

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

LUCIAN A. BEBCHUK,

Plaintiff,

v

CA, INC.,

Defendant.

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: Civil Action
: No. 2145-N
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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, June 16, 2006
10:06 a.m.

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BEFORE: HON. STEPHEN P. LAMB, Vice Chancellor.

- - -

FINAL HEARING

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
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APPEARANCES:

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Richards, Layton & Finger, P.A.
-and-

ROBERT J. GIUFFRA, JR., ESQ.
WILLIAM H. WAGENER, ESQ.
of the New York Bar
Sullivan & Cromwell LLP
for Defendant

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1 THE COURT: Good morning, everyone.

2 MR. BARRY: Good morning, Your Honor.

3 MR. GIUFFRA: Good morning, Your
4 Honor.

5 THE COURT: Who's going first?

6 MR. GIUFFRA: Computer Associates --
7 CA, Your Honor. I'm Robert Giuffra with Sullivan
8 Cromwell.

9 THE COURT: You may proceed, Mr.
10 Giuffra.

11 MR. GIUFFRA: Good morning, Your
12 Honor. Again, Robert Giuffra, Sullivan Cromwell, for
13 CA, Inc.

14 Your Honor, this is a straightforward
15 question of statutory interpretation. Is this
16 proposed bylaw consistent with Section 157? There's
17 no need for the Court to enter in a grand academic
18 debate about poison pills or shareholder rights. The
19 Court can decide this question on the application of
20 straightforward questions of statutory construction.

21 Now, there are three provisions that
22 we think are relevant here. Those are 109, 141, and
23 157. And under basic rules of statutory
24 interpretation, Professor Bebchuk's bylaw is invalid.

1 This is a simple case.

2 Your Honor, under 109, a bylaw is
3 invalid if inconsistent with law. Professor Bebchuk's
4 proposed bylaw has two provisions in it. The first is
5 that the board cannot approve a rights plan with a
6 term of more than one year. Now, the rights plan
7 under this proposed bylaw shall expire within one year
8 after its adoption or amendment. It's a -- a
9 prohibition on a rights plan for more than one year.

10 In addition, it's a provision
11 requiring a unanimous vote with respect to rights
12 plans, and we're not challenging that piece of his
13 provision before the Court today.

14 THE COURT: Well, do you concede the
15 legality of that part of the bylaw?

16 MR. GIUFFRA: Your Honor, we believe
17 that 142 -- 141(b) at least permits supermajority
18 voting. Whether an application, there might be an
19 issue with respect to 141; but at least for purposes
20 of the present facial challenge, we're focusing on the
21 substantive limitation on the length of a rights plan.

22 THE COURT: What -- what do you mean
23 by "application" in that context?

24 MR. GIUFFRA: Excuse me, Your Honor?

1 THE COURT: What do you mean when you
2 try to reserve some later challenge with respect to
3 the application?

4 MR. GIUFFRA: Well, Your Honor, we
5 believe that since one portion of the bylaw is
6 invalid, the bylaw says that a rights plan cannot go
7 on for more than one year. And under 157, the
8 legislature has made quite clear that boards of
9 directors have the power to have a rights plan of
10 unlimited duration. That's in the express language of
11 157. And our view would be that as -- as reflected in
12 cases like Quickturn, if any aspect of a proposed
13 bylaw is invalid, the whole bylaw is invalid. So
14 that's what we're focused on here today.

15 THE COURT: You concede the legality
16 of the unanimity provision.

17 MR. GIUFFRA: For present purposes,
18 Your Honor, yes, we do.

19 THE COURT: Well, in your reply brief
20 you conceded, said you thought it was unwise but,
21 nevertheless, permissible under 141(b). Did I misread
22 that?

23 MR. GIUFFRA: That was our position,
24 Your Honor. And we do think it's an unwise provision;

1 but we believe that under 141(b) and subsequent and
2 also case law, that it might well be permissible. So
3 we're not challenging it.

4 Now, many rights plans, Your Honor,
5 have durations more than 10 years. The rights plan in
6 Household was a 10-year plan. And one year --

7 THE COURT: There's nothing in the
8 statute that says a plan shall be more than a year, is
9 there?

10 MR. GIUFFRA: It says the board has
11 the discretion to have a plan that can be limited or
12 unlimited in duration.

13 THE COURT: Well, I know that. But
14 there's nothing in the statute that says plans shall
15 be more than a year.

16 MR. GIUFFRA: No. In fact, the Court
17 could decide, in the exercise of its business
18 judgment, to have a plan less than a year. The board
19 could decide not to have a plan at all, but the point
20 is the statute vests in the board of directors the
21 discretion to have a rights plan of unlimited
22 duration.

23 THE COURT: Would -- so the argument
24 would be the same if this plan, rather than trying to

1 limit the duration, tried to limit some other term of
2 a rights plan.

3 MR. GIUFFRA: That's absolutely
4 correct, Your Honor. And in 157 there's a provision
5 governing consideration. So, for example, if a rights
6 plan sharelaw [sic] bylaw proposal said that the --
7 the exercise price of the rights plan must be equal to
8 the market price, which would obviously eviscerate the
9 utility of the rights plan, that, Your Honor, would,
10 in our view, be invalid just as well as a -- a term
11 limitation, which is what we face in this case.

12 Again, it says "shall expire in one
13 year." And Professor Bebchuk at page 31 of his brief
14 concedes what his real objective here, which is that
15 he believes under the theory that's being put forward,
16 that if -- if you can limit the duration, you can
17 essentially eliminate poison pills and rights plans
18 through shareholder bylaw proposals. And that --

19 THE COURT: Let me stop you there for
20 a minute. As you said, a board might actually adopt a
21 rights plan that had a one-year duration. Presumably
22 no board would adopt a rights plan with an exercise
23 price equal to market price.

24 MR. GIUFFRA: Presumably not, Your

1 Honor, but it's possible that if someone had -- a
2 shareholder agitator had a desire to outlaw poison
3 pills, they could try to propose through -- through --
4 through bylaw process a rights plan where the -- where
5 the market price and the exercise price were the same
6 and, therefore, the rights plan would have no utility.
7 and, therefore, it's a backdoor way of eviscerating
8 rights plans and obviously eliminating the board's
9 power to -- to enter into rights plans under --
10 expressly under 157 and also under 141(a).

11 THE COURT: I just draw a distinction
12 between the two cases you're talking about, one in
13 which you could have a rights plan of normal utility,
14 just of limited duration; and the other would be a
15 situation in which the rights plan is limited to one
16 where the exercise price had to be equal to the market
17 price and would be of no use at all.

18 MR. GIUFFRA: That's correct, Your
19 Honor. The board could do -- the board would have the
20 discretion -- obviously it wouldn't make any sense to
21 do the latter case, but the board could have the
22 discretion to have a rights plan of whatever duration
23 the board chose, and that's what's specified under the
24 statute. The problem here is that you're talking

1 about unilateral action by the shareholders by a
2 bylaw. And now we believe that violates 157, which,
3 again, expressly, by statute, gives the board the
4 ability to have a rights plan that's unlimited in
5 duration.

6 Now, this case --

7 THE COURT: Is the problem under 157
8 that no bylaw is permissible, or is it limited to
9 bylaws by stockholders?

10 MR. GIUFFRA: Your Honor, I think if
11 you read 157, it says on its -- it -- it doesn't
12 reference bylaws -- 157 is part of subchapter 5 --
13 when gone closely through subchapter 5 -- and
14 subchapter 5 does not permit bylaws. The legislature
15 in 141 in a number of places provides that for
16 amendments by bylaw or amendments to the certificate
17 of incorporation. There's no reference to bylaws in
18 157 or in -- anyplace else in subchapter 5. And
19 that's because under the -- the way the statutory
20 structure is set up and as the Supreme Court
21 recognized in the Grimes case, the board of directors
22 has the exclusive authority over the capital structure
23 of the firm, things like the form of stock, preferred
24 stock, dividends, stock options. And, you know, in

1 141, there are a number of provisions that provide for
2 what might be described as procedural changes.

3 So, for example, 141(b) you have
4 the -- the permission to have a bylaw that requires
5 supermajority voting by the board.

6 In 141(b) --

7 THE COURT: References are found in
8 places other than 141.

9 MR. GIUFFRA: That's correct. And in
10 those places --

11 THE COURT: They're found throughout
12 the general corporation law with, as you pointed out,
13 the exception -- may not be the only exception -- of
14 subchapter 5.

15 MR. GIUFFRA: Well, I think that was a
16 considered decision by the -- by the General Assembly
17 to not permit the amendment of the provisions of
18 subchapter 5 by bylaw, and that's because the General
19 Assembly instruction to the business corporation law
20 wanted to leave to the board the power over the
21 capital structure of the firm.

22 Obviously a company could in its
23 certificate of incorporation have limitations on the
24 board's authority to -- to issue rights plans, and

1 that's something that's specified on the face of the
2 statute. There's no such limitation with respect to
3 being able to have unilateral shareholder action limit
4 a board's ability to -- to determine the terms of the
5 rights plan. And we would submit that the duration is
6 a critical term of a rights plan.

7 THE COURT: What if -- what if a board
8 proposed this bylaw to its shareholders for them to
9 adopt or not? Would that be a valid bylaw?

10 MR. GIUFFRA: Your Honor, I think that
11 there have been -- there's two cases which talk about
12 a shareholder resolution. One is the National
13 Intergroup case, and then you have the issue of News
14 Corp., which is a contract case. Those are cases
15 where the board itself entered into -- the courts
16 treated them as contract cases, not as cases
17 involving -- having any bylaw being exercised by the
18 shareholders in a unilateral fashion.

19 So a board resolution obviously could
20 be adopted limiting the board's power to -- to a
21 bylaw. The board could adopt a change in the
22 certificate of incorporation, working with the
23 shareholders would have to approve that. And I
24 don't --

1 THE COURT: The question is, could a
2 board -- let's talk a simpler question. Could a board
3 itself adopt a bylaw that contained a provision
4 limiting the term of poison pills to a year?

5 MR. GIUFFRA: I think the board
6 could -- could adopt a resolution.

7 THE COURT: Could it adopt a bylaw?

8 MR. GIUFFRA: Don't know the --

9 THE COURT: Yes or no?

10 MR. GIUFFRA: I mean, I think under
11 our reading of the statute, the answer would be no,
12 because the statute -- excuse me.

13 THE COURT: But you could by -- by
14 resolution do that.

15 MR. GIUFFRA: Yes, Your Honor. Or --
16 or the board could enter into a contract, as was the
17 case in News Corp., limiting the board's power to take
18 certain actions with respect to rights plans. So the
19 board is giving up its statutory authority with
20 respect to rights plans.

21 THE COURT: And you think a board can
22 do that by contract and it can do that by resolution
23 but can't do that by bylaw.

24 MR. GIUFFRA: Well, the statute on its

1 face doesn't permit bylaws as a means to -- to limit
2 the board's power under 157. And the -- you know,
3 since it can do it by resolution, there would be no
4 need to do it by bylaw. It's more of an academic
5 question, I think. I mean, it has the power to do it
6 by resolution.

7 THE COURT: Well, I might have
8 thought, Mr. Giuffra, if it has the power to do it by
9 resolution, it can obviously do it by bylaw. But the
10 problem with that is that if the board can do it by
11 bylaw, then why can't stockholders do it by bylaw?

12 MR. GIUFFRA: Well --

13 THE COURT: That's what I'm sort of
14 faced with.

15 MR. GIUFFRA: But I think the reason
16 why the stockholders cannot do it by bylaw is that 157
17 vests in the board of directors the power to determine
18 the terms of a rights plan, including its duration.
19 And in places where the shareholders have the ability
20 by unilateral bylaw to limit the power of the board,
21 those are matters that are specified in the -- in the
22 corporation law.

23 So, for example, you know, the number
24 of directors needed for a quorum. That's something

1 specified can be done by either certificate or by
2 bylaw, the powers of board committees.

3 THE COURT: And can be done by a bylaw
4 adopted by either shareholders; or if the certificate
5 of incorporation gives the power to the directors to
6 adopt and repeal bylaws, that can be done by them,
7 too.

8 MR. GIUFFRA: Yes, that's correct,
9 Your Honor.

10 THE COURT: Or it can be done by them
11 in both cases.

12 MR. GIUFFRA: That's correct, Your
13 Honor.

14 THE COURT: But your argument is, I
15 gather -- maybe it's -- perhaps bylaws are totally
16 impermissible under Rule 157 or, in any event, even if
17 they're not, shareholder bylaws are.

18 MR. GIUFFRA: That's correct, Your
19 Honor. That would be our position. And that's
20 because of the role that the board of directors is to
21 have over the capital structure of the firm.

22 And the problem with -- with Professor
23 Bebchuk's theory is that it really has no limits.
24 There's no limiting principle. This bylaw proposes a

1 one-year limit on rights plans. Well, the next one
2 might propose a one-month limit, a one-week limit, a
3 one-day limit. And effectively by these limits, you
4 could eliminate a board's ability to adopt rights
5 plans. In addition, you could obviously do things by
6 bylaw dealing with terms.

7 THE COURT: But presumably if -- if
8 the -- if a court concluded that 157 was not the
9 absolute bar to bylaws as you say it is, then the
10 analysis moves -- moves somewhere else --

11 MR. GIUFFRA: Yes, it would move to --

12 THE COURT: -- to 141.

13 MR. GIUFFRA: It would move to 141,
14 that's correct.

15 THE COURT: So, you know, a one-day
16 bylaw may well run afoul of 141 even if it doesn't run
17 afoul of 157.

18 MR. GIUFFRA: That's correct. And you
19 might even have a problem with respect to an amendment
20 by bylaw. Let's suppose a corporation enacted --
21 adopted a bylaw or shareholders proposed a bylaw that
22 the annual meeting must be held in Antarctica on
23 December 25th every year and that's the only time
24 the -- that's the only -- or that's the only time that

1 the directors -- excuse me; one board meeting a year
2 in Antarctica on Christmas. I think that might be a
3 bylaw that would -- would conflict with the board's
4 ability to operate a business under 141. But that's
5 obviously not the question -- that's not --

6 THE COURT: Can you draw the line
7 somewhat closer to reality?

8 MR. GIUFFRA: I think the key point
9 would be in looking at 141, Your Honor, where it says
10 you can amend by certificate of incorporation or
11 bylaw, but then the words "bylaw" do not appear
12 anywhere in subchapter 5, clearly in interpreting the
13 statute, there must be a reason why the legislature
14 said "and by bylaw" in 141. Otherwise, the -- the
15 specific reference to "bylaw" would be a mere
16 surplusage; and obviously under basic canons of
17 statutory construction, that's not something that a
18 good court would want to do.

19 THE COURT: But otherwise on a
20 nonsurplusage.

21 MR. GIUFFRA: No, Your Honor, because
22 109 says that shareholders can adopt a bylaw relating
23 to the business so long as it is not inconsistent with
24 law. And we would submit that this proposed bylaw is

1 inconsistent with law. It's, in fact, inconsistent
2 with 157 on its face.

3 THE COURT: I was speaking sort of
4 more generally. I mean, if you limit the ability of
5 stockholders to adopt bylaws to those instances in the
6 general corporation law where bylaws are specifically
7 authorized, you certainly take away the utility of
8 109, don't you?

9 MR. GIUFFRA: No, Your Honor. I
10 think --

11 THE COURT: Particularly if you're
12 doing that because of the general grant of power to
13 the board of directors in 141(a). You certainly are
14 -- and I think this may be the right answer -- you
15 then make 141(a) a superior grant of power than 109.

16 MR. GIUFFRA: That's a way of looking
17 at it; but this case, Your Honor, I think is really
18 determined by 157, because we're dealing with a
19 situation where there's a -- an express grant of
20 statutory authority to the board on the very subject
21 that is the basis for the bylaw. I mean, we're -- on
22 the face of 157, the General Assembly speaks of rights
23 plans unlimited in duration; and this proposal --

24 THE COURT: I'm sorry. You'll have to

1 say that again.

2 MR. GIUFFRA: I'm sorry, Your Honor.

3 THE COURT: There's nowhere in 157
4 that talks about stockholder rights plans. It talks
5 about the ability to issue rights --

6 MR. GIUFFRA: That's correct, Your
7 Honor. And --

8 THE COURT: -- and plans on how you --

9 MR. GIUFFRA: But -- but --

10 THE COURT: -- that are in there --
11 that are read in by Moran.

12 MR. GIUFFRA: But in the -- obviously
13 in Household, the Court has said that the board has
14 the power under 141 and 157 to -- to do rights plans.

15 THE COURT: You're reminding me of two
16 years of my life I spent in some other pursuit.

17 Well, is that of any principle? And
18 is -- obviously rights plans have their own special
19 place in our jurisprudence. They've been the subject
20 of countless cases that are -- the ability, the power
21 to adopt rights plans is -- is well-established. But
22 is that itself a limiting principle?

23 MR. GIUFFRA: I think two things are
24 limiting principles. One, the express terms of 157;

1 in addition, the powers of directors under 141(a) to
2 manage the business with respect to fundamental
3 matters like the issuance of a rights plan, which is
4 obviously a critical aspect of corporate management
5 and very important matter that boards of directors
6 must consider. Obviously the fact that there's been
7 so much case law about rights plans demonstrates and
8 confirms the importance of rights plans at a board
9 level. It's a central element of -- of board
10 activity. And so --

11 THE COURT: At the same time the case
12 law, at least some of the case law recognizes that
13 rights plans are fundamentally the license for
14 altering the power relations inside a corporation.
15 It's a plan -- it's a device that requires third-party
16 acquirers to negotiate with the board of directors
17 rather than offer -- make offers directly to
18 stockholders. I mean, that's how it was litigated.
19 Perhaps that's how it's described. That's how it was
20 justified, but doesn't that also in some respect
21 create any basis for limiting this principle?

22 MR. GIUFFRA: Your Honor, on a
23 particular -- in a particular case where there's a
24 rights plan at issue and particular facts, courts

1 obviously address whether -- you know, the handling of
2 the rights plan by a board. This is a case where
3 there are no facts disputed. We're not dealing with a
4 potential takeover, whether the board is or isn't
5 properly exercising its fiduciary duties or business
6 judgment. The question here is whether a board in the
7 abstract should have the power to have -- to exercise
8 its -- its power under the statute, 157, to have a
9 rights plan of limited duration. Under this bylaw,
10 the board could not do that.

11 And the point would be that the
12 jurisprudence all talks about the power of the board
13 to, for example, you know, build a fortification in
14 advance of a potential tender offer. And by having a
15 rights plan that's, you know, longer than a year, a
16 board can reasonably make the business judgment that
17 we want to have our defenses up in the event that
18 there might be some sort of a -- a tender offer that
19 the board believes is inconsistent with the
20 corporation and shareholders' interest.

21 And what this bylaw would like to do
22 is hamstring the board and prevent the board from
23 doing that. But the statute permits under 157 and 141
24 a board to exercise its rights.

1 I think it's important to also think
2 about Section 102, because Section 102 talks about the
3 power of a -- what you can do in terms of amending an
4 article of incorporation. And it talks about the --
5 on its face it refers to -- that an article of -- a
6 certificate of incorporation can be amended by any
7 provision that created -- by provision that creates,
8 defines, limits, or regulates the power of the
9 directors. If you look at 109, it talks about
10 relating to the business of the corporation. And if
11 you want to regulate the powers of the board by
12 limiting those powers and defining those powers and
13 regulating those powers, the proper way under the
14 statutory scheme would be to do it under 102(b)(1),
15 which is the certificate of incorporation, because --

16 THE COURT: You know, I sort of -- I
17 mean, I get your argument that the language in 109 is
18 different than 102; but it's not quite as different as
19 you just put it, because it -- 109 also speaks about
20 bylaws relating to business corporation, the conduct
21 of its affairs, and the rights or powers of its
22 directors.

23 So, I mean, it -- it -- the sort of
24 textual issue is does the language relating to the

1 rights or powers of directors create a more narrow
2 universe of things that can be done than the 102
3 language about -- which is, you know, is presumably
4 broad, creating, regulating, so forth, the rights or
5 powers of directors.

6 MR. GIUFFRA: The critical provision
7 in 109 is that the bylaw provision must not be
8 inconsistent with law. In addition, the fact that the
9 corporation law in various points says that powers can
10 be changed or decisions made by amendments to the
11 certificate or by bylaw must have a meaning. I mean,
12 the words -- otherwise, why in some places like 141
13 does "bylaw" appear repeatedly on procedural matters
14 like quorums and number of committees, procedural
15 matters? whereas in 157, which is a substantive
16 provision of the corporation law, a provision -- a
17 part of the corporation law that deals with the most
18 important corporate board matters, there is absolutely
19 no reference anywhere to "bylaws." And we think, Your
20 Honor, that that's a critical, critical, critical
21 difference.

22 I mean, the -- in -- in the Grimes
23 case, the Supreme Court, at 804 A. 2d 260, said that
24 the subchapter 5 consolidates in the board exclusive

1 authority to govern and regulate a corporation's
2 capital structure. In that case the Court focused on
3 the importance of -- of statutory formalities.

4 And taken to --

5 THE COURT: Well --

6 MR. GIUFFRA: Taken to its --

7 THE COURT: Isn't a rights plan part
8 of a company's capital structure?

9 MR. GIUFFRA: Yes, it is, Your Honor.

10 THE COURT: In what respect?

11 MR. GIUFFRA: Well, because if the
12 rights plan goes into effect, obviously it affects
13 the -- the capital structure of the corporation And --
14 and it falls within 157.

15 The problem with the theory that's
16 being advocated here is that the rest of the
17 provisions in subchapter 5, if -- if -- if Professor
18 Bebchuk is right and you can amend 157, there's
19 absolutely no limiting principle. So you could -- you
20 could regulate by bylaw preferred stock, executive
21 stock options, and any other aspect of the capital
22 structure of a corporation, dividends. You could say
23 that dividends can only be paid in certain amounts on
24 certain days. You could -- you could hamstring by

1 bylaw a board's ability to pay dividends.

2 This is one of those cases where we
3 submit it's a relatively straightforward case; but
4 were the Court to agree with Professor Bebchuk's
5 theory with -- without any limitations, it could have
6 extremely pernicious effects in terms of upsetting
7 Delaware corporate scheme. It would allow for bylaws.
8 It would allow, by bylaw, shareholders to propose
9 bylaws -- those shareholders wouldn't have any
10 fiduciary duties to the corporation -- to essentially
11 create an extrastatutory regime to micromanage the
12 company. If someone wants to do that, they should
13 invest in a close corporation, not in a public company
14 where there is obviously a separation of ownership
15 from control.

16 This case, Your Honor, again, we think
17 is relatively simple. And the language in the statute
18 in 157 where it says "Subject to the certificate of
19 incorporation" obviously must have meaning.

20 In addition, cases like Hilton Hotels
21 where the Court has said --

22 THE COURT: So you read -- can you
23 read that as a bylaw excluder as Vice Chancellor
24 Strine described it in Jones Apparel?

1 MR. GIUFFRA: Well, I think -- I think
2 that -- I think the fact that the word "bylaws" do not
3 appear in 157 is a bylaw excluder. In -- in the Jones
4 Apparel case that Your Honor referenced where Vice
5 Chancellor talked about bylaw excluders, the provision
6 said "unless otherwise provided in the certificate of
7 incorporation," to mean that you couldn't modify by
8 bylaw. This one says "Subject to the provisions in
9 the certificate of incorporation." This is 157. And,
10 you know, I don't really see a difference between
11 "unless otherwise provided" and "subject to." Both
12 logically and grammatically mean the same thing, which
13 is that only a certificate of incorporation change can
14 limit the powers granted by statute to the board with
15 respect to the subject matter in subchapter 5.

16 THE COURT: If I can just take you
17 back to Jones Apparel for a second. As I recall, it
18 was -- it involved 213?

19 MR. GIUFFRA: I believe so, Your
20 Honor.

21 THE COURT: And 213 doesn't refer to
22 either bylaws or certificate; correct? I guess what
23 he held there was the fact that it didn't refer to the
24 certificate didn't mean that you couldn't have a

1 certificate provision. That was essentially
2 consistent with the statutory provision.

3 MR. GIUFFRA: But I think another way
4 of thinking about it is that 102 is a broader
5 provision than 109, in that under 102 you can -- you
6 know, a certificate of incorporation is higher up in
7 the hierarchy.

8 THE COURT: Well, that's a hard
9 argument, because there -- there are cases -- and I
10 wouldn't be surprised if a great number of
11 corporations didn't have bylaws that regulate the very
12 subject matter that's coming back to 213. And the
13 cases cited under 213 similarly involve companies with
14 bylaws that had to do with setting record dates; and
15 there was no issue raised really in those cases about
16 sort of -- question whether you even have a bylaw
17 under 213.

18 MR. GIUFFRA: But the difference --

19 THE COURT: What -- what Vice
20 Chancellor Strine held, you could have a charter
21 provision and that it would govern -- I'm telling you
22 there -- there are cases that deal with bylaws under
23 213.

24 MR. GIUFFRA: But, Your Honor, I think

1 the difference between 213 and 157, again, would be
2 the -- the language of 157, plus would be the powers
3 granted to the board under 141(a) to manage the
4 corporation. And it would be our position that those
5 powers under 141(a) to manage the corporation, courts
6 have repeatedly held that the management of a rights
7 plan is a fundamental matter. It's not a procedural
8 matter. It's not about where you hold your annual --
9 where you hold your board meetings or how many people
10 are on the board, and that those sorts of fundamental
11 decisions need to be vested in the corporation. So in
12 order -- you know, I think Your Honor can rule on the
13 basis of both 157 but also on the basis of 141.

14 And -- and I think the -- the -- what
15 I think is -- makes sense about the 157 argument is
16 the -- the fact that there's no limiting principle on
17 Professor Bebchuk's proposal. And he, in fact, admits
18 that on page 31 of his brief where he says that by
19 shareholder bylaw you could essentially eliminate
20 poison pills. And that would be a rather, rather
21 radical step.

22 THE COURT: Well, that itself has a
23 limiting principle, though, doesn't it? Which is that
24 at least in cases where boards of directors share the

1 power to adopt and then they repeal bylaws, the board
2 would continue to have the power to repeal such a
3 bylaw, wouldn't it? I know there's at least one case
4 that suggests otherwise, but it wasn't in a hole.

5 MR. GIUFFRA: Theoretically that might
6 be correct, Your Honor; but the issue in our case,
7 again, is they want to propose a bylaw that will
8 hamstring the board at the outset of having a rights
9 plan longer than a year. And the problem is the next
10 bylaw could be a day or it could be a week. And then,
11 you know, when you couple that with the unanimous vote
12 requirement and then that may be a situation where you
13 would have a problem with the unanimous vote
14 requirement, that would present a problem for a
15 corporation, because you essentially would be
16 outlawing a poison pill by bylaw. And courts, I
17 think, have -- have never permitted that.

18 THE COURT: Well --

19 MR. GIUFFRA: I don't -- you don't
20 need to have a shareholder vote to have a poison pill.

21 THE COURT: You know, what you -- all
22 the things you're saying make me wonder if this case
23 is even ripe for you to seek an advisory opinion on a
24 narrow issue, and you're reserving other issues that

1 you might want to litigate later about this very
2 bylaw. The bylaw hasn't been approved by the
3 stockholders. It's not even a fact.

4 MR. GIUFFRA: The bylaw has been
5 submitted. We sought a no-action letter from the SEC.

6 THE COURT: Which they haven't given.

7 MR. GIUFFRA: Which they haven't given
8 us because of this litigation, and the SEC has a
9 policy that in the event of a litigation, the SEC will
10 not rule on whether to grant a no-action letter when
11 it's a question of state law. And that's the question
12 that's presented here. And our bylaw -- our proxy has
13 to be sent out on July 14th.

14 So the issue is whether --

15 THE COURT: So you have sort of
16 created this problem that you are now asking me to
17 give you the answer to by sending a Delaware lawyer's
18 opinion letter to the SEC, which now, under its
19 regulations or its procedures, isn't even considering
20 whether or not to issue the no-action letter until I
21 decide.

22 MR. GIUFFRA: Well, in fact, Your
23 Honor --

24 THE COURT: Why not just put it on a

1 ballot and let it be voted on? And if you think it's
2 illegal, we'll litigate about it later.

3 MR. GIUFFRA: Your Honor -- Your
4 Honor, the -- the fact of the matter is that in other
5 cases, corporations have done exactly what CA did in
6 this case. They got an opinion from the Delaware
7 lawyer. They have sent the opinion down to the SEC,
8 and they received a no-action letter. But Professor
9 Bebchuk, obviously being aware of what the SEC's
10 procedures are, commenced this litigation and,
11 therefore, has prevented the SEC from issuing a
12 no-action letter. So the company --

13 THE COURT: I mean -- and I'm being a
14 little -- I really do have to say I don't understand
15 the SEC's policy under this rule of theirs that
16 something which is of debatable reality can be
17 excluded under their rule just by getting a letter
18 from someone. But in any event, I haven't been
19 involved in that process for a long time. But it does
20 raise issues of ripeness, frankly.

21 MR. GIUFFRA: Well, Your Honor, we
22 think --

23 THE COURT: And you're also telling
24 me, as I understand what you're saying, Mr. Giuffra,

1 that, you know, you're sort of keeping your powder dry
2 on other aspects of this very bylaw, and all you're
3 asking me to do is to decide whether or not some
4 particular aspect of it is legal or illegal while
5 maintaining your position that other parts of it, if
6 it's subsequently adopted by the stockholders, may
7 also be illegal.

8 MR. GIUFFRA: Your Honor, the
9 provision we're challenging on its face is illegal
10 under the statute. And so that's why we're
11 challenging it. We don't think it's a close question.
12 We think that 157, 141, the language of 102, 109, 141,
13 157 make this case a relatively simple case of
14 statutory construction. And it's -- it's really a
15 question of 157 says "directors shall," "unlimited in
16 duration."

17 And this is a bylaw that's essentially
18 putting on its face a substantive limitation on how
19 long a rights plan can be. And given the way the --
20 the statute is set up -- and I think this answers the
21 question. If Professor Bebchuk's theory is correct,
22 there is no limiting principle with respect to rights
23 plans and with respect to anything else in subchapter
24 5.

1 THE COURT: Well, rights plans
2 themselves are a limiting principle. I mean, is that
3 possible? What is a rights plan? Aren't there other
4 things that courts do -- I mean, that boards do that
5 carry very similar characteristics?

6 MR. GIUFFRA: Yes, Your Honor. But
7 the point is is that 157 is part of a larger
8 subchapter of the Delaware Code. That subchapter
9 deals with the issuance of stock, dividends, classes
10 of stock, all the things we've talked about this
11 morning. And those are fundamental powers of the
12 board. They're not something that shareholders can
13 micromanage by bylaw. And essentially what we're
14 seeking from the Court would be a judgment that says
15 that 157 vests the power in the board to -- to
16 determine the terms of rights plans but subject to the
17 certificate of incorporation and that you cannot have
18 a limitation or micromanagement of the board's ability
19 to -- to issue a rights plan by -- by a unilateral
20 shareholder bylaw.

21 THE COURT: Well, I do understand
22 that. But let -- what if, you know, this hadn't
23 proceeded this way and, instead, the matter was put to
24 the stockholders and they approved it and you had a

1 unanimous board that wished to redeem this -- or not
2 redeem but to repeal this bylaw because they thought
3 it was ill-advised and that it imposed undue
4 limitations on their ability to protect the interests
5 of the corporation and its shareholders. Could you
6 come before Court -- before this Court and ask for an
7 advisory opinion to the effect that the bylaw was
8 illegal, or would you just repeal it and let somebody
9 sue you?

10 MR. GIUFFRA: Your Honor, in this
11 particular litigation we haven't come to the Court to
12 seek the advisory opinion. The advisory opinion was
13 being sought by Professor Bebchuk.

14 THE COURT: Well, that's an answer to
15 a different question.

16 MR. GIUFFRA: But -- but, Your Honor,
17 the way the bylaw is written, the board would have the
18 power by unanimous vote to repeal the bylaw, that's
19 correct.

20 THE COURT: If you have that power and
21 you have the unanimous consensus that it should be
22 repealed, could you possibly come to Court before him
23 to get some judgment as to whether or not the thing
24 that you wish to repeal was legal or illegal?

1 MR. GIUFFRA: There -- there might be
2 an ability of someone in a particular situation to
3 challenge the board's ability to vote to repeal that
4 bylaw even on a unanimous basis under particular
5 circumstances and facts that I'm -- you know, wouldn't
6 be aware of.

7 THE COURT: Presumably after you did
8 that.

9 MR. GIUFFRA: Presumably -- but there
10 could be an issue about whether that was a proper
11 issue given the circumstances that could be present at
12 the time in terms of the offers that might be made for
13 the company.

14 THE COURT: So you might -- you might
15 be able to seek some sort of declaratory relief that
16 you wouldn't be breaching your fiduciary duties by
17 repealing the bylaw consistent with its terms.

18 MR. GIUFFRA: Your Honor, I think what
19 we would be doing would be coming in again and saying
20 the bylaw's invalid, because it limits the board's
21 power under 157 and under 141. That would be our
22 position.

23 THE COURT: But only after you
24 repealed, presumably.

1 MR. GIUFFRA: Again, I -- I haven't
2 really thought it all through. I think this is --
3 again, we're -- we're the defendant in this case. We
4 didn't come to the Court seeking an advisory ruling.
5 We followed the procedure that other companies have
6 followed with respect to these sorts of impermissible
7 shareholder bylaw proposals. The --

8 THE COURT: Not -- not everyone. Some
9 companies have gone ahead and put these kind of bylaws
10 to a vote, haven't they?

11 MR. GIUFFRA: Yes. And when they've
12 done it, it's been with board approval, and that's the
13 critical difference. Because it's of fundamental
14 critical importance in the corporation, the board must
15 have a role in deciding whether the board's power
16 should be limited. So if you look at a case like News
17 Corp., which is a case repeatedly cited, you have a
18 situation where News Corp. is an Australian
19 corporation, wanted to be incorporated in Delaware.
20 Institutional investors in Australia were concerned
21 about poison pills. And the company agreed to -- to
22 limit its power. And it was a contract case. And --
23 and the Chancellor said the dispute was one of the
24 company's own making, the board's own making because

1 it had -- at least on the -- the assumed facts in that
2 case was that there was a contract.

3 So if the board agrees to do something
4 with the shareholders, yes, the board's powers can be
5 limited. A board can limit its powers by entering
6 into a loan agreement with a bank.

7 THE COURT: Well, forget about the
8 loan agreement. I mean, it's a consent -- you're
9 making a concession about UniSuper in a way. UniSuper
10 is a decision by the Court of Chancery. It's not a
11 Supreme Court decision, and it isn't necessarily true
12 that the Supreme Court would agree, is it?

13 MR. GIUFFRA: Absolutely correct, Your
14 Honor. But I still think that the News Corp. case is
15 distinguishable clearly on the facts here. So I want
16 to just distinguish it for Your Honor's benefit, which
17 is it's a contract case. There's no mention in that
18 decision of 157, nowhere. There's no mention --

19 THE COURT: But it gets back to my
20 question, I think, that could a board authorize a
21 bylaw under 157 be legal. And it is a slightly more
22 different and difficult question to say -- than to say
23 no bylaw could be legal than to say only a bylaw that
24 the board has acquiesced in can. It's a rather

1 different question.

2 MR. GIUFFRA: I mean, I would think
3 that our view would be a board -- if -- if it was a
4 bylaw acquiesced in by the board, you're in a
5 different legal situation than in this case where
6 you're talking about unilateral shareholder action.

7 We think our case is an easy case; and
8 we think Your Honor should decide it and just, you
9 know, sort of resolve -- resolve the issue and sort of
10 draw the line in the sand.

11 So we would ask Your Honor to -- to,
12 you know, grant judgment to -- to CA and hold this --
13 this proposed bylaw is invalid given the relative --
14 relevant statutory scheme in Delaware that it violates
15 157 and 141.

16 THE COURT: Can I take you back to 102
17 and 109 again for a minute?

18 MR. GIUFFRA: Certainly, Your Honor.

19 THE COURT: As I was saying a few
20 minutes ago, the language used in 102 is a good
21 deal -- it's certainly different; and when reading it,
22 one might say broader than the language in 109, where
23 it speaks about creating, limiting, regulating,
24 defining rights and powers of directors versus 109,

1 which only talks about bylaws that relate to the
2 rights or powers.

3 MR. GIUFFRA: Yes. That would be our
4 view, Your Honor, that -- that 102 is a much broader
5 provision permitting, as it says on its face,
6 "amendments to the certificate that define, limit, and
7 regulate the powers of the directors." And so the
8 genius of the corporation law is that in a certificate
9 of incorporation, the incorporators or the
10 shareholders and directors can amend the certificate
11 and -- and, in fact, micromanage what the directors
12 can do to some extent.

13 But that's not 109. 109 is a
14 provision that talks about "relating to," and we
15 believe that that provision needs to be read in the
16 context of 141 where "bylaw" is repeatedly used. And
17 I think what they're attempting to do under 109 is not
18 something that can be done under 102. And under 102
19 you clearly can outlaw rights plans. And -- and 157
20 says that on its face.

21 THE COURT: Of course. I mean, it
22 talks about rights, but not rights plans.

23 MR. GIUFFRA: Well, point taken, Your
24 Honor.

1 THE COURT: All right. Thank you, Mr.
2 Giuffra.

3 MR. GIUFFRA: Thank you.

4 MR. BARRY: Your Honor, Michael Barry
5 from Grant & Eisenhofer for Professor Lucian Bebchuk.

6 The fundamental question in this case
7 is whether a bylaw that requires a unanimous vote for
8 the directors in order to implement a poison pill and
9 then requires the directors to consider that poison
10 pill on an annual basis violates Delaware law.

11 This is a case that has to be resolved
12 under Section 109. Either the bylaw is valid or it's
13 not. Either Section 109 permits bylaws relating to
14 poison pills or it doesn't. That's the simple
15 question.

16 The -- the defendant here tries to
17 kind of shift the argument by -- by making arguments
18 that are -- shift the focus by making arguments that
19 are both contradictory and in some respects the
20 product of a mishmashing of different provisions of
21 Section 157 in particular.

22 Now, focusing on the -- the phrase
23 "not inconsistent with law" in Section 109, CA argues
24 that because bylaws, or at least bylaws enacted by

1 shareholders, aren't expressly authorized under
2 Section 141(a) and 14 -- and 157, that somehow the
3 proposed bylaw here is invalid. But that's not the
4 question. The question isn't whether Sections 157 or
5 141 specifically permit the bylaw. The question is
6 whether or not the -- the proposed bylaw here -- at
7 issue here, that the word -- CA -- that CA really kind
8 of ignores the actual terms. The question is whether
9 or not the proposed bylaw here is inconsistent with
10 141 and 157, not whether they're -- the bylaws are
11 expressly permitted by, but whether or not the
12 proposed bylaw here can be read in harmony with those
13 statutory sections. And it can.

14 And in this regard there are two
15 fundamental points that CA has no response to. The
16 first is that it is clear under Delaware law through
17 the News Corp. case, through the National Intergroup
18 case, that not -- and as they've conceded here at oral
19 argument, that not every limitation on a board's
20 ability to implement a -- a poison pill must appear in
21 the certificate of incorporation. If 157 required
22 that any limitation on a director's ability to
23 implement a poison pill has to be in the certificate
24 of incorporation, then a contract would be void. A

1 contract ceding that responsibility to somebody else
2 would violate Delaware law. It doesn't. That's not
3 what the Court held in News Corp. It didn't address
4 157 in News Corp., but the underlying issue is
5 implicit.

6 The second point that they have no
7 response to is, there is no prohibition under Delaware
8 law from shareholders having any sort of input at all
9 on the general subject matter of poison pills. If
10 there was that provision, News Corp.'s wrong, National
11 Intergroup's wrong. Why? Because both of those cases
12 said that it was a -- a -- shareholder approval could
13 be enforced. In News Corp., for example, the Court
14 approved a settlement that required the -- the
15 shareholder approval and actually precluded certain --
16 certain poison pills for windows over the next 20
17 years. So there's no prohibition under Delaware law
18 for shareholders to have some say.

19 Again, relying on these -- this
20 statutory construction argument, which I'll get to in
21 a minute, CA makes a general policy argument. At the
22 beginning of my -- my able opponent's argument, he
23 said this is a simple case and it doesn't impact a lot
24 of stuff. But then there's an underlying theme that

1 goes through each one of the defendant's arguments
2 here. And the underlying theme that -- it's actually
3 set forth in -- in -- on page 11 of their reply
4 brief -- that directors have unfettered discretion at
5 all on matters of, their term, "fundamental legal
6 significance" and that shareholders can only have
7 input on "certain matters of lesser importance." I
8 don't think that's what the DGCL says. I don't think
9 that's what the legislature intended by enacting the
10 law. The shareholders own the corporation. The
11 directors are responsive to the shareholders.

12 We talk a lot -- there's a lot of talk
13 about directors' rights, directors' powers; but in
14 considering this proposed bylaw and in considering
15 these issues, there's certain things that -- the
16 underlying issues to -- to the theme presented by --
17 by CA here that have to be recognized. They don't
18 have an inherent right, the directors don't have an
19 inherent right to adopt poison pills, to do anything
20 management related. They have a responsibility to the
21 shareholders. They don't have a power to enact it.
22 They have a privilege. And they don't have a --
23 necessarily just a blanket unfettered discretion.
24 They have a fiduciary duty that they have to comply

1 with.

2 Underlying those theories, they --
3 they ignore those points in elevating the directors
4 above the shareholders.

5 THE COURT: This isn't a fiduciary
6 duty case.

7 MR. BARRY: It's not a fiduciary duty.

8 THE COURT: But whether you like it or
9 not, it is a case that deals with rights and powers.

10 MR. BARRY: This case deals with
11 statutory authority, statutory construction. In that
12 regard, I agree with -- with Mr. Giuffra.

13 So let's -- let's start specifically
14 with the statutory construction issue. Any
15 consideration of the proposed bylaw here has to -- has
16 to start with Section 109. It doesn't start with
17 Section 157. It starts with Section 109. And 109(a)
18 makes clear that the authority to adopt and amend
19 bylaws is with the shareholders. They don't dispute
20 that. I think it's -- it's -- it's fairly clear.

21 Also, as the Court identified -- the
22 Section 109(b), which says the terms of -- of bylaws
23 are very, very broad, as the Court identified, not
24 only does it relate to authorized bylaws relating to

1 the business of a corporation, but it also relates.
2 to -- permits bylaws relating to "the rights of
3 directors." So to the extent we're talking about
4 rights, the bylaws specifically contemplate that.

5 Now --

6 THE COURT: What does "relating to"
7 mean in that context?

8 MR. BARRY: What does relating to mean
9 in that context? I think "relating to" means in that
10 context requires the Court to make a judicial
11 determination as to whether the -- the specific bylaw
12 at issue relates to, as -- under -- under Section 109.
13 It is our opinion that "relates to" is a rather
14 broad -- broad -- broad statutory grant. There's no
15 prohibition under certain -- under the -- under
16 Section 109 of any other subject matter, and the
17 question what "relates to" is a question that the
18 Court has to address.

19 THE COURT: All right. Well, I know I
20 do. But in doing that, don't -- isn't it sensible to
21 contrast it and compare that language with the
22 language in 102 that -- that begins with the scope of
23 the charter provisions?

24 MR. BARRY: The scope -- to the extent

1 that there's a necessity to compare and contrast
2 Sections 109 and 102, I will -- the distinction would
3 be that to the extent Section 109 -- 109 could -- a
4 bylaw enacted pursuant to Section 109 completely
5 eviscerates a right otherwise statutorily given to the
6 boards of directors, then perhaps that specific bylaw
7 at issue under Section 109 might -- might raise that
8 distinction. This bylaw doesn't.

9 THE COURT: Where -- where do we get
10 this complete evisceration standard from?

11 MR. BARRY: Well, the -- Section 109
12 says you have to -- Section 109 says "relates to."
13 And Section 102 says --

14 THE COURT: Creating, limiting,
15 defining, or regulating.

16 MR. BARRY: I'm sorry?

17 THE COURT: 102 says charter
18 provisions can create, define, limit, or regulate --
19 or I may be getting the words mixed up, but the duties
20 of directors.

21 MR. BARRY: Yes, it does.

22 THE COURT: 109 talks about bylaws
23 that relate to the duties and rights of directors,
24 presumably the rights and duties that -- one would

1 agree that the rights and duties that are created
2 either in the statute or in the charter.

3 MR. BARRY: Correct.

4 THE COURT: All right. So the charter
5 and the statute create the rights of duties of
6 directors.

7 MR. BARRY: Correct. And --

8 THE COURT: What is it -- what is the
9 scope of operation of a bylaw that presumably cannot
10 create -- I don't know about presumably but arguably
11 can't create, regulate or define but, nevertheless,
12 can relate to that duty. What is the scope of
13 operation of "relating to" in that context?

14 MR. BARRY: Well, I think the two
15 statutes have to be read in harmony; and the only way
16 to read them in harmony -- and you want -- and if it's
17 necessary to erect a distinction between the two -- I
18 don't necessarily think there is; but to the extent
19 there is, then a bylaw that would -- that would
20 completely remove authority from directors that
21 otherwise would be given under Section 102 could be
22 inconsistent. That's not this bylaw. That's not this
23 bylaw.

24 THE COURT: All right. So -- stop

1 right there and tell me where is this complete
2 evisceration, complete removal standard? Where do I
3 -- where does it come from? Is it a case or is it
4 just a -- a logical argument?

5 MR. BARRY: But, frankly, it's a
6 logical argument based on if the Court thinks it's
7 necessary to erect a distinction between the two
8 provisions. I don't think there is. I don't think --
9 because I don't think the Court has to, in -- in
10 resolving this case, has to address the distinction
11 between 102 and 109.

12 THE COURT: Well, how about -- 102
13 says anything that can be in the bylaws can be in the
14 charter. 109 doesn't say anything in the charter can
15 be in the bylaws.

16 MR. BARRY: Agreed. But that doesn't
17 mean that everything in the bylaws has to be
18 specifically permitted by the -- by other provisions
19 of the DGCL. Otherwise, Section 109(b) would be
20 completely superfluous. Section 1 -- the argument
21 that CA has made here, that Section 109(b) requires
22 some sort of enabling statute in other provisions of
23 the DGCL in order to authorize a bylaw on a particular
24 subject, if accepted, would render 109(b) completely

1 irrelevant.

2 The question isn't whether or not it's
3 authorized, a bylaw is authorized by another provision
4 of this -- of the -- of the DGCL, but whether or not
5 the bylaw is inconsistent with another provision of
6 the DGCL.

7 THE COURT: Well, do you agree with
8 Vice Chancellor Strine's decision in -- and I'm sure
9 he was referring to some other authority -- that
10 certain forms of language used in the statute are
11 magic words, as he said, can be interpreted as bylaw
12 excluders?

13 MR. BARRY: Certain -- certain
14 language based on the construction of certain
15 statutes, it could be that -- that certain language
16 could be bylaw excluders. For example, the right to
17 amend the bylaws has to be given to the directors in
18 the certificate of incorporation. Now, that -- the
19 language in -- in that provision, I would submit, is
20 bylaw limiting. You can't adopt a bylaw to give the
21 directors the rights to amend the bylaws.

22 THE COURT: Right. Well, that's --

23 MR. BARRY: Other provisions contain
24 certain language -- similar language.

1 THE COURT: How about 228?

2 MR. BARRY: (Reviewing)

3 THE COURT: It says, "Unless otherwise
4 provided in the certificate of incorporation" and has
5 been interpreted by the Supreme Court, consistent with
6 the meaning that you can't -- can't be done by bylaw.

7 MR. BARRY: I don't -- I don't
8 disagree with that. I'm not challenging the Supreme
9 Court's holding in that regard. And that particular
10 statute, with the language of that particular statute
11 perhaps yes, unless "otherwise provided in the
12 certificate of incorporation," is bylaw limiting. But
13 that's not what we're talking here. We're talking
14 about 157.

15 THE COURT: Which says "Subject to."

16 MR. BARRY: Well, 157 --

17 THE COURT: It says, "Subject to any
18 provision in the certificate of incorporation." Now,
19 is that -- do I have to interpret that differently
20 than 228?

21 MR. BARRY: Well, let's actually look
22 specifically at 157. Section 157 says in sub -- in
23 sub paragraph (a), "Subject to any" limitation "in the
24 certificate of incorporation, every corporation," not

1 the board; every corporation has the right to -- may
2 create, issue stock rights, and such -- such right --
3 and -- and such rights must be in a form that is in
4 writing and is approved by the board of directors.
5 That's the holding of the Grimes case. No more, no
6 less. The terms of these rights are -- are set forth
7 in subparagraph (b). This is the distinction I was
8 telling you that the -- the defendants have ignored.

9 There is no -- the -- that language,
10 that "Subject to any provision in the certificate of
11 incorporation," does not appear in sub -- subparagraph
12 (b). What it does say --

13 THE COURT: But something else does.

14 MR. BARRY: Well, what it does say is
15 that any provision -- any stockholders' rights adopted
16 shall have terms as shall be set forth in either the
17 certificate of incorporation or a resolution adopted
18 by the -- by the board.

19 THE COURT: And do we know -- do we
20 know where that second phrase came from and when it
21 came into the statute?

22 MR. BARRY: I do not, Your Honor.

23 THE COURT: Has anyone researched that
24 question?

1 (No response)

2 THE COURT: I only ask, because it
3 strikes me as probably language that was intended to
4 permit the creation by a charter blank check preferred
5 power.

6 MR. BARRY: I'm sorry. I didn't --

7 THE COURT: Blank check preferred
8 power.

9 MR. BARRY: Uh-huh.

10 THE COURT: A board can issue
11 securities and the terms of which were not established
12 in the certificate of incorporation. And so,
13 therefore, it would be established by the board in
14 their resolution.

15 MR. BARRY: Correct.

16 THE COURT: That was adopted pursuant
17 to the power delegated to the board in the
18 certificate.

19 MR. BARRY: Correct. But on the other
20 hand -- and in that regard I can trust a different --
21 another -- another statute, for example.

22 But let -- let me focus specifically
23 for the minute on the phrase "in the certificate or
24 resolution." This is the fundamental point of our

1 disagreement. We say that any resolution that -- they
2 say that this means any resolution is -- is free game,
3 they can do anything they want. We say any resolution
4 that the board -- that the board adopts always is
5 subject to the bylaws of the corporation. That's
6 the -- that's the fundamental distinction. They say
7 the resolution in Section 157 somehow precludes the
8 use of the term "resolution" in 157, precludes the
9 adoption of a bylaw on the subject --

10 THE COURT: Well --

11 MR. BARRY: -- because they say it's
12 inconsistent.

13 THE COURT: First, I mean, what I said
14 "blank check," is obviously, for purposes of our
15 discussion, deals with the issuance of shares. Now,
16 it's an analogous concept in terms of issuing rights
17 so that you have a power to issue rights, the
18 termination of which are not fixed in the statute, but
19 would be fixed by the board of directors pursuant to
20 delegated authority.

21 Now, I think that's what it stands
22 for. Now, I may be --

23 MR. BARRY: Well, yes, but -- and yes,
24 they have the authority to do -- to adopt it by

1 resolution. As a matter of fact, shareholders don't
2 have the authority to adopt the terms by resolution.
3 The directors have to do it by resolution, and it has
4 to be in writing and has to be approved the board.
5 That doesn't mean, however, in adopting that
6 resolution the board is free to disregard the bylaws
7 of the corporation.

8 Anytime the board adopts a resolution,
9 they're always governed by the -- by the bylaws. For
10 example, in -- and I -- one of the -- the --
11 disadvantages of not being able to brief last is, I'm
12 missing some authority. May I identify this case --

13 THE COURT: The situation -- the
14 position that you put yourself in, I might add.

15 MR. BARRY: That -- that may be true.
16 But in -- in Russell versus Morris, Chancery Court
17 1990 Westlaw 15618 -- may I?

18 THE COURT: You may.

19 MR. BARRY: This case involved a sale
20 of all or substantially all of the corporation's
21 assets under Section 271. Section 271 required that a
22 board have a meeting, make a resolution, and recommend
23 it to the shareholders before the vote. In that case
24 they had the meeting, they did the -- they made the

1 resolution, and they -- and they recommended for
2 shareholder vote; but the Court declared that that
3 meeting, that resolution was invalid because it didn't
4 comply with the bylaws.

5 THE COURT: In what respect?

6 MR. BARRY: Because the bylaws at
7 issue in that particular case required five days'
8 notice before they had the meeting. And because the
9 bylaws required five days' notice before they had the
10 meeting, the resolution adopted, which was, subject to
11 the bylaws, was -- was invalid.

12 THE COURT: All right. Of course.
13 And if they had -- the bylaws said you have to have a
14 60 percent vote and they only had a 40 percent vote,
15 it would have been adopted obviously as well.

16 MR. BARRY: Right. The simple
17 point -- the simple point is that board resolutions
18 are -- are subject to bylaw provisions.

19 THE COURT: Right. But the point is
20 rather --

21 MR. BARRY: The distinction --

22 THE COURT: The point is rather too
23 simple.

24 MR. BARRY: It is too simple. As a

1 matter of fact, it's rather straightforward. But the
2 distinction that -- that has to be drawn has to be
3 contrasted with Section 151. Section 151 requires
4 that a -- where's the statute book? Section 151
5 requires "with regard to" is the establishment of
6 classes of stock that has to be in the certificate of
7 incorporation or by resolution of the board pursuant
8 to authority expressly granted in the certificate of
9 incorporation. That arguably could be read as bylaw
10 excluding, because a bylaw that would be contrary to
11 the certificate of incorporation would also be
12 invalid.

13 So to the extent the bylaw would limit
14 the ability of a director to issue stock classes
15 beyond -- or somehow limited than otherwise provided
16 in the certificate, that would be invalid. That's not
17 what Section 157 says. It simply says "by
18 resolution."

19 And as the Hollinger Court made clear,
20 you can't -- a board can't simply override a bylaw by
21 resolution. If that was the case, then the
22 prohibition -- or the requirement that any right of
23 the board to be -- to amend bylaws be set forth in the
24 certificate of incorporation would be irrelevant. The

1 board could simply override a bylaw by adopting a
2 resolution. By definition, resolutions are subject to
3 the bylaws.

4 So let's -- let's actually consider
5 whether the particular bylaw at issue here actually
6 conflicts with Section 157. It doesn't. Section
7 157(a) says it has to be in the -- that the right to
8 issue has to be in the certificate or it has to be
9 adopted by a resolution by the board and in writing.
10 The -- the proposed bylaw here doesn't change that.

11 This subsection (b) says that it has
12 to be -- that the -- the terms can be set forth in the
13 certificate or by resolution. The bylaw here doesn't
14 do that, either. What the bylaw here only does, is,
15 it says after a year you got to consider it again.
16 The bylaw expressly says that the -- that the board,
17 in effect, can keep a bylaw -- a poison pill in place
18 in perpetuity by simply electing next year to renew
19 it.

20 THE COURT: Well, I mean, your -- I'm
21 not sure I can accept fully your characterization of
22 your own bylaw. As I read it, it actually limits the
23 term of any -- any rights plan that the board may
24 adopt to one year.

1 MR. BARRY: It limits the rights plan
2 of any board --

3 THE COURT: Doesn't require the board
4 to review it annually, as you say. The board could
5 adopt it for one year and never review it again.

6 MR. BARRY: And that's entirely
7 correct. But if they wanted to extend it, they could.
8 There's no prohibition. The supporting statement
9 actually made that clear. And, in fact, as the Court
10 alluded to --

11 THE COURT: It would have to do so
12 again by unanimous vote.

13 MR. BARRY: Exactly. And as the Court
14 alluded to, the -- this bylaw itself says if they
15 think it breaches their fiduciary duties, they can
16 repeal it.

17 THE COURT: By unanimous vote.

18 MR. BARRY: By unanimous vote. And --

19 THE COURT: But the -- I mean, face up
20 to it. It says they can only have a rights plan of a
21 year's duration.

22 MR. BARRY: Yes, it does. Yes, it
23 does. And, on the other hand, that's not inconsistent
24 with their fiduciary duties, either. Both

1 Quickturn --

2 THE COURT: We're not talking about
3 fiduciary duties.

4 MR. BARRY: Yes. But it's not
5 inconsistent with Section 1 -- 157.

6 THE COURT: Why not?

7 MR. BARRY: It's not inconsistent with
8 Section 157, because the -- the -- there's no limit in
9 the certificate that says it can be -- that it must be
10 of unlimited duration. There's no limit that this
11 bylaw wouldn't purport to issue a right itself; and in
12 adopting any resolution, the board is always going to
13 be subject to the bylaws. So simply because a
14 bylaw --

15 THE COURT: The question, then, is:
16 Can a bylaw adopted by the stockholders impose a -- a
17 constriction upon the power of the board to determine
18 the duration of the rights plan?

19 MR. BARRY: Yes.

20 THE COURT: That's the question.

21 MR. BARRY: Yes. And there is no
22 prohibition under Section 157 that -- that -- that
23 would prevent the shareholders from adopting a bylaw
24 or prohibit a bylaw on that subject at all.

1 THE COURT: Well, could --

2 MR. BARRY: Regardless of who adopted
3 it.

4 THE COURT: Could a bylaw require that
5 the pricing terms of a rights term be as specified in
6 a bylaw?

7 MR. BARRY: No. And I think that's a
8 very good distinction, and that's a distinction CA has
9 ignored, and I think it's a distinction that I think
10 you pointed out to. Section 157, the last
11 paragraph -- Section 157(b) has a -- first there's an
12 initial sentence about the terms, and that's the
13 terms -- the section that they're relying on, talking
14 about a limited and unlimited duration. But the last
15 paragraph says that "In the" -- "In the absence of
16 actual fraud in the transaction, the judgment of the
17 directors as to the consideration" of "the issuance of
18 such rights" and "options ... shall be conclusive."
19 That would seem to indicate that -- or at least
20 provide a basis for -- that shareholders can affect
21 the consideration. Notably that similar language
22 isn't in the first paragraph of subsection (b).

23 THE COURT: But, you know, as I
24 understand rights plans, that -- we're talking about

1 consideration for the issuance of a rights for the
2 option.

3 MR. BARRY: Yes.

4 THE COURT: And when a rights plan is
5 issued basically for zero consideration, it's
6 dividended out to the stockholders.

7 MR. BARRY: Yes.

8 THE COURT: The question isn't what
9 the consideration is for the issuance of the right.
10 The question is can a bylaw adopted by stockholders
11 provide that the power of directors to determine in
12 their judgment not only the duration but the other
13 terms upon which it is to be issued.

14 For example, and most -- the question
15 I was trying to ask before is sort of the conversion
16 price of the preferred stock of the debt or whatever,
17 usually the 2 to 3, 4 to 1 conversion rights. Could
18 you specify that the exercise price in all
19 circumstances must be equal to market? By bylaw,
20 could you -- could you say to the directors "You may
21 issue any rights plan you want except it can't have
22 any dilutive effect"?

23 MR. BARRY: That's -- well, first off,
24 I don't -- that's not this bylaw. There may be

1 restrictions on that kind of bylaw. And the entire
2 argument that there's no limiting principle in -- in
3 Professor Bebchuk's proposal is -- is simply
4 incorrect. There are limiting principles. The
5 limiting principles are specifically -- we both -- we,
6 through the DGCL, were specific and through, as the
7 Hollinger Court noted, principles of equity.

8 So to the extent some day the Court is
9 presented with a bylaw that overly restricts or
10 prohibits the directors from issuing any poison pill
11 or purports to define the conversion rate of a
12 particular right, then that might -- that might be a
13 different case. That's not this case.

14 THE COURT: Why is it different? I
15 mean, is that a different -- why would it present a
16 different question under 157? is what I want to know.

17 MR. BARRY: Presents a different
18 question under 157, because then the -- the extent to
19 which the -- the directors can be restricted in
20 defining the terms might be -- might be overly
21 impacted.

22 I would submit that a one-year term
23 isn't overly impacted, especially when the proposed
24 bylaw at issue here specifically says if, at the end

1 of the one year, they could renew it or, more
2 importantly, if they think they need to -- adopt one
3 that's longer, they can repeal the bylaw.

4 THE COURT: If they think they need a
5 longer one, they can repeal it?

6 MR. BARRY: It says so in the -- in
7 the bylaw itself, that to the extent the board deems
8 it necessary to adopt a longer period of poison pill
9 or they think this bylaw is inconsistent with the
10 fiduciary duties, the bylaw says --

11 THE COURT: They can repeal the bylaw.

12 MR. BARRY: The bylaw -- they can
13 repeal the bylaw and then up -- and then up to, with
14 -- consistent with their fiduciary duties, adopt a
15 longer term.

16 THE COURT: Well, which gets me to the
17 issue I asked Mr. Giuffra and I should ask you. Why
18 is this case ripe?

19 MR. BARRY: That's -- and I
20 actually -- the -- Mr. -- Professor Bebchuk submitted
21 a -- a shareholder proposal under SEC Rule 14A. This
22 brings up some federal issues, but I have to explain
23 the background a little bit.

24 The -- under -- under Rule -- SEC Rule

1 14A, provided he satisfied the eligibility procedural
2 requirements, the corporation has to prevent -- has to
3 publish this proposal unless, and it's unless one of
4 13 exclusions apply.

5 There -- the -- the law is clear on
6 the federal side, that if a properly-submitted bylaw
7 is wrongfully excluded, that's irreparable injury.
8 New York Employees Retirement System versus American
9 Brand, 634 F. Supp. 1382, Southern District of New
10 York 1986.

11 This case is ripe, because we say this
12 is a valid bylaw. They say, "It's an invalid bylaw
13 and I'm going to exclude it." To the -- the -- the
14 case is ripe, because the injury to Professor Bebchuk
15 is imminent. If they publish their statement and it's
16 excluded, Professor Bebchuk is irreparably injured.
17 We're not asking for an advisory opinion specifically
18 because they've already said they're going to exclude
19 it. The fact that the SEC -- the SEC's division of
20 corporation finance hasn't issued an opinion -- an
21 opinion letter is irrelevant. It's an advisory
22 letter, anyway. Once they -- once they make the
23 statement that they are going to exclude it, that
24 gives rise to a threat of irreparable injury for

1 Professor Bebchuk.

2 This very issue --

3 THE COURT: You're right. They made
4 that statement in the context of the letter -- of the
5 no-action letter request presumably.

6 MR. BARRY: It was in the context of a
7 no-action letter request --

8 THE COURT: If the no-action letter
9 request --

10 MR. BARRY: -- "We hereby state our
11 intention" --

12 THE COURT: If the no-action letter
13 request is denied by the SEC, there's no indication,
14 is there, that they plan to exclude the -- the
15 proposal from their proxy material?

16 MR. BARRY: They haven't -- there's no
17 evidence that they would. The only evidence that we
18 have, based on the stipulated facts, is that they
19 intend to do it. They intend to exclude it. And once
20 they make that statement they intend to exclude,
21 there's no suggestion here, and there's been no
22 evidence presented from anybody else saying, that they
23 might some day put it in or "We might change our minds
24 now." Once they've said that "We are going to

1 exclude," that's -- those are the stipulated facts
2 before the Court, and that's why this case is an
3 advisory, because the threat of irreparable injury
4 from the wrongful exclusion of a shareholder proposal
5 is ripe. The question that the Court has to address
6 is whether or not the exclusion would be wrongful.
7 And in that respect, the only issue that is before the
8 Court is a pure state law issue.

9 THE COURT: That isn't really the
10 question I'm being asked to address.

11 MR. BARRY: It's not the question
12 you're being asked to address. You're being asked to
13 address -- the underlying question is whether it's
14 wrongful; but the only reason they advanced to exclude
15 it is that -- its alleged invalidity under state law.
16 That's why -- that's why it's relevant to the -- to
17 the Court of Chancery and why it's ripe at this time.

18 Now, News Corp. and these other
19 companies have -- have made -- these other companies'
20 bylaws have made clear that restrictions on directors'
21 abilities to implement poison pills don't have to be
22 just in the certificate of incorporation. They admit
23 they can do it by contract. They attempt to
24 distinguish News Corp. and -- and the National

1 Intergroup case by claiming "Oh, that's a contract
2 case where the board acquiesced to it." There's no
3 support in -- for that argument in Section 157. As a
4 matter of fact, bylaws, last I checked, were
5 considered a contract between the -- the corporation,
6 the directors, and -- and the shareholders.

7 So to the extent that they're raising
8 a distinction based on News Corp. being a contract,
9 it -- and then this being a bylaw, that's a
10 distinction without a difference.

11 THE COURT: Well, the distinction that
12 interests me is that both the News Corp. -- the
13 UniSuper case and the National Intergroup case, the --
14 the facts involved the board acting itself to approve
15 or authorize the term of a resolution or a bylaw that
16 had the effect of limiting its discretion to adopt
17 poison pills in the future.

18 MR. BARRY: Correct. Correct. But
19 the terms -- but whether or not the bylaw's valid --

20 THE COURT: The question I'm being
21 asked here is -- I'm sorry --

22 MR. BARRY: Certainly.

23 THE COURT: -- is whether that kind of
24 limitation can be imposed upon the board unilaterally

1 by stockholder action.

2 MR. BARRY: Section 10 -- Section 109
3 and the DGCL in general doesn't draw a distinction
4 between bylaws that are adopted by shareholders and
5 bylaws adopted by a board. Either the bylaw's valid
6 or it isn't. If the board can adopt a bylaw, the
7 shareholders can adopt a bylaw.

8 THE COURT: Why -- is there anything
9 that says that's true? Is there any case that's ever
10 said that's true?

11 MR. BARRY: There's no case that's
12 ever drawn a distinction between -- that has
13 invalidated a bylaw based on the fact that it can't be
14 adopted by the shareholders but it can be adopted by
15 the directors. That's a distinction that is nowhere
16 in the history of Delaware jurisprudence that they're
17 trying to draw here, and they're trying to draw it
18 based on the argument that anything in subchapter 5
19 can't be affected by bylaws. But there's nothing in
20 subchapter 5 that says "Thou shalt not enact bylaws
21 relating to anything in subchapter 5." As a matter of
22 fact, several companies I pointed out have them.
23 They've submitted they can do it by -- by -- by
24 resolution, and they've admitted they can do it by

1 policy. So there's -- there's no -- there's no line
2 in the sand for Section 1 -- for subchapter 5 that
3 prevents bylaws on the subject.

4 THE COURT: It's not the kind of
5 admission that gets by my ears.

6 MR. BARRY: I'm sorry?

7 THE COURT: It's not an admission of a
8 party before me. So it is in some corporeal sense an
9 admission, a concession, a surrender; but it doesn't
10 answer the legal question.

11 MR. BARRY: Which is whether or not
12 section -- anything in subchapter -- subchapter 5
13 permits bylaws? I would submit that there's nothing
14 in subchapter 5 that blanketly prohibits them and,
15 instead, you have to look at the various specific
16 statutes. There's no blanket prohibition.

17 And where the Court -- where the
18 legislature has been clear that director resolutions
19 can only be effected through the certificate, they
20 have. In this particular instance they simply say "in
21 the certificate or resolution." And resolutions
22 historically can be subject to the bylaws.

23 Moving from -- from Section 157,
24 they -- well, because it's their -- their argument

1. that any restriction on director authority has to be
2 in the certificate of incorporation, is simply
3 inconsistent with the idea that they can do it by
4 contract and they can do it through resolution --
5 through -- through policy and per -- perhaps a bylaw
6 adopted by the -- by the directors. That -- that --
7 that really kind of distills the fact that any
8 limitation doesn't have to be in the certificate. So
9 the question is whether or not it's inconsistent with
10 law, and that brings us to Section 141(a).

11 Their argument under Section 141(a),
12 again, this has been -- been -- been rejected by -- by
13 the -- by the Court in News Corp. and also in -- and
14 also by -- by this Court in Hollinger. By arguing
15 that all things management related can only be
16 addressed by the -- by the -- by the board, they
17 ignore the language in Section 150 -- 141 that -- that
18 says that such -- such authority may be limited "as
19 otherwise provided in the chapter" or the certificate
20 of incorporation. Section 109, being the same chapter
21 as -- as Section 141, implies that Section -- that
22 bylaws under Section -- enacted under Section 109 can,
23 in fact, impact directorial authority under Section
24 141(a). That's specifically what the Court stated in

1 Hollinger where the Court said that "Sections 109 and
2 141, taken in totality and read in light of the Frantz
3 opinion, made clear that bylaws made pervasively and
4 strictly regulate the process by which boards act
5 subject to the constraints of equity."

6 The process that --

7 THE COURT: Where there is process.

8 MR. BARRY: Yes. And the process that
9 is being imposed here is that they consider the issue
10 at least on an annual basis. And the way to do it is
11 to provide that the -- that the terms of -- that the
12 plans -- that the terms of any plan that they adopt --
13 and they can adopt as many plans with whatever terms
14 they want -- would simply expire at the end of one
15 year. If they want to adopt a new one, they can do
16 so. And if they want to repeal the bylaw, they can do
17 so.

18 The limitation on the -- the
19 limitation on the discretion that is created by this
20 proposed bylaw I would submit is rather discrete. It
21 doesn't take away all discretion. It doesn't put the
22 discretion for adopting the pill in anyone other than
23 the board. It doesn't purport to issue rights itself.
24 It simply provides the -- the bounds within which the

1 directors can exercise their discretion. And that's
2 why, to the extent that the bylaws can form the
3 contract between the corporation, stockholders and the
4 directors, it always can set those -- those -- those
5 limits. It doesn't necessarily --

6 THE COURT: In other words, you
7 interpret this as meaning basically the same thing as
8 the bylaw that said you can adopt any poison pill you
9 like, but annually the board of directors must meet
10 and annually must reaffirm in some way, whether it's
11 by considering whether or not to redeem or something
12 else, and then setting the vote so that what?

13 MR. BARRY: There -- there would be --

14 THE COURT: Unanimously approve -- if
15 you don't unanimously determine to keep it going, then
16 you must redeem it? Is this -- is this just a way to
17 get around the cases that have talked about
18 redemption?

19 MR. BARRY: Well, regarding the -- the
20 a board's decision to redeem a rights plan? No, it's
21 not. And it -- and it doesn't have to be seen that
22 way.

23 It -- the bylaw at issue simply
24 sets -- sets a limit, it sets a time limit, one year.

1 It doesn't necessarily -- because it doesn't require
2 the affirmative act of redeeming, that perhaps could
3 impact -- could be improper. And for the same reason
4 that a bylaw that would issue rights in and of itself
5 or bylaw that says "We hereby redeem," that also might
6 be inconsistent. But a bylaw that simply provides
7 the -- the groundwork or the -- the terms within
8 which -- or the parameters within which the board can
9 act, that doesn't. And I think there's a very
10 important distinction.

11 THE COURT: What I'm just getting at
12 is, your argument is that this, what might have
13 been -- might be viewed as a terminal provision, is
14 really just a process provision.

15 MR. BARRY: Exactly. And it's a
16 process provision, because it simply requires them
17 to -- to vote annually.

18 Now, importantly -- and this is the --
19 this is the distinction between what -- what you were
20 suggesting -- I'm not suggesting and Professor Bebchuk
21 is not suggesting -- that -- that shareholders can
22 simply vote to redeem a pill. Shareholders also can't
23 vote to issue a pill. The decision to redeem or the
24 decision to adopt is exclusively within the board --

1 within the board -- within the board's province.

2 That's what Section 157 says. It doesn't --

3 THE COURT: Could you adopt a pill
4 in -- in your argument, consistent with your argument,
5 that said that when a board is asked to redeem the
6 pill by shareholders having 10 percent of the stock
7 which it must, within a certain amount of time, meet
8 and these are the only two things it can consider as
9 to whether or not the pill should be redeemed,
10 specifically whether the offer is, you know, all cash,
11 all shares, that sort of thing?

12 MR. BARRY: No.

13 THE COURT: Why not?

14 MR. BARRY: Because, and most
15 importantly, I -- I suggest -- I submit, a proposal
16 requiring them to meet might be -- might be
17 permissible. It's not our bylaw. It might be
18 permissible. But to the extent a proposal -- a
19 proposed bylaw that would say you can only consider X,
20 Y, and Z, that perhaps would unlawfully restrict the
21 business judgment of the board. And, again, that's
22 not our bylaw, but that in theory could be that
23 limiting principle that -- that CA is arguing for
24 here. That -- or -- or that CA is arguing is absent

1 here.

2 There are limitations on how far
3 bylaws can go. This case doesn't present that. It
4 doesn't -- it doesn't restrict the -- the business
5 judgment of the -- of the -- of the board in adopting
6 a pill, subject to doing it annually. It doesn't say
7 what they can or can't consider, and it doesn't
8 purport to issue rights in and of itself. It doesn't
9 violate Section 157, because it doesn't excuse or
10 permit the issuance of rights without board approval
11 or without a written instrument. That's the --
12 those -- that's what the focus is of the Grimes case,
13 and that's exactly how the Grimes case distilled
14 Section 157.

15 THE COURT: Do -- do you think that
16 after this you're going to have to convince me that
17 this is a process bylaw?

18 MR. BARRY: I do not. I do not. I
19 don't think, because Section 141(a) doesn't restrict
20 things to process.

21 The language used by the Court in
22 Hollinger certainly used that language. But -- but
23 Section 14 -- 109 doesn't restrict bylaws that relate
24 to process. It simply -- it says, restricts bylaws

1 that relate "to the business of the corporation, the
2 conduct of its affairs," or the rights of its
3 officers, agents, stockholders, directors.

4 So as a result, it doesn't have to
5 relate to process. In this particular instance I
6 believe it does, but I don't have to convince the
7 Court that it does in order to prevail here.

8 I wanted to point out really quickly
9 the -- the -- the -- the -- the Court's opinion in --
10 the In Re Hilton Hotels case, the Hilton Hotels case,
11 that they rely on for the proposition that
12 shareholder -- that directors have the exclusive
13 authority to adopt pills.

14 The important aspect of that case was
15 that there were basically -- there were at least two
16 issues involved. The first was the facial invalidity,
17 the alleged facial invalidity of the pill. And
18 that's -- that's, of course, the Court's holding that
19 they address. And the Court -- and the Court held
20 un -- rather uncontroversially that boards have the
21 authority to adopt pills.

22 The second point that the Court
23 addressed is whether or not that particular pill
24 violated Hilton Hotels bylaws. Ultimately it held

1 that it didn't, but the fact that the Court considered
2 it implies that it was necessary that the bylaw had to
3 be -- that the poison pill had to be considered with
4 respect to the bylaw of that particular corporation.

5 THE COURT: I don't recall now
6 exactly. What was the issue under the bylaw?

7 MR. BARRY: The issue under ... the --
8 the bylaws of Hilton required that "every holder of
9 stock in a corporation shall be entitled to have a
10 certificate certifying the number of shares owned by
11 the shareholders of such corporation."

12 The plaintiffs in that case argued
13 that the particular bylaw at issue, which attached
14 certain restrictions on the stock, didn't comply with
15 that bylaw. That's why the -- I -- I don't disagree
16 with the Court's holding that it did, in fact, comply
17 with the bylaw; but because of the fact -- the mere
18 fact that the Court considered the consistency of --
19 of the -- of the specific bylaw with -- with the
20 poison pill at issue demonstrates the Court's
21 consideration or appreciation of the relationship
22 between the bylaws and -- and the poison pills.

23 With that, Your Honor, if you have any
24 further questions.

1 Oh. I did want to make one other
2 point. The -- back to the lines that we're drawing.
3 The Christmas meeting in Antarctica is a little
4 absurd. The -- as -- as the Court --

5 THE COURT: Well, I'm thinking in
6 another 50 years it won't seem so --

7 MR. BARRY: Yeah, right.

8 But -- but, as again, the Court made
9 clear in Hollinger that equity always provides a
10 limitation. So the -- the fear of -- of the slippery
11 slope that the defendants are arguing, it's always
12 going to be constrained by both other provisions of
13 the DGCL and -- and -- and considerations of equity.

14 THE COURT: Well, I mean, this gets
15 back briefly to my ripeness question. The good
16 judgment of people who own corporations themselves
17 often provide some other limitation on other issues I
18 have to consider, in that provisions that, as you
19 suggest, probably would never be adopted.

20 MR. BARRY: And as a matter of fact,
21 let me make a point about that. This isn't quite --
22 this isn't a question about whether or not the bylaw
23 is a good idea. A similar bylaw was introduced at
24 Hollinger and roundly defeated. So it's not a

1 question of whether or not the bylaw is a good idea
2 but whether or not it's legal under Delaware law.

3 THE COURT: Thank you, Mr. Barry.

4 MR. BARRY: Thank you.

5 (Pause in the proceedings)

6 THE COURT: Now you may proceed.

7 MR. GIUFFRA: Your Honor, this case
8 presents a question of the board's statutory power
9 under 157. And the question is how and -- that power
10 can be limited. Under 157 on its face, it says the
11 board has the statutory power to create rights plans
12 of unlimited duration subject to the certificate of
13 incorporation.

14 And I think there is a way, which is
15 quite straightforward, to reconcile 102, 109, and 157.
16 And that is, if you want to limit the board's
17 statutory power, that process must be done by amending
18 the charter. And in 102, the General Assembly
19 provided that you could define, limit, and regulate
20 the powers of the board, the substantive powers of the
21 board. And we would submit that it is a substantive
22 power of the board to determine the length of a rights
23 plan.

24 109 talks about relating to board

1 power. That's different than defining, limiting, or
2 regulating. And the fact that in a number of
3 provisions in the corporation law, and most
4 specifically 141 where the word "bylaw" appears, those
5 -- the use of the word "bylaw" in those provisions
6 must have some legal significance or otherwise it
7 would be mere surplusage. And so --

8 THE COURT: You might say the same
9 thing about 109. I mean, is there -- can you think of
10 some exercise of power under 109 relating to the
11 rights or powers of the board of directors beyond
12 those that are specifically provided for in other
13 sections of the DGCL that would be permissible?

14 MR. GIUFFRA: I mean, for example, you
15 know, if -- if someone wanted to have communications
16 amongst the board by e-mail, a procedural matter, that
17 doesn't affect the board's substantive powers, that
18 might be permissible. But what we're talking about is
19 a limitation on a statutorily-granted power to
20 determine the tenure of rights plans. The case that
21 was cited was a procedural case.

22 The other point is, the board has the
23 ability -- and the cases recognize this -- to give up
24 its power by contract, by resolution. They do it by

1 resolution. There might be circumstances where a
2 board could just withdraw the resolution. Again, the
3 board has the power. If you want to limit the board's
4 powers over rights plans, you can do it in their
5 certificate under 102, which obviously requires the
6 board to be involved in that process.

7 The Quickturn case -- it's Delaware
8 Supreme Court 712 at 1291 -- on its face says,
9 "Section 141(a) requires that any limit on the board's
10 authority must be set out in the certificate of
11 incorporation." No reference to bylaws. And we
12 believe that 102 and that process provides the means
13 for limiting board powers.

14 And so we propose I think a reading
15 that harmonizes 102, 109, 141, 157. Doesn't turn
16 words into surplusage. The -- the proposal is one
17 that has no limiting principles. It's not a process
18 provision. It's a limit on a substantive statutory
19 authority.

20 And I think, Your Honor, you need look
21 no further than Professor Bebchuk's brief at page 31
22 where he says "requiring the Board to put the adoption
23 or extension of a poison pill to shareholder vote, it
24 would still be valid under Delaware law." And that,

1 Your Honor, would be a radical, radical departure from
2 years and years and years of cases.

3 And so we submit, Your Honor, that
4 this proposed bylaw on its face violates Delaware law,
5 and would ask Your Honor to give us a -- a judgment to
6 that effect.

7 Thank you.

8 THE COURT: Thank you, Mr. Giuffra.

9 What is -- just remind me what the
10 timing issues are here.

11 MR. GIUFFRA: Our proxy is set to
12 be -- to be sent out on July 14th.

13 THE COURT: And do I understand that
14 if I rule in favor of Professor Bebchuk, that you --
15 it won't be necessary for me to order you to withdraw
16 your no-action request?

17 MR. GIUFFRA: If you rule in Professor
18 Bebchuk's favor, we'll put the proposal in the proxy.

19 THE COURT: But I wouldn't need to
20 enter any sort of injunction. I would just issue a
21 ruling of some sort and you would comply.

22 MR. GIUFFRA: Correct.

23 THE COURT: All right. Thank you.
24 I'll take this under advisement.

(Court adjourned at 11:39 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 82 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 19th day of June 2006.

Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent