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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 INCORPORATED, et al., Defendants.	C.A. No. 10866
LITERARY PARTNERS, L.P., et al., Plaintiff, v. TIME INCORPORATED, et al., Defendants.	C.A. No. 10935
IN RE TIME INCORPORATED SHAREHOLDER LITIGATION	CONSOLIDATED C.A. No. 10670

WARNER'S MEMORANDUM IN OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

Preliminary Statement

Warner Communications Inc. ("Warner") respectfully submits this memorandum in opposition to plaintiffs' motions for an injunction pending appeal against the consummation of the tender offer by Time Incorporated ("Time") for 100,000,000 shares of Warner common stock. Absent the requested relief, Warner stockholders will receive $70 per

share, or $7 billion in the aggregate, promptly upon the closing of Time's tender offer at midnight, July 17, 1989.

After extensive expedited discovery, full briefing and lengthy argument, this Court has now denied plaintiffs' motion for a preliminary injunction against consummation of Time's tender offer and implementation of the Time/Warner merger agreement. For at least three independent reasons, the Court should deny this motion as well.

First, plaintiffs have failed to show that the closing of the Time offer will irreparably injure them. The clear weight of the evidence before the Court demonstrates that the Time offer does not preclude Paramount from proceeding with a tender offer for Time common shares. This evidence includes concessions by Paramount's chief executive officer Martin Davis that Paramount's offer would not be precluded by the Time/Warner combination and that Paramount's "business judgment" will dictate whether it continues its acquisition attempt (Exhibit A hereto, pp. 329-332)[1]; testimony by Davis that Time and Warner could well be more vulnerable to a takeover after the combination (Exhibit A hereto, pp. 228-30, 241-43); similar concessions from other Paramount witnesses during discovery (Exhibit B hereto, Pattison Tr. 124-25; Hope Tr. 178-79); and affidavits, submitted by Time, of Frederick Seegal of Shearson Lehman

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[1]The Exhibits cited herein are contained in a separate compendium of exhibits submitted contemporaneously herewith.

Hutton & Co. and of Kevin D. Senie, Vice-President and Treasurer of Time, that entirely refute plaintiffs' claim that the Time/Warner combination would be "preclusive." As this Court expressly found at page 76 of its opinion, "it is not established in this record that [Paramount's acquisition of the combined entity] is foreclosed as a practical matter."

On this motion, Warner submits the affidavit of Mr. O'Herron of Lazard Freres & Co. which further supports defendants' position that (a) the Time offer is not "preclusive" of an offer by Paramount or any other party to acquire Time; and (b) the Time offer does not impair the value of Time but rather renders Time more valuable to a potential acquiror. Among other things, Mr. O'Herron's affidavit demonstrates that the size of Time Warner would not remotely prevent a takeover of that entity: indeed, just this very week there was announced a $21.2 billion offer by a group led by Sir James Goldsmith for B.A.T. Industries that contemplates significant asset sales to reduce the debt being incurred for the acquisition. Paramount, either alone or in conjunction with others, could proceed for Time Warner in much the same manner. O'Herron Aff. ¶6.

The status of Paramount's offer itself further demonstrates that there is no imminent threat of irreparable harm to Paramount or to the stockholder plaintiffs. Paramount's offer is not ready to close and will not be ready to close following the decision on an expedited appeal. Thus,

as this Court is aware, the record reflects that Paramount's own investment banker expects the offer to close in October 1989 and its commercial bank based its analysis on the offer closing in March-April 1990 (Exhibit C hereto, pertinent pages from Hope Ex. 8 at 2323; Coppolla Ex. 5 at C06851). The testimony of Paramount's own officers and directors confirms that, at a minimum, several months' delay can be expected before Paramount can close its offer, particularly due to the necessity of approvals from the FCC and cable television authorities (Exhibit D hereto, Hope Tr. 142-43; Pattison Tr. 85-89). And even should Paramount obtain cable approvals on terms "satisfactory" to it, there are still other conditions to Paramount's offer that will remain unfulfilled -- including the condition that the Court rescind the Share Purchase Agreement between Warner and Time. Thus, Paramount's offer is itself a highly speculative proposition and the threatened "loss" of such an offer -- by Paramount or Time stockholders -- simply does not give rise to a concrete threat of irreparable harm.

Second, the balance of equities weighs strongly against an injunction pending appeal. Whereas any threatened "loss" to Paramount or the Time stockholders of the conditional Paramount offer is highly conjectural, the threatened loss to Warner and its stockholders if an injunction is granted is very real, very concrete, and very severe. Warner stockholders would lose the opportunity to receive $7 billion

next Monday night. And the threat to the Warner stockholders is not limited to the loss of some $1.73 million daily (assuming simple interest at a 9% rate on the $7 billion tender offer consideration) or the opportunity to invest $7 billion for a period of time. There is also the clear potential for loss of the entire transaction -- both the first-step tender offer and the entire $14 billion merger. The loss of the merger transaction would be an extraordinary loss to both Warner, Time and their stockholders: the record is replete with evidence, totally uncontradicted, that the proposed merger is a unique opportunity for the two companies to form the world's premier communications company. As shown herein, the courts have expressly recognized that delay jeopardizes tender offers, and that unforeseen events during the period of an injunction can cause the demise of major transactions. In this case, should such an event occur, the loss to Warner and its stockholders would be of enormous magnitude.

Moreover, delay continues the uncertainty as to the future of Warner. As the uncontradicted record in this action demonstrates, Warner is highly dependent upon relationships among senior executives, division heads and highly mobile creative artists. E.g., Ross Aff. ¶7; Greenough Aff. ¶11. These relationships can only suffer from any continued period of uncertainty and by any public perception (upon grant of an injunction pending appeal) that the merger is in

jeopardy. The possibility of prolonged uncertainty was of major concern to Warner's directors when they agreed to the revised transaction with Time; they recognized the serious damage which would be suffered by the company and Warner's businesses by extended periods of takeover speculation and uncertainty as to the company's ownership. Ross Aff. ¶6.

Third, plaintiffs' appeal lacks merit. This was a highly fact-intensive case that turned on the particular facts at issue and on the application of existing legal principles. The Court did not announce any new legal doctrine but instead applied each and every legal doctrine relied upon by plaintiffs. Warner submits that although this case involves huge sums of money and is highly visible to the public, it is not a case that is likely to be reversed on appeal or raises issues so novel or so difficult that it is necessary to hold up the tender offer pending appeal.

There has been, moreover, no showing whatsoever of any conceivable wrongdoing by Warner or its directors. On the contrary, there was clear and uncontradicted evidence that Warner acted in complete good faith and in the reasonable belief that Time's eminent directors acted in a manner fully consistent with their fiduciary obligations. E.g., Greenough Aff. ¶¶12-13; see Ross Tr. 169-170, 181-84, 186, 198-99. Yet the party who would be most directly affected if the requested relief were granted would be Warner -- whose public stockholders have a legitimate expectancy, based upon

Warner's contractual rights, of receiving $70 per share promptly after midnight next Monday.

Accordingly, and for the reasons set forth herein, plaintiffs' motion for an injunction pending appeal should be denied and the Warner stockholders should be permitted to obtain the benefits of the Time/Warner merger agreement.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT AN INJUNCTION PENDING APPEAL.

A. The Legal Standard

The standard for injunction or stay pending appeal is "the test typically employed by this Court in granting or withholding preliminary relief." Blinder, Robinson & Co. v. Bruton, Del. Ch., C.A. No. 9096, slip op. at 1, Allen, C., (July 17, 1987) (Exhibit H hereto). Plaintiffs are thus required to demonstrate that (a) they will likely prevail on the merits of the appeal; (b) they will suffer imminent irreparable harm if the injunction or stay is denied; and (c) that the balance of the hardships weighs heavily in their favor. Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1341 (1987); Blinder, Robinson & Co. v. Bruton, slip op. at 1-2.

The Supreme Court's recent decision in In re Polaroid Shareholders Litigation, Del. Supr., No. 117, 1989, Christie, C.J. (March 23, 1989) (Order) (Exhibit F hereto), is instructive with respect to application of these criteria and supports Warner's position that injunctive relief pending appeal should be denied. In Polaroid, the Supreme Court was asked to enjoin pending appeal a self-tender by Polaroid made during the pendency of a tender offer and proxy contest by Shamrock Holdings, Inc. Vice Chancellor Berger had previously denied a motion by Shamrock (and Polaroid stockholder plaintiffs) for a preliminary injunction against the

self-tender but had entered a one-week interim injunction pending appeal. The Supreme Court refused to grant an injunction pending appeal and dissolved the Vice Chancellor's interim injunction.

The Supreme Court's Order denying injunctive relief in Polaroid makes clear that the Supreme Court adheres to the requirement that the movant must demonstrate irreparable harm before it can obtain an injunction pending appeal. Shamrock's irreparable harm argument in Polaroid was essentially identical to Paramount's here: the contention that the bid would be "precluded" or "stymied" if the relief sought were not granted (See Transcript of Argument, March 23, 1989, Exhibit E hereto, pp. 16-19). However, as in the instant case, the evidence in Polaroid demonstrated that the acquiror was not, in fact, precluded and the injunction pending appeal was denied. The Supreme Court's Order in Polaroid expressly found that Shamrock failed to show "that it will be irreparably harmed unless it is granted a further injunction pending appeal" (Exhibit F, at 2) and denied relief to plaintiffs.

Polaroid is also instructive on the other criteria for injunctive relief pending appeal. Polaroid argued that the burden of plaintiffs seeking provisional relief pending appeal is to show only "possible merit on the appeal" and not the likelihood of success required on a preliminary injunction motion (Exhibit E, pp. 13-14). Justice Moore stated

during argument that this lesser standard is "not the standard by which this Court reviews the matter." (Exhibit E, p. 14).

Finally, Polaroid confirms the importance of the "balance of equities" test upon motions of this nature. Plaintiffs there argued, as do plaintiffs here, that the Supreme Court was being asked to enjoin the offer only for a matter of weeks (Exhibit E, p. 15). Yet the Court denied relief. Moreover, questioning by members of the Court indicated substantial concern over the size of a bond which would be necessary to protect Polaroid stockholders who, like Warner stockholders here, are faced with loss of a premium tender offer price if an injunction were to issue (Exhibit E, pp. 6-9).

B. The Equities

The equities strongly favor the contractual right of Warner and its stockholders to receive $7 billion on Monday night over the "rights" of Paramount (and, for that matter, the stockholder plaintiffs) since the Paramount offer is conditional, months from consummation, and would in any event not be precluded by the acquisition of Warner by Time.

As noted above, Paramount cannot demonstrate that it is threatened with irreparable harm. Martin Davis, Paramount's chairman, has thus testified:

-- that, after merging with Warner, Time could well be more vulnerable to a takeover (Exhibit A, pp. 228-30, 241-43);

-- that Paramount's decision that it wished to acquire only Time -- and not Warner as well as Time -- was a "business decision" (Exhibit A, pp. 325, 331);

-- that so far as he knows there is no legal prohibition that would prevent Paramount from proceeding to acquire Time even if the revised Time-Warner merger is not enjoined (Exhibit A, p. 332);

-- that he knows of nothing, other than "Paramount's choice", that prevents Paramount from going ahead with its offer for Time even if the revised Time-Warner merger agreement stays in place (Exhibit A, p. 330); and

-- that in the event this Court does not enjoin the revised Time-Warner merger agreement, Paramount will then "evaluate" the situation and decide whether or not to proceed anyway; as Davis put it, "from a business judgment standpoint, we'll get to that point when we get there" (Exhibit A, pp. 329, 332).

And Davis has not testified -- as Paramount so often erroneously contends (see Paramount's opening brief in

support of its motion for preliminary injunction, at 96, and Paramount's reply brief, at 51) -- that Paramount will not proceed with an offer to acquire Time for $200 per share if the Time-Warner merger is consummated. Nor has Davis submitted any affidavit or made any public statement to that effect.

The record, thus, does not support plaintiffs' contention that the Time Warner merger is preclusive. See also pp. 2-3, supra, and citations therein. Moreover, as the accompanying O'Herron affidavit demonstrates:

-- The affidavit of Steven Waters on which Paramount bases its "preclusion" argument is based upon fallacious premises, including that Time would be "tapped out" after incurring acquisition debt for Warner (O'Herron Aff. ¶3; Senie Aff.);

-- Waters incorrectly assumes that any bidder for Time Warner would be "forced to rely on its own borrowing capacity to finance any bid for Time-Warner." (Waters Aff. ¶6). In fact, a bidder could bring equity to the transaction and could seek to acquire Time Warner by the issuance of stock (or a combination of stock and cash); could use its own resources to provide some or all of the financing for the acquisition; could combine with others in an

acquisition attempt;[2] and could sell significant assets of Time Warner to help reduce any necessary acquisition debt. (O'Herron Aff. ¶¶3-6).

-- Waters tells us that an acquiror would need $27 billion to acquire Time Warner. Actually, since the Warner stockholders will, by definition, already have been taken out for $14 billion, all that would remain would be to take out the Time stockholders: assuming a price in excess of $200 per share, the aggregate price would be something in excess of $11.4 billion. But even if Mr. Waters correctly assumes that $27 billion would be needed to acquire Time Warner based upon his assumptions, the capital markets can handle such a transaction. (O'Herron Aff. ¶7; Seegal Aff. ¶4).

-- There is no reason to suppose that a would be acquiror would be unwilling to pay at least $200 per share to acquire Time Warner. (O'Herron Aff. ¶8).

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[2]Indeed, the record reveals that Paramount has been approached by other entities which expressed an interest in joining with Paramount in an effort to acquire Time. (See Exhibit G hereto, Davis Tr. at 230-237; Oresman Tr. at 58-65).

Furthermore, the speculative and conditional nature of the Paramount offer belies any threat of irreparable harm to Paramount or the Time stockholder plaintiffs. In this connection, the law is clear that conjectural harm does not satisfy the test for injunctive relief. In re Damon Corp. Stockholders Litigation, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,040, at 90,873 (D. Del. Sept. 16, 1988) ("For this Court to grant the requested relief [a preliminary injunction], any prospective irreparable harm to Nomad must be 'imminent,' 'unspeculative,' and 'genuine.'"); Yanow v. Scientific Leasing, Inc., Del. Ch., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,660, at 98,034, Jacobs, V.C. (Feb. 8, 1988).

Moreover, Paramount commenced its tender offer with full knowledge of the original merger agreement and thereby accepted the risk purportedly posed by its existence. See, e.g., Goodman v. Futrovsky, Del. Supr., 213 A.2d 899, 902-03 (1965), cert. denied, 383 U.S. 946 (1966); Newell Co. v. Wm. E. Wright Co., Del. Ch., 500 A.2d 974, 985 (1985). In this connection, in FMC Corp. v. R.P. Scherer Corp., Del. Ch., C.A. No. 6889, Longobardi, V.C. (Aug. 6, 1982) (Exhibit I hereto), this Court refused to issue injunctive relief at the behest of a tender offeror who challenged a proposed super-majority voting provision where such provision had been proposed over two weeks before the making of the tender offer:

> If an injunction does not issue, FMC could quite easily extricate itself from a situation it intentionally and knowingly created. It could, by the very terms of its offer, decline to takedown the tendered shares and will have suffered no loss. It would be in the same position it would have found itself if it had approached Scherer after the stockholders had adopted the Supermajority Proposals . . . . On balance, it appears FMC can extricate itself from harm at its option or it can impose upon itself the threatened harm from which it seeks the Court's assistance. Under those circumstances, there is no justifiable basis for injunctive relief. There is no irreparable, imminent, unspeculative harm.

Slip op. at 11-12 (emphasis added). See also TW Services, Inc. Shareholders Litigation, Del. Ch., [Current] Fed. Sec. L. Rep. (CCH) ¶94,334, at 92,180-82, Allen, C. (Mar. 2, 1989) (holding that where a bidder conditioned its offer on the approval of a merger by the target board, it cannot complain about the board's decision regarding the merger being reviewed under the business judgment rule).

Paramount and the stockholder plaintiffs have thus entirely failed to prove an imminent threat of irreparable harm. There can be no question, however, that Warner and its stockholders will be threatened with immediate -- and potentially irreparable -- harm if injunctive relief pending appeal is granted.

The delay of the closing of the Time offer could result in Warner stockholders being deprived forever of the consideration -- $14 billion of cash and equity in Time

Warner -- which Time agreed to pay in this transaction. While plaintiffs will argue that they seek only a short delay, a significant adverse change in market conditions during that period could trigger an "out" for Time under the merger agreement and the offer could be withdrawn. As this Court recognized in Hecco Ventures v. Sea-Land Corp., Del. Ch., C.A. No. 8486, slip op. at 14, Jacobs, V.C. (May 19, 1986) (Exhibit J hereto), "to impose such a restraint [delaying a tender offer] might cause irreparable harm, by creating a risk that the . . . offer, due to market changes occasioned by court-ordered delay, might not go forward." See also Citron v. Steego Corp., Del. Ch., C.A. No. 10171, slip op. at 4-5, Allen, C. (Sept. 9, 1988) (Exhibit K hereto); Solash v. Telex Corp., Del. Ch., [1987-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,608, at 97,723, Allen, C. (Jan. 19, 1988); Freedman v. Restaurant Assocs., Del. Ch., [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,502, at 97,221-22, Allen, C. (Oct. 16, 1987).

Furthermore, delay in consummation of the offer would, conservatively, cost Warner stockholders $1.73 million a day in interest alone; would deprive them of the opportunity to invest $7 billion of funds; would continue a period of uncertainty as to Warner's future which could impact its business severely; and threatens the entire highly desirable business combination of Warner and Time in which the Warner stockholders would continue to have an equity interest and

potentially a common equity interest. See pp. 5-6, supra, Ross' Aff. ¶10.

There is simply no question that the equities strongly militate against an injunction pending appeal.

C. The Merits

Warner respectfully refers the Court to the arguments in its brief in opposition to plaintiffs' motion for a preliminary injunction for its argument that plaintiffs cannot demonstrate a likelihood of success on appeal of this Court's decision. See also pp. 6-7, supra.

D. The Controversy Will Not Be Moot

Plaintiffs will no doubt contend that this matter will be rendered moot if an injunction pending appeal is not granted. This argument lacks merit.

In the first place, plaintiffs have no "right" to be heard by the Supreme Court. An appeal from this Court's order is entirely discretionary under Supreme Court Rule 42. This factor was noted by Justice Moore at the Polaroid argument when plaintiffs there contended that an injunction pending appeal was necessary to preserve all issues on appeal. (Exhibit E, pp. 77-78).

Moreover, plaintiffs' "mootness" contention is entirely dependent upon its fallacious "preclusive effect" argument. Since the overwhelming evidence shows that Paramount will not be precluded from continuing its offer following a Time-Warner merger, Paramount can hardly be heard

to contend that its appeal will be rendered moot. Regardless of the outcome of that appeal, Paramount will still be in a position to make a "business judgment" -- to use Mr. Davis' words -- whether or not to go forward.

And nothing precludes the stockholder plaintiffs and, for that matter, Paramount from proceeding in this Court with claims for damages resulting from any alleged breach of fiduciary obligations (See Exhibit E, at 26-29).

In sum, plaintiffs' claim that injunctive relief is needed to prevent their appeal from becoming moot is ill-founded.

CONCLUSION

Plaintiffs' motion for an injunction pending appeal should be denied. Warner's stockholders should be permitted to receive $70 per share, as scheduled, in the Time tender offer.

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Dated: July 14, 1989

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of July I caused to be hand delivered two copies of the foregoing Memorandum In Opposition To Motions For Injunction Pending Appeal to each of the following attorneys of record at the addresses indicated:

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