IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PARAMOUNT COMMUNICATIONS INC. and KDS ACQUISITION INC.,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 10866
TIME INCORPORATED, et al.,	:	
Defendants.	:	

\- - -

Second Floor
Federal Courthouse
Wilmington, Delaware
Friday, June 9, 1989
11:06 a.m.

\- - -

BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

\- - -

ARGUMENT ON PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER

\- - -

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

APPEARANCES:

BRUCE M. STARGATT, ESQ.,
EDWARD B. MAXWELL, II, ESQ.,
JOSY W. INGERSOLL, ESQ.,
DAVID C. McBRIDE, ESQ.,
MELANIE K. SHARP, ESQ. and
BRUCE L. SILVERSTEIN, ESQ.
Young, Conaway, Stargatt & Taylor
-and-
MELVYN L. CANTOR, ESQ.,
MICHAEL J. CHEPIGA, ESQ. and
JOSEPH F. WAYLAND, ESQ., of the
New York Bar
Simpson Thacher & Bartlett
for Paramount Plaintiffs

HENRY A. HEIMAN, ESQ.
Heiman, Aber & Goldlust
-and-
ROBERT D. GOLDBERG, ESQ.
Biggs & Battaglia
-and-
STUART H. SAVETT, ESQ., of the
Pennsylvania Bar
Kohn, Savett, Marion & Graf
-and-
SHERRI RAIKEN SAVETT, ESQ., of the
Pennsylvania Bar
Berger & Montague
-and-
LAWRENCE A. SUCHAROW, ESQ., of the
New York Bar
Goodkind, Labaton & Rudoff
-and-
JILL S. ABRAMS, ESQ., of the
New York Bar
Abbey & Ellis
for Shareholder Plaintiffs

APPEARANCES, Cont'd:

MARTIN P. TULLY, ESQ.,
LAWRENCE A. HAMERMESH, ESQ. and
THOMAS REED HUNT, JR., ESQ.
Morris, Nichols, Arsht & Tunnell
-and-
ROBERT D. JOFFE, ESQ. and
VERONICA SMITH LEWIS, ESQ., of the
New York Bar
Cravath, Swaine & Moore
for Defendant Time

CHARLES F. RICHARDS, JR., ESQ.,
WILLIAM J. WADE, ESQ.,
GREGORY V. VARALLO, ESQ.,
DANIEL A. DREISBACH, ESQ.,
MICHAEL FEINSTEIN, ESQ. and
MARK J. GENTILE, ESQ.
Richards, Layton & Finger
-and-
HERBERT M. WACHTELL, ESQ. and
BARBARA ROBBINS, ESQ., of the
New York Bar
Wachtell, Lipton, Rosen & Katz
for Defendant Warner

\- - -

THE COURT: Good morning, ladies and gentlemen.

MR. HAMERMESH: Good morning, Your Honor. I rise, Your Honor, solely for the purpose of introducing and moving the admission of Robert D. Joffe, of Cravath, Swaine & Moore, for purposes of this proceeding. A motion has been presented, and I respectfully ask that it be granted.

THE COURT: All right, Mr. Hamermesh. I am happy to grant your motion. Welcome, Mr. Joffe.

MR. JOFFE: Thank you, Your Honor.

MR. HAMERMESH: Thank you.

MR. RICHARDS: Your Honor, I would like to move the admission pro hac vice of Herbert M. Wachtell and Barbara Robbins, of the New York firm of Wachtell, Lipton, Rosen & Katz. And here are the original and a copy of the motions. I have served them on my opponents.

THE COURT: Good morning, counsel. I am happy to grant your motion, Mr. Richards.

MR. RICHARDS: Thank you, Your Honor.

MR. HEIMAN: Good morning, Your Honor. I would like to move the admission of Stuart Savett, Sherrie Savett and Larry Sucharow for purposes of this matter.

THE COURT: Yes. Well, this raises the question of the intervention or consolidation. I don't know what to call it. I would ask the counsel for the various parties to consult and see if that can't be agreed upon, as it typically is. If it requires judicial action, I will address it at some other time.

I will listen to you very briefly this morning with respect to whatever matters we have to address this morning.

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

MR. HEIMAN: Thank you, Your Honor.

THE COURT: Just give me a moment to sign these things.

Mr. Cantor.

MR. CANTOR: Good morning, Your Honor. Your Honor, let me begin where we left off on Wednesday at the conclusion of Your Honor's remarks, where you expressed a hope that the parties could try to work something out to try to maintain the status quo to avoid Your Honor having to rule on a temporary restraining order and to avoid whatever market effect or perception that ruling might have, whichever way it went.

THE COURT: Right.

MR. CANTOR: We made a proposal yesterday to the defendants, which we thought was a very simple one and which would have resolved the matter this morning. And it was simply this --

THE COURT: I am not sure I have to go into what your proposal was and what their response was. If you were unable to resolve it and you have to press your motion this morning, that is enough for me to know.

MR. CANTOR: Well, Your Honor, it does go to what relief we would seek on the motion. We would make the same proposal to Your Honor.

THE COURT: Well, go right ahead and make the proposal to me in the course of your argument. I am just disinclined to hear about discussions between counsel unless it is essential.

MR. CANTOR: Okay, fine. Let me make the proposal, then, Your Honor, to frame the argument. And the proposal is simply this: That if we get notice, the five business-day notice that the amended share exchange agreement provides for, or to state it differently, if that provision of the amended share exchange agreement is not amended and we get notice of a triggering, we would be satisfied, because, in fact, there may never be a triggering. And if there isn't, this is all moot. If there is, we can be back before Your Honor at a time where Your Honor must rule.

Our problem, and the reason we are here today and the reason we were here on Wednesday, is by its terms the share exchange agreement may be amended, and we would not get notice of that, and everything would happen, and the injury that we claim would flow from that would occur before we could get before Your Honor. So that is our proposed resolution of the problem which we make to Your Honor.

Now, what is the irreparable injury, Your Honor? The irreparable injury is multi-fold and it is imminent. Under the share exchange agreement the parties have the right to amend any term of the agreement. That means the voting restrictions, it means the restrictions on alienation, it means the restrictions with respect to forming a group. Anything that is in this agreement, including the trigger, by the way, can be amended without giving notice to us or to the Court.

If that happens, Your Honor, the notion of unscrambling the egg, the notion that at a trial on the merits this can all be undone, which I don't understand in any event, but even at a preliminary injunction that this can all be undone, is absolutely moot. The shares could be anyplace, Your Honor, and certainly beyond the jurisdiction of this Court, and all of the restrictions that are currently in effect on them could be lifted. That's Point No. 1 with respect to the imminence of irreparable injury, Your Honor.

Point No. 2 with respect to irreparable injury is simply the market perception -- and it has been in the press already -- that Warner holds a block on this deal. This deal, this share exchange, is a deterrent. It is expressly admitted to be a deterrent in the merger proxy statement. It is referred to as a deterrent in Mr. Payson's affidavit submitted in support of the motion, the Warner general counsel. And the deterrent effect, Your Honor, will exist from today until such time as it is removed.

And again, Your Honor, I would go back to our proposed solution. If they don't intend to trigger, this is all moot. If they do intend to trigger and give us notice, we can get relief at that point in time. But to have this overhang and to come into court, Your Honor, and say, as they said Wednesday and as I think they will say again today, "Please don't issue a TRO, because the market may misperceive that as you are saying that there is something illegal here," when, in fact, there is a way out of that dilemma I suggest does not serve the defendants' arguments very well.

THE COURT: Well, haven't you just said that the deterrent effect that you perceive will exist until final judgment in the case?

MR. CANTOR: The deterrent effect -- the deterrent effect will exist if the market perceives that they have an unfettered right to trigger the stock anytime they want. What I am saying, Your Honor, is that if we get notice of that fact and have the opportunity to be heard if, in fact, they intend to do it -- if they don't intend to do it, that is fine. We never have to come back on this issue. But if we get notice of the fact that they do intend to do it, that to me minimizes substantially the deterrents and the market perception problem, and we can argue this out if and when we have to argue it out.

I would also point out, Your Honor, that simply talking about numbers for a minute -- and I recognize that numbers are something that in some situations can be dealt with down the road, but here, if the share exchange is triggered and if it is -- of course, it causes the pooling of interests problems, it causes the other problems that both sides, the defendants' affidavits as well as ours, seem to agree on. It raises the purchase price of the deal by $1,250,000,000. The amount of money that Paramount would have to raise, the financing commitments that it would have to get, the financing fees that it would have to get would all go up.

Yes, there is a quid pro quo at the end of the day. Yes, we are getting, if we are successful in acquiring time, Warner shares that will have some value, and I don't think anyone knows what that value will be. I mean, we know what it is today. We don't know what it will be a month from now or six months from now or whenever. But, Your

Honor, the fact of the matter is that today we have to raise an additional $1-1/4 billion.

It was the express intent, Your Honor, of the parties when they passed or at least when they passed the amended version of the share exchange agreement to cause this precise impediment to a deal. Those are Mr. Payson's words. Those are the words in the merger proxy statement. And I submit that under Revlon and under the Unocal standards they are improper.

Now, what is there, Your Honor, on the other side of the equation? Why shouldn't we at least get notice so that we can argue this out presumably after discovery, because I would hope discovery would start imminently, on a more complete record? What do the defendants say to that? The only thing that I saw in their papers -- and admittedly, I read them very hurriedly, Your Honor -- is that there is a June 23 shareholder vote. And if they are not allowed to trigger before then, A, and B, if the vote is held, and C, if the merger is turned down, they would then lose the right to trigger under the terms of the share exchange agreement. That's their injury, Your Honor.

First of all, I think the likelihood of a vote occurring on June 23 in this climate is unlikely. But that's -- I mean, obviously people can differ on that. Perhaps the defendants will differ on that.

Number two, if the shares are, in fact, exchanged, I am not an expert on filings with the SEC, Your Honor, but it is inconceivable to me that there would not have to be filed revised financial statements with the SEC showing the impact on the transaction of the loss of pooling of interests. Those would then have to clear the SEC and they would have to be circulated. So I can't see realistically how there could be a vote even if the parties intended to go ahead with the vote on June 23, in any event.

And finally, Your Honor, I come back in a sense full circle to where I started. All of this may be moot. They want to go ahead on June 23. We want notice. If they don't intend to trigger the share exchange, they can go ahead on June 23. If they intend to trigger the share exchange, all they have to do is give us notice, and we come in then in a different situation a week from now or whenever it is. We will be that much closer to June 23, and we will find out whether, in fact, the standards for a preliminary injunction have been met.

THE COURT: You say that you are not an expert in SEC law, so it may be an imposition to answer this inquiry, but what would be the effect under the SEC regulations, if you know, triggering -- of exercising rights under the share exchange agreement, of exchanging shares, if it does have a significant effect on the pro forma financials of the merged entity? What would be the effect under SEC rules of the utilization by management of proxies that had been granted prior to that event?

MR. CANTOR: I say with some trepidation, Your Honor, that they would have to send out an amended statement that would show the new financials and at least give people -- I don't know whether they would have to resolicit. I cannot answer that question. I would think at the least that they would have to give people the opportunity to change their vote. I mean, if you have people who voted for a deal that had a certain pro forma effect and then the shares are triggered and pooling of interests is lost and the good will is incurred and the hit on earnings, which everybody agrees would occur in that situation, occurs, I can't believe that proxies sent in prior to that time would be valid. I cannot tell Your Honor the mechanics of how that would work.

THE COURT: But the basic point that you make is that while Warner and Time say that they may lose the benefit of this contract if it is not exercised by the time a vote occurs and the vote disapproves the proposed merger, that that's not something that I have to be very concerned about, because it is a fairly likely prospect that there will be both a triggering and a June 23 meeting.

MR. CANTOR: Very unlikely prospect.

THE COURT: I thought that's what I said. That's what I meant to say.

MR. CANTOR: Yes.

THE COURT: So that's the point. And you balance that, you say, against what you regard as a very slight incursion into the freedom of movement of the other side, and in that balance equity lies in granting the relief that you -- modified relief that you seek this morning.

MR. CANTOR: And I would put one

further point in that, Your Honor, and that is that the modified relief itself solves any dilemma that the defendants have, because if I am wrong that the vote, in fact, could -- you know, if the vote, in fact, could occur on June 23 and if, in fact --

THE COURT: Even if there is a triggering or an exchange.

MR. CANTOR: Yes, if there is a triggering and exchange and if the vote could occur on June 23, all we are saying is give us notice of that fact, and we will be back in Court at that time. So that even if what I view as the extremely unlikely scenario of this parlay that the defendants are putting together could turn into a winner, we don't have to worry about that now. We can worry about it if it becomes a reality.

THE COURT: All right.

MR. CANTOR: That's all I have, Your Honor.

THE COURT: Thank you.

Now, I said that the shareholders -- I see they are sitting over at this side of the table. They are not formally a party, but I will hear the shareholders' representative for a minute or two.

Mr. Savett -- it is Mr. Savett, isn't it?

MR. SAVETT: Yes.

THE COURT: Do you represent the plaintiffs in these other actions that have earlier been filed?

MR. SAVETT: Yes, Your Honor, under Your Honor's order of consolidation order. Also, as Your Honor knows, we filed our own motion for a temporary restraining order on Wednesday and filed an amended one this morning, Your Honor.

I will try to make this as brief as possible, Your Honor.

We are really concerned with irreparable harm here, Your Honor. We firmly believe that allowing the stock lockup swap to remain will not only have a potential of losing Paramount but, of paramount importance, deterring other third parties.

Your Honor, a quick calculation -- and we spell this out in our brief we filed this morning, Your Honor -- anyone coming in at at least $175, which is Paramount's present bid, must pay immediately to Warner, if the stock swap occurs, $1.2

billion just right out of cash flow. It goes right out.

Your Honor, we are also concerned with disclosure. And we believe we are the people to raise that issue. There is a proxy sitting out there. The proxy does not tell you several items.

The proxy refers to projections and forecasts. Your Honor, I don't know if Your Honor has before you the appendix we filed --

THE COURT: No. The appendices were too heavy to bring over here.

MR. SAVETT: We had a very small one, Your Honor, very, very small. The opinions -- Your Honor, here is an extra copy, if I may.

MR. RICHARDS: Your Honor, may I rise on a point of order. We have no objection to an argument that is based on the motion which they filed on Thursday, which was on the same grounds as the Paramount plaintiffs. This morning they filed an argument, a new motion seeking temporary restraining relief based on alleged proxy statement disclosures, of which we first got notice an hour ago.

As Your Honor knows, the Paramount development may have been unknown to the class plaintiffs, but the proxy statement has been known to the class plaintiffs since May 22. With all due respect, we don't think that those contentions added an hour before the hearing should be the subject of argument this morning.

THE COURT: Well, as I think is made plain by a number of opinions in the court, applications of this kind are not made to turn upon, and very importantly, evaluations of the merits but about irreparable injury, Mr. Savett. So you ought to really -- if you want to press some of these arguments, you ought to talk about the irreparable injury and not about the merits very much, because it is not going to have a large impact upon me.

MR. SAVETT: I realize that, Your Honor. What we are talking about is irreparable harm, Your Honor. We believe that a nondisclosure of a material item in the proxy is irreparable harm. That proxy is out there. The shareholders have three choices right now: They can vote, they can tender or they can sell.

What do they not have? They do not have the financial projections and forecasts referred to by the financial advisers in their opinions relied upon by the board of directors in recommending a yes vote to the merger. Yet they do not have those documents. They are very important.

THE COURT: Why didn't you bring this on earlier, as Mr. Richards says?

MR. SAVETT: I will be glad to respond to that, Your Honor. As Your Honor may or may not know, production of documents commenced last Saturday in this case. We had a schedule. Paramount came out of -- I wouldn't say the blue. Came earlier than we had anticipated. We already had an amended complaint in draft form ready to be filed. We were going to take depositions, and then this speeded up the process. I don't think there is any question about that.

THE COURT: What was your plan?

MR. SAVETT: Our plan was after we reviewed the documents, Your Honor, get a date from Your Honor for a preliminary injunction hearing. At that point in time there was, way back there, there was no other bidder out there, Your Honor. Now there is a serious, reputable bidder named Paramount.

THE COURT: All right. I think that if you want to bring on a preliminary injunction about the quality of the disclosure, you ought to discuss with the other side a schedule for that if you think the meeting date is a critical date and so forth. I am really not going to get into this issue on this TRO record. I think that the defendants' point is well taken. To bring it on in this setting I don't think is the right way to do it.

If your idea was to pursue discovery towards a preliminary injunction, I don't see why the Paramount transaction really affects that end of the case.

MR. SAVETT: Well, Your Honor, I will focus my remarks then on Paramount. But, Your Honor, if there is a problem about scheduling another TRO hearing, we would be willing to meet with Your Honor as early as Your Honor's convenience allows and allow the defendants time to prepare for it. That is no problem, Your Honor. We will do it this afternoon. We will do it anytime Your Honor suggests.

What we have out there, Your Honor, is that stock swap. As I said before, this must deter potential acquirors. How can one go into a deal knowing what they must pay out, not only the $1.2 billion but the point of pooling of interests problem, Your Honor? It is like shooting yourself in the foot.

What Time and Warner are saying is, if we trigger this, we are going to lose pooling of interests. In that regard, Your Honor, we will be forced to amortize good will --

THE COURT: I understand, Mr. Savett.

MR. SAVETT: May I have one moment, Your Honor?

THE COURT: Well, you can finish the point. But I understand about what pooling of interests means for the deal.

MR. SAVETT: Okay. Your Honor, the pooling of interests is massive. I refer Your Honor to Exhibit H, one of Time's own documents, which shows what this will do just on the 1989 pro forma, Your Honor. The shareholders have no idea of what this is. The proxy material just states that this is the pooling of interests pro forma. They do not say, one, we will lose the pooling of interests, which they will do if the stock swap is triggered, nor do they say what is the impact.

Your Honor, the impact is just devastating. I refer Your Honor to Exhibit H.

Could I just have one moment to consult with someone?

THE COURT: Sure.

MR. SAVETT: Your Honor, in addition to the stock swap, irreparable harm, Your Honor, if the stock swap goes through, Warner becomes at least an 11.1 percent shareholder. They will have virtually veto power over any merger. Therefore, any third party would not be interested in acquiring Time.

Two, the shareholders' interest would be substantially diluted, Your Honor. And it just would be totally, totally unfair to the shareholders. They lose 11 percent of their company.

Does Your Honor have any questions?

THE COURT: Well, you know, the word "dilution" is used a lot, and let me ask you what you mean by it. In Case A you have 10 shares outstanding in a company, let us say, with a net value of 100, and each share -- let's join the efficient market theorists for a moment. Say each share is worth 10 on the market, and that company then decides to issue another share. It issues one share and gets 12 for it. Have those shareholders been diluted in the way that you have used the word?

MR. SAVETT: No. They have been diluted in voting power, Your Honor.

THE COURT: And when you say that the Time shareholders are diluted by the implementation of this exchange agreement, then, you are assuming that the Warner stock is worth less than the Time stock.

MR. SAVETT: Yes, Your Honor, the Warner stock is. If you calculate --

THE COURT: Based on the market, current market.

MR. SAVETT: Based on the market, not as of yesterday but as of two days ago, it was worth approximately $930 million. You would subtract that out from the $1.2 billion, using the Paramount offer. And I understand Paramount is willing to negotiate a higher. You will have at least a $300 million dilution.

And again, Your Honor, what third party wants to come into this as a $300 million dilution on one hand and on a cash flow basis must pay out $1.2 billion at least, if not higher?

THE COURT: Well, the answer to that

is, I have no idea whether there is such a person or whether such a person would be deterred. I mean, it is an empirical inquiry that I just don't --

MR. SAVETT: Your Honor, you can say you have no idea. Generally I would agree with Your Honor. We are not talking about $67 million, as in Fort Howard. We are talking about a cash outlay of $1.2 billion. And I think in the real world that is a substantial barrier, Your Honor.

THE COURT: All right. Thank you.

MR. SAVETT: Thank you.

MR. JOFFE: May it please the Court, when Paramount made its application for emergency relief two days ago, it asked to have the share exchange agreement enjoined. It made no showing of irreparable injury in the last two days, and it has backed off that request. Now what it seeks is five days' notice before the share exchange agreement is exercised.

THE COURT: Well, not exactly. As I understood Mr. Cantor, it was five days' notice of any amendment to the agreement, which has larger implications than simply exercising the agreement, because he says that the parties could through innovation remove the restriction on the stock, for example, so that it is no longer restricted stock, and otherwise create possibilities for future action that we can't foresee now.

MR. JOFFE: Well, the parties are prepared to represent to the Court and do represent to the Court that they will not amend the alienation provisions prior to a ruling on the preliminary injunction on the application to bar the share exchange agreement without giving five days' notice. So that is just a red herring. The parties have no intention of disposing of the stock if they exercise the share exchange agreement, and are prepared to represent to the Court they won't do so before the Court rules on a preliminary injunction hearing after evidence is taken.

The merger agreement and the share exchange agreement between Time and Warner were announced on March 3, after more than a year of discussions between Time and Warner and an extensive review by Time of its acquisition options. The shareholder vote for the merger was set for June 23.

Two days ago Paramount, a competitor of both Time and Warner, launched a hostile tender offer for Time and commenced this lawsuit. Paramount's tender offer is set to expire on July 5, but there is no hope whatsoever that their approvals can be obtained in less than three months, and any realistic schedule is more like six months or a year.

Plaintiffs by their last-minute effort seek to prevent a long-considered merger from taking place. To that end plaintiffs seek a TRO, or maybe it is a preliminary injunction, against the share exchange agreement because, they say, one, it will chill if not preclude offers for Time; two, it has no legitimate purpose; and three, they and others will be irreparably injured.

The short answer is, there is no irreparable injury. The share exchange agreement can be undone at a preliminary injunction or final hearing.

A slightly longer answer, but I think an equally dispositive answer, is that the share exchange agreement will not preclude or even seriously discourage a well financed, bona fide offer for time, and plaintiff has submitted neither expert testimony nor its own company's testimony to that effect.

There is no affidavit from Paramount saying the share exchange agreement discouraged it from making a tender offer. There is no investment banker who has submitted an affidavit saying such a preclusion might, let alone would, take place. I went through Mr. Waters' affidavit very carefully. He doesn't say that it would have that effect.

Their counsel has submitted an affidavit with an ipse dixit in it saying that that was the purpose of the agreement, but there is no evidence for that. Even he does not say it will have that effect. There is no sworn statement by Paramount, by their investment banker or even an unsworn statement by a lawyer saying they will go away if the share agreement is not invalidated. How can it be a lockup?

I think that is the answer to an application for emergency relief. The record is insufficient. All there is are assertions in a memorandum submitted by counsel and a lawyer's unsupported assertions saying that was the purpose. They are patently insufficient.

Now let me turn to a somewhat longer answer that addresses not only the legal insufficiency of their application but the legitimacy of the share exchange agreement. I do that not because that can be the issue today on this record but because it must be the context in which plaintiffs' application must be weighed.

THE COURT: Mr. Joffe, I was thinking of something, relating to your argument, but I didn't catch when you switched gears. I am sorry.

MR. JOFFE: I apologize.

THE COURT: What I was thinking about was Mr. Savett's argument, which is essentially a billion-two is such a large number that you just have to assume that it is going to be a very substantial impediment to anyone coming forward with another proposal. I suppose he is thinking about somebody in addition to Paramount.

MR. JOFFE: Well, Your Honor, I guess all I can say, with all deference to Mr. Savett, is that that is utter and complete speculation. He had an opportunity to go find an investment banker. He had an opportunity to go find a prospective bidder.

The last few days the papers have been filled with names of prospective bidders. There is no one -- there is no affidavit. There is no evidence in this courtroom that anyone has been deterred by this. There is no evidence that Paramount has been deterred by it. They have no affidavit saying this caused them one minute's lost sleep or that they would go away if the Court doesn't grant the relief they seek.

Over the last two years Time has considered a wide range of acquisition options to achieve its long-range strategic objectives, which are to be an internationally competitive, worldwide media company. The facts that I am reciting are from Mr. Munro's affidavit, the chief executive officer of Time Incorporated. They are not made up by a lawyer.

Time sought to expand its participation in motion pictures, in TV series, in manufacture and distribution of video cassettes, in music, in cable TV and book publishing. Time considered acquiring a wide range of companies, including Gulf & Western, now with a changed name, Paramount. The talks with Warner took place in 1987, in 1988 and finally earlier this year. Time decided that Warner was its best choice for a combination, that it was in first place. All the others were, at best, second best.

The merger agreement and the share exchange agreement were not entered into in the context of a battle for ownership or control of Time Incorporated. At the time Time and Warner entered into the merger agreement there was no offer for Time. There were no known efforts or intentions of any party to acquire or make a bid for Time. Mr. Munro has sworn to that.

In considering the duties of the directors, on whose shoulders rests the burden of proving the appropriateness or lack thereof of any action, this lack of an outstanding offer or contemplated offer, known contemplated offer, is key. Eleven of the 15 directors who voted for the merger agreement and the share exchange agreement were independent outside directors. Only four were inside directors. The share exchange agreement was entered into at the same time as the merger agreement.

Let's turn for a moment to the merger agreement. The plaintiff argues that it was a sale of Time to Warner; and therefore, an auction should have been held and that the share exchange agreement precludes offers for Time. Each argument, each argument is wrong.

First, there was no sale. Warner and the subsidiary --

THE COURT: Mr. Joffe, I don't need to hear all the detail on these arguments. I mean, I have read the papers. I read Mr. Munro's affidavit. I am familiar with the arguments about the sale and so forth and so on.

MR. JOFFE: Let me turn for a moment, then, to irreparable injury and just run through the points.

The swap can be undone. The alienation problem has been solved. Paramount's offer is conditioned on an entry of a final judgment against the share exchange agreement. A TRO issued by this Court will not allow the offer to proceed. Final relief will grant Paramount what it requires, not a TRO.

A final hearing can be held way before the second step in this merger is consummated, if it ever is. By the time that second step takes place, either the share exchange agreement will be approved by this Court or it will be set aside.

It is particularly ironic that Paramount is claiming in this litigation that the share exchange agreement will stop or in some way impede the second step of their proposed acquisition, since they are claiming in this very lawsuit that under 203(b)(6) they are not required to get 85 percent. How can they have it both ways? They seem to be seeking an advisory opinion from the Court.

Furthermore, assuming they get the first 50 percent or more of Time --

THE COURT: Well, isn't there a charter provision that also bears on that?

MR. JOFFE: There is, Your Honor. There is no reason to assume that if they get the first 50 -- but they are attacking that charter provision.

THE COURT: I understand.

MR. JOFFE: There is no reason to assume that if they get the first 50 percent, Warner would not sell the shares to them. They have to offer them to Time first, but if Time were to acquire them, they would become treasury shares and wouldn't count towards the 85 percent in any event. But assuming they get 51 percent, why shouldn't Warner tender its shares to them? They haven't suggested a reason why it wouldn't. They have put in no evidence on this issue.

Finally, I turn to the point that Paramount itself raised. A TRO would send a signal to the marketplace not only that Paramount's rights were in some way irreparably threatened but that Time and Warner had done something wrong. Even a requirement of notice would send that signal to the marketplace. On this record, Your Honor, I submit on any record, but certainly on this record, such a signal would be unfounded and unjust.

As to the items that the plaintiff raised in the papers, the class action plaintiffs raised in the papers they submitted an hour before court, they have made no showing of irreparable injury. Again, at most what you have is argument. Frankly, I have not read their papers, not because I didn't want to, but I just only got them about 50 minutes before the argument.

They have known about these matters for some time and they have yet some time in which they can cure them if there is a problem. They can make a proper motion for preliminary injunction and on a proper record we can all argue about it.

Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Joffe.

MR. RICHARDS: Your Honor, before I begin, I think perhaps I should explain that I would like to go over some of the background and circumstances from the point of view of my client. I readily appreciate and will focus in my argument that the focus of today's proceedings is whether or not there is irreparable harm. And inevitably, I am afraid, but I will try to keep it to a minimum, there may be some duplication with what my predecessor has said or even what is said in our brief. But we feel on behalf of Warner Communications that it has important interests at stake on this application in and of itself, separate and apart from Time, and I think a brief explanation of our position requires some recitation of the background as we see it.

So with that apology, I think it is adequately set forth in the papers, and Mr. Joffe has dealt with it, the extensive background of this particular merger transaction and the share exchange agreement. In terms of the kinds of transactions that management may be adopting defensively in some of the other quite different transactions that we have seen, where a hostile takeover initiates the transaction and then there is a reactive transaction, this case presents an extraordinarily different situation: The two years of negotiations, the exploration of joint ventures, the managements getting to know each other and the businesses, the unique combination that both managements saw in the other, the synergies, the good that they saw both for the companies and their shareholders and, indeed, for the United States' economic position vis-a-vis the world, something, of course, that Mr. Davis tries to piggyback on. He says, "Well, we would be just as good."

They don't challenge any of these factors. Indeed, this merger in many respects was hailed by the press and governmental leaders because of certain of its favorable public policy considerations.

Therefore, there is no reason to look at this merger in a cynical or skeptical manner, or the share exchange agreement, as sometimes I think the Court is constrained to do where there is a reactive restructuring, highly leveraged, in reaction to a series of offers.

And the plaintiffs cannot turn history on its head. Their brief is written as if Paramount's offer occurred in February and the exchange agreement was reactive to that. Their brief is written as if the exchange agreement was entered into in three days instead of their offer.

I think it is indisputable on this record, and, indeed, there is no challenge from the plaintiffs, and both the Warner affidavit from Mr. Payson and the Munro affidavit from Mr. Munro, which were prepared completely independently under the circumstances and without any opportunity to confer or to see them -- I think it is a striking proof of the veracity of those two affidavits in terms of the legitimate business purposes which are set forth in those affidavits.

And I won't go through in great detail in terms of the mutual investment, the upside if anything happened to the merger, the compensation for the tremendous effort, expense and risks, and particularly from Warner's point of view what I will refer to in a shorthand way as the Herb Siegel risk, which I think is set forth in our papers and Your Honor will be familiar with from the previous litigation.

I am told, although I haven't seen it, that the Wall Street Journal is speculating today, or perhaps it is The New York Times, that Mr. Siegel will now mount a tender offer for Warner. And I think all that illustrates is that no one knows to whose greatest advantage the share exchange agreement if upheld will turn out to be. No one knows what is going to happen, just like no one knew when it was entered into. It was a completely neutral and reciprocal arrangement. Indeed, Mr. Hill's affidavit submitted on behalf of Time shows that, in fact, at the time, based on the relative market prices, Time was getting a slight advantage because the Warner stock based on the five-day average was worth $20 million more than the Time stock.

Now because of Paramount's offer they say it is disadvantageous. That is not a reason to set aside an arm's-length agreement reached for good business purposes prior to their coming on the scene.

A bidder -- the cases are replete with saying a bidder must take his argument as he finds it; specifically, with all of its assets and subject to all of its contractual liabilities.

I think that despite plaintiffs' claims, we have seen that this transaction is not a show-stopper. Indeed, as Mr. Joffe went on at some length -- and I will try not to repeat it -- plaintiffs don't even claim that it is. They claim at most that it is a disadvantage. And as Mr. Hill's affidavit suggests, perhaps the disadvantage at the moment, based on yesterday's market prices, is in the neighborhood of 200 to $250 million.

Contrast that, if you will -- that's a lot of money. I mean, if somebody said to you or me that you had to come up with $250 million before, you know, you could go down and buy something that you and I might like to buy, a car or something, I mean, that would be a substantial impediment, to be sure. But contrast that with the plaintiffs' own disclosures. They disclose in their tender offer that they have already committed to pay $350 million in something called agency and some other kind of fees, agency and facility fees. And then they explain that they will have to pay a commitment fee of another half percent on all the money they raise, so that is a half percent times 10 billion-plus, which is again a much bigger number than I am accustomed to thinking with. But this is a big transaction.

It doesn't do any good to come in and say, well, we want to bust up an $18 billion merger and, even if they want to look at this as a break-up fee, to say we might have to pay a 200 or $220 million break-up fee. Depending upon how you calculate it, even if you thought it was solely a break-up fee and you disregarded the only sworn testimony in this case, you would find that that fee was about 1.5 to 1.6 percent of the total amount involved here or, as Your Honor will recall, substantially more than the percentage of a break-up fee which Your Honor approved in the Fort Howard case.

And that was a case where the company was for sale, and that was a case that instead of an auction the company decided to start the thing out with a management-led LBO. And this Court found, and there are other cases cited in our brief, that such a fee, even if looked at strictly as that, was, A, I suppose, no substantial impediment, and B, adequate compensation for the tremendous amount of effort that had gone into that. And the effort that went into the Fort Howard, the time, the duration, and the difficulties in Fort Howard is minuscule compared to what has happened here.

I think just a moment on the question of no sale of Time. It is entirely fanciful, I think, when there is some sort of reorganization among the public shareholders of a company to say because the mix of shareholders changes -- and that's all that would happen in this merger -- that somehow there has been a sale of the company. I mean, the existing Time shareholders will remain shareholders of Time Warner, and the existing Warner shareholders will be shareholders of Time Warner, and they will then also have an interest in each other's assets.

It is as if, I believe, as Time submitted in their papers, Time had gone out and raised some additional capital for good consideration. You wouldn't say that that was a change in control because you had admitted new shareholders. Indeed, I think Your Honor fixed on the point in the Interco case, where you said that a test of whether or not a sale of a company has been incurred is whether or not the shareholders are being cashed out or whether or not there is continuing participation. And, indeed, that is set forth in our papers.

Now, I think it is worth noting -- and I won't go through it at length in view of the pressures the Court is under -- but if anything, I think the Paramount offer must be regarded with at least skepticism by the Court as somewhat of a phantom offer, if you look at the extraordinary number of conditions that they have in their offer, including, of course -- and there hasn't been too much comment about this one -- the condition that all FCC and other approvals be obtained.

What I don't think they disclose but what the Court will know and recognize is, Paramount is not even in a position to obtain some of those approvals as an outsider, that in order to obtain approvals for the transfer of cable licenses and other local television licenses and other licenses, of course, the license holder would have to go in and do it. So the difficulties to Paramount of accomplishing that purpose -- I mean, it is just not possible for them. They can't even file the applications. So that is a condition which cannot happen before they control the company, yet it is a condition to their offer. It is a real Catch-22 in their offer.

The July 15 date, as my friend said, I think is almost laughable when you consider it in the light of the fact that I just alluded to and that Warner and Time have been working cooperatively together for three months. And I can report because of the favorable public reaction there has been no impediments or substantial hurdles raised, and it is going forward much more rapidly than we might have expected, yet it has been more than three months since we started on this, and all such approvals are not obtained as yet. So I think any thought that this could possibly occur before the fall I think is completely wrong.

Now, the point is, is there any irreparable harm if Your Honor doesn't grant a temporary restraining order. And for the reasons that we have advanced before -- I don't think there is any way to dress it up or mystify it or explain it differently -- the basic answer is that if a temporary restraining order is not entered and if the exchange agreement is executed and the exchange takes place, this Court will be able to undo it.

It is reversible. It is two Delaware corporations before the Court. It is subject to the provisions of a registration statement and the other alienation restrictions set forth in the right of first refusal and so forth. But so that the Court will not be concerned and so that the Court won't have to read through all that stuff, and to answer my friend Mr. Cantor's objection, well, we might amend out all of that stuff -- I don't know how we could amend out the requirements of the Securities Exchange Act and some of these other things, but even if that were possible, as Mr. Joffe said -- and I want to make sure you hear it from me as well -- we will agree that if the exchange occurs, that we will not transfer the Time shares we receive before the Court holds a hearing, whether it is a preliminary injunction hearing or a final hearing, whatever is determined, and a decision by this Court without giving five days' notice of an intention to do so.

Now, clearly this is not irreparable damage if it can be undone. And the News International case cited in our brief at Pages 19 and 20 is squarely on point for this situation exactly.

I think I have covered the point that there is no imminent harm because -- imminency to the injury because the closing as contemplated even under plaintiffs' account wouldn't occur until July 5 and I think, under any realistic looking at it, far beyond that.

I will pass over the point about the self-inflicted nature of it and anticipatory nature of their so-called irreparable injury, because I think that is covered adequately in our papers.

THE COURT: But in your view of a realistic schedule for all of this, including your perception, your present perception of the schedule of the proposed merger, you would have the Court decline to issue a restraining order today and schedule a preliminary -- not that you would have me schedule a preliminary injunction, but that's one of the things that I will do. But not to restrict the ability of the parties to implement this agreement that has now been triggered, and if that were to be done, the status quo would be changed.

And what would be important to the plaintiff, Paramount, would be to reach a final judgment given the conditions in their offer, although it can be a waivable condition.

What kind of schedule do you think that this issue of the validity of this contract could reach a trial on? Have you thought about that?

MR. RICHARDS: I have thought about it. You are talking about a trial on -- a final hearing?

THE COURT: Yes.

MR. RICHARDS: Well, I think it depends, of course, on how much discovery the plaintiffs think they need to prove their case. And I think you can approach it from when is the earliest it could be done under the most draconian of circumstances, and then you can also say but we don't need to hold the trial until before there is a realistic chance that they need that final answer. And since I think that there is --

THE COURT: Which means completion of all the conditions for the Warner-Time merger?

MR. RICHARDS: Well, under the circumstances I suggest that nobody knows exactly what is going to happen here, with all of these other players.

THE COURT: Certainly so.

MR. RICHARDS: So, you know, whether the conditions precedent to the Warner-Time merger, you know, will even still be -- if that's what you are talking about, will even still be at issue at that time --

THE COURT: I know. But I have to work on some assumptions, and my assumptions are going to be that I don't know what the future may hold and that there is going to be a meeting on the 23rd and the shareholders will or will not approve it. And I am going to work on the assumption that they will approve it, because if I work on the other assumption, I don't have too much to worry about. And if they do approve it, then there is going to be a merger, and that is going to be sometime early in the fall possibly, and so there is a whole lot of things that may happen between now and then, and any of those events may change them. But I am working on the assumption that that is going to happen and that this offer is going to be out there and it can be closed no earlier than the 5th if everything happened just the way that Paramount imagines it might but that that is probably unrealistic to think that it will.

And what I am trying to get is a sense as to whether or not it is feasible to try this issue or maybe other issues at a time prior to a realistic time when the merger would be otherwise consummated.

MR. RICHARDS: Well, Your Honor, in referring to the discussions, we did have discussions with the other side with respect to discovery and hearings and so forth. And we weren't able to reach agreement because of the two different hypothetical positions will you grant the TRO or will you deny the TRO. But the plaintiffs said that if you denied the TRO, that they would be prepared to go forward with a preliminary injunction hearing, which is what they would want, prior to July 5. And certainly we would be willing to do that.

I could give a lot of complicated answers based on scenarios, but basically our position is, if it is a preliminary injunction they want, that can be held before July 5 if, indeed, they really want it and can justify to Your Honor that they are entitled to it. And if it is a final hearing that they want, which they haven't said to us in any of these discussions, then they can have that, as far as we are concerned, before the 5th of July, again, if they satisfy the Court that it is warranted.

I think that's an impossible burden for them to do. I can see no reason to hold a final hearing in this case until August or September, as far as that goes. I mean, they are just not going to be in a position to close their offer.

And I think, you know, we have recognized the difficulties -- and Mr. Cantor has alluded to them -- of going forward. I mean, no one knows what is going to happen on June 23 or what action the two parties will take. And, indeed, while Time and Warner have contractual arrangements and are trying to get this merger done, they also have diverse interests. But I suggest that it is going to be difficult at least from Warner's point of view to get a favorable vote on this at the Time meeting while there is a $175 so-called offer out there.

So I think, you know, without -- I am not in a position to speak for Time, and I don't know what they will do, but I am not so sure -- I join in Mr. Cantor's skepticism. He was addressing a different point. But I don't really know whether that meeting is going to take place on the 23rd. But nobody knows what is going to happen anywhere.

There is speculation in the paper that there will be a takeover attempt made for Paramount, that there will be a takeover attempt made for Warner, you know, names of people that are interested. Investment bankers are busy lining up clients and money, and the banks are all scurrying around.

And in addition, there is the freedom to act that Warner and Time have to modify or change their arrangements. I mean, you know, they don't need to go forward necessarily with the plans that exist today. There is other modifications. So --

THE COURT: Well, this allusion to the reality of things doesn't help clarify, however.

MR. RICHARDS: No. But your duty, I think, with all due respect, if I can argue to the Court, is --

THE COURT: Few lawyers use the phrase "with all due respect" as frequently as you do. A few probably more than you need to.

MR. RICHARDS: Maybe -- it reminds me

of the line from Shakespeare. Maybe I am protesting too much. Actually I -- well, I won't protest again.

Your Honor has succeeded in disconcerting me with that thought. All I can remember is that --

THE COURT: All right. Well, I recognize that the disposition of this motion affects the scheduling, and that is why I prefer to have the scheduling sort of resolved at a time when the parties are under some uncertainty with respect to this motion. I see utility in that, although from the parties' view I suppose I see utility in knowing what the resolution of this is.

But once I decide this motion, one side will then take a more concrete position with respect to scheduling, and so it seems to me that there is some benefit to trying to think through how these things can be handled or litigated to a relatively prompt yet responsible point that is fully adjudicated.

MR. RICHARDS: But I think the issue in terms of the scheduling, I think the issue today is, I think Your Honor should not be motivated to grant a temporary restraining order out of some notion that it would be nice to stop everything from moving, because Your Honor can't do that. You can stop us from exercising under the exchange agreement, but all these other elements are going to be moving. And Your Honor should not restrain us from exercising rights under an exchange agreement unless they can show irreparable harm.

You know, we don't -- he is criticizing us because our Section 3 argument doesn't show irreparable harm or whatever. We don't have to show irreparable harm. They have to show irreparable harm. They have to show imminence. And we submit they have to show a probability of success.

Now, I am well aware that in Your Honor's cases on a TRO you said it is a lesser showing. But other judges of this court since Your Honor's ruling have said that it is a probability of success, and so has the Supreme Court. I don't mean to argue that with you. But they certainly do have to make some showing --

THE COURT: No. Well, let's pause on it. What probability do you think they all mean?

MR. RICHARDS: Well, I think that the Court has to feel that there is a realistic chance, can see the factual basis, the application of legal theories, so that based on the very limited record before the Court the Court can say, "Well, I can see if this proves out and that proves out and these things, I can see that they could win."

And I submit on this record that Your Honor ought to be able to see, based on the record before Your Honor today -- you know, maybe they will be able to flesh it out on the preliminary injunction -- that Your Honor ought to be able to see they can't win because the predicates for their arguments are standing the only known facts directly on their heads.

THE COURT: So you say the Court should ask itself -- if I say they can't win, then that's the test.

MR. RICHARDS: No. I don't think it is a motion to dismiss test.

THE COURT: Well, I am asking you to tell me what it is when you say there is a requirement for a probability. And do you mean when you say a probability more than 50 percent? And I don't think the cases would support that.

MR. RICHARDS: No, I don't think more

than 50 percent.

THE COURT: So it is some probability. So now you say, well, it is a reasonable probability. Well, what does a reasonable probability mean? Well, you have to balance a lot of things, and given the early stage of the litigation is an important one. And so I am trying to probe you what it means. If I got it wrong in those cases, what does it mean to say that there is a requirement of a probability of success.

MR. RICHARDS: I was afraid we would get into this dialogue.

THE COURT: And so then you say if I am in a position to say that they are not going to win, well, that doesn't seem to me to be very different from saying that they have a litigatable claim or a colorable claim.

MR. RICHARDS: Yes, but I don't think that is -- when I went through the explanation, that may have been a shorthand summary, but I will try to say what I said before, because I think it is the best that I can do it. And that is, I think you have to look to see whether or not they have made some sort of prima facie showing of the basic factual elements on which their legal theory is based. And if their legal theory is wrong, of course, they haven't shown it. If they have a legal theory that simply doesn't apply to the only facts that are before Your Honor, then even though in discovery they might be able to find facts that would fit their legal theory, I think Your Honor would have to reject it.

And here their legal theories -- and that's why we have talked about it. But their legal theories are that this is a sale. Well, I think Your Honor can look at this and say, "On a TRO basis, you know, I just don't think they have shown this is a sale." You know, I think Your Honor can look at this -- and, sure, it is not binding or the law of the case or what you are going to do at the trial. I think you can look at this and say, "Well, was Time's board entitled to the business judgment rule when they entered into this exchange agreement on March 3?" And then Your Honor applies the law.

As Your Honor said, now, and especially in the light of Unocal, judges are coming back and saying, "Boy, if the business judgment rule gets applied, you know, it is going to be damn difficult to overturn that." Well, I think Your Honor can see that now, because their Unocal theory is entirely dependent on this absolutely stand the world on its head, saying that this exchange offer is somehow a defensive reaction to their tender offer. Well, that is just contrary to the facts. I mean, we know the sequence of events. And it is also contrary to the intention of the parties, the purposes.

And I think the Doskocil case --

THE COURT: I am sure the parties didn't intend to invoke Revlon duties, whatever those Revlon duties are, when they entered into this merger agreement. But anyway, look, I understand these issues. As soon as -- I understand the issues. I see where they fit in the development of the law and so forth. My problem is, I can write something reasonably quick on this, but I can't -- they are important issues, and they require some reflection. But I thank you for reminding me what this case is about.

MR. RICHARDS: Well, I want to just -- you know, I knew Your Honor when I got over here, but everybody was so solemn about the motion to admit pro hac vice, I wanted to get up and say fliply that I wanted to move to remand to the Court of Chancery. I think I should have made that motion.

I think I just want to quote one more tidbit to Your Honor. And, of course, I suppose one of the difficulties of being a judge is that you always have your own words quoted back to you, and I appreciate the difficulties of trying to do that. But I think you summed it up from our point of view in the McCann Surveyors case pretty well, and that is, "The office of the writ of a temporary restraining order is a very narrow one. Such an order will issue only to prevent irreparable injury that is occurring -- that is now -- or is threatened to occur before the Court may hear an application for a preliminary injunction. On an application for a temporary restraining order the imminence of threatened irreparable injury constitutes the predominating concern."

And as we have said, since it is undoable, it is not irreparable. And since it is only a barrier to an offer that is going to occur, according to their ipse dixit, on July 5, it is not imminent. Thank you.

THE COURT: All right. Thank you.

MR. JOFFE: Your Honor, with your consent, Mr. Cantor said I could address the scheduling questions you raised before he responds.

THE COURT: All right. Fine.

MR. JOFFE: We will, of course -- all the parties will, of course, meet any schedule Your Honor sets. But speaking at least for Time, I think we would rather not have seriatim hearings, seriatim discovery and then seriatim hearings on each issue in the plaintiffs' complaint if we can avoid that. If there was a realistic chance that their offer was going to go ahead on July 5 and that they could consummate that transaction, we would suggest that all issues be tried prior to that date.

Since there is no realistic chance -- and I don't think they will argue the point -- that it can be done in less than three months, we don't think that it is necessary to have such a hearing unless we could have it within the three-month period or even two months, if necessary.

My own preference would be not to try and decide that before Your Honor rules for this reason: I think nothing concentrates the mind like an imminent hanging, and I think we will all be able to better decide what needs to be done after Your Honor has ruled. We can do that quickly. We can consult with each other. We can try and reach agreement. It is also possible that events will have occurred which will make tons of discovery and a trial unnecessary.

In any event, I would suggest we get together, quickly try and reach agreement after Your Honor has ruled and, if we can't, come back to you for a quick scheduling order.

THE COURT: All right. Thank you, Mr. Joffe.

Mr. Cantor, you were brief in your opening remarks, having briefed and argued your motion the other day. The other counsel have taken longer, so I don't want you to feel as though you haven't had a fair chance.

MR. CANTOR: I don't feel that, Your Honor, and I have a few brief remarks by way of reply. I will be happy to answer any questions Your Honor has after that.

First, on the question of nothing in the record to support the deterrent effect that the share exchange will have, which I believe is a point that Mr. Joffe made in his opening remarks, I would start first with the affidavit submitted by Stephen Waters, who is Paramount's investment banker. In Paragraph 11 it says, "In light of this amendment" -- to the share exchange agreement -- "and the fact that either party may terminate the merger if the share exchange occurs, the only conceivable purpose for the Lock-Up Stock Swap is to discourage competing bids. There simply is no legitimate corporate purpose served by a share exchange agreement that will have such substantial negative effects on Time Warner and its stockholders in the event that an exchange of shares actually occurs."

Second, Your Honor, I would refer to Mr. Payson's affidavit, submitted this morning, which is a little bit more temperate but which makes much the same point in Paragraph 12. "A further reason for the Share Exchange Agreement was that, while in view of the low percentages of stock involved and the way the Share Exchange Agreement was structured it was recognized that it could not serve as a 'show-stopper' to block a hostile bid for one party or the other, it was hoped that the share exchange could have some deterrent effect -- albeit largely symbolic -- by evidencing the parties' commitment to effectuating the merger" -- and I refer you to Steve Ross having a blocking vote, what the press is saying -- "and thereby conceivably serve to dissuade third-parties from seeking to disrupt the merger."

And finally, Your Honor, I would refer you -- and I have alluded a couple of times to this -- to Page 69 of the merger proxy statement, Exhibit C to our appendix, and it says, "The Share Exchange Agreement could have the effect of making an acquisition of either Time or WCI by a third party more costly" -- and in this case a billion and a quarter more costly -- "because of the need to acquire the shares issued under the Share Exchange Agreement in any such transaction."

So I would submit to Your Honor that certainly on a TRO application there is more than ample evidence of the deterrent effect of this transaction.

Now, with respect to the concession made by Mr. Joffe and Mr. Richards that they would agree not to alienate the shares without giving five days' notice, I would point out to Your Honor that is only one, as Your Honor indeed pointed out, of the many concerns that we have. The agreement could be amended with respect to voting. It could be amended with respect to forming a 13D group. It could be amended with respect to anything that I frankly can't anticipate at the moment. And simply to say we will give you this one concession on that and as a result of that don't give notice, all we are asking, Your Honor -- because if it doesn't happen, this is all academic -- is give us notice and give us the five business days that the agreement currently contemplates. All we are saying is, don't amend the agreement, and if either party triggers it, give us notice so we can get before you. There will have been discovery at that point. There will have been some discovery certainly, and Your Honor will have a more complete record.

The question of no seriatim hearings is an interesting one. You know, on the one hand I guess we hear Mr. Richards saying we could have a hearing right away if Your Honor denies a TRO, so what could the irreparable injury be. I think I have addressed what it could be even if there were a hearing two or three weeks from now.

On the other hand, Mr. Joffe says

this won't happen for three months or six months or a year or never, so let's not have a hearing. What is the big rush?

Your Honor, it just defies reality to say that you can have a block of stock with a loaded trigger out there for months and that that wouldn't have an effect not only on Paramount but on any other bidder and that Mr. Savett's clients as well as my client would not be irreparably injured by that. And when the cure is so easy, when the cure is simply notice, they want, Your Honor, the in terrorem effect of this overhang. That's what they want. And I know of no case that says that they are entitled to have that, absolutely none.

They haven't said why the notice doesn't work, Your Honor. I did not hear a single remark addressed to the concept of why giving us notice, which -- I have been in a lot of TRO hearings, and it is very often a way that you work out a TRO. I haven't heard a single person say what the problem with that is.

I guess the argument is, somehow the market will misperceive that as a TRO. But we offered it on a voluntary basis. They said no to that. So now we have got to present it to Your Honor. It can be done consensually. You know, they can issue a press release saying, "Court defers ruling on TRO because parties agree to save Judge Allen a headache." I mean, we could do a lot of things, Your Honor, if we wanted to. They are the ones who are pressing Your Honor for a ruling when it is unnecessary that they have one.

I have nothing else, Your Honor.

THE COURT: Thank you, Mr. Cantor.

Mr. Savett.

MR. SAVETT: Your Honor, may I have less than one minute?

THE COURT: Surely. Take more than one minute. Not substantially more.

MR. SAVETT: Your Honor, two very quick points. One, we respectfully, and not with due respect, but we respectfully suggest that before Your Honor renders a decision on the TRO request in this, the Paramount case, that Your Honor may find our papers filed today helpful.

Secondly, Your Honor, on behalf of the shareholders in the shareholders litigation, there is no question we need a preliminary injunction hearing before June 23, 1989, unless Time is willing to adjourn the meeting of June 23, 1989.

As I had mentioned before in my opening statement, Your Honor, there is a proxy out there that we claim is false and misleading and, therefore, violative of the duty of candor. And we believe that, Your Honor, this preliminary injunction hearing should be held almost -- as soon as possible.

We have already had document production of the first wave. We have already filed notices of depositions. I am sure we can work out a schedule, and we could be prepared to have this hearing maybe eight or nine days from today, as long as it meets Your Honor's schedule.

THE COURT: Well, why don't you set up a telephone conference with me sometime early next week to discuss that.

All right, counsel. Thank you for the presentation. It was helpful. I will reserve this decision, and I will try and reach a decision by the end of the day, and I will do that by a letter to counsel.

And I hope all the people in the back of the room don't start telephoning the office immediately as to when it is coming out. It will hold things up.

Court will stand in recess.

- - -

(Court adjourned at 12:25 p.m.)

- - -

CERTIFICATE

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware and Notary Public, do hereby certify that the foregoing pages numbered 4 through 65 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 21st day of February, 1988.

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