

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

James A. Yates

PRESENT: _____

PART 49

Index Number : 651076/2010

ICAHN, CARL C

vs

LIONS GATE ENTERTAINMENT CORP.

Sequence Number : 005

PRELIMINARY INJUNCTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER, DATED 12-9-10.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: DEC 09 2010

James A. Yates

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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CARL C. ICAHN, et al.,           :
                                  :
                                  :
        Plaintiffs,              :      Order and Decision
                                  :      Motion Seq.005
        v.                        :
                                  :
LIONS GATE ENTERTAINMENT CORP.,  :
et al.,,                          :      Index No. 651076-2010
                                  :
        Defendants.             :
-----X

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Hon. James A. Yates, J.S.C.

On July 26, 2010, plaintiffs Carl Ichan, Icahn Partners LP, a limited partnership governed by the laws of Delaware, and certain entities affiliated with Icahn Partners LP (collectively the "Icahn Group" or "Icahn") sued Lions Gate Entertainment Corporation and Lions Gate Entertainment Inc. ("Lions Gate"), the Board of Directors of Lions Gate, Dr. Mark Rachesky ("Rachesky"), a principal with MHR Partners, MHR Fund Management LLC and MHR Institutional Partners III LP (the "MHR Fund"), MHR Institutional Advisors II LLC, MHR Institutional Advisors III LLC, Kornitzer Capital Management, Inc, and its principal, John C. Kornitzer. Plaintiffs allege that a July 20, 2010 exchange agreement and subsequent issuance of common shares of Lions Gate to Rachesky's fund through a conversion represents (1) a breach of a July 9, 2010 letter agreement between Lions Gate and the Icahn Group; (2) tortious interference with the same letter agreement; and (3) tortious interference with prospective business relationships. Both tortious interference claims are premised, in part, on allegations that the Lions Gate board of directors breached their fiduciary duties and sought to entrench themselves in office. The lawsuit seeks to unwind the debt-for-equity transaction.

Lions Gate, a film and television media company based in Canada and Santa Monica, California, allegedly exchanged roughly \$100 million of LGEI (a wholly-owned subsidiary of Lions Gate) convertible notes with near-maturity dates held by one of its bondholders, defendant Kornitzer Capital Management Inc. ("KCM"), into convertible notes redeemable at a price below the then-current market price. That same day, KCM sold the notes at a profit to MHR Institutional Partners II LP ("MHR"), a fund

affiliated with Dr. Rachesky. MHR then converted the notes into Lions Gate shares, and exercised the shares at \$6.20 per share. The debt-to-equity swap increased Rachesky's stake by about 16 million shares to approximately 29% while diluting Carl Icahn's ownership interest from 37.9% to 33.5%. Icahn remains Lions Gate's largest shareholder.

On December 3, 2010, the Court heard oral argument on the Icahn Group's motion for preliminary injunction restraining the fund controlled by Rachesky from voting the Lions Gate shares he acquired on July 20, 2010 at the annual general meeting of Lions Gate shareholders scheduled for December 14, 2010.

For the reasons that follow, plaintiffs' motion for a preliminary injunction is denied.

Discussion

In their motion for a preliminary injunction, pursuant to Article 63 of Civil Procedure Laws and Rules, plaintiffs seek an order i) barring the Rachesky defendants from voting the shares of Lions Gate acquired on July 20, 2010, at the next annual general meeting of shareholders, ii) barring the Rachesky defendants from granting or issuing any proxies to vote the July 20 shares at the 2010 Meeting, iii) barring the Rachesky defendants from transferring or pledging the July 20 Shares prior to the 2010 Meeting, iv) barring Lions Gate from accepting or counting the votes or proxies of the July 20 Shares at the 2010 Meeting, and v) barring Lions Gate from issuing replacement shares to the Rachesky defendants in place of the July 20 Shares, or taking any other action to permit the Rachesky defendants to exercise the voting power of the July 20 Shares.

The party seeking a preliminary injunction must demonstrate: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of an injunction, and (3) a balance of equities tipping decidedly in its favor. See CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005); *Faberge Intl., Inc v DiPino*, 109 AD2d 235, 240 (1st Dept 1985). Additionally, a mandatory preliminary injunction (one mandating specific conduct), by which movant would receive a form of the final relief sought, is granted only where the granting of the relief is essential to maintaining the status quo pending trial of the action. *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD2d 255, 264 (1st Dept 2009) (internal quotations omitted). Such relief is granted only where a clear right to mandatory injunctive relief is established. *Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2D 793, 794 (2d Dept 1995).

The preliminary injunction sought by Icahn in this case is a mandatory injunction, and therefore the injunction should be granted only if it satisfies the heightened standard. Although Icahn argues that prohibiting a counting of the newly acquired shares at the time of a vote is essential to restore the balance of market power that existed before defendants acquired any additional shares, a preliminary injunction would be an alteration of the status quo because it would deprive defendants of shareholder rights that they currently hold pursuant to the debt to equity transaction. As well, despite the fact that Rachesky is a major shareholder and a member of the Board of Directors, he personally was not a signatory to the letter agreement. In effect, the application is one to bar a shareholder, Rachesky, of shareholder rights on account of his alleged tortious interference with a standstill agreement between two other parties. Although Icahn is an alleged aggrieved party to a breach of the standstill agreement, he does not have a property interest in the shares held by Rachesky, regardless of the ultimate decision regarding the alleged breach.

The impetus behind the motion for a preliminary injunction and the immediate request for relief is an effort to elect the five Icahn-nominated directors to the 12-person Board of Directors. The Icahn nominees have submitted letters of resignation conditioned upon a subsequent court determination that the shares should not have been voted. Nonetheless, if the defendants' position is vindicated in subsequent proceedings in this litigation, a preliminary injunction will have altered the board composition and management structure at a critical time in the company's existence.

The Icahn Group has not made an actual showing that it would be irreparably and inequitably harmed by the denial of the preliminary injunction. Control of company shares is a "moving target." A variety of tender offers have been made and at this point in time almost one-third of the shares are uncommitted. The balance of power in this and future proxy fights rests with the uncommitted votes.

The impact of the issued shares upon the proxy fight was discussed by The Honourable Mr. Justice Low of the Court of Appeal for British Columbia in an application asking for interim relief in a parallel proceeding, *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2010 BCSC 1547, on appeal Docket CA038552, November 5, 2010). He observed,

[T]he impugned transaction has been approved by the court. There is no evidence that the effect of the order of the chambers judge is devastating to the attempts of the appellants to seek to control the company or even that it is a significant setback....There is no evidence of a tipping point. With their present shareholding, [Icahn] might obtain enough proxies to control the election of the board of directors without [interim relief].

It seems to me that the essence of a fight for control of a public company is which faction can win the hearts and proxies of the shareholders...Although the percentage of shares owned by a faction is a starting point to win that battle, persuasion is the ultimate vehicle for success.

(*Id.*, at 5.)

An important factor in this Court's determination is the commitment made by Defendants during oral argument that there will be another shareholder's meeting in less than a year, September, 2011. The Court's denial of the application for a preliminary injunction is conditioned upon that commitment. In effect, denial of the preliminary injunction at this time will permit existing shareholders to vote on December 14 while giving Icahn, if he loses the proxy fight on that day, and should he prevail in the ensuing litigation, an opportunity for a new election with votes counted as he seeks in less than ten months.

Accordingly, plaintiffs' motion for preliminary injunction is denied.

This constitutes the Decision and Order of the Court.

Dated: December 9, 2010

DEC 09 2010

ENTER:

James A. Yates, J.S.C.

James A. Yates