

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

LITERARY PARTNERS, L.P.,)
et al.,)
Plaintiffs,)

#36

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
11:40 a.m.

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BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

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RULING OF THE COURT ON PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING ORDER

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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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RULING OF THE COURT

1
2 THE COURT: The pending motion is to
3 restrain the holding of the adjourned annual meeting of
4 Time Incorporated. The motion was ably presented, and
5 I thank counsel for their assistance.

6 I haven't had a great deal of time to
7 consider the matter, but I do think that I have had
8 sufficient time to feel confident in the result reached.

9 The test for the issuance of a restraining
10 order is commonly understood in this Court. It involves
11 several elements. The first element concerns itself with
12 the nature of the claims asserted, and looks at the merits
13 of the claims and asks whether those claims are litigable,
14 colorable, whether they appear to be worthy of serious
15 consideration at a later stage in the proceeding, with no
16 apparent conclusive answer to them.

17 The second element of this test relates to
18 the occurrence of imminent irreparable injury. It is the
19 sine quo non of this remedy, the central focus of a motion
20 of this kind.

21 The third aspect of the legal test relates
22 to a balancing of the impacts that issuance of the order
23 sought or declining to enter the order might have upon the
24 parties and the public.

1 The fourth element of the test relates to
2 the promptness with which the application has been brought
3 on. The reason that that is a particularly significant
4 aspect of the test in a restraining order context is the
5 obvious one: that the application is ordinarily made on
6 such short notice that the Court is unable to look
7 seriously at the merits, and it is important for the Court
8 to be assured that the plaintiff is not delayed unduly in
9 bringing on the application, seeking to gain advantage
10 from the fact that the Court will be unable to look very
11 closely at the merits of the case.

12 As to the claims asserted in this instance,
13 they involve, as I understand at this phase, several
14 aspects.

15 First, there is the notion that intervening
16 events have been -- counsel used the word "momentous" --
17 have been so significant to the interests of the
18 corporation and its shareholders and the disclosure of
19 those events from the board of directors of the
20 corporation has been so inadequate that the election of
21 directors that is to happen, unless restrained,
22 tomorrow -- or is it Friday?

23 MR. HAMERMESH: Friday.

24 THE COURT: -- Friday, will be on inadequate

1 information and unreliable and invalid. That I take to be
2 the principal thrust of the application in terms of the
3 merits.

4 Also was mentioned the notion that there has
5 been in this instance strung together a long list of
6 legally permissible bylaws and other provisions regulating
7 the conducting of annual meetings and the election of
8 directors that, when taken together, at least in this
9 particular context -- and I am trying to restate counsel's
10 words -- that taken together, they essentially rob the
11 franchise of its meaning in this particular instance.

12 Those I take to be the central points on the
13 application. To my mind they do satisfy the reduced
14 standards for review of the legal claims for an emergency
15 application for a restraining order.

16 The answers that the defendants make to
17 these claims is that the disclosure was full and complete
18 and that counsel for plaintiffs simply was unaware of the
19 filings and the communications that have made it full and
20 complete. This answer does present litigable fact
21 questions for further inquiry. But those questions cannot
22 be answered responsibly today.

23 Counsel for the defendants did not address
24 the point that the long list of bylaw and other governance

1 provisions affect the reality of the exercise of the
2 franchise, but the answer that would no doubt be made is
3 that these are lawful provisions and, taken in
4 combination, they are lawful provisions, and there is no
5 reason for the Court to enjoin the exercise of power under
6 lawful bylaw provisions.

7 The short answer to all of this, in my
8 opinion, is simply that these matters deserve more careful
9 scrutiny than the Court is able to give them in this
10 setting, and I cannot say that the plaintiffs' claims are
11 without merit.

12 I turn, then, to really what is the heart of
13 this application, which is the claim that there is
14 irreparable injury about to occur. When we say in a
15 restraining order that irreparable injury is about to
16 occur we mean that there will be injury occurring between
17 the date of the hearing and the final trial of the case,
18 and that after trial of the case the Court will be unable
19 to fix or shape a remedy that will fully compensate or
20 alleviate the injury that has been done in the interim.

21 The essential claim of irreparable injury in
22 this instance is that the Delaware courts -- and I take
23 the Delaware courts not to be unusual in this -- but the
24 Delaware courts in a long line of cases have announced and

1 applied a particular sensitivity and protective attitude
2 towards the exercise of the corporate franchise. The
3 plaintiffs case that I wrote a year or two ago was cited,
4 and it is the case that I had an opportunity to dilate on
5 this question a bit. In Blasius and in Aprahamian v. HBO,
6 which was the case before Blasius on which this Court had
7 an occasion to speak on this subject, and in Schnell and
8 in Emtrol after that, where the Supreme Court spoke on
9 this subject, our courts have exercised a protective
10 attitude toward the franchise.

11 We have not, however, to my current
12 knowledge, exercised the important power of issuing
13 restraining orders against an annual meeting where what
14 the Court was asked to do was to protect the metaphysical
15 right of franchise. That is to say, in the Blasius case
16 something was happening in which shareholder rights would,
17 as a practical matter, be affected. That case, as
18 I mentioned to counsel, was after a trial. But I don't
19 make anything turn on that. I don't think anything turns
20 on that for this morning's purposes.

21 The real difference between the Blasius case
22 and the Aprahamian case, and I believe other cases, and
23 this case, is that nothing in fact, as a practical matter,
24 turns upon whether or not the restraining order issues

1 this morning.

2 If a restraining order did issue, the four
3 nominees who stand for election to the post of director of
4 Time Magazine would retain their office. Counsel for the
5 plaintiffs clearly admitted that -- I shouldn't use the
6 word "admitted" -- stated that and were well aware of the
7 significance of that.

8 It seems to me that I am asked this morning
9 to issue a restraining order, and the justification for
10 it is not a practical justification -- something is going
11 to happen that has real consequences and cannot be
12 reversed -- but it is a rather metaphysical justification:
13 "There is a franchise and it is sacred, and I have stated
14 some claims, and I will be able to prove them, that the
15 franchise is not being respected."

16 Even accepting for these purposes those
17 statements, I do not feel justified in issuing a
18 restraining order against the holding of the annual
19 meeting of Time Incorporated in these circumstances.

20 In determining this motion as I do, I feel
21 myself in the mainstream of a long tradition of Delaware
22 Corporation Law. As Chancellor Marvel said in 1980 in
23 Columbia Pictures Industries v. Kirk Kerkorian, "A court
24 should be extremely reluctant to enjoin the convening of

1 a meeting of stockholders and will do so only on rare
2 occasions, such as a showing of fraud in the giving of
3 notice of such meeting."

4 That was an injunction case; not a
5 restraining order case.

6 There are a long list of cases in which our
7 Court has declined to issue orders of the kind sought
8 today. The principal reason for that is that ordinarily
9 there is not irreparable injury that occurs from the
10 holding of a meeting. A vote can be taken and more
11 limited relief, such as the effectuation of the
12 transaction that is authorized, is sufficient and is
13 commonly agreed to or in some instances ordered by the
14 Court. Here no narrower relief is sought, and I think
15 that is in part a reflection of the fact that the
16 practicalities of the situation are that the directors
17 will remain in office as holdovers, even if this remedy
18 were granted.

19 So for those reasons I need not address the
20 balance of the hardships between or among the parties, or
21 the question of laches. I have no reason to really
22 suppose that there has been any delay in this instance,
23 although it is the case that the Court is required to
24 answer the question very promptly.

1 I could have taken the remaining part of
2 today and some part of tomorrow to further consider this
3 matter. But I have spent yesterday reading the deposition
4 of Mr. Finkelstein, who is one of the directors of Time.
5 I had hoped today to read -- and I will later -- some or
6 all of the deposition of Mr. Levin, who is an officer of
7 the company, and I feel it is probably more important for
8 me to spend my time now preparing for the July 11th matter
9 than to give further consideration and amplify on the
10 reasons for this decision. As I say, I feel confident
11 about the decision.

12 There was the remaining question of the
13 right or ability of these plaintiffs to participate in
14 this litigation. This involves some questions of just
15 plain cumbersomeness of the proceeding. I am not inclined
16 to rule on this as a judicial matter at this stage. I do
17 think that counsel for these plaintiffs should consult
18 with counsel for Time and for Paramount to see if that may
19 be accommodated without resistance.

20 It is the case that Paramount's interests
21 are parallel to some shareholder-perceived interests,
22 those shareholders who would like to see the Paramount
23 deal accomplished. I don't assume that is all the
24 shareholders, but I do assume that it is some

1 stockholders, and, indeed, Mr. Klein tells me that it is
2 the substantial shareholders that he represents. Those
3 interests are in some respects parallel. There may be
4 points at which they diverge.

5 It is I think important that the
6 shareholders' voices be present in the proxy.

7 Currently there are class action plaintiffs who purport
8 to represent -- and by using the word "purport" I do not
9 mean in any way to imply that they do not represent the
10 shareholders. But the plaintiffs in this case have what
11 in other circumstances might be called a huge and in these
12 circumstances what we can call a large investment in this
13 company. I would think they should be afforded some role
14 in the proceedings.

15 However, the fact is that we are moving to
16 a rather prompt preliminary injunction. Schedules have
17 been set up, and there will not be very much room for
18 flexibility. I don't think anyone will welcome an
19 additional participant. But I think that if the
20 additional participant doesn't take up too much room at
21 the table, it is probably a valuable contribution.

22 I say that simply to encourage some
23 reasonable accommodation on both sides to see that that
24 question need not come back to me.

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I will then decline to issue the order
sought this morning.

Is there anything else, gentlemen?

MR. HAMERMESH: No, your Honor.

THE COURT: Court will stand in recess.

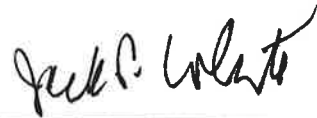
(Hearing recessed at 12:02 p.m.)

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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 12 contain a true and correct transcription of the ruling of the Court in 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