

#62

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.

- - -

TELEPHONE CONFERENCE ON SCHEDULING  
AND DISCOVERY PROBLEMS

- - -

---

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.

- - -

## P R O C E E D I N G S

1  
2 THE COURT: Good morning, counsel.

3 I'm not sure who it is that originated this  
4 call or all of the subjects that you wish to bring up this  
5 morning. I understand from reading these two letters that  
6 there is a dispute concerning a confidentiality order.  
7 I will hear you on that. As to whether there are other  
8 things, you will have to inform me.

9 MR. CANTOR: This is Mel Cantor here in New  
10 York, and I'm here with David McBride, Josy Ingersoll and  
11 my partner, David Massengill. We requested the conference  
12 call.

13 The primary purpose, at least as far as we  
14 are concerned, is to schedule a hearing on a motion for  
15 preliminary injunction with respect to the partial offer  
16 that Time made on Friday for Warner shares. We have been  
17 in touch with counsel for Time and Warner Friday and over  
18 the weekend, and we believe that we've worked out a  
19 briefing schedule and a suggested date for your Honor with  
20 respect to the hearing. That suggested date would be  
21 July 11. That takes into account both the expiration date  
22 of the Time offer, which is July 17, and what we  
23 understand to be your Honor's vacation plans, which we  
24 have been informed you are leaving on July 15.

1                   Just backing up from the hearing date, the  
2 parties have agreed that Paramount would file its opening  
3 brief at noon on July 3rd, that the defendants would file  
4 any opposing brief at noon on July 8, and we would reply  
5 at noon on July 10 and the hearing would be on July 11th,  
6 if your Honor could hear us then.

7                   THE COURT: You would file the reply when?

8                   MR. CANTOR: Noon on the 10th.

9                   THE COURT: I was thinking about the 10th,  
10 but I'll take the 11th at 10:00 o'clock.

11                  MR. CANTOR: Okay.

12                  MS. SAVETT: Your Honor, this is Sherri  
13 Savett on behalf of the shareholder plaintiffs.

14                  We are attempting to set up a schedule  
15 ourselves to put on a preliminary injunction motion. When  
16 I spoke to counsel for Time this morning, they told me  
17 that Paramount was already in the process of doing so and  
18 told me what the parameters of it were. We are willing to  
19 agree to the same schedule on behalf of the shareholder  
20 plaintiffs.

21                  THE COURT: Fine.

22                  What else do we have to talk about this  
23 morning?

24                  MR. CANTOR: There is the issue of the

1 confidentiality orders. I've not been involved in the  
2 discussions on those. My partner, David Massengill, has.  
3 Perhaps he could speak for us and then whoever wants to  
4 would respond.

5 MR. RICHARDS: Mel, before we get to that --  
6 this is Charlie Richards -- I wonder if we could just  
7 recite some other tentative agreements for the Court that  
8 led to the brief schedule. I understand that you will  
9 be filing an amended complaint either tomorrow or  
10 Wednesday --

11 MR. CANTOR: Correct.

12 MR. RICHARDS: -- together with your motion  
13 for a preliminary injunction, so we can see just what the  
14 grounds are on which you are moving.

15 MR. CANTOR: Correct.

16 MR. RICHARDS: And that we will answer by  
17 Friday at 5:00 p.m.

18 MR. CANTOR: Correct.

19 MR. RICHARDS: And that the parties have  
20 agreed to a discovery cutoff date, the last day for  
21 depositions of June 30, unless, of course, we should agree  
22 to extend in order to particularly convenience some  
23 witness or something.

24 MR. CANTOR: All of that is correct.

1 MR. RICHARDS: So I thought that the Court  
2 might be interested in that as sort of background for the  
3 brief schedule.

4 THE COURT: Thank you.

5 By the way, I have asked the Court Reporter  
6 to take this conference down.

7 MR. CANTOR: Okay.

8 MS. SAVETT: On behalf of the shareholder  
9 plaintiffs, while we didn't discuss all of those different  
10 deadlines, it's consistent with our thinking and we would  
11 like to be subject to the same schedule, if nobody  
12 objects.

13 THE COURT: All right. I'm sure no one  
14 objects, Ms. Savett, to that.

15 Mr. Massengill.

16 MR. MASSENGILL: Yes.

17 Your Honor, I think in Mr. Cantor's letter,  
18 which I believe you indicated was delivered over, it sets  
19 out our position. That is really that we've been able,  
20 I think, to work out most of the terms of the  
21 confidentiality order. Our only area of disagreement lies  
22 in an area of restricted documents. As we state in there,  
23 the question is simply what documents fall into that area,  
24 and particularly for Paramount the ability of someone from

1 Paramount to see those documents so Paramount can  
2 participate in this litigation, so we can get some  
3 assistance from our investment banker.

4 I believe it is fairly spelled out in the  
5 letter that unless someone from Paramount can be privy  
6 to the confidential restricted information, they are  
7 not going to be able to review legal papers and attend  
8 depositions, and effectively they are going to be  
9 deprived of the ability to participate in this litigation.  
10 We don't think that's appropriate.

11 We have a second problem, and I'm not sure  
12 exactly what this Court can do at this time about it,  
13 which is that although both sides agree that the words  
14 "competitive business information" describe what should  
15 fall into the area of confidential restricted information,  
16 their interpretation of that, from what we've seen on the  
17 documents, is much broader than ours. And perhaps that is  
18 something that we'll just have to work out with them on a  
19 negotiating basis and then come back to you, if we have to  
20 and we cannot agree.

21 MR. CANTOR: Our position, your Honor, in  
22 a nutshell is that "competitive restrictive" should refer  
23 to really going forward business sensitive information,  
24 franchise information, that type of stuff, and not

1 presentations that are made to the board with respect to  
2 this transaction. Again, if the parties agree on the  
3 language and just disagree in the implementation, we may  
4 have to fight it out on a document-by-document basis.  
5 I don't know quite what we can do about that.

6 THE COURT: I'm sorry. You will have to  
7 identify yourself for the Reporter and for me.

8 MR. CANTOR: I'm sorry. That was Mel Cantor  
9 at the end of Mr. Massengill's speech.

10 MR. JOFFE: Your Honor, this is Bob Joffe in  
11 New York for Time Inc.

12 I guess our differences are several. First  
13 of all, we believe that the documents and deposition  
14 testimony which can appropriately be stamped "restricted"  
15 or designated "restricted," in addition to competitive  
16 information -- after all, Time, Warner and Paramount are  
17 competitors and Paramount is a significant supplier of  
18 ours. In addition to that kind of information,  
19 information that could be used by Paramount to formulate  
20 or revise its bid should be so designated.

21 I'm looking at documents in front of me  
22 right now, Shearson documents that have been produced  
23 to the other side that are stamped "Restricted and  
24 Confidential," which show valuations of Time Inc.

1 They are based on cash flow analyses, they are based on  
2 segment analysis. They have per-share equity values in  
3 specific ranges above \$200. We are about to produce  
4 additional documents that we've so stamped that have  
5 break-up valuations of Time Inc., in specific dollar  
6 amounts.

7 I can't conceive of a reason why anyone  
8 inside of Paramount should be allowed to look at those  
9 documents. They obviously would enable Paramount to  
10 revise or amend its bid to target the range, to put it  
11 above the range, and these are not complicated documents.  
12 It's not like Simpson Thacher needs inside help at  
13 Paramount, either to understand the documents or to make  
14 its legal argument. And if it does, we have no objection  
15 to their getting independent expert help to look at the  
16 documents.

17 The problem is, we believe those documents  
18 should only be reviewed by outside counsel and independent  
19 experts who are not investment bankers on the deal. They  
20 want to be able to show the documents to two designated  
21 inside counsel at Paramount and to people at their  
22 investment banking houses who are not working on the deal.  
23 To us, that just seems very risky.

24 THE COURT: Does anybody else want to be

1 heard on this dispute?

2 MR. RICHARDS: Yes, your Honor. Charles  
3 Richards on behalf of Warner.

4 I'd just like to briefly emphasize that  
5 similarly at Warner's board meeting on Thursday and  
6 Friday -- and I was present -- Lazard presented what we  
7 would regard as a highly sensitive analysis by business  
8 segment, breaking down and analyzing Warner's business,  
9 including projections, including break-up values. All of  
10 this would be of enormous value to Paramount, which is  
11 a direct competitor of ours in many important lines of  
12 our business, and would also be of great help to their  
13 investment bankers or to people working on the deal in  
14 structuring their next moves.

15 We think that the protection that we are  
16 calling for -- namely, that if they need expert help to  
17 interpret these documents, that they retain special  
18 experts and not be permitted to use the bankers that are  
19 working on the deal or the same firm -- are supported by  
20 a number of authorities.

21 I guess I would start with something your  
22 Honor said in Gioia v. Texas Air, which is not analogous  
23 in terms of the degree of confidentiality, but your Honor  
24 noted that confidentiality orders do not provide absolute

1 protection, and you went on to say, without quoting at  
2 length, that, "We must operate, however, in a world more  
3 closely aligned with the reality in which mistakes occur  
4 and in which trust is sometimes abused for advantage."

5 We are very concerned that investment  
6 bankers working on the deal with the incentives they have  
7 to achieve the deal wouldn't be put under enormous strains  
8 and stresses.

9 The kind of argument that we are having  
10 here, as your Honor may know, was made repeatedly to Vice  
11 Chancellor Berger in the LA Partners/Allegis case, and  
12 while I can, if your Honor wishes, read you from Vice  
13 Chancellor Berger's opinion at some length, I'm thinking  
14 that you would not wish it. Suffice it to say that the  
15 ruling that she made supports what we are asking for here;  
16 namely, that the documents could not be given to the  
17 investment bankers working on the deal.

18 This is also the case in other  
19 jurisdictions. This issue was litigated, for example, in  
20 the Coastal Corporation v. Texas Eastern in the Southern  
21 District of Texas, where at the conclusion Judge Hughes in  
22 that case prevented the confidential information from  
23 going to the investment banking firms.

24 A similar ruling was rendered in the

1 Caesar's World case in the Central District of California  
2 by Judge Penn, and we have the transcripts and the rulings  
3 here.

4 I'm told -- but your Honor will know more  
5 about it than I do because I was not privy to it -- I'm  
6 told that your Honor may have made such a ruling -- I'm  
7 told your Honor did make such a ruling in a discovery  
8 dispute in the Damon case. But I have been unable to  
9 locate any evidence of that.

10 MR. JOFFE: Your Honor, Bob Joffe again.

11 One other comment about our form protective  
12 order. We do have, as does the other lawyer, a provision  
13 saying that if any document is stamped "restricted" or a  
14 portion of a deposition is designated "restricted" and the  
15 other side agrees with it and we can't reach agreement,  
16 then in that particular case they can, of course, bring  
17 the document to your Honor's attention. So that if there  
18 were a document that were peculiarly necessary for them to  
19 show to their inside counsel for some reason or their  
20 investment banker, they could with respect to that  
21 particular document -- if we couldn't reach agreement,  
22 they could always appeal to your Honor.

23 What we are trying to do here is set out the  
24 broad guidelines that will essentially be the rules, on

1 the assumption that no one is going to abuse them.

2 MR. MASSENGILL: Your Honor, this is David  
3 Massengill again.

4 I have two problems. Let me get to the  
5 basic one first, which is: They want to keep anyone at  
6 Paramount from having anything to do with what apparently  
7 are the key issues in this case. What I have just heard  
8 them say is, any documents that relate to how the Time  
9 board made its decision, how the Warner board made its  
10 decision, what the values of the companies are, how they  
11 are proceeding, basically the fundamental decision on  
12 going forward on this tender offer for Warner, Paramount  
13 cannot see any of those, cannot participate in it.  
14 Paramount is to be excluded from this and Paramount's  
15 outside counsel are to be the only ones that can  
16 participate. Paramount cannot attend the depositions or  
17 look at the documents. Paramount cannot even attend  
18 argument in the Court on significant issues.

19 We don't believe that is appropriate.  
20 We don't believe they have a right to it because of  
21 speculation about what might happen at some point.

22 As far as the investment bankers go, we have  
23 agreed that we will Chinese Wall the investment bankers  
24 within Morgan Stanley from those who are advising on the

1 deal. We believe that you have -- we have a fundamental  
2 right to have accurate advice on business issues from  
3 our investment advisors, and we have agreed to put in  
4 a Chinese Wall and offer protection. We believe Paramount  
5 has a basic right to have somebody participating in the  
6 litigation and to be able to attend.

7 As far as the difference between what  
8 documents are there, I have heard Mr. Joffe and I have  
9 heard Mr. Richards, and what they both appear to be saying  
10 is that there are some documents that are competitively  
11 sensitive because they deal with business information.  
12 If that is true, then I have no objection to their being  
13 in the restricted category.

14 If, on the other hand, there are documents  
15 that are not reflective of future competitive problems,  
16 that are not competitively sensitive, then they should be  
17 covered under the regular confidentiality point.

18 I would point out that undoubtedly new  
19 documents that really fall within white knight or  
20 corporate strategy privilege have been withheld. So all  
21 we are talking about is documents that clearly should be  
22 handed over because they do not reveal corporate strategy  
23 to the point that it is damaging enough to the other side  
24 that they could assert the corporate strategy privilege.

1           So I think both on grounds of due process  
2           and our right to have somebody participate and, frankly,  
3           not to burden the Court -- I mean I'd like to get resolved  
4           right now an understanding of what's in that restricted  
5           category because I think the last thing the parties or  
6           this Court wants is for us to be coming back every three  
7           days arguing to your Honor about whether something does or  
8           doesn't fall within the restricted category.

9           MR. JOFFE: Your Honor, I don't think  
10          there's any due process question here. Counsel are often  
11          the only ones able to see documents and trade secrets in  
12          other important business confidentiality cases. I know of  
13          no decision that says that that's a due process violation.

14          Also, we are not going as far as  
15          Mr. Massengill states our position. I have no objection  
16          to someone reviewing a deposition transcript where my  
17          witness says that he decided not to accept the Paramount  
18          bid because he considered a number of factors, including  
19          company valuations. However, if they are going to ask him  
20          what those numbers were, it seems to me that is the point  
21          at which it is very unfair and prejudicial for someone  
22          inside Paramount who can be helping formulate strategy in  
23          the marketplace to look at those numbers.

24          MR. CANTOR: I shouldn't butt in, since

1 David really has handled all this, but I can't for the  
2 life of me understand what the distinction is between  
3 counsel within Paramount and outside counsel, unless the  
4 view is that counsel won't do what they are sworn to do,  
5 which is maintain the privilege. If that's the view,  
6 I don't know why they trust us but not counsel within  
7 Paramount. The point is that Paramount has a right to be  
8 advised by its counsel. Paramount has a right to have its  
9 counsel participate in this litigation, and they can't do  
10 it if they can't see the documents.

11 MR. WACHTELL: I'm a little bit confused by  
12 the last statement Mr. Cantor made. It's my understanding  
13 that the counsel within Paramount that they are talking  
14 about are their general counsel and their deputy general  
15 counsel. Unless they are prepared to say that these  
16 people are having no role whatsoever in the formulation of  
17 Paramount's strategy or any revised bids for Time or any  
18 amended ones, are these people supposed to put a Chinese  
19 Wall midway through their brain? Really, I don't  
20 understand how the protection lasts.

21 If I may just say this, your Honor:  
22 There obviously is a substantive law issue when you have  
23 a company such as Time, which Time is maintaining is not  
24 a target and has not made itself available for sale.

1 You obviously have a substantive law issue as to whether  
2 it is obliged to give its detailed business information to  
3 somebody such as Paramount.

4 I think the point here is simply that that  
5 substantive law issue should not be susceptible to being  
6 circumvented through discovery, where the only legitimate  
7 use of the information is obviously in connection with the  
8 litigation. And for that purpose, obviously it is going  
9 to be given.

10 MR. CANTOR: If I may respond briefly.  
11 We are also advising Paramount. So the Chinese Wall down  
12 the middle of a person would present the same problem for  
13 Simpson Thacher as it would for inside counsel. The  
14 suggestion we make is, you are just going to have to trust  
15 us on the fact that we're not going to disclose what  
16 shouldn't be disclosed, and we are asking that inside  
17 counsel receive the same trust. The problem is no  
18 different.

19 THE COURT: Thank you. If you will just  
20 hold the phone a moment, I will make a ruling.

21 (Brief recess taken.)

22 (The Court's ruling was transcribed under  
23 separate cover.)

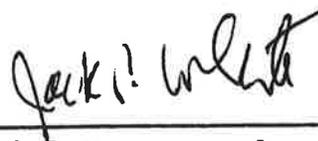
24

- - -

**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 17 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above stated cause, before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 19th day of June 1989.



---

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

Transcribed by:  
Ann B. Nolan