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STATE OF DELAWARE

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October 17, 2000

VIA FAX & U.S. MAIL

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Re: *TCW Technology Limited Partnership v. Intermedia Communications, Inc., et al.*
Civil Action No. ~~18336~~
Hug v. Intermedia Communitcations, et al.
Civil Action No. 18289 ✓
Steinberg v. Ruberg, et al.
Civil Action No. 18293

Dear Counsel:

This is my decision on dcfcndants' October 11 application seeking an Order consolidating,, or imposing equivalent relief in, these multiple

derivative, class and individual actions. Defendants seek consolidation, or equivalent relief, because of the immense practical difficulties occasioned by the simultaneous prosecution of three separate groups of class and derivative lawsuits on an expedited basis. A brief recitation of the procedural background will provide the context for my decision.

I.

Approximately twelve separate lawsuits have been filed in the Court of Chancery challenging a merger agreement between Intermedia Communications, Inc. ("ICI") and WorldCom, Inc. ICI owns a 62 percent interest in Digex, Inc., a Delaware corporation engaged in the managed web hosting business. Digex's stock price has increased by more than 2 ½ times over the past year, rising from $32.50 per share on September 1, 1999, to more than $84.00 per share on September 1, 2000. In contrast, ICI's stock price has fallen over this same period by more than 13 percent. After the merger agreement between ICI and WorldCom was announced on September 1, the reaction from Digex's minority public shareholders was swift and negative. In the days following the merger announcement, several Digex shareholders filed lawsuits attacking the proposed ICI/WorldCom merger. The gist of these lawsuits is that WorldCom's real purpose for purchasing ICI is to acquire Digex, ICI's crown jewel, and that ICI diverted

to itself Digcx's opportunity to bc sold at a market premium by instead arranging ICI's snlc to WorldCom.

As I mentioned above, approximately twelvc lawsuits have been filed in the Court of Chancery arising out of the basic facts surrounding the proposed WorldCom/ICI merger. On September 20, however, TCW Technology Limited Partnership ("TCW"), a Delaware limited partnership which owns 1,042,000 shares or about 4.25 percent of Digex's outstanding stock, filed a class and derivative complaint challenging the merger. TCW's claims are substantially similar to the claims asserted in the pending dozen or so lawsuits. Unlike the other pending actions, TCW promptly sought an expedited preliminary injunction hearing on its complaint. ICI and Digex vigorously opposed TCW's motion to expedite. Because WorldCom is not a named defendant in TCW's complaint, it did not appear during the healing on TCW's motion. Despite the fact that no other counsel for any other plaintiff shareholder action filed a motion for expedition, all counsel representing the various shareholder plaintiffs attended the hearing. Counsel for the other shareholder plaintiffs participated in the conference and spoke in favor of TCW's motion to expedite an injunction hearing.

On October 2, 2000, I granted TCW's motion to expedite and established a schedule for discovery and briefing. I also set a preliminary injunction hearing on November 29.

In light of the Court's accelerated schedule for the preliminary injunction hearing, counsel in the various shareholder actions began sending requests for production to the various defendants and proposing deposition schedules for several individual defendants named in the various lawsuits. Because these requests were uncoordinated, at least to some extent, defendants faced a barrage of conflicting deposition notices, as well as duplicative document requests and sundry other discovery demands. Besieged by conflicting discovery demands, and facing a radically compressed injunction schedule, defendants have appealed to the Court to consolidate these cases, or at least exert a firm managerial hand over them.

In a conference on October 13, I invited all plaintiffs' counsel to attempt to reach agreement on an appropriate consolidation order. Several derivative plaintiffs, represented by Pamela S. Tikellis of Chimicles & Tikellis LLP, insist that the class and derivative lawsuits assert potentially conflicting claims. 'Thus, these plaintiffs endorse only coordination, and not consolidation, of the various lawsuits. In a similar vein, the shareholder class plaintiffs, represented by Joseph A. Rosenthal of Rosenthal, Monhait,

Gross & Goddess, P.A., urge me to enter an order of consolidation along the lines that then-Vice Chancellor (now Justice) Steele was persuaded to enter in the *SFX* litigation.[1] The shareholder class's representative counsel insists that the *SFX* consolidation order worked successfully (and could do so again in this situation) because it combined the prosecution skills of counsel for the large institutional shareholders with counsel for the typical shareholder class lawsuits, This dual, co-lead counsel approach worked in *SFX*, and counsel insists it could work in this circumstance as well. The third category of lawsuits is comprised of institutional shareholders (TCW and the Kansas Public Employees Retirement System), represented by Stuart M. Grant of Grant & Eisenhofer, P.A. This group proposes that "all of the traditional plaintiffs' bar lawsuits" be consolidated into one action. That consolidated action would then proceed on a parallel course with the two institutional investor lawsuits (which would be consolidated into one action), This would produce two parallel actions, one involving the traditional plaintiffs' bar and one involving the institutional shareholder's bar.

II.

Notwithstanding my request that counsel for all three groups of

[1] *See In re SFX Entertainment, Inc. Shareholders Litig.*, Consol. C.A. No. 17818, Steele, V.C. (April 25, 2000) (ORDER).

plaintiffs agree upon a consolidation order, they have been unable to do so. The Court's schedule, and the parties' schedule, will not allow further delay in resolving this problem. With the limited time available to me, I offer the following opinion.

None of the proposed solutions is satisfactory to the Court. Each method would result in a proliferation of actions, with attendant practical burdens on the defendants and the Court. Ms. Tikellis's proposal effectively creates three parallel litigation tracks (the derivative actions, the class actions, and TCW/Kansas action), with multiple layers of coordination required among counsel. This procedure is cumbersome, duplicative, unnecessary, and unworkable. Mr. Rosenthal's proposal--the model used in the *SFX* litigation—labors under similar infirmities. The *SFX* model results in at least two parallel consolidated lawsuits, requiring coordination between a traditional shareholder plaintiffs' action and the institutional shareholder plaintiffs' action. Mr. Grant initially supported this model, but then reversed course and complained about it. From my vantage point, I agree that it is unnecessarily cumbersome and results in a duplication of effort.

Finally, I am not persuaded that the institutional shareholders proposal for a bifurcated consolidation order--carving out a traditional plaintiffs' bar action--adds anything to the analysis. This suggestion is no

different, so far as I can tell, from Mr. Rosenthal's *SFX* model proposal-a model that, in my opinion, papers over the problem without solving it. Indeed, I think that the inability of the traditional shareholder plaintiffs' bar and the institutional shareholders' bar to reach agreement—especially in Delaware's specialized corporate law practice environment and with the threat of judicial intervention hanging over counsel like the sword of Damocles—illustrates the practical coordination and scheduling problems posed by the various consolidation models.

III.

Expedited litigation imposes severe burdens on the Court and it inflicts not insubstantial costs on private litigants. Traditionally, the Court of Chancery has allowed counsel representing individual, class or derivative plaintiffs to engage in a type of private ordering, that is, to coordinate prosecution of the litigation and to propose the most efficient means of consolidation. Over the past ten years, members of the Court of Chancery have been asked, with increasing frequency, to become involved in the sometimes unseemly internecine struggles within the plaintiffs' bar over the power to control, direct and (one suspects) ultimately settle shareholder lawsuits filed in this jurisdiction. In every single instance that I am able to recall, this Court has resisted being drawn into such disputes, In every

instance, the plaintiffs' bar has been able to work out a consolidation compromise. It may have been imperfect, but the compromise has always seemed, in the end, to accommodate reasonably the interests of all the parties and the Court. My attempt lo encourage a similar compromise of competing interests in these sharcholdcr actions, unfortunately, has failed.

I turn then to the underlying problem. At the outset, I note that no rule, **statute** or decisional authority has been brought to my attention that bears upon this question. One thing is clear, however. Although it might be thought, based on myths, fables, or mere urban legends, that the first to file a lawsuit in this Court wins some advantage in the race to represent the shareholder class, that assumption, in my opinion, has neither empirical nor logical support.

Too often judges of this Court face complaints tiled hastily, minutes or hours after a transaction is announccci, based on snippets from the print or electronic media. Such pleadings are remarkable, but only because of the speed with which they arc filed in reaction to an announced transaction. It is not the race to the courthouse door, however, that impresses the members of this Court when it comes to deciding who should control and coordinate litigation on behalf of the sharcholdcr class. In fact, this Court and the Delaware Supreme Court have repeatedly emphasized the importance of

plaintiffs' counsel taking the time to use the "tools at hand" (such as a § 220 books and records action) to develop a record sufficient to *craft* pleadings with particularized factual allegations necessary to survive the inevitable motions to dismiss.[2] Accordingly, none of the pending lawsuits in this litigation is entitled to any special status as the lead or coordinating lawsuit simply by virtue of having been filed earlier than any other pending action.

Among the factors that should, in my opinion, guide the Court, in determining which lawsuit should assume a lead or coordinating role, are the following. First, this Court should consider the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs."[3] Second, the Court should give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit. This factor, ofcourse, is similar to the federal system that now uses a model whereby the class member with the largest economic interest in the action is given responsibility to control the litigation. Delaware courts have not formally adopted the federal model, and I am not suggesting that it

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[2] *See, e.g.*, Ash *v. McKesson HBOC, Inc.*, Del. Ch., C.A. No. 17132, Chandler, C. (Sept. 15, 2000). mem. op. at 44 n.56 (citing cases).

[3] In fact, this Court has recently expressed this philosophy in a different context, when it stayed a class action filed in Delaware in deference to a class and derivative action in California, precisely because the pleading in California was much more detailed and of far better quality, than the Delaware pleading. *See Derdiger v. Tallman*, Del. Ch., C.A. No. 17276, Chandler, C. (July 20, 2000), mem. op. at 17.

should bc mechanically applied in every case. But it seems appropriate, at least, to give recognition to large shareholders or significant institutional investors who are willing to litigate vigorously on behalf of an entire class of shareholders, provided, no economic or other conflicts exist between &he institutional shareholder and smaller, more typical shareholders, Finally, the Court should accord some weight in the analysis to whether a particular litigant has prosecuted its lawsuit with greater energy, enthusiasm or vigor than have other similarly situated litigants.

IV.

Based on these considerations, I conclude that the institutional shareholders, TCW Technology Limited Partnership and Kansas Public Employees Retirement System, represented by Grant & Eisenhofer, should serve as lead plaintiff, with all of the other shareholder actions consolidated with the two institutional lawsuits for purposes of the scheduled preliminary injunction hearing. The derivative and class claims all arise from the same basic facts and none of the claims are internally inconsistent or conflict with the legal theories supporting any other claim. Counsel for the institutional shareholders has vigorously pursued the shareholders' interests and has moved the litigation forward aggressively. The institutional shareholders assert both class and derivative claims, so their interests are strategically

aligned with the small shareholder class and derivative lawsuits. Because of the pressing need for resolution of this issue, this brief explanation of my rationale for selecting the institutional shareholder plaintiffs as the lead plaintiffs will have to suffice.

V.

Based on the above, I ask Mr. Grant, on behalf of all the shareholder plaintiffs, to submit and prepare a proposed form of Consolidation Order, implementing this decision. I also ask Mr. Grant to file an amended complaint, to include defendant WorldCom, within two days of this letter. Defendants shall have two days to answer the amended complaint. Mr. Grant is responsible for coordinating all document production and deposition schedules, as. well as briefing in connection with the preliminary injunction hearing.

With this framework in place, I do not expect there to be any duplication of document production or deposition notices. Briefing of the preliminary injunction shall be coordinated among counsel, but I expect the traditional opening, answer and reply, with the reply to be filed no later than 4:00 p.m., November 27. I will not authorize extensions to the page limitations fixed by Court Rule.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

William B. Chandler III

WBCIII:meg

oc: Register in Chancery
xc: Vice Chancellors
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