D. Wiles

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

BARRIS INDUSTRIES, INC., et al., Plaintiffs,	)	
v.	)	Civil Action No. 88-0188-R
D. TENNANT BRYAN, et al., Defendants.	)	

MEMORANDUM OPINION

By Order dated April 8, 1988, the Court has denied the plaintiffs' motion for a preliminary and permanent injunction. This Opinion sets forth the Court's reasons for denying the requested injunctive relief.

On April 5, 1988, the plaintiffs moved for a preliminary and permanent injunction that would: (1) prohibit defendants from further dissemination of their allegedly false and misleading proxy statement, filed with the SEC and mailed to shareholders on March 28, 1988; (2) enjoin the voting at the May 20, 1988 annual shareholders' meeting, of all proxies received by defendants as a result of the allegedly tainted proxy material; (3) require the defendants to file new proxy material with the SEC that is not false and misleading; and (4) require the defendants' new proxy material and proxy cards to be in a color other than white, so as to avoid shareholder confusion and so that the tainted proxies could be readily identified and voided.

In this Circuit, whether or not to grant a preliminary injunction is governed by the balance-of-hardships test, as defined in a line of cases starting with Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189, 193-96 (4th Cir. 1977). The Court of Appeals has explained the standard as follows:

> Four factors enter into the determination of whether to grant or withhold interim injunctive relief: (a) plaintiff's likelihood of success in the underlying dispute between the parties; (b) whether plaintiff will suffer irreparable injury if interim relief is denied; (c) the injury to defendant if an injunction is issued; and (d) the public interest. There is a correlation between the likelihood of plaintiff's success and the probability of irreparable injury to him. If the likelihood of success is great, the need for showing the probability of irreparable harm is less. Conversely, if the likelihood of success is remote, there must be a strong showing of the probability of irreparable injury to justify issuance of the injunction. Of all the factors, the two most important are those of probable irreparable injury to the plaintiff if the injunction is not issued and likely harm to the defendant if an injunction is issued. If, upon weighing them, the balance is struck in favor of the plaintiff, a preliminary injunction should issue if, at least, grave or serious questions are presented.

North Carolina State Ports Authority v. Dart Containerline Co., Ltd., 592 F.2d 749, 750 (4th Cir. 1979). See also Feller v. Brock, 802 F.2d 722, 727 (4th Cir. 1986); Friends of Phil Gramm v. Americans for Phil Gramm, 587 F.Supp. 769, 771 (E.D. Va. 1984).

Applying these factors to the present circumstances shows that the plaintiffs are not entitled to any injunctive relief, whether preliminary or permanent. It is clear upon weighing the risks of harm posed by this case, that the balance tips heavily

in favor of the defendants. First, the plaintiffs have failed to show that they would suffer any irreparable harm without the requested injunction. Even assuming the plaintiffs are correct on the merits of their claims, any harm they might suffer could later be remedied by an appropriate order of this Court.

The Court would be able to redress any resulting harm to the plaintiffs by granting appropriate relief prior to the May 20 annual shareholders' meeting. For example, the Court could take any of the following actions: (1) It could exclude from the vote count all proxies received prior to the date on which the supplemental proxy statements were likely received by the shareholders. Since this supplemental information was first mailed on April 7, a generous cut-off date would be April 25, 1988. Excluding from the vote tabulation all proxies received prior to April 25 would thus eliminate the risk that "tainted" proxies will be counted at the May 20 shareholders' meeting. This assumes, of course, that the supplemental proxy material will adequately cure any misleading statements made in the originial proxy material.

(2) If the supplemental material proves inadequate to cure any prior misleading statements, the Court could order that new, corrected and non-misleading proxy statements be sent immediately to all shareholders.

(3) Finally, should these options prove impracticable or unavailing, the Court may order that no proxy votes be counted at the May 20 shareholders' meeting or that the meeting be cancelled and rescheduled to a later date. While this is an extraordinary

remedy of last resort, it is nonetheless available to the Court should circumstances require it.

Moreover, if the injunction is issued, the defendants will face a substantial risk of serious and irreparable injury. Such an injunction would doubtless be reported in the press, and a great number of Media General shareholders would consequently learn of its issuance. As other courts have recognized, the "[s]hareholders may view an injunction as a final determination of wrongdoing and be unduly influenced by it." Management Assistance, Inc. v. Edelman, 584 F.Supp. 1021, 1025 n.1 (S.D.N.Y. 1984); see also Unicorp Financial Corp. v. First Union Real Estate Equity and Mortgage Investments, 515 F.Supp. 249, 263 (S.D. Ohio 1981); Jewelcor Inc. v. Pearlman, 397 F.Supp. 221, 252 (S.D.N.Y. 1975); Sherman v. Posner, 515 F.Supp. 871, 874 (S.D.N.Y. 1966).

Another court has explained that:

> The risk of an erroneous issuance of an injunction. . . must be weighed against the harm, itself perhaps irreparable, the injunction may cause the parties enjoined. There exists the danger that shareholders may view an injunction inaccurately as a final determination of wrongdoing on the part of [defendants] and influence the election in this way. [citations omitted.] The equities do not warrant undertaking such a risk here.

Unicorp Financial Corp. v. First Union, 515 F.Supp. 249, 263 (S.D. Ohio 1981). Even if the defendants ultimately prevail on the merits, there may be no way for this Court to fully redress the damage done to them. See Sherman v. Posner, 266 F.Supp. 871, 874 (S.D.N.Y. 1966).

The Second Circuit, in a similar case, has recognized this risk that the injunction may unduly influence the results of the board election. See Kennecott Copper Corp. v. Curtis-Wright Corp., 584 F.2d 1195, 1200-01 (2d Cir. 1978). Indeed, because the court there found a "strong likelihood" that the election results had been affected by an injunction, it ordered the election meeting "voided in whole or in part so as to permit a new election of directors." Id., 584 F.2d at 1200-01.

Finally, while the Court has not decided the merits of the plaintiffs' claims (and will reserve doing so until it rules on the motion for summary judgment), the Court can say at this point that these claims are not obviously meritorious. At best, they present a serious and close question of law. This factor, then, does not tip the balance in favor of an injunction.

As the Fourth Circuit has made clear, the two most important factors in the analysis are the likelihood of irreparable harm to the plaintiff without the injunction, and the likelihood of harm to the defendants if the injunction is issued. North Carolina State Ports v. Dart Containerline, 592 F.2d 749, 750 (4th Cir. 1979); Feller v. Brock, 802 F.2d 722, 727 (4th Cir. 1986). As already explained, these considerations weigh heavily against such preliminary injunctive relief. The plaintiffs have shown no real risk that they will suffer irreparable harm without the injunction, while the injunction would likely have a serious adverse impact on the defendants. The Court thus concludes that no injunctive relief should be granted at this time. For these

reasons, plaintiffs' motion was denied by the Order dated April 8, 1988.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

DATE

RICHARD L. WILLIAMS,
United States District Judge