintiffs' motion for a preliminary injunction.

Accordingly, an interlocutory appeal should not be granted here.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THE "EXCEPTIONAL CIRCUMSTANCES" NECESSARY TO JUSTIFY AN IMMEDIATE INTERLOCUTORY APPEAL.

Plaintiffs seek leave to take an interlocutory appeal from this Court's Opinion and Order denying plaintiffs' motions to preliminarily enjoin the Time/Warner combination. As demonstrated below, plaintiffs have failed to make their showing under Supreme Court Rule 42, and their applications must be denied.

In order to be entitled to the certification of an interlocutory appeal the would-be appellant must show that the order: "(1) determines a substantial issue and (2) establishes a legal right and (3) meets one or more of the following criteria:

(i) Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;

(iv) The interlocutory order has vacated or opened a judgment of the trial court; or

(v) A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice."

Supr. Ct. R. 42; Appellate Handbook at 5-6 (emphasis in original).

Interlocutory appeals from this Court are governed by Supreme Court Rule 42(b). As such, they are addressed to the sound discretion of both this Court and the Supreme Court "and are accepted only in exceptional circumstances." In re Mobile Communications Corp. Consol. Litig., Del. Supr., No. 133, 1989, Order at 2, Holland, J. (Apr. 4, 1989) (ORDER) (emphasis supplied). Further, "urgent" and "important" reasons must exist to justify the appeal. ARCO Alaska, Inc. v. Phillips Petroleum Co., Del. Supr., No. 212, 1985, Moore, Jr. (July 2, 1985) (ORDER); Edelman v. Phillips Petroleum Co., Del. Supr., No. 55, 1985, Moore, J. (Feb. 16, 1985) (ORDER).

Contrary to plaintiffs' assertions, this Court's opinion and order meet none of the criteria for interlocutory appeal. The opinion applies settled principles established in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985) and it does not "establish" any legal rights -- those "rights" are already granted in the General Corporation Law, see, e.g., 8 Del.C. §§123, 141. Likewise, review of the decision now will not terminate the litigation or otherwise serve "considerations of justice" because regardless of the outcome of this motion, if permitted to proceed, Time will purchase over 50% of the outstanding Warner stock for a price that has not been shown to be other than fair and various

matters raised in the complaints will remain pending before this Court. Thus, appeal of this decision in no way would expedite resolution of the disposition of this matter. Instead, the opposite is true.

For these reasons, and for the further reason that plaintiffs do not even attempt to meet the other criteria of Supreme Court Rule 42 (thereby conceding their inability to do so) defendants' motion should be denied.

A. The Opinion Establishes No Legal Rights And Determines No Substantial Issue.

Contrary to plaintiffs' unsupported arguments, no legal rights are "established" by this Court's decision. The right at issue here -- the right of Time pursuant to a decision of its Board of Directors to purchase Warner stock -- is a right granted by statute. 8 Del.C. §§123, 141. Thus, no legal right is "established" in the opinion; to the contrary the decision merely declines to stop Time from exercising a pre-existing statutory right.

Examples of findings which establish "legal rights" justifying an interlocutory appeal are those which establish a legal right "necessarily controlling [the Court's] final decision," Consolidated Film Indus., Inc. v. Johnson, Del. Supr., 192 A. 603, 609 (1937), or determine "an issue [of law] ... which had the plea been sustained .. would have been a complete bar to the complainant's case." Electrical Research Products, Inc. v. Vitaphone Corp., Del. Supr., 171 A. 738, 747 (1934). No such "legal rights" have been

established here. As our courts have consistently held, the grant or denial of injunctive relief does not itself establish legal rights.[1]

Plaintiffs' inability to demonstrate how this Court's opinion 'establishes' any 'legal right' should itself be dispositive of this motion. Moreover, the opinion does not determine a "substantial issue." As shown above, the Court applied settled law (e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (1985)); as well as the Revlon/MacMillan line of cases and other decisions discussed above. Plaintiffs cannot seriously suggest otherwise. Instead, plaintiffs appear to argue that substantial issues must have been determined in light of the magnitude of the impending transaction. Our law is to the contrary. A "substantial issue" is not presented merely because control of a corporation may be at stake or because the decision involves a large transaction. Telvest, Inc. v. Olson, Del. Ch., C.A. No. 5798, Brown, V.C. (Mar. 22, 1979) (denying interlocutory appeal from grant of preliminary injunction); Outdoor Sports Indus., Inc. v. Telvest, Inc., Del. Supr., No. 73, 1979, Quillen, J. (May 2, 1979) (ORDER) (Supreme Court denying interlocutory review, same case). Instead, our

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[1] See Plant Indus., Inc. v. Katz, Del. Supr., C.A. No. 123, 1981, Quillen, J. (May 1, 1981) (ORDER) (granting of a preliminary injunction did not finally establish a legal right); and see Mobile Communications Corp. v. MCI Communications Corp., Del. Ch., C.A. No. 8108, Berger, V.C. (Sept. 18, 1985) (ORDER) (denial of a preliminary injunction does not establish legal rights).

courts have held that orders granting or denying interim injunctive relief are "interlocutory in the strict sense," because such an order "determines nothing finally against [the litigants]." Consolidated Fisheries Co. v. Consolidated Solubles Co., Del. Supr., 99 A.2d 497, 500 (1953).

B. The Opinion Does Not Determine An Issue Of First Impression Or Conflict With Other Decisions.

Contrary to plaintiffs' suggestion, at base, the Court's decision applies the Unocal test to the decision of the Time board of directors to protect the long term strategy of Time Inc. Neither the test itself nor the manner in which the Court applied it are novel.

Plaintiffs would be incorrect in arguing that the Court's decision conflicts with the Supreme Court's holdings in Revlon and Macmillan. Once again, the decision merely applies (or more properly declines to apply) those precedents to the facts of record.

Similarly, plaintiffs would also be incorrect in arguing that the decision here conflicts with this Court's earlier decision in Blasius Indus., Inc. v. Atlas Corp., Del. Ch., C.A. No. 9720, Allen, C. (July 25, 1988). As the Court determined here, the factual predicate necessary to trigger Blasius-type scrutiny is missing from the record of this case.

C. Granting An Interlocutory Appeal Now Will Not Terminate The Litigation Or Otherwise Serve Considerations Of Justice.

Plaintiffs are thus left with the somewhat amorphous standard of serving "considerations of justice." "[C]onsiderations of justice" must be more than the hope that the Supreme Court will support one's contentions. If the chance of lower court error were a sufficient consideration of justice, then virtually all interlocutory orders would be appealable. Such a result would be "unacceptable in the interest of the proper administration of justice." Pepsico, Inc. v. Pepsi-Cola Bottling Co., Del. Supr., 261 A.2d 520, 521 (1969).

Granting Paramount -- or any other plaintiff -- the right to appeal now will not hasten termination of this litigation. As to Paramount, Mr. Davis has made clear under oath that the company has not yet decided whether to press its bid for the combined company. If it did (or if anyone else did), there would undoubtedly be litigation regarding the continued use of the Time Rights Plan in connection with that offer.

Alternatively, even if Paramount did not press a bid for the combined companies, both the shareholder plaintiffs and the Literary Partners have other claims which remain pending before this Court. Whether or not an appeal takes place now or later is likely to have no impact on further motion practice.

Finally, as to the Literary Partners, as Mr. Klein made plain at oral argument, the Court should have no doubt

(Trpt. p. 229) that his client will return for a "final hearing" (id.) with respect to the Partners' claims regarding the Time June 30, 1989 annual meeting.

Where, as here, further litigation and/or possible transactional developments can be expected, an appeal is not ripe, and should be denied. See West Point-Pepperell, Inc. v. J.P. Stevens & Co., Del. Supr., No. 131, 1988, Moore, J. (Apr. 12, 1988) (ORDER) (denying interlocutory appeal where transactional developments "in flux"); and compare In re Polaroid Corp Shareholders Litigation., Del. Supr. No. 13, 1989 Horsey, J. (Mar. 6, 1989) (remanding appeal after full trial on the merits to allow matter to be heard together with appeal from Court's decision not to enjoin later transactional development). Of course, the "in flux" doctrine developed in cases such as J.P. Stevens is nothing more than an appropriate regard for judicial economy recognized in the "considerations of justice" prong of Supreme Court Rule 41, as applied to interlocutory appeals through Supreme Court Rule 42(b). In light of the virtual certainty of further proceedings in this Court regarding Time Warner Inc. (or its component companies) and considering the uncertainty of whether Paramount will press its bid for the combined company, it is appropriate to defer an appeal of this decision until Paramount has litigated all its motions and

some certainty exists with respect to further transactional developments.

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Date: July 14, 1989

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 1989, I caused two copies of the within Memorandum of Defendant Warner Communications Inc. in Opposition to Plaintiffs' applications for Interlocutory Appeal to be hand delivered to the following counsel of record:

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