#35

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

LITERARY PARTNERS, L.P., et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 10935
TIME INCORPORATED, TW SUB INC., JAMES F. BERE, MICHAEL D. DINGMAN, EDWARD S. FINKELSTEIN, MATINA S. HORNER, DAVID T. KEARNS, GERALD M. LEVIN, HENRY LUCE III, JASON D. McMANUS, J. RICHARD MUNRO, N. J. NICHOLAS, JR., JOHN R. OPEL, DONALD S. PERKINS, and WARNER COMMUNICATIONS, INC.,	)	
Defendants.	)	

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Courtroom No. 302
Public Building
Wilmington, Delaware
Wednesday, June 28, 1989
10:12 a.m.

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BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

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HEARING ON PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING ORDER

- - -

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

APPEARANCES:

P. CLARKSON COLLINS, JR., ESQ.
LEWIS H. LAZARUS, ESQ.
BARBARA MacDONALD, ESQ.
Morris, James, Hitchens & Williams
-and-
MICHAEL R. KLEIN, ESQ.
(Washington, D.C. Bar)
THOMAS W. JEFFREY, ESQ.
ERIC MARKUS, ESQ.
Wilmer, Cutler & Pickering
for the Plaintiffs.

LAWRENCE A. HAMERMESH, ESQ.
R. JUDSON SCAGGS, JR., ESQ.
Morris, Nichols, Arsht & Tunnell
for Time Inc.

WILLIAM J. WADE, ESQ.
Richards, Layton & Finger
for Warner Communications, Inc.

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PROCEEDINGS

THE COURT: Good morning, ladies and gentlemen. I apologize for keeping you waiting for a few minutes. I wanted to finish reading the materials that were delivered to me this morning. I had read the plaintiffs' materials earlier.

This is the time that I set for the hearing of a restraining order in Civil Action 10935, Literary Partners v. Time Incorporated and others. Are plaintiffs prepared to proceed now?

MR. COLLINS: Yes, your Honor.

Before we proceed I'd like to introduce to the Court and move the admission pro hac vice of Michael Klein, who will be presenting the argument this morning on behalf of the plaintiffs. I'd like to hand to the Court the motion and form of order.

THE COURT: Fine.

I will ask you to speak out. I think the microphone has been disconnected so that the Court Reporter can hear. Those who have come to listen to this proceeding may not be able to hear if you don't speak loudly.

I am happy to grant your motion, Mr. Collins.

Mr. Klein.

MR. KLEIN: Thank you, your Honor.

On behalf of my clients I'd like to express appreciation for the scheduling so rapidly of this hearing. I will try to be direct and succinct this morning and divide my remarks into the issues relating to the merits and then to the issue of appropriateness of relief, assuming I have made out a case.

THE COURT: By "merits," I am sure you intend to include that the irreparable harm that your client faces, in your view.

MR. KLEIN: Yes, I do.

The central argument made by us in our complaint and our memorandum is that since mid-May, when Time mailed its initial proxy materials, a great deal has happened and the Time shareholders have not received revised proxy materials that come close to satisfying an appropriate degree of disclosure and, under the totality of the circumstances, are faced with a meeting this Friday in which they have been effectively disenfranchised.

May I just briefly review -- I know the Court has reviewed with care -- in summary the highlights of what it is we think has happened since May 24, about which we believe the shareholders have not received any

adequate disclosure or explanation concerning the actions of the nominees, as well as the rest of the board of directors, but particularly the nominees.

Two weeks after the proxy materials were mailed initially -- the big, thick package which the Court has been provided -- Paramount on the 6th of June announced and the next day commenced its $175 tender offer and invited Time to negotiate to improve either the price or the terms.

Ten days after that, we now know, culminating from earlier meetings, Time's directors took a number of rather dramatic actions.

First, they rejected the Paramount offer out of hand and, having declined theretofore and since to negotiate at all, they reconsidered and revised the Warner merger agreement which was proposed to the shareholders and described both as to its legal and economic consequences in the rather lengthy materials provided in the May 24 proxy materials. They changed that transaction in ways that very dramatically adversely affect the benefit to the shareholders of that transaction. I'll come back to that.

They waived the five-day period that was provided for in the original share exchange agreement and

issued to Warner what is now 11-plus percent of the total current outstanding shares of Time.

And most germane to what we're dealing with here, they, I think believing that the Time shareholders would by no means approve the transaction that was then being considered or the earlier one, canceled the promised shareholder vote on the combination with Warner, although in effect reaffirming the merger agreement in some of its basic elements, including in the shareholder vote that inferentially would have ratified the planned and still planned restructuring of the Time board of directors to increase its number to 24 and put 12 nominees of Warner on that board.

On June 20th, Time postponed its already truncated annual shareholders meeting for seven days, from last Friday to this, and they distributed to Time shareholders an amendment with proxies in the form of a one-page letter which we have provided the Court, effectively saying nothing more than that the meeting had been adjourned and there would be no vote on any merger proposal.

Thereafter, on the 23rd of June, five days ago, Paramount increased the bid to $200 a share, and a couple of days ago on the 26th, Time rejected that new bid

as inadequate, stating for the first time that both of its bankers, including Wasserstein Perella, had advised them, by way of explaining the decision to reject $200 a share, that in their view Time is worth $250 a share, and at the same meeting reaffirmed their commitment to the revised Warner transaction, which, as we and I believe the other investment community regard it, imputes a value of $151.50 a share to the Time shares, which is to say $100 less than the value they place and $50 less than the value that is being bid in cash.

We argued in our original papers to the Court and we believed at the time that the proxy materials, revised and adequately disseminated, explaining those events, their consequences to the shareholders of Time and the role played by the four nominees, three of whom are senior executives of Time, was and is required to provide the shareholders an adequate opportunity to intelligently exercise their franchise. And we argued that it had not been provided.

We understand that at yesterday's scheduling conference Time advised the Court that it believes it has made disclosures to the shareholders of precisely that which we contend has not been made, or at least it has provided many pages of disclosure to the shareholders

regarding the events that took place through June 16. Specifically, we are told and now this morning an affidavit has related that through the 19th to the 21st, late last week, Time mailed to its stockholders a letter of a couple of pages transmitting portions of a 14D-9 that provides significant disclosures with respect to the events taking place up through the 16th.

We were, quite frankly, shocked to learn of the reported June 16 disclosure. We have been working on these papers for three or four business days. Neither we nor our clients related to it or knew about it. And we have spent a good deal of yesterday trying to figure out how possibly there could be two such different views of the reality of the disclosures in this case.

At this juncture I think we have found the answer. It is that Time may have attempted in perfect good faith to get its June 16th letter and the attachments, the 14D-9, into the hands of its shareholders, but it has failed to do so.

Here is what we have found: We found that as of the close of business yesterday Literary Partners, the first named plaintiff, had yet to receive the mailing at all.

THE COURT: Is Literary Partners a

registered owner?

MR. KLEIN: It owns those shares through Merrill Lynch. We contacted the back office of Literary Partners and asked them to make inquiry regarding whether it had been holding the materials or why they had not been received. I don't know if the Court did get it, but we delivered over this morning an affidavit from the head of the back office of Literary Partners.

THE COURT: No. I haven't seen it.

MR. KLEIN: This is one of two affidavits. I will mark the other one and explain them both, your Honor.

THE COURT: The Clerk will hand them up to me after she has marked them.

MR. KLEIN: Yes, sir.

The first affidavit explains what it is that we learned upon inquiry and on successive inquiry. It is that late last Thursday, which is the 22nd of June --

THE COURT: Which is the first affidavit?

MR. KLEIN: It's the affidavit of Laverne Sturdy.

THE COURT: Yes, sir.

MR. KLEIN: As the affidavit reflects, your Honor, she had not received the materials, and so she made

inquiry of Merrill Lynch, where the shares are held in street name. The people at Merrill Lynch -- the gentleman is identified -- got back to her and related the following, which is set forth in the affidavit which we, of course, provided counsel this morning. We received it, I must say, in its form executed after we provided it to them but didn't get it out until last night.

Apparently on the 22nd of June, D. F. King delivered a handful of these letters and the attachments to Merrill and made inquiry of them how many copies they would need to satisfy the street holders for whom Time is held. And they were told 2,000 copies.

We were told through Ms. Sturdy that as of the close of business last night Merrill Lynch has yet to receive the 2,000 packages. There are 14,000-odd shareholders of Time. I don't know that 2,000 is represented as the number of such street holders, but certainly I think it's probably an approximation. It is approximately a seventh just at Merrill Lynch.

We then asked our other client, U. S. Media Partners, had they received the materials. They have fared slightly better. Their shares are held in Drexel. They received copies of the materials yesterday. One of the gentlemen who is a partner in this partnership and who

holds shares in his own name received them I think Thursday or Friday of last week.

During the course of yesterday we received a number of telephone calls from shareholders encouraging us in this effort to try to see if we could get a meeting that would be effective, one of them a mutual fund that owns 1,200,000 shares, Mutual Series Funds, Inc. They communicated with us. We asked them to check to see whether they had gotten the materials explaining the conundrum in which we had found ourselves, and an affidavit from that mutual fund is before the Court, and it, too, recites that they had as of the close of business yesterday yet to receive these materials that explain the events through the 16th of June.

Interestingly, however, all three of our clients, as well as Mutual Series Funds, did receive the June 20th letter, the one-page letter to which we adverted in our pleadings and attached as an exhibit. And I think, without knowing, that the explanation for that is the same explanation for our inability to deal with the June 16th package in our complaint and brief, and that is that our check of the SEC filing docket, which is no longer officially maintained but maintained by an outside source, lists the materials that are provided to the Commission as

14D proxy materials and separately from the other materials.

What we find is that the June 20th letter that we describe as an amended proxy solicitation, and was treated as such, was filed with the SEC as proxy materials and assumedly reviewed and cleared by them and thereafter treated as that; whereas the June 16th material was not filed at the SEC as proxy materials. I believe, without knowing and without impugning any improper motives --

THE COURT: I don't understand how that explains the fact that your client received in the mailing the one letter but not the other.

MR. KLEIN: Because I think they were in fact sent out the regular way on the 20th as proxy materials and received as such by the houses; whereas the Merrill Lynch affidavit reflects they received the 14D materials in their Reorganization Department, the original bunch, and then were asked how many more copies they needed, without perhaps the sense of urgency, because, as your Honor knows, those materials are there to be evaluated by the analysts and communicated to the market because they are deemed to be in effect something in the nature of the periodic filings relating to the Commission, rather than the exercise of franchise of the kind that

goes forward.

In any event, I'm speculating here and impugning no one. I don't suggest for the moment, notwithstanding the affidavit that's been provided this morning suggesting that they were still mailing the June 16 materials on the 21st, I believe, as the affidavit that the Court was provided states.

But there is, as this Court has noted in the TWA litigation, and we are aware of a different quality and character of information when it is received and disseminated as proxy materials and that which is on file, available for analysts and the press to report upon and indirectly communicate to shareholders. The Court I believe used the word "underwhelming" in response to the argument in TWA that it was adequate to provide the indirect form of disclosure; that shareholders did not have an opportunity to review that.

But whatever the explanation is, the plain fact also is that Time has not yet managed to communicate what it believes it has communicated to its shareholders. As we stand here today there is no reason to believe that it can do so by Friday. Accordingly, this is not like the situation this Court faced in Anderson Clayton where the directors had provided Mailgrams and kept the polls open

and represented having taken a variety of extraordinary steps with respect, by the way, to more discrete issues, in an effort to make it possible for the shareholders to actually get some materials. I won't comment on what ultimately happened later on in that case, but it is different than that.

We find in effect that in perfectly good faith -- and without suggesting any impropriety, we have not had -- and I hope the Court understands this is the explanation for lawyers working with these things, not relating these 14D-9 materials to the Court -- they weren't filed as proxy materials, they weren't received by our clients, the principal clients, and that is our situation.

I want to be clear, however, that in our view, having last night received and reviewed the 14D-9 materials dated June 9th and the 16th and the transmitting letter that Time has unsuccessfully tried to get out, we still do not believe that those materials, had they been effectively disseminated and read, come close to providing Time shareholders with the material facts essential to a reasoned vote on the four nominees who are up for election on Friday.

I don't want to burden the Court with

a long, petty list of nuances. The issues in this election are large; they are not minor. What we are dealing with here are Time directors who have taken actions that will be of great personal benefit to at least three of the nominees. That action is at the moment inexplicable to us as major shareholders and we believe to the great majority of major shareholders. We and our fellow shareholders believe we are entitled to an explanation that might make some sense of it.

Permit me just to explain a few of the pieces of information and analysis that we think disclosure, standard of disclosure, nonflagellating disclosure, ought be provided to us in order to enable us to make a reasoned decision.

Paramount on last Friday offered us $200 a share for our shares. On Monday the four nominees and their colleagues unanimously rejected that offer. That was after June 16th. Why is that? We are told this morning in a filing that there's attached materials that they propose to send out once again, hopefully through their regular proxy process.

Yesterday's news stories report that the explanation for the rejection of the $200 offer is the view that the directors have that it is worth $250

a share. But as we calculate the current Warner transaction which they are proceeding with -- and the analysis of that is set forth in our memorandum and rather uniformly shared among the analysts -- that transaction places an imputed value of $150 a share on Time. And at least for us, as participants in the recent battles over Macmillan, we draw very little comfort from the news reports that Wasserstein Perella have explained this to the directors' satisfaction. It's frankly a little too frighteningly reminiscent of the legerdemain that we had in Macmillan, where they advised the directors that a $64.15 restructuring that transferred control to the directors was neither a sale nor unfair, but the $73 identical restructuring that my clients offered was both unfair and inadequate.

Moreover, Wasserstein's advice and opinions may not be the most dispositive issue here, but we have had them and they put them forth as a rationale, and we believe that the shareholders are entitled to see updated pro forma numbers showing on a comparative basis what it is that the company will look like, assuming that the Warner transaction goes forward. There were such numbers in the May 24 proxy when the transaction was a pooling-of-interest transaction. I don't know whether your Honor

wants to be burdened by an explanation of that or is familiar with it.

THE COURT: I think I understand from the earlier matters.

MR. KLEIN: Now what we have got is not a pooling transaction, but we've got a purchase transaction of Warner with $14 billion to be paid for a company that lists its present assets at book at $5 billion. That means that we are going to have $9 billion of good will, which is going to have to be amortized over no more than forty years. That's at least $225 million a year of reduction of reported earnings. Who knows, because yet remains to be revealed how much more of those reduced earnings --

THE COURT: Does that have to be on a straight-line method?

MR. KLEIN: It depends upon the nature of the assets. There are some assets that the Commission takes the position under accounting standards that have a shorter life. But otherwise it is a straight-line. The general presumption is forty years, and it depends on the nature of the assets, whether they are expiring assets; for example, copyrights that would run out in a shorter period of time but would have, of course, to be amortized

over that period of time. For the most part, straight-line.

But in the transaction that is proposed they have left open the question whether those are common stocks, junk bonds or cash. But, in any event, two of the three of those suggests a substantially increased debt burden. How much will the debt burden be, so that we can basically say to ourselves that we know, as we now suspect may unfortunately be the case, when it is quite possible that Time Incorporated will have no reportable earnings for several years as a combination of good will writeoff and the debt service. Because if that's true, and we think the shareholders ought to know whether it is true, then gauging the conduct and decisions and the roles played by these four nominees, especially since they have now decided they are not going to let us decide it for ourselves by canceling the vote and restructuring the transaction and deciding not even to permit a discretionary vote, why stock in a company that could potentially have no reportable earnings is preferable to us than $200 a share.

This is not like the Northwest Airlines case which the Court recently dealt with, with directors who had announced a willingness and an openness to consider

a variety of transactions so that the impact of the election and the interplay with the bidding led the Court to conclude that it would have some impact but not as severe as it might in other circumstances. These are those other circumstances.

The June 16 materials have other shortcomings, even with respect to the pre-June 16 events and some of them since. On June 7th Mr. Munro, who is one of the nominees, the chairman of the company, announced publicly, quickly off the bat, an angry rejection of Paramount's $175 bid, a threat to the Warner merger under which he is to profit handsomely, along with his colleagues. Upon whose authority did he do that? Particularly given the benefits that he would get under the Warner transaction but lose under Paramount. And did Messrs. Nicholas and Levin, who are co-officers, join him in that? And what action did Mr. Perkins, who is a supposedly outside director, take?

It appears from the press quite possible that there isn't a separate investment banker, that Wasserstein and Shearson are investment bankers for the management and the board of directors. Who hired them? Are we dealing with a situation, as we were, in which the chairman of Macmillan, Mr. Evans, hired Wasserstein and

First Boston and essentially presented them and thrust them upon the directors, reluctant, as directors ordinarily are, to challenge the executives with respect to major business plans? How have Messrs. Nicholas and Levin and Perkins dealt with those issues?

We could go further through the 14D-9. I'm trying to highlight what I think of as rather enormous issues, given the position that we are in at this moment. But I hope that that quick summary explains the nature and intensity and quality of our concerns, so that even if the materials that were sent out were received, we find them imperfect as to the disclosure -- substantially imperfect as to the disclosures of events up to June 16, and, of course, nothing has yet been provided about the events since. Those materials now are stale, incomplete, irrelevant, and worst of all, I suspect, based upon what we were able to find out in one day, not yet received by the number of shareholders who hold their shares in street name.

Permit me to address now issues other than simply the question of the disclosure. We are dealing in this situation as well with a series of perfectly lawful, step-by-step provisions of articles and bylaws and decisions that culminate to create a fundamental

unfairness here. That is to say, the articles of incorporation of Time provide that no shareholder -- no number of shareholders, however large, even a majority, may convene a special meeting. The bylaws provide that ninety days' prior notice of the annual meeting is necessary to put in nominees, seven days for a special meeting.

We have a situation here in which, as a result of the postponement and adjournment of the meeting -- excuse me -- the convening and adjournment of the meeting -- this meeting is going to be held on the last day on which it can be lawfully convened, if it was to be convened on the 30th in the first instance. We are stretching to the limits, even assuming perfect legality and no intent to injure the shareholders by virtue of the convening on the 23rd and adjourning to the 30th.

By the way, we adjourned -- we adjourned -- made that decision because of the enormity of the perceived decisions made on the 16th and the desire, apparently, to communicate to the shareholders an explanation for that.

We likewise find out this morning that Time proposes to make comparable disclosures by another mailing of its decisions on the 26th, but no further adjournment

or postponement of the meeting. We urge upon Time the consideration, absent this litigation, whether or not that is not only consistent with what it is they have done before but fair and appropriate under the circumstances so as to preclude the necessity of this Court making findings or pressing them by an order to accomplish what fundamental fairness would require.

We've got another problem with this May 1 date. There are cases that the Court is familiar with -- the one that we find most analogous to what we have here is the Teleprompter decision by Judge Brieant, in which the simple magnitude of the occurrence of events that have intervened since the initial setting of the date and the initial dissemination of materials makes it inappropriate and unfair and inequitable for a meeting to go forward here.

There's a facet of this that is extraordinarily important, your Honor, to appreciate. Because Time is now in a position in which as a formal regulatory matter there is not a "contested election," the following rules are in place with respect to all of the shares that are held in street name, and that is this:

The brokerage firms are permitted, absent instructions, to vote those shares in favor of the

management slate; indeed, are kept from doing so and can be exempted from doing the mechanical act. Because we have had, I would suspect, without knowing -- discovery would reveal -- probably forty, fifty, maybe a great percentage turnover in the shares from the date on which these materials -- the May 1 -- occurred; by the way, a record date that was not disclosed until they disseminated the May 23 or 24 materials themselves, so people didn't even know we were dealing with a record date. Those of us who are shareholders scurried around trying to find out the record date.

In any event, because of the fact that we had a May 1 meeting, given the actual ultimate marketplace as a result of the Paramount offers and the estimates by people of the outcome of litigation in this Court and persistence in a revised and extremely disadvantageous transaction from the shareholders' perspective, we have had probably a 50 percent or more turnover of shares. I'll bet you loads of those -- if Merrill Lynch has 2,000 shares of record in street name, the street name holding at this stage of the game in this entity must be enormous. And the shareholders of record on May 1 to whom these proxy materials had been sent and who have the right to have the franchise may have no stake in the outcome of

this, giving no instructions to brokers, who are then permitted to vote the shares, incentivized for doing so. We are likely to have an election that is not only ill-informed but is simply voted to the detriment of the current shareholders by brokerage houses failing instructions from the record holders of interest.

So what we have got is I think a culmination of circumstances which, like in the Teleprompter case, warrant judicial intervention.

THE COURT: Are you going to turn to irreparable injury now?

MR. KLEIN: Immediately, your Honor. I'm usually not that good at timing. I appreciate that.

What we are seeking here --

THE COURT: How many directors are on the board of Time?

MR. KLEIN: They have had some resignations. I think we now have twelve.

Is that correct?

MR. HAMERMESH: That's right.

MR. KLEIN: One director resigned immediately or shortly after the -- shortly after the vote on the original merger, and three more have resigned to accommodate I think the plan to put twelve Warner

directors on, so that we will have a twelve-and-twelve board.

Of course, your Honor, we hope to participate in the discovery schedule and bring to the attention of the Court, if we are permitted, on July 11 our views with respect to the more substantive issues which may involve why some of these directors left.

THE COURT: I am sure I will be hearing more about that.

How many directors are standing for election at this meeting?

MR. KLEIN: There are four directors. There's a staggered board, and if a staggered board -- that raised another point which I meant to mention and certainly should.

The disenfranching here really could be quite dramatic. We have got a staggered board where they have three-year terms. In effect, if this election is permitted to go forward, because of that and the addition of the Warner representatives, the twelve Warner representatives, we could go out two or three years down the road in which the shareholders cannot convene a special meeting. They are subject to the annual election process.

Even if we were able to elect the slate, we would only be replacing a third of the board, or a quarter, each time, for a succession of years. There's undoubtedly an unintended but nonetheless cumulative impact of all of these provisions of the articles and the bylaws and the staggered board and the record ownership. The disenfranchising would be a substantial injury.

As to the issue of injury and as to the question of the appropriateness of injunctive relief in these circumstances, I don't want to pander to the Court, but I will commend the Court to review its own writings in Part 4 of the Blasius v. Atlas case, which we find to be an explication of what we perceive to be the rule in Delaware and the reason for it that commended us to come before the Chancery Court in seeking relief. It is a statement as straightforward as is susceptible of being made that as between those cases involving commercial transactions which are ongoing and money damages will remedy and premature intervention could in fact injure the parties, the courts of this jurisdiction, including the Supreme Court in Shell and this Court in Blasius and in a variety of others, have rather consistently taken a much more aggressive -- and appropriately so -- view with respect to the allocation of authority as between the

directors who are agents and the shareholders when what is at issue is who is going to be that agent, as opposed to what kind of business transaction has been reviewed.

We reviewed this morning the materials, the unreported cases and the memoranda received from the other side, and I find those decisions wholly consistent with what it is we are dealing with -- first Blasius and Schnell.

THE COURT: You said, "Part 4 of the Blasius decision." That's when we were talking about counting the proxies. Is that right?

MR. KLEIN: That is when you were talking about the effect on the board of adding two directors, manipulating the number of directors so that even if the majority of shareholders wanted to replace a majority of the board, the election of two directors to fill those slots, however motivated to put decent people on the board as well, effectively precluded a majority of the shareholders of that company from obtaining voting control and precluded the shareholders from participating. Not because you found that they had been malicious. You indeed conceded, as we are prepared to concede, that these directors may honestly believe that what they are doing has not only been sound and in the best interests of the

shareholders, but they have communicated it.

But the fact of the matter is, we don't believe it is sound. We believe rather strongly that if in fact they had not decided to cancel the election on the Warner merger or had decided to permit a precatory vote with respect to the revised transaction, that the shareholders of Time would resoundingly -- the shareholders today would resoundingly defeat that transaction in the absence of an explanation, which is not apparent from anything that we have read, and as you noted in TWA, we are not required to go read and figure things out by divining rods and extralegal searches. We have not been provided an explanation.

So that I can go through the cases, your Honor, in which we are dealing with the franchise, with Shell. I can go through the HBO case, with Lerman.

THE COURT: Blasius was a very different case. Number one, it was after trial. Number two, what was perceived by the Court, in all events, was involved was a critical action by the incumbent board that would have taken control of the corporation from the potential group that was involved in the consent solicitation. You have a situation here in which -- and the Court is required in matters of this kind to look to the

practicalities, because a restraining order is a practical remedy -- the corporation is governed currently by twelve directors, four of whom are being elected at a meeting, and that there is no factual way for me, it seems to me, to assume this afternoon that the vote on those four directors' tenure is a critical element in the immediate future. If this vote were to be enjoined, they would continue, would they not, as directors?

MR. KLEIN: As they would if this vote were not enjoined. The fact is, they would continue in office, but it would not put this Court in a position, which we are not happy in doing, of asking judicial intervention to do what one would have thought they would have done on their own nickel,if you would, as they tried to do on the 16th. And that is to provide another opportunity for the shareholders to learn the facts. We could then address the question whether the electoral machinery has been wittingly or unwittingly manipulated to include a fair franchise.

But not just those cases that you cited, but Chancellor Jacobs' opinion in the Petty case, and others, are dealing with situations which in a variety of ways what is happening is that the majority of shareholders ostensibly could be frustrated by maneuvers: lengthening

the notice period, abbreviating the meeting dates, issuing blocks of stock that preclude effective franchise, adding a couple of directors so there are no vacancies to fill. All of those have provoked the kind of judicial intervention with findings of irreparable harm to the integrity of the standards that are quite different than the standards that have been applied in the transactional cases.

And again, your Honor, in Cooke v. Teleprompter at 334 Federal Supplement 467 with Judge Brieant, I think the dynamics of what happened there and the dynamics of what we have here are virtually identical. We had there a gentleman by the name of Kahn, who was thought not to be so much of a gentleman by the jury that convicted him of some crimes. He was the chairman of the company. I don't want to bore the Court if it is familiar with the case. He was the chairman of the company. Jack Kent Cooke, who now owns the football team that my son demands that I buy him tickets to, he was engaged in an effort to remove Mr. Kahn. And Mr. Kahn after his conviction -- which, by the way, earlier proxy materials had predicted would not occur -- gets some august firms, the legal equivalents of Wasserstein & Perella, to issue an opinion saying that, "He's going to be vindicated on

appeal. Don't worry about it." And after a little jockeying back and forth that disclosure and that stance is perceived to be inappropriate and not susceptible to be persisted upon.

So what we have is, he agrees to resign, sort of. They agree not to do the Warner transaction, sort of. And so we are left with a situation in which they are going to go ahead with the deal, if you would. Kahn's continual rule; the Warner deal in another form. Much less advantageous. And because he controls all these people and he reduces the number of directors, so that his slate -- his position is not even to be filled, what does Judge Brieant find? He finds that the disclosure is not adequate. Too much time has elapsed. The intervening investments have been sufficiently momentous that the likelihood is that shareholders of record on the original date are just not motivated, as are the current shareholders, to do what it is that's appropriate in the exercise of their franchise, and so he orders them, "Convene a new meeting, set a new record date, issue new disclosures, and the franchise is protected." And he cites a couple of decisions outside this jurisdiction for similar propositions with respect to the record date.

I am very sensitive -- and any attorney who

began to come before any court, but particularly this Court -- possessed of an awareness of its reluctance to enter preliminary or temporary relief in a situation which does not necessarily require it, is reluctant to put to this Court the burden and, indeed, to put our colleagues on the other side of this case at risk to the possibility of an order or an opinion that would appear to put the Court on one side or another in a facet of an ongoing battle.

Frankly, I respectfully request of Time that it consider whether under the circumstances the right and decent and fair and equitable thing to do here is, indeed, not to postpone that meeting until you have had the hearing on the 11th, in which the Court will have before it enough of a record so that what comes out of it in the way of an opinion, to say nothing about the intervening disclosure, will assure us the capacity for an adequate disclosure. We may not even want to have an opportunity to run a slate. But we will not have had the mischief, if you will, of having four directors, who obviously have played a central role, get re-elected on the basis of materials that have not been disseminated and some that have not been yet mailed, and claiming that in effect their positions are secure and ratified, and that there's

nothing wrong.

There's a lot wrong. And this Court has the power to remedy it, not simply because it possesses the power but because, consistent with its own view of the franchise in this State and the view of the Supreme Court in the Shell case, the intervention of the courts to protect the integrity of the electoral process is a different piece of work and business than the mere intervention among parties disputing for business transactions.

We are not bidders here. We are shareholders. All we want to do is have a fair meeting.

Thank you, your Honor.

THE COURT: Thank you, Mr. Klein.

Mr. Hamermesh.

MR. HAMERMESH: Thank you, your Honor.

There are two puzzling things about this application this morning. I think Mr. Klein was sensitive to the one of most concern to me, which I did raise with the Court yesterday morning in the scheduling conference.

Mr. Klein says he was shocked to learn about the existence of materials disseminated to stockholders dated June 16. I was equally shocked to see papers submitted to the Court premised on nondisclosure claims

which apparently did not recognize the existence of those June 16 materials.

I take Mr. Klein at his word that he was shocked to learn of those June 16 materials. Nonetheless, I question whether or not his clients are appropriately before the Court making applications about the absence of those materials from the hands of stockholders for a variety of reasons.

Conspicuous among the papers that were filed or dated June 16 -- I guess filed the next day -- was Exhibit G to Mr. Collins' affidavit. This is the June 20 letter that Mr. Klein referred to, which he characterized as sort of the proxy pigeonhole versus the tender offer pigeonhole. If it is sent to the stockholders, I'm not sure what the difference is. But that June 20 letter, which obviously they got well before they made their application, says in the very first sentence, "As we advised the Time stockholders in our press announcement and letter of June 16, the 1989 annual meeting will be adjourned."

Did somebody read that? Did somebody say, "Gee! What is that June 16 letter?" And, more realistically, did these clients of Mr. Klein's, who apparently own millions of shares of Time Incorporated,

not know about the obligation of Time Incorporated to file a Schedule 14D-9 with the SEC? Did they really understand or think as parties or did their lawyers really think that there wasn't such a thing?

I still find it, notwithstanding Mr. Klein's professed ignorance of those matters, surprising, to put it charitably, that those matters were not called to the attention of the Court and that it took us coming in the following day to present them to the Court.

I want to speak for a moment about the process of disseminating those materials, because I think Mr. Klein is attempting to backpedal from the failure to point those materials out, innocently or otherwise, by saying that, "Gee, they haven't reached all the stockholders yet." It's abundantly clear from the affidavits filed this morning that Literary Partners is not a stockholder of record, and the Court is well familiar, I'm sure, with the fact that when someone chooses to hold stock through a registered nominee owner, there are inevitable delays by virtue of interposing that layer into the process of stockholder communication.

I think in fact, while Mr. Klein referred to your Honor's decision in Anderson Clayton about the efforts that the Anderson Clayton board made to

disseminate news of the Bear Stearns offer that occurred four days before the meeting to vote on the recapitalization, your Honor took pains to point out that the Mailgrams that were sent to stockholders in that circumstance were sent to registered stockholders.

I also find it telling that Mr. Klein acknowledges that at least one record stockholder with whom he is familiar received the materials back last Thursday, and, in fact, a beneficial owner received them yesterday through the course of dissemination.

Let me correct one other thing, too, that Mr. Klein said. I think he indicated that the 2,000 copies to which one of the affidavits refers represents one-seventh of the 14,655 stockholders of Time. I assume Mr. Klein is referring to the number in the proxy statement of May 22 that says that there are 14,655 stockholders of record. We obviously don't know, on behalf of Time Incorporated, how many ultimate beneficial owners there are, and I suspect that 2,000 is but a very small number of those. I don't mean to suggest that 2,000 is a matter of indifference to anybody, but I am suggesting that this is hardly a widespread case of failure to get materials out. To the contrary, I think it is fully understandable, given the fact that people

sometimes choose not to hold stock in their own names, that there are some delays in getting materials to them. But I fail to see anything in the affidavits that suggests any shortcomings in the efforts of Time to disseminate these materials to its stockholders.

So from that point Mr. Klein turns to the suggestion now, raised, of course, for the first time this morning, that there are materials or there's information that is not contained in those materials disseminated to stockholders that is somehow necessary to be presented to the stockholders before they vote on election of four out of the twelve members of the board of Time this Friday.

The short answer to that point, your Honor, is, in the first instance: I don't think it is appropriate and I'm certainly not prepared to address the individual nondisclosure points that Mr. Klein raises. They are not in his complaint, obviously. They are not in his brief filed two days ago, although they could have been. They are heard for the first time this morning.

Nonetheless, even after having heard them, it is far from clear to me that any of the various matters he refers to is the kind of thing that is pertinent as a matter of law or material as a matter of law to an election of four out of twelve directors. Had this been

a vote on some transaction, as in the Anderson Clayton case, a recapitalization, or the economic consequences of the transaction were more directly at issue for the stockholders to consider, I think the argument about various updated pro forma numbers, for example, might be interesting, at least. But in the context of the election of directors, I respectfully suggest that it is entirely tangential and, indeed, if every economic --

THE COURT: You mean it is tangential to the board's response to the increased Paramount bid?

MR. HAMERMESH: Certainly not. And the Court may want to consider that. I am saying that it is tangential to the question of the election of directors. If every detail of the transactions that the board considers had to be disclosed in its underlying support to the stockholders, I suggest that proxy statements for the election of directors would be very, very different things, and I suggest would be an unhelpful world to the stockholder.

This is not a vote for better or worse -- and we'll address that at some point in the future -- on whether or not a transaction with Warner should go forward. It is a vote on the election of directors. It is a vote that was scheduled and announced to the

stockholders back in May. It was announced before Paramount ever emerged with its tender offer. The record date was set before Paramount emerged with its tender offer. The record date was disclosed before Paramount emerged with its tender offer. And the process that is leading to the vote for the election of directors this Friday is one that was set in motion long before any of that surfaced, and all that Time has done is to make some attempt to advise stockholders of information concerning these developments, from which I hope the Court will not take any concession that there is some obligation on an ongoing basis to keep putting off the meeting, to keep putting off an election of directors as new events occur. And that, I suggest, is the logical conclusion of many of Mr. Klein's arguments.

There has to come a point by statute, if nothing else, when elections of directors have to occur. There is nothing that has been done here that represents an attempt on the part of Time, its board of directors or its management to alter the course of proceeding forward with the election of directors that was set in motion so long ago.

The only thing that did occur, I should say in fairness, is that Time's board determined to convene

the June 23 meeting, which occurred last Friday, of course, and adjourn it for one week for the purpose of taking the vote on the election of directors and a couple of other matters this coming Friday. That's the only alteration that's occurred.

I would think it is apparent -- and I understand Mr. Klein almost to concede implicitly -- that that deferral can only be in the interests of stockholders receiving these additional materials. I don't understand Mr. Klein to contend that that delay represents any prejudice to his clients or the stockholders generally.

I said when I began this presentation that there were two puzzling aspects to it. The other puzzling aspect of it is the matter that your Honor solicited plaintiffs' views on at the outset, and that is the question of irreparable harm.

I think the Court, as we indicated in our papers, ought fairly to ask itself what is this about. What is to be accomplished by a temporary restraining order of the sort sought here? The directors who are up for election, the four of them who are up for election on Friday, are currently directors. If the election is deferred, they stay on as directors. They continue to

serve in the functions they have served, and at some point, if there's going to be a future election directed after some final hearing, perhaps they won't serve if there's going to be a future election.

But the point is, nothing that will be accomplished on Friday in terms of taking the votes, counting the votes and certifying the election of these directors is anything that cannot be set aside after final hearing.

I really am uncomfortable uttering those words because of any suggestion that I think that that could ever be an appropriate remedy. But certainly if the Court were convinced that there ought to be an election, that there ought to be a new record date, that there ought to be a new solicitation of proxies, it can be done.

I recited that proposition I think without authority in our brief filed this morning and, like many good ideas that come to you in the middle of the night, it occurred to me to refer to another case that was not in our briefs that I have sent to opposing counsel and given to opposing counsel this morning. This is the Brooks and Perkins case. It's interesting in that it was also an effort to restrain a stockholder vote on election of directors on a staggered board.

The Court concluded at page 10, after rehearsing some of the arguments, that if the plaintiff's position is correct on final analysis, you can have a new election with a new record date, a new meeting date, an election of directors on different terms than proposed, which referred in that case to the fact that the directors had in fact taken away cumulative voting before the election at issue in that case. Of course, Time's directors haven't done anything like that with respect to the election of directors here.

So the bottom line is with all the disclosure claims, I think factually mispremised as they are and with the ability of the Court to grant final relief that is every bit as useful, perhaps, except for public relations value, for the plaintiffs as the relief sought today, there is no basis whatsoever under standard principles of equity to issue a temporary restraining order. To the contrary, as I think the Court may be sensitive to -- and I think opposing counsel is sensitive to -- the public relations value of a temporary restraining order is mammoth and unfair in relation to anything practical that could be accomplished by the relief sought.

Unless the Court has any questions, I have

nothing further.

THE COURT: Explain to me how that works in this case. What is the public relations impact? What difference does it make in this case?

MR. HAMERMESH: Your Honor, a decision of this Court restraining the conclusion of this meeting, the reconvening of it on Friday, is obviously, as witnessed by those in attendance today, the subject of considerable public interest: interest on the part of the financial community, the financial press. I don't have affidavits on the point, but I think it is well known to the Court, certainly from decisions of this Court and other courts, that restraining orders carry with them a stigma that I think the Court recognized in the Northwest case. I think Mr. Klein has recognized that. And they carry within the pages that the Court has made a determination that the Time directors, by carrying forward with the meeting that they set in motion so long ago to elect directors, are somehow guilty of wrongdoing. And that determination and that appearance publicly created on the eve of an election of directors, where presumably stockholders will be influenced by that, and they will be influenced by it undoubtedly in the course of other events that are too obvious to rehearse; namely, the whole

process of the Paramount offer and the various other events that are taking place in this situation.

The stigma is real. The public relations aspect of this case are very real.

THE COURT: The stigma, so-called, occurs in any restraining order or may occur in any restraining order situation in which the Court has to act promptly in an emergency situation without confidence that a more thorough record can be given. The notion that that action may have an effect upon an ongoing contest is also a point worth considering, and where, for example, if one has a proxy contest -- I have forgotten now what the Northwest Airlines case procedurally involved.

But it seems to me that this particular point is less significant in this instance than it would be in many other instances. The directors of Time Magazine have considered matters and taken positions, apparently, and there is now an application with respect to an injunction. It may be something that the Court does that in effect affects shareholders' perceptions or may even affect the Paramount proposal in some marginal way, although, frankly, I don't imagine it would have much impact of that kind.

But in this particular instance, I have no

reason to suspect that that is going to have any impact upon the practical situation that gives rise to the legal issues that I will have to face on July 11.

Anyway, I take your point, in all events, to involve nothing less than the point that the directors ought not to be in your view besmirched by having an order issued of the kind the plaintiffs seek here because it involves some implication about what they have done, despite the effort by the plaintiffs to put their case on the basis of assuming good faith up until now. Okay.

MR. HAMERMESH: Your Honor's comments, I regret, prompt two further remarks from me. One is that I don't mean to overstate the position. Obviously, the Court can enter interim injunctive relief, notwithstanding the public appearance of it from the standpoint of the defendants, if it is otherwise called for. I think your Honor understands that that can be weighed in the balance.

The second point, obviously, though, is that you don't really need to reach, I suggest, the question of whether or not there is going to be some practical situation to what I think is the inevitable stigma of interim relief if the Court determines that there is in fact no irreparable harm, which is, of course, the sine qua non of the application.

Thank you, your Honor.

THE COURT: Mr. Klein, do you want to reply to those remarks briefly?

MR. KLEIN: Frankly, your Honor, if the Court has questions, I'll be glad to answer them.

THE COURT: No. I am not inviting you to do so further. I will be happy to give you an opportunity to address further now.

MR. KLEIN: I apologize for the suggestion that one can perfectly relate the request for 2,000 packages to Merrill to the 14,000-odd number. But I find it straining credulity somewhat that at this moment Time really does not have a sense of how many shares are held in street name or fundamentally where they are. We are involved, after all, in a control battle in which these things are monitored.

I am reminded of Vice Chancellor Jacobs' opinion in the Morlan case in which he was called upon to rule on the calling and the setting of a meeting in which a substantial amount of time and effort were spent crafting a time frame with due regard to the difficulties, with which the courts are obviously familiar, of communicating to the street name holders. It is not as though -- if there was a reason, a felt need on the 16th

of June to communicate information to shareholders in the fashion that the attempt has been made, there is no reason for the rush here. This Court itself, as well as other courts in this jurisdiction, have enjoined meetings and found irreparable harm with respect to outcomes.

I was reminded by my colleagues as I sat there about the Ampac case in which the Chancery Court in 1982 said -- and it is a brief quote -- "While the vote on directors could well be nullified, then the stockholders may well be confused with the result. If a winning incumbent is erased, all most stockholders will appreciate is that the individuals they have supported were prevented from being elected by actions of the plaintiffs, and the stigma which the plaintiffs would suffer would be substantial and irreparable in and of itself."

It is simply, I think, a tradition of this Court to treat very carefully the franchise, and I pray for nothing more than we get treatment consistent with the prior decisions of the Court.

THE COURT: Thank you, counsel.

I will take the matter under consideration for about twenty minutes, and I will make an oral ruling say at 11:30. The press of other matters, particularly other aspects of this particular case, really don't

provide to me the luxury of writing an opinion that would give me an opportunity to take the kind of care with the language that I will be required to use that I would like to do.

I have thought about the matter previously. The argument this morning is helpful. I want to read one or two things before I finally conclude.

So I will recess, then, until 11:30.

(The ruling of the Court was transcribed under separate cover.)

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C E R T I F I C A T E

I, JACK P. WHITE, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 48 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above stated cause, before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 28th day of June 1989.

Official Reporter for the
Court of Chancery of the
State of Delaware

Transcribed by:
Ann B. Nolan