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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| LITERARY PARTNERS, L.P., et al., Plaintiffs, v. 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. | ) | Civil Action No. 10935 |

MEMORANDUM OF TIME INCORPORATED
IN OPPOSITION TO PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING ORDER

MORRIS, NICHOLS, ARSHT & TUNNELL
Martin P. Tully
Lawrence A. Hamermesh
R. Judson Scaggs, Jr.
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorneys for Time Incorporated

OF COUNSEL:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, NY 10005
(212) 428-1000

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## NATURE AND STAGE OF THE PROCEEDINGS

At the close of business on June 26, 1989, plaintiffs moved for an order temporarily restraining defendant Time Incorporated ("Time") from reconvening its 1989 annual shareholders' meeting, which was convened as scheduled on June 23, 1989, and adjourned to June 30, 1989.

Plaintiffs filed a memorandum ("Pl. Mem.") in support of that motion for a temporary restraining order, and this is Time's memorandum in opposition to that motion.

## STATEMENT OF FACTS

In December, 1983, Time's stockholders approved a merger of Time into a newly formed Delaware subsidiary pursuant to which Time would be reincorporated as a Delaware corporation.[1] The certificate of incorporation and bylaws approved by Time's stockholders in connection with the reincorporation include the following provisions:

- Article VI, Section 1 provides for a classified Board of Directors (Scaggs Aff. Ex. A at B-22).
- Article VI, Section 2 of the certificate of incorporation provides that advance notice of nominations for election of directors be given as provided in the bylaws, and Article III, Section 3 of the bylaws provides that notice of nominations be given at least 90 days in advance of the annual meeting of shareholders. (Id. at B-22, C-4).
- Article VI, Section 3 of the certificate of incorporation confers exclusive power upon the Board of Directors to fill Board vacancies and newly created directorships, and Article III, Section 2 of the bylaws conferred authority upon the Board to increase the number of directors without limit. (Id. at B-22, C-3).

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1 The proxy statement issued to Time stockholders in connection with that approval is attached as Exhibit A to the affidavit of R.J. Scaggs, Jr. ("Scaggs Aff.") filed herewith.

In accordance with those provisions, Time gave notice on May 22, 1989 that its annual meeting of stockholders would be held on June 23, 1989, and that the Board had set May 1, 1989 as the record date for determining entitlement to vote at that meeting. (Scaggs Aff. Ex. B). In addition to the election of four directors, the ratification of auditors, and a stockholder proposal to elect directors annually, Time's May 22, 1989 proxy statement separately presented for stockholder vote an agreement and plan of merger dated as of March 3, 1989, pursuant to which Warner Communications, Inc. ("Warner") would be merged into a wholly owned subsidiary of Time, and each outstanding share of Warner common stock would be converted into the right to receive 0.465 of a share of Time common stock.

On June 7, 1989, however, Paramount Communications Inc. ("Paramount") commenced a highly conditional tender offer (the "Paramount Offer") for Time. At meetings held on June 8, 11 and 15-16, 1989, Time's Board of Directors reviewed the Paramount Offer and after deliberation and consultation with Time's legal and financial advisors, determined to reject that offer as inadequate and not in the best interest of Time or its stockholders. The Board further resolved to enter into an amended merger agreement with Warner pursuant to which Time would acquire Warner through a first-step cash tender offer for 100 million shares of Warner common stock, and a subsequent merger in which Warner would become a wholly owned subsidiary of Time and its remaining shares would be converted

into the right to receive cash or debt or equity securities of Time. (Affidavit of Allen Barr ("Barr Aff.") Ex. A (Schedule 14D-9) at 5). The original Time-Warner merger proposal had thus become moot by virtue of subsequent events and Time's cash tender offer for 100 million shares of Warner common stock does not involve issuance of Time shares so as to require a vote of Time stockholders under the rules of the New York Stock Exchange.

Time's Board also determined at its June 16 meeting to convene the 1989 annual meeting as scheduled on June 23, but to adjourn the meeting until this Friday, June 30, 1989, for the purpose of voting on the other business scheduled to come before the annual meeting, i.e., the election of four directors, the ratification of auditors and a stockholder proposal to elect directors annually. (Id. at 8).

After the Board decided to reject the Paramount Offer and proceed with a tender offer for Warner on June 16, Time issued a press release describing those decisions, and sent a letter to its stockholders which also described those decisions and which noted the determination to convene and adjourn for one week the annual meeting of stockholders. Enclosed with that letter were the text of Time's Schedule 14D-9 setting forth in detail the reasons for its Board's rejection of the Paramount Offer, the written opinions of Time's investment bankers received on June 16, 1989 with respect to the Paramount Offer and the revised Warner merger agreement, and the full text of Time's Offer to Purchase Warner shares. (Barr Aff. Ex. A).

Plaintiffs' memorandum in support of their motion for a temporary restraining order recites that "there has been absolutely no disclosure to shareholders of the developments that occurred after the issuance of the joint proxy statement [on May 22] but prior to the letter dated June 20, 1989" from Time to its stockholders advising them again of the Time Board's determination to adjourn the annual meeting to June 30 and to proceed with the previously scheduled vote on the election of four directors.[2] (Pl. Mem. at 20). Plaintiffs are silent as to why Time's June 16, 1989 letter to stockholders, the accompanying Schedule 14D-9 and the Offer to Purchase Warner shares were not included in the voluminous papers plaintiffs submitted in support of their motion. In any event, the statement that there was no disclosure of developments subsequent to the May 22 proxy statement is simply untrue. The materials disseminated to stockholders by Time and its Board of Directors disclosed, among other things, the Board's rejection of the Paramount Offer, the decision to proceed with the tender offer for Warner, the determination to convene the annual meeting as scheduled and adjourn it for a week, and the fact that these decisions were reached unanimously by Time's directors, including the four candidates for election at the 1989 annual meeting.

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2 That June 20 letter is Exhibit G to the Affidavit of P. Clarkson Collins, Jr. ("Collins Aff.") sworn to on June 25, 1989.

## ARGUMENT

### I. PLAINTIFFS HAVE FAILED TO ESTABLISH ANY THREAT OF IMMINENT IRREPARABLE HARM SUFFICIENT TO JUSTIFY THE ENTRY OF THE TEMPORARY RESTRAINING ORDER THEY SEEK.

Plaintiffs seek to restrain the reconvening of the adjourned 1989 annual meeting of Time stockholders for the purpose of taking a vote on the election of four directors and certain other matters. To prevail on that application, plaintiffs obviously must demonstrate that reconvening the shareholders' meeting would irreparably injure them. It is difficult to perceive how taking and counting a vote on the election of four directors on Friday will do so, particularly since if that vote is not taken and counted the same persons who are candidates for re-election at that meeting will continue as holdover directors.

Recognizing that voting at a meeting of shareholders ordinarily presents no threat of harm in and of itself, this Court has frequently denied requests to restrain the convening of shareholders' meetings and the taking and certification of shareholder votes.[3] Here, if plaintiffs are somehow entitled

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3 In re Holly Farms Corp. Shareholder Litigation, Del. Ch., Cons. C.A. No. 10350, Hartnett, V.C. (March 22, 1989) (refusing to enjoin a shareholder vote on a merger agreement); Phillips v. Insituform of North America, Inc., Del. Ch., C.A. No. 9173-NC, Allen, C. (Aug. 27, 1987) (enjoining a merger but refusing to enjoin shareholder meeting to vote on merger). See also Speiser v. Baker, Del. Ch., 525 A.2d 1001, 1007 (1987) (refusal to enjoin majority shareholder from voting his stock); Initio Partners v. Tandycrafts, Inc., Del. Ch., C.A. No. 8697, Hartnett, V.C. (Nov. 10, 1986) (refusal to enjoin stockholders meeting to

(Continued)

to an order directing that a new meeting be convened, with a new record date, so that a new proxy solicitation with reference to election of directors can occur, the fact that the 1989 annual meeting will have proceeded to a conclusion will not stand in the way.

Plaintiffs, however, attempt in two ways to meet the requirement of demonstrating irreparable injury. First, they claim that the election of directors would proceed this Friday on the basis of incomplete disclosure to stockholders. (Pl. Mem. at 13-14). Second, plaintiffs maintain that Time management has somehow manipulated the election process "to thwart a shareholder vote." (Pl. Mem. at 14-17). As demonstrated below, neither of these arguments has any merit.

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vote on defensive charter amendment); Bacine v. Scharffenberger, Del. Ch., C.A. No. 7862, Brown, C. (Dec. 11, 1984) (refusal to enjoin special meeting to vote on liquidation); Columbia Pictures Industries, Inc. v. Kerkorian, Del. Ch., C.A. No. 6334, Marvel, C. (Dec. 14, 1980) (annual meeting); Cascella v. GDV, Inc., Del. Ch., 5 Del. J. Corp. L. 519, Brown, V.C. (June 21, 1979) (refusing to enjoin meeting to vote on a proposed corporate acquisition); Sarabyn v. Jessco, Inc., Del. Ch., 4 Del. J. Corp. L. 610, Hartnett, V.C. (Sept. 20, 1978) (refusing to enjoin vote on proposed merger); Lenahan v. National Computer Analysts Corp., Del. Ch., 310 A.2d 661, 664 (1973) (annual meeting); Campbell v. Loew's Inc., Del. Ch., 134 A.2d 565, 567 (1957) (special meeting); Hauth v. Giant Portland Cement Co., Del. Ch., 96 A.2d 233, 235 (1953) (annual meeting); Empire Southern Gas Co. v. Gray, Del. Ch., 46 A.2d 741, 743 (1946) (proxy contest); Vanadium Corp. v. Susquehanna Corp., 203 F. Supp. 686, 699 (D. Del. 1962) (annual meeting).

### A. Plaintiffs' Disclosure Claims Have No Support In Fact And Can In Any Event Be Vindicated After Trial.

Plaintiffs' first claim of irreparable harm -- that Time's stockholders are inadequately informed with respect to the election of directors to occur this Friday -- is without merit for two basic reasons.

First, the nondisclosure claims that are the foundation of plaintiffs' assertion of irreparable harm are premised on the repeated but erroneous assertion that Time stockholders have not been told of the Board's actions of June 16. As previously noted, that assertion completely overlooks the fact that Time's June 16, 1989 Schedule 14D-9 and most of the exhibits to it were delivered to Time stockholders on or about June 19. Indeed, each of the matters which plaintiffs claim have not been disclosed to Time stockholders (see Pl. Mem. at 3-4 and Verified Complaint ¶ 49) is in fact set forth in those materials sent to Time stockholders. Specifically, the Schedule 14D-9 discloses (a) that by unanimous action, Time's Board -- including the four nominees for election on Friday -- approved the tender offer for Warner and the revised merger agreement (Barr Aff. Ex. A at 5), (b) that the reciprocal share issuance pursuant to the Share Exchange Agreement between Time and Warner was consummated on June 16, 1989 (id. at 6), (c) that Time's Board unanimously determined to reject the Paramount offer (id. at 2), and (d) the Board's decision to convene the annual meeting on June 23 and to adjourn the meeting to June 30 for the purpose of voting on the election of four directors (id. at 8).

Asserting that all of these matters were not disclosed to stockholders, plaintiffs find it "hard to imagine a more comprehensive and devastating failure to provide information material to any informed decision whether to vote for the four Board members standing for re-election." (Pl. Mem. at 4). To the contrary, we respectfully suggest that it is hard to imagine a more comprehensive and devastating omission in papers supplied to this Court than plaintiffs' failure to supply Time's Schedule 14D-9. Plaintiffs' claims of irreparable harm arising from nondisclosure are accordingly entirely without merit.

In any event, even incomplete disclosure does not constitute irreparable injury if meaningful relief after final hearing can cure the claimed nondisclosure. Cottle v. Carr, Del. Ch., C.A. No. 9612, Allen, C., slip op. at 12-13 (Feb. 9, 1988). In the present case, restraining the shareholder meeting on Friday will be virtually futile, while final relief will be more than satisfactory to address any disclosure concerns on plaintiffs' part. As plaintiffs recognize (Verified Complaint ¶ 50), the four directors whose nominations are to be presented on Friday will continue in office as holdover directors if the meeting is deferred. If those directors are re-elected on Friday, on the other hand, and the Court ultimately concludes that Time stockholders should have a further opportunity to elect directors in lieu of those four nominees, a further meeting can be convened with a new record date, which appears to be relief plaintiffs seek in any event. (Verified Complaint at p. 26, ¶ A).

Plaintiffs nonetheless argue that the Time annual meeting presents "circumstances substantially similar" to those present in American Pacific Corp. v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 12, 1982) and Cooke v. Teleprompter Corp., 334 F. Supp. 467 (S.D.N.Y. 1971) (Pl. Mem. at 13-14). These cases are not remotely similar to the circumstances present here. In American Pacific as in Cooke v. Teleprompter, there was an ongoing proxy fight which the courts concluded was being waged unfairly by management because the management proxy material was either false and misleading or hopelessly confused. There is no proxy contest here and plaintiffs' claim of misleading proxy materials is based entirely upon the erroneous assertion that "there has been absolutely no disclosure to shareholders of the developments that occurred after the issuance of the joint proxy statement [dated May 22, 1989] but prior to the June 20 letter." (Pl. Mem. at 20).

In the Cooke case Judge Brieant found that the management slate had affirmatively misrepresented the facts concerning the criminal conviction of the former CEO and the corporation for bribing public officials, and in American Pacific Vice Chancellor Longobardi found, and the management slate conceded, that its proxy materials were wrong in several material respects. There is no such record of misrepresentation here.

B. It Is Plaintiffs, Not Defendants, Who Seek To Change The Corporate Status Quo With Respect To The Election Of Directors.

Plaintiffs' second claim of irreparable injury is that the "corporate machinery" is somehow being "manipulated," and that the Court should therefore delay the 1989 annual meeting of stockholders. We confess some difficulty in identifying the respects in which plaintiffs are claiming a manipulation of corporate machinery. They complain occasionally that Time is attempting "to twist Time's corporate machinery" by maintaining the May 1, 1989 record date fixed well before Paramount announced its tender offer. (Pl. Mem. at 19). Plaintiffs cite no authority, however, for the proposition that leaving a long-established record date in place constitutes a manipulation. Compare Lenahan v. National Computer Analysts Corp., Del. Ch., 310 A.2d 661, 663 (1973); American Hardware Corp. v. Savage Arms Corp., Del. Ch., 135 A.2d 725 (1957).

Plaintiffs also suggest manipulation in the Board's determination to convene the annual meeting and adjourn it for one week. (Verified Complaint ¶ 50). According to plaintiffs, that adjournment was insufficient to allow stockholders "to determine whether to propose an alternate slate of directors to oppose the management incumbents." (Id.)[4] Had Time proceeded to a vote on the election of directors on June 23

4 One of the nominees, Donald Perkins, is not a member of Time management.

when the 1989 annual meeting was convened, however, Time would simply have been proceeding with the election process on the dates fixed and announced before the Paramount Offer was made. Again, plaintiffs cite no authority that following through in that fashion constitutes manipulation of the corporate machinery.

Nor can Time's determination to adjourn the meeting for one week before taking the vote on the election of directors be considered a wrongful manipulation. To the contrary, that week's adjournment afforded additional time in which Time's disclosures of June 16, 1989 could be disseminated to and absorbed by Time's stockholders. That week's adjournment can in no realistic way be considered to have advantaged management or the four candidates for election at the meeting.

The manipulation cases cited by the plaintiffs, e.g., Aprahamian v. HBO & Company, Del. Ch., 531 A.2d 1204 (1987); Blasius Industries v. Atlas Corporation, Del. Ch., C.A. No. 9720, Allen, C. (July 25, 1988); and Schnell v. Chris-Craft Industries, Del. Supr., 285 A.2d 437 (1972), are inapposite. They all involved contested elections in which majority control of the board of directors was at stake. In those cases management acted to prevent the shareholders from voting for a dissident slate at the scheduled annual meeting or in a consent solicitation already begun. Here there is no election contest, and a majority of the Time Board of Directors is not up for election.

In sum, by convening the adjourned 1989 annual meeting of stockholders this Friday, Time will simply be following through on the annual election process it set in motion long ago, and with which it is proceeding pursuant to the provisions of Time's certificate of incorporation and bylaws as adopted by its stockholders back in 1983. Time has in no way manipulated the electoral process. To the contrary, by seeking an indefinite delay of the 1989 annual meeting, it is plaintiffs, not Time, that seek to change the status quo to their advantage.

## II. THE BALANCE OF EQUITIES TIPS STRONGLY AGAINST THE RELIEF PLAINTIFFS SEEK.

The lack of irreparable harm noted above is sufficient reason to deny plaintiffs' motion. There is a further reason, however, that outweighs any speculative showing of irreparable harm that plaintiffs may have mustered. Specifically, as this Court needs little reminding, the daily deluge of press coverage of the Time/Warner/Paramount situation, and of the proceedings in this Court in particular, requires special attention to the concern that a temporary restraining order will be interpreted -- indeed touted -- as a determination of wrongdoing on the part of Time and its directors. Concern over such a stigma is a factor weighing against the grant of interim injunctive relief. See, e.g., Davis Acquisition, Inc. v. NWA Inc., Del. Ch., C.A. No. 10761, Allen, C., slip op. at 11, 14 (Apr. 25, 1989); Management Assistance, Inc. v. Edelman, 584 F. Supp. 1021, 1025 n.1 (S.D.N.Y. 1984).

Indeed, one must ask whether such a public relations stigma is in fact what plaintiffs are seeking here. The relief they nominally seek -- delay of the 1989 annual meeting -- has not commended itself as appropriate either to Paramount or to any of the numerous Time shareholder plaintiffs who have filed suit in this Court months ago. Indeed, plaintiffs here acknowledge that the four candidates for election this Friday will continue as directors even if the 1989 annual meeting were delayed. Weighed against the prospect that the relief now sought would accomplish nothing, the prospect that it

would have considerable public relations value appears to be a far more plausible motivation for plaintiffs' present application. That motivation, however, bears no equity.

Finally, the Court can also appropriately consider delay on the part of plaintiffs in presenting this application. See Cottle v. Carr, supra, slip op. at 7 n.5. Paramount and the other shareholder plaintiffs filed complaints concerning the Time Board's June 16 actions last week, within 5 and 6 days, respectively, of the announcement of those actions, and before the 1989 annual meeting was convened on June 23. In contrast, plaintiffs here did not bring suit until 12 days after the Board's June 16 actions, 3 days after the annual meeting was convened on June 23, and only 4 days before the adjourned session they seek to delay.[5]

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5 The absence of any separate argument section dealing with the merits of plaintiffs' claims should not be taken as a concession that they are even colorable. To the contrary, as discussed in the argument regarding irreparable injury, those claims are thoroughly unsound.

## CONCLUSION

For the foregoing reasons, plaintiffs' motion for an order temporarily restraining the reconvening of the 1989 annual meeting should be denied.

MORRIS, NICHOLS, ARSHT & TUNNELL

Martin P. Tully
Lawrence A. Hamermesh
R. Judson Scaggs, Jr.
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorneys for Defendant
Time Incorporated

OF COUNSEL:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, NY 10005
(212) 428-1000

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