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

PARAMOUNT COMMUNICATIONS	)	
INC. and KDS ACQUISITION	)	
INC.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 10866
	)	
TIME INCORPORATED, et al.,	)	
	)	
Defendants.	)	

- - -

Chancery Court Chambers  
Public Building  
Wilmington, Delaware  
Monday, June 19, 1989  
11:20 a.m.

- - -

BEFORE:           HON. WILLIAM T. ALLEN, Chancellor.

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COURT'S RULING ON DISCOVERY PROBLEMS  
PRESENTED IN TELEPHONE CONFERENCE

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

## APPEARANCES (telephonically):

DAVID C. McBRIDE, ESQ.  
JOSY W. INGERSOLL, ESQ.  
Young, Conaway, Stargatt & Taylor

-and-

MELVYN L. CANTOR, ESQ.  
DAVID E. MASSENGILL, ESQ. (New York Bar)  
Simpson Thacher & Bartlett  
for Paramount Plaintiffs.

SHERRI R. SAVETT, ESQ. (Pennsylvania Bar)  
Berger & Montague  
for Shareholder Plaintiffs.

CHARLES F. RICHARDS, JR., ESQ.  
Richards, Layton & Finger

-and-

HERBERT M. WACHTELL, ESQ. (New York Bar)  
Wachtell Lipton Rosen & Katz  
for Defendant Warner.

ROBERT D. JOFFE, ESQ. (New York Bar)  
Cravath, Swaine & Moore  
for Defendant Time.

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RULING OF THE COURT

1  
2 THE COURT: Counsel, I will try and make  
3 a ruling here in the spirit of moving these things ahead,  
4 disclaiming the capacity to gather all of this together  
5 in my mind and make as fine distinctions as time would  
6 permit.

7 Basically we are cast again into the realm  
8 governed by Rule 26(c) that directs the Court in the  
9 management of litigation to balance the legitimate needs  
10 and interests of litigants with respect to confidential  
11 and valuable information, while attempting to make  
12 available to adversaries that information that is  
13 necessary or appropriate under the language of Rule 26(a)  
14 to pursue the litigated claims.

15 This Court has had to grapple with this  
16 problem before and has yet to formulate a test that guides  
17 discretion in any perfectly predictable fashion. It is  
18 true, as counsel for Warner mentioned, that we attempt to  
19 have a realistic assessment of the kind that Paramount's  
20 counsel referred to at the close as to what such  
21 agreements should reasonably be expected to mean, or at  
22 least what others can reasonably worry about as to what  
23 they mean.

24 Three issues seem to me to be presented

1 here. In no particular order, they involve whether or not  
2 restricted documents as defined by the parties should be  
3 available to an investment banker and, if so, what  
4 investment banker. The sub issue is: Is a Chinese Wall  
5 sufficient protection?

6 The second issue is whether inside counsel  
7 for the party, Paramount, should also have access to  
8 restricted documents.

9 The third issue is what documents fall under  
10 this restricted document rubric.

11 The first issue, to my mind, is relatively  
12 easy. While I respect Paramount's wish to be advised by  
13 Morgan Stanley in the litigation, as it is advised by  
14 Morgan Stanley with respect to the underlying transaction,  
15 I recognize a risk to the defendants in having access to  
16 information that would otherwise not be available to any  
17 Morgan Stanley person, available to some Morgan Stanley  
18 personnel who were advising with respect to the  
19 litigation. I don't see an offsetting need to Paramount  
20 that justifies this additional risk to the defendants.

21 While it may be that most of the major  
22 investment banking firms have already chosen up sides in  
23 this transaction -- I don't know that -- there are no  
24 doubt people with expertise out there who can advise the

1 litigation lawyers with respect to the meaning of any  
2 restricted documents that come to the litigation lawyers'  
3 attention.

4 I don't know as an empirical matter whether  
5 Chinese Walls are effective most of the time, some of the  
6 time or only infrequently effective. I know that they  
7 require people to place trust in individuals that they  
8 don't know, and for that reason when large interests are  
9 involved, individuals have a right to distrust them.  
10 I see no reason why in this instance that risk should be  
11 run when there seems to me to be an alternative.

12 Therefore, I will not require that a  
13 confidentiality order permit restricted documents to be  
14 disclosed to investment bankers employed by the Morgan  
15 Stanley firm, but I would require that some investment  
16 banker who enters into an undertaking to maintain  
17 confidence should be available to the litigation lawyers  
18 to assist them with respect to these documents.

19 The second issue to me is a very, very  
20 difficult issue. It is the case that in some of these  
21 litigations orders have been entered that restrict  
22 disclosure of documents to what we have called or has been  
23 called "lawyers' eyes only," meaning litigation lawyers'  
24 eyes. That is rather an anomalous resolution, it seems to

1 me. Mr. Joffe refers to the trade secret area. I'm not  
2 an expert in the area. I think there are a few cases  
3 where this very problem has been written on. I think the  
4 cases may point in different directions. There is not a  
5 lot of law out there in the trade secret area in this  
6 area, I don't think. There is none, aside from some oral  
7 rulings of this type, perhaps in this Court in this area.

8 I say it is anomalous because it is the  
9 party whose rights are being litigated. It is the party  
10 who has the right to make litigation decisions to have  
11 material, discoverable matters available to the litigation  
12 lawyer but not available to the party, that in a sense  
13 puts the litigation in a completely untenable position.  
14 He has to make substantive decisions affecting his  
15 client's rights without his client knowing it, or he has  
16 to advise his client to do one thing or another without  
17 informing him as to why he advises that. It is a very  
18 awkward and highly problematic situation. It has in some  
19 instances been done. But when it's been done, it seems to  
20 me, it is rather an ad hoc, practical working out of a  
21 specific problem in order to let the litigation move  
22 forward, and it has difficulties from a rationalizing or  
23 a principle point of view so far as I can see.

24 When the information is highly specific and

1 limited, a court, recognizing the imperfections in the  
2 whole system, may be willing to impose it. But where we  
3 are not talking about particular documents but are talking  
4 about classes of documents that may be broad, that one of  
5 the parties' claims is broad and encompasses much, it is  
6 to my mind not appropriate to essentially cut off the  
7 party from the information. One could only do it on the  
8 basis that there would be no basis in law to provide any  
9 disclosure or discovery whatever.

10 And I must add, also, that while I recognize  
11 I've got a natural suspicion that arises between  
12 adversaries at times like this and that that suspicion  
13 reasonably can be deeper with respect to in-house counsel  
14 than with respect to the outside firm advising the firm,  
15 I cannot at this time require Paramount to litigate the  
16 case without any Paramount personnel having access to  
17 restricted documents.

18 The third area involved the definition of  
19 "restricted documents." I don't have it clearly in mind,  
20 Frankly. But I do have some things to say that may be  
21 helpful to you. It does in a sense relate to the second  
22 point, because what it is that is restricted and available  
23 to only one or two members of Paramount is obviously  
24 related to whether or not some Paramount officer has

1 access to any of it.

2 First, I conclude tentatively -- and  
3 reaching any kind of conclusions on a ruling of this kind  
4 is a little difficult, so I hesitate to use the word --  
5 but it is my present view that documents that are useful  
6 for the formulation of a step in this ongoing contest are  
7 legitimately highly confidential, whether you call them  
8 restricted documents or whatever. That is, it seems to me  
9 that this highly confidential and restricted category of  
10 documents is not or ought not be restricted simply to  
11 documents that have a competitive impact in the day-to-day  
12 businesses of these companies, but should extend as well  
13 to documents that would be useful to Paramount with  
14 respect to formulating another business step.

15 I said that this third category related to  
16 the second, and by that I meant there may be documents  
17 that are critically important to defendants and that they  
18 feel a compelling need to seek protection from discovery.  
19 The documents that were mentioned, I think it was by  
20 Mr. Joffe, showed the break-up value of Time or somebody's  
21 impression of the break-up value of Time and projections  
22 of future earnings.

23 I have, in ruling on matters of this kind in  
24 the past, attempted to leave room for a specific and



1 particular evaluation of any such documents, and  
2 I expressly do so today. If the defendants seek such  
3 a ruling with respect to these documents on break-up value  
4 and projections, I have to see the documents and I have to  
5 hear from them. Those documents for that purpose could be  
6 disclosed only to litigation counsel. I don't want to  
7 assume what's the effective way to litigate that question,  
8 if it is going to be raised, about specific documents.  
9 I leave it for another day. It should be brought on just  
10 as quickly as possible because it will interfere with the  
11 deposition schedule, because no doubt those will be  
12 centrally important.

13 I recognize that this kind of ruling is  
14 unsatisfactory in some ways. But let me reiterate what  
15 I have said.

16 Paramount can show the documents to an  
17 outside investment banker but not to Morgan Stanley, if  
18 the outside investment banker subjects himself to a  
19 confidentiality order. With respect to the inside  
20 lawyers, assuming they also are willing to enter into such  
21 an agreement, I think that they should be shown restricted  
22 documents, but I leave open the possibility that a small  
23 number of critical documents -- thereby introducing a  
24 third level of confidentiality into this process -- might

1 be litigated separately. But if it is to be done, it must  
2 be done very, very promptly.

3 Is there anything that I have obviously left  
4 on the table that needs to be decided?

5 MR. CANTOR: I just have one question by way  
6 of clarification. In your third category we would also  
7 have to litigate the question of the outside expert seeing  
8 it or simply of Paramount's in-house counsel seeing it.

9 MR. JOFFE: We have no objection to your  
10 outside experts seeing any document we produce.

11 MR. CANTOR: Okay.

12 THE COURT: That takes care of that.

13 MR. JOFFE: I take it, Mel, you'll hold on  
14 to the documents you presently have so we can review them  
15 and decide whether or not we wish to put any of those into  
16 a third category.

17 MR. CANTOR: Yes, but I would ask that it be  
18 done very promptly in accordance with the Chancellor's  
19 observation, because depositions are starting on  
20 Wednesday.

21 MR. JOFFE: We will do it within 24 hours.

22 THE COURT: Mr. Joffe, I do encourage you to  
23 exercise restraint and judgment. I don't want to get a  
24 whole pile of documents to go through. The whole point,

1       aside from the basically conservative nature of  
2       introducing this notion, is that there may be a few  
3       documents that are clearly very, very, very special.

4                   MR. CANTOR: I understand, your Honor.

5                   THE COURT: Thank you, counsel.

6                   MR. CANTOR: Thank you very much.

7                   THE COURT: Goodbye.

8                   (Telephone conference concluded at

9       12:02 p.m.)

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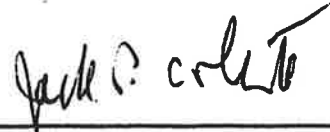
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**C E R T I F I C A T E**

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 11 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 19th day of June 1989.



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

Transcribed by:  
Ann B. Nolan