

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

BLASIUS INDUSTRIES, INC.,	§	
et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Consolidated
	§	Civil Action No. 9720
ATLAS CORPORATION, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR PROTECTIVE ORDER

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NATURE AND STAGE OF THE PROCEEDINGS

On March 8, 1988 defendant Atlas Corporation ("Atlas") served a document production request and notices of deposition upon plaintiff Blasius Industries, Inc. ("Blasius") and two of its directors, Michael Lubin and Warren Delano, Jr. This is their memorandum of law, accompanied by the affidavit of Greg A. Danilow, in support of a motion for a protective order pursuant to Court of Chancery Rule 26(c) to vacate the document production request and notices of deposition. Oral argument has been scheduled for March 14, 1988.

STATEMENT OF FACTS

Blasius Begins To Seek Atlas Stockholder  
Support Through Written Consents

On December 30, 1987, Blasius caused Cede & Co. to deliver to Atlas a written consent calling for (1) the adoption of a precatory resolution recommending that Atlas' Board promptly develop and implement a restructuring program, (2) the amendment of Atlas' By-laws to, among other things, expand the size of the Atlas Board from 7 members to 15 and, (3) the election of 8 Blasius nominees to fill the 8 newly created directorships. On the same day, Blasius commenced an action in this Court seeking a declaration that Atlas' September 1, 1987 by-laws were an illegal restriction upon stockholder rights to take action by consent under 8 Del. C. § 228 and inconsistent with the decision of the Delaware Supreme Court in Datapoint Corp. v. Plaza Securities Co., 496 A.2d 1031 (Del. 1985).

Atlas Tries To Thwart The Consent Process

On December 31, 1987, one day after Blasius delivered its consent to Atlas and less than two months after its November annual meeting, the Atlas Board held a special meeting (called on the evening of December 30, 1987) and purported to amend Atlas' By-laws to increase the number of directors from 7 to 9 and to appoint John M. Devaney and Harry J. Winters, Jr. as new Board members. To Blasius, this precipitous Board action -- taken just one day after Blasius delivered its consent -- was for the sole and primary purpose of entrenching

the Board and constituted a blatant manipulation of the corporate election machinery.

Blasius Delivers A New Consent

On January 7, 1988, in response to the actions of the Atlas Board on December 31, 1987, Blasius amended and supplemented its previously filed complaint in this Court to seek declaratory, preliminary, and permanent injunctive relief that the purported appointment of Messrs. Devaney and Winters constituted an illegal manipulation of the corporate election machinery for the purpose of entrenching the Board under the doctrine of Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437 (Del. 1971). A copy of the Amended and Supplemental Complaint is Exhibit A to the Danilow Affidavit. On that same date, and also in response to the Board's December 31, 1987 actions, Blasius caused a new Consent to be delivered to Atlas which (1) calls for the adoption of a precatory resolution requesting and recommending that Atlas' Board promptly develop and implement a restructuring program or, in the alternative, sell Atlas, or substantially all of its assets, at a price not less than \$50 per share, (2) seeks to amend Atlas' By-laws to, among other things, expand the Board to 15 members, (3) seeks to remove without cause the directors purportedly appointed by the Board at the December 31, 1987 meeting, (4) in the event it is determined that the December 31 directors may be removed by a majority of Atlas' stockholders without cause, or if their ad hoc appointment by the board is held to constitute an illegal manipulation of the corporate election machinery

requiring their removal, operates to elect all eight of Blasius' nominees to the Atlas Board, and (5) in the event the December 31, 1987 directors are insulated from removal without cause and their election is upheld by this Court, operates to elect only six directors, giving the Atlas Board a total membership of 15 (including Messrs. Winters and Devaney).

Atlas filed its Answer and Counterclaim in this action on January 22, 1988. A copy of the Answer and Counterclaim is Exhibit B to the Danilow Affidavit. Atlas' answer pleads a single affirmative defense -- that the complaint fails to state a claim upon which relief may be granted. Atlas' counterclaim against Blasius asserts that, as a matter of law, Messrs. Devaney and Winters "cannot be removed from the Atlas Board without cause" because such removal is allegedly barred by Section 141(k) of the Delaware General Corporation Law and seeks a declaratory judgment to that effect. (Answer & Counterclaim, ¶¶ 38-43).

On January 26, Blasius noticed the depositions of and later deposed two Atlas directors and Mr. Devaney on the single issue of whether the December 31, 1987 election of Messrs. Devaney and Winters is invalid under Schnell. Blasius also served a narrowly tailored document request.

Atlas Charges Blasius With  
Federal Proxy Violations

Blasius began to solicit consents on February 1, 1988, when it mailed a 41 page Consent Statement to Atlas stockholders seeking support for the 5 proposals contained in

the consent delivered to Atlas on January 7, 1988. On February 5, 1988 Atlas brought suit against Blasius in the United States District Court for the District of Delaware, asserting that the Consent Statement violated Section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a) (the "Federal Action"). In its complaint (a copy of which is Exhibit C to the Danilow Affidavit), Atlas pleaded a panoply of proxy violations, chief among them the alleged failure to state that "as a matter of Delaware General Corporation Law," Messrs. Devaney and Winters could not be removed without cause, as well as a number of alleged misstatements and omissions with respect to Blasius' restructuring proposal.

In the Federal Action, Atlas specifically declined to take any discovery from Blasius on the validity of Blasius' disclosures or on any other issue, including the Section 141(k) issue, that it raised or could have raised in that suit. Counsel for Atlas asserted that "it's our view that we can demonstrate our burden here without taking any discovery." (February 8, 1988 Scheduling Hearing at 2, annexed as Exhibit D to the Danilow Affidavit).

Atlas Loses Its Federal Challenge And Blasius  
Delivers The Consents Of Atlas Stockholders

After briefing and argument, on Friday, March 4, 1988, Judge Longobardi issued a twenty-four page opinion in which he denied Atlas' motion for a preliminary injunction and ruled that Blasius' consent solicitation materials did "not contain material misstatements or omissions . . . ." (Op. at



20. A copy of the opinion is annexed as Exhibit E to the Danilow Affidavit). On Sunday, March 6, 1988, Blasius delivered to Atlas signed, written consents that, Blasius asserts, together with other consents delivered to Atlas, constituted the votes of a majority of the holders of outstanding Atlas stock entitled to vote on January 7, 1988, in support of Blasius' proposals.

Atlas Files Admittedly  
Irrelevant Discovery Requests

On March 8, 1988, six and one-half weeks after filing its Answer and Counterclaim in this action, Atlas filed the discovery requests at issue here. Copies of these requests are annexed as Exhibit F to the Danilow Affidavit. Atlas' document request seeks documents that by Atlas' own admission are irrelevant to this action. On February 25, 1987, Atlas filed in this Court its "Responses and Objections" to Blasius' document request (a copy of Atlas' responses and objection is annexed as Exhibit G to the Danilow Affidavit). In that Court filing, Atlas made two relevancy objections that we quote in full below.

D. Defendants object to each and every one of Plaintiff's document requests to the extent they require the production of documents relating to events subsequent to December 31, 1987, for the reason that all the acts of the Board of Directors of Atlas that are complained of in this action occurred on or before December 31, 1987, so that documents relating to events subsequent to that date are not reasonably calculated to lead to the discovery of admissible evidence.

E. Defendants object to each and every one of Plaintiff's document requests to the extent they require the production of documents relating to matters other than Sections 11(b), 11(c) and 12 of the Atlas ByLaws and the increase in the number of the members of the Atlas Board of Directors and the election of two individuals to fill these vacancies, for the reason that the foregoing are the only matters challenged by Plaintiff in this action, so that documents relating to matters other than the foregoing are not reasonably calculated or likely to lead to the discovery of admissible evidence.

With no regard to this prior position, Atlas now seeks documents wholly unrelated to its challenged By-laws and the events of December 30 and 31, 1987. Instead, Atlas seeks documents relating to Blasius' consent solicitation; specifically, Atlas requests any communication regarding (a) Atlas, (b) the restructuring of Atlas, (c) any potential nominee to the Atlas Board of Directors, (d) Atlas' by-laws and any amendments thereto, and (e) the consent of Atlas stockholders for action without a stockholders' meeting. Though this action concerns the actions of the Atlas Board on December 30-31, 1987, each of these requests seeks Blasius' documents "prepared or received from September 1, 1987 through the date of production." Atlas also noticed the depositions of Messrs. Delano and Lubin for March 17 and 18, requesting that they bring with them a schedule of documents mirroring those requested in the document request.

As a matter of law, Atlas' requests are irrelevant to this action. Moreover, in light of Atlas' own previous position in this litigation, we submit that Atlas should be

precluded from seeking such wide ranging and admittedly irrelevant discovery.

On March 9, 1988, after these discovery requests were filed, Blasius commenced a second action in the Court of Chancery against Atlas (the "\$ 225 action"). This action seeks a declaration pursuant to 8 Del. C. § 225 that on March 6, 1988, Blasius delivered consents representing a majority of Atlas' outstanding shares entitled to vote on January 7 in favor of the five Blasius proposals. A copy of the § 225 Application is annexed as Exhibit H to the Danilow Affidavit. The Schnell and § 225 actions were consolidated by order of this Court on March 11, 1988, at which time a joint trial date of April 12-13, 1988 was set.

#### ARGUMENT

THE DISCOVERY SOUGHT IS IRRELEVANT TO THE SUBJECT MATTER OF THE CONSOLIDATED ACTIONS, CALCULATED TO HARASS AND ANNOY BLASIOUS AND SHOULD THEREFORE BE DENIED.

Rule 26(b) of the Chancery Court Rules provides for discovery only of "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Rule 26(c) provides that "for good cause shown, the Court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

Here, the documents requested by Atlas fail to pass the threshold test of relevance under Rule 26(b). We could

not state the issue any more clearly than did counsel for Atlas when he raised a relevancy objection during Mr. Devaney's deposition: "The issue in this litigation is what the board [k]new or didn't know as of the time the two directors were elected on December 31st. That's the issue." A copy of the relevant transcript page is annexed as Exhibit I to the Danilow Affidavit. The documents sought respecting Blasius' actions, knowledge and intentions in regard to Atlas, the proposed restructuring, Blasius Board nominees, by-law amendments and the consent solicitation process cannot possibly be relevant to this case or to any Atlas defense. "Clearly defendants cannot establish their state of mind or their level of knowledge at the time of the incidents by the questioning of plaintiff." Gagne v. Reddy, 104 F.R.D. 454, 456 (D. Mass. 1984).

The documents requested by Atlas are as irrelevant to Atlas' § 141(k) counterclaim as they are to the Schnell claim. Atlas itself has repeatedly insisted in its counterclaim, in its federal complaint and in its briefs and argument before the District Court that its § 141(k) claim is purely an issue of law. Where, as here, there are no disputed facts and the issue is purely one of law, discovery is "properly denied because the materials sought [are] not relevant . . . ." Groves v. United States, 533 F.2d 1376, 1380 (5th Cir.), cert. denied, 429 U.S. 1000 (1976) (affirming denial of motion to compel discovery where issue was purely of statutory interpretation).

Finally, Atlas cannot use Blasius' § 225 action filed on March 9, 1988 as a bootstrap to justify its patently irrelevant requests of March 8, 1988. As the Court said in Bossier v. Connell, C.A. No. 8623 (Del. Ch. Oct. 7, 1986) (annexed as Exhibit 1 to this memorandum):

The purpose of 8 Del. C. § 225 is to grant a quick method of review of the corporate election process in order to prevent a corporation from being immobilized by controversies as to who are its proper officers or directors. In order to preserve an expedited remedy this Court has consistently held that a proceeding brought pursuant to 8 Del. C. § 225 is a summary proceeding and this Court has consistently limited trials pursuant to it to narrow issues.

The accuracy of Blasius' disclosure in its Consent Statement is irrelevant to a § 225 proceeding in which "the Court of Chancery will not attempt to resolve equitable controversies between stockholders which are collateral to the validity of the meeting under review, or undertake to resolve matters which are being adjudicated in another forum." 1 Balotti & Finkelstein, The Delaware Law of Corporations, § 7.47 at 397. Cf. Bossier v. Connell, supra.

Similarly, "[a]sserted violations of the federal proxy rules will not be reviewed in a Section 225 proceeding." 1 Folk on the Delaware General Corporation Law § 225.6.2 at 528 (2d ed. 1988). The adequacy of Blasius' disclosure has already been litigated -- and lost by Atlas -- before the federal district court, where Atlas disavowed any need to take discovery. Counsel for Atlas has admitted, in oral argument in the Federal Action in support of an injunction pending

appeal, that any disclosure question going to the validity of the consents solicited by Blasius cannot be raised in this Court. In response to Judge Longobardi's question as to whether this Court could enjoin any attempt by Blasius to act in Atlas' name, counsel for Atlas asserted, "We may have access to Chancery, but again there is an issue here for the Third Circuit of whether these consents were valid at all. The Chancery Court is not going to be able to address that question and we are trying to preserve the jurisdiction of the Third Circuit" (emphasis supplied). (A copy of the relevant transcript pages of this oral argument is annexed as Exhibit J to the Danilow Affidavit.)<sup>1</sup>

The patent and acknowledged irrelevance of Atlas' requests, taken in conjunction with their timing, can lead to only one inference: that they were intended purely to harass and annoy Blasius. Where, as here, the discovery sought has no "utility save as an harassment" and the "desire for discovery is more a matter of form and tactics than of substance" it is appropriate to deny access to the materials sought. United States v. Howard, 360 F.2d 373, 381 (3d Cir. 1966).

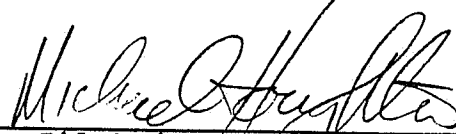
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<sup>1</sup> Having litigated the federal disclosure issues, Atlas should not be permitted to litigate anew disclosure claims as to the same solicitation materials that may arise under comparable Delaware law and which could have been raised in the Federal Action as pendent claims. Cf. Miller Brewing Co. v. Jos. Schlitz & Co., 605 F.2d 990, 995-96 (7th Cir. 1979) (reversal of preliminary injunction is res judicata in subsequent suit), cert. denied, 444 U.S. 1102 (1980). It is improper, in such event, to try to reopen issues litigated in one lawsuit by seeking discovery in another. Rohm & Haas Co. v. Consolidated Industrial & Agricultural Chemicals, 1 Fed. R. Serv. 2d 530 (W.D. Mich. 1958).

CONCLUSION

For the reasons stated here and in the accompanying affidavit of Greg A. Danilow, Esq., the motion of Blasius and Messrs. Delano and Lubin for a protective order should be granted.

MORRIS, NICHOLS, ARSHT & TUNNELL



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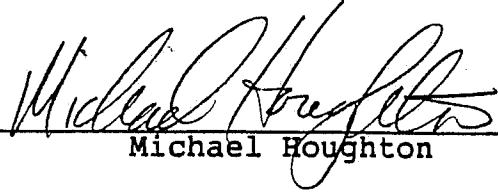
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March 14, 1988

CERTIFICATE OF SERVICE

I, Michael Houghton, hereby certify that two copies of the attached Memorandum of Law In Support Of Motion for Protective Order and Affidavit of Greg. A. Danilow, Esquire, were served by hand on Samuel A. Nolen, Esquire of the firm of Richards, Layton & Finger, One Rodney Square, Wilmington, Delaware, counsel for defendants in this action.

  
Michael Houghton