**FIN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| LUCIAN A. BEBCHUK, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 2145-N |
| | ) | |
| CA, INC., | ) | |
| | ) | |
| Defendant. | ) | |

# DEFENDANT'S PRE-HEARING REPLY BRIEF


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## PRELIMINARY STATEMENT

Through this action, Professor Lucian Bebchuk ("Plaintiff") seeks judicial authorization to override the plain language of Section 157 of the Delaware General Corporation Law ("DGCL") and decades of Delaware law confirming that boards of directors—not shareholders—manage Delaware corporations, including managing their capital structure and determining the terms of stock options and rights. As the Delaware Supreme Court has explained, Subchapter V of the DGCL, which includes Section 157, "consolidate[s] in [the] board of directors the *exclusive authority* to govern and regulate a corporation's capital structure." *Grimes v. Alteon*, 804 A.2d 256, 260 (Del. 2002) (emphasis added).

Under Plaintiff's proposed bylaw (the "Proposed Bylaw"), CA, Inc.'s Board of Directors (the "Board") could not, in the exercise of its business judgment, approve a rights plan with a duration of more than one year from the date of such approval. Therefore, in direct contravention of Section 157, the Proposed Bylaw would divest the Board of its exclusive statutory authority to set the terms of stock options and rights, including their duration.

Under Section 157(a), "[s]ubject to any provisions in the certificate of incorporation,"[1] a Delaware corporation may issue rights and options respecting stock "*as shall be approved by the board of directors.*" 8 *Del. C.* § 157(a) (emphasis added). Moreover, Section 157(b) expressly provides that the board of directors or the certificate

[1] It is undisputed that CA's certificate of incorporation is silent regarding rights and options plans. *See generally* Asay Aff., Ex. 5.

of incorporation "*shall*" determine "[t]he *terms* upon which, including *the time or times which may be limited or* ***unlimited*** *in duration*, . . . and the consideration . . . for which any such shares may be acquired from the corporation upon the exercise of any such right or option." 8 *Del. C.* § 157(b) (emphasis added). The power of a corporation to adopt a stockholder rights plan derives from Section 157. *See Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985) ("The directors adopted the [rights plan] pursuant to statutory authority in 8 *Del. C.* §§ 141, 151, [and] 157.").

Plaintiff's entire argument relies on Section 109(b), which allows shareholders to propose bylaws "relating to the business of the corporation," but also requires that such proposals may not be "*inconsistent with law.*" (emphasis added.) Plaintiff's brief largely ignores this critical provision, because the Proposed Bylaw is flatly inconsistent with the plain language of Section 157. The Proposed Bylaw does *not*, as stated by Plaintiff, merely require the Board to "consider annually the advisability of keeping any . . . pill in place." (Pl. Br. at 2.) Rather, the Proposed Bylaw requires that rights or options granted by the corporation "*shall expire* no later than one year" after any plan is adopted or last amended. (Pl. Br. at 6 (emphasis added).) But Section 157 expressly authorizes the Board—"subject to any limitations in the certificate of incorporation" but otherwise without limitation or qualification—to issue rights "***unlimited*** in duration."

Plaintiff's expansive reading of Section 109 would require this Court to disregard the language and carefully designed structure of the DGCL. Section 157 permits the creation of rights plans, "subject to any provisions in the certificate of incorporation," upon such terms as "shall" be set by the board of directors or the certificate of

incorporation. Plaintiff's argument that Section 157's silence regarding bylaws "does not preclude bylaws on the subject" (Pl. Br. at 23) ignores that—*unlike* Section 157—other provisions of the DGCL *expressly authorize* limits on Board discretion through both the certificate of incorporation *and* bylaws in specific instances.

The two main cases cited by Plaintiff do not support the legality of his Proposed Bylaw: neither case had anything to do with Section 157 or bylaws. *News Corp.* did not, as Plaintiff asserts (Pl. Br. at 1), "answer[]" the question presented here: whether a shareholder-adopted bylaw can limit a board's statutory power under Section 157 to set the terms of rights plans. Rather, the Court considered whether News Corp.'s board had *contractually* agreed with the company's shareholders not to extend its rights plan in connection with the company's reincorporation in Delaware. Similarly, *National Intergroup* did not enforce a "limitation on [the] board's ability to implement [a] poison pill" imposed by a unilateral shareholder bylaw. (Pl. Br. at 4.) *National Intergroup* instead held that a resolution proposed by shareholders but *supported by the board of directors* amended the contractual terms of the company's existing rights plan in a way that precluded further amendments to that plan.

In addition to the specific grant of power over rights plans in Section 157, the Board's powers to adopt, and fix the terms of, a rights plan flow from Section 141(a), which mandates that "[t]he business and affairs of every corporation . . . *shall be managed* by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 *Del. C.* § 141(a) (emphasis added.)

Plaintiff's theory of Section 109(b) cannot be squared with Section 157 and the years of Delaware law confirming the power of boards under Section 141(a) to manage corporations, particularly in matters of corporate control. Plaintiff's theory of Section 109(b) contains no limiting principle—none. Tellingly, under Plaintiff's extreme theory, a bylaw that "shift[ed] the power over poison pills from the Board to the shareholders, . . . for instance, by requiring the Board to put the adoption or extension of a poison pill to a shareholder vote . . . would still be valid under Delaware law." (Pl. Br. at 31.) Taken to its logical conclusion, Plaintiff's theory would permit shareholder bylaws unilaterally to restrain directors from discharging many, if not most, of their statutory duties.

For example, if the Proposed Bylaw can limit the Board's authority under Section 157, the same logic would let shareholder bylaws micromanage, in contravention of the terms of Subchapter V of the DGCL and the Supreme Court's admonition in *Grimes*, other aspects of a corporation's capital structure such as the terms of preferred stock (DGCL § 151), the form of consideration received by the corporation for an issuance of stock (DGCL § 152), and the terms and duration of employee stock option plans, (DGCL § 157). Similarly, if the Proposed Bylaw lawfully can require that all rights plans expire after one year, similar bylaws could require that such plans expire after a month, a week, or even a day. Indeed, if Plaintiff has his way, shareholders could propose bylaws setting a floor on the exercise price in a rights plan, thereby precluding the very dilution that permits rights plans to act as a takeover defense.

By enacting Section 157, the General Assembly determined that boards should determine the terms of rights plans. The Supreme Court has confirmed that this board

power is "meaningless if [a] rights plan require[s] shareholder approval." *Leonard Loventhal Account v. Hilton Hotels Corp.*, 780 A.2d 245, 249 (Del. 2001). Because the Proposed Bylaw is inconsistent with Section 157's express grant of power to CA's Board, and Section 141's broad grant of authority to CA's Board, this Court should declare the Proposed Bylaw invalid.

## ARGUMENT

### I. THE PROPOSED BYLAW IS "INCONSISTENT WITH" SECTION 157.

#### A. The Proposed Bylaw Unlawfully Would Usurp the Board's Statutory Power Under Section 157(b) To Set the "Terms," Including the "Duration," of a Rights Plan.

Plaintiff "does not dispute that Section 157 grants directors [the] power [to enact a poison pill]." (Pl. Br. at 24.) To save his Proposed Bylaw, Plaintiff claims that his proposal "is entirely consistent with Section 157(a) because it does not take power away from CA to adopt a shareholder rights plan and maintains the requirement that the Board approve such plans." (Pl. Br. at 21.) This is not correct.

Plaintiff's Proposed Bylaw, which requires that "any Stockholder Rights plan . . . and any rights or options provided thereunder *shall expire* no later than one year following the later of the date of its adoption and the date of its last such amendment" (Pl. Br. at 6 (emphasis added)), *substantively* would prohibit the Board from exercising its statutory power under Section 157(b) to adopt a rights plan with a duration of longer than 12 months.[2]

[2] Rights plans commonly exist for far longer than one year, with a typical term being ten years. *See, e.g., Leonard Loventhal Account v. Hilton Hotels Corp.*, 780 A.2d 245, 246 (Del.

By its terms, Section 157(b) grants the Board the power to set the terms, including the "limited or unlimited . . . duration," of any rights to be issued by the corporation:

> The terms upon which, *including the time or times which may be limited or unlimited in duration*, at or within which, and the consideration . . . for which any such shares may be acquired from the corporation . . . *shall be such as shall be stated* in the certificate of incorporation, or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options.

8 *Del. C.* § 157(b) (emphasis added.)

To save his Proposed Bylaw, Plaintiff seeks to rewrite Section 157: "Section 157(b) merely says that the terms of any stock rights *may* be established either by a provision in a corporation's certificate of incorporation or by a resolution adopted by the Board." (Pl. Br. at 22.) But under Section 157(b), the "terms" of any rights plan, including its "limited or unlimited . . . duration," "*shall* be such as shall be stated in the certificate of incorporation, or *in a resolution* adopted by the board of directors."

The Proposed Bylaw does far more than "regulate the process by which boards act." (Pl. Br. at 36, *quoting Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1080 (Del. Ch. 2004).) Although *Hollinger* held that a bylaw could eliminate a board committee created by board resolution, 844 A.2d at 1080, the Court noted that the DGCL expressly allows bylaws to limit the Board's ability to exercise power through committee, *id.* at 1079 & n.131 (*citing* 8 *Del. C.* § 141(c)(2)). By imposing a substantive one-year limit on the

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2001) (ten-year term of rights plan); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1066 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985) (same); Stephen M. Bainbridge, *Precommitment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills*, 29 Iowa J. Corp. L. 1, 9 (2003) (rights issued pursuant to rights plans are typically exercisable for ten years).

duration of any rights plans adopted by the Board, the Proposed Bylaw would eviscerate the Board's statutory power to set the "time or times which may be limited or unlimited in duration" during which rights may be exercised. The Proposed Bylaw is thus "inconsistent with" Delaware law and invalid.

### B. Section 157 Does Not Permit Shareholder Bylaws Limiting the Statutory Power of the Board To Set the "Terms," Including the "Duration," of Rights Plans.

Unlike other sections of the DGCL that *affirmatively permit* modification by bylaw, Section 157, like the other sections of Subchapter V of the DGCL, does not mention bylaws. But Plaintiff's theory that Section 157 may be modified by bylaw because Section 157 does not expressly prohibit that regulation would render those provisions of the DGCL explicitly *authorizing* amendment by bylaw meaningless.[3]

"Words in a statute [should not be construed] as surplusage if there is a reasonable construction [which] will give them meaning . . . and courts must ascribe a purpose to the use of statutory language, if reasonably possible." *New Castle County Dep't of Land Use v. Univ. of Del.*, 842 A.2d 1201, 1207 & n.16 (Del. 2004) (*quoting* Norman A. Singer, *Statutes and Statutory Construction*, § 46.06, at 193 (Rev. 2000)). Here, the "reasonable" reading of the DGCL capable of giving meaning to these authorizations of amendment by bylaw is clear: shareholder bylaws can limit a board's discretion when authorized by

[3] *See, e.g.*, 8 *Del. C.* §§ 141(b), (c)(2), (f), (g), (h), (i); 142(a), (b); 202(b); 211(a)(1).

statute, but not in those areas where limitations may be imposed only by the certificate of incorporation.[4]

Plaintiff also asserts that Section 157 is grammatically "different from other provisions of the DGCL that establish default rules that can *only* be altered in the certificate of incorporation." (Pl. Br. at 22-23 (emphasis in original).) Specifically, Plaintiff identifies several provisions of the DGCL that contain the phrase "unless otherwise provided in the certificate of incorporation," (Pl. Br. at 23 & n.9)[5] rather than the phrases "subject to any limitations in the certificate of incorporation" used in Section 157(a) or "shall be such as shall be stated in the certificate of incorporation" in Section 157(b). Plaintiff then concludes, without analysis or citation to any authority, that because of this difference in phrasing, Section 157 "does not preclude bylaws on the subject." (Pl. Br. at 23.)

Plaintiff's theory appears to rest on *Jones Apparel*, which observed that the phrase "unless otherwise provided in the certificate of incorporation" "can be read as a 'bylaw excluder,' in the sense that those words make clear that the specific grant of authority in

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[4] Plaintiff attempts to rebut this argument by analogy to *Jones Apparel*, an inapposite case discussing whether the certificate of incorporation may limit director discretion without explicit statutory authorization. (*See* Pl. Br. at 15-19, *discussing Jones Apparel Group, Inc. v Maxwell Shoe Co.*, 883 A.2d 837 (Del. Ch. 2004).) But *Jones Apparel* focused on the interplay between Sections 102(b)(1) and 141(a), and the legislative history of the disputed terms. *See id.* at 838. Plaintiff's observation that CA's bylaws address subjects not covered by the DGCL, (Pl. Br. at 18), sheds no light on whether a matter expressly delegated by statute to the Board, subject to limitation only by the certificate of incorporation, may be amended by bylaw in the face of statutory silence.

[5] Plaintiff cites Sections 125 (granting of honorary degrees), 211 (annual meetings and elections), 215 (voting rights of nonstock corporations), 228 (consent of stockholders in lieu of meeting), 243 (retirement of stock), 251 (mergers) and 272 (mortgage or pledge of assets).

that particular statute is one that can be varied only by charter and [not by bylaw]." *Jones Apparel*, 883 A.2d at 848. But Plaintiff does not attempt to explain—using grammar, statutory structure, case law, legislative history, or public policy—how the phrase "unless otherwise provided in the certificate of incorporation" in various provisions of the DGCL that are silent regarding bylaws *prohibits* amendment by bylaw, but the phrase "subject to any limitations in the certificate of incorporation" in Section 157, coupled with silence about bylaws, somehow *permits* amendment by shareholder bylaw.

Moreover, the scattered provisions identified by Plaintiff shed no light on statutes that, like Section 157, appear in Subchapter V of the DGCL. For example, Section 151 uses language almost identical to Section 157(b) in multiple places, stating that classes or series of stock may have such "voting powers . . . and such designations, preferences and . . . qualifications, limitations, or restrictions . . . *as shall be stated and expressed* in the certificate of incorporation . . . or *in the resolution . . . adopted by the board of directors*." 8 *Del. C.* § 151(a) (emphasis added.) In Plaintiff's view, this plain language is not "exclusionary," but, for example, would permit shareholders to adopt bylaws regulating the terms of preferred stock to be issued by the corporation.

Similarly, Section 170 provides that the "directors of every corporation, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends." 8 *Del. C.* § 170(a). Under Plaintiff's theory, stockholders could adopt a bylaw stating that directors could not declare any dividend over a proscribed amount. The DGCL simply does not contemplate a role for shareholders in such matters.

Subchapter V governs the capital structure of the firm. Under Subchapter V, only the certificate of incorporation can limit the statutory power granted to the Board. And, the certificate of incorporation can be amended only with the approval of the Board *and* the shareholders. *See* 8 *Del. C.* § 242(b). Tellingly, the word "bylaw" appears *nowhere* in Subchapter V. This omission is not by accident: "the issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control, and the capital structure of the enterprise." *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991).

In *Grimes*, the Supreme Court emphasized the Board's "exclusive authority" to regulate the capital structure of a corporation:

> One must read *in pari materia* the relevant statutory provisions of the Corporation Law. First there is the fundamental corporate governance principle set forth in [Section] 141(a) that the business and affairs of every corporation . . . shall be managed by and under the direction of the board of directors. One then turns to the board's role in stock issuance set forth in the relevant sections of Subchapter V[6] . . .. Taken together, [Section 141(a) and Subchapter V] are calculated to advance . . . fundamental policies of the Corporation Law [including] *to consolidate in its board of directors the exclusive authority to govern and regulate a corporation's capital structure.*

*Grimes*, 804 A.2d at 260 (emphasis added). *Grimes* further emphasized that, given the "fundamental legal significance" of issuances of corporate stock, Delaware law requires "strict adherence to statutory formality." *Id.* at 260.

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[6] *Grimes* stressed that Sections 151, 152, 153, 157, 161, and 166 provide "policy context" for one another and "confirm the board's exclusive authority to issue stock and regulate a corporation's capital structure." 804 A.2d at 261.

Plaintiff's argument that not just the certificate of incorporation, but also bylaws passed without approval of the Board, can limit the Board's discretion under Section 157 because regulation by bylaw is not expressly prohibited, cannot be squared with the need for "strict adherence to statutory formality" in construing Subchapter V. Although the DGCL expressly permits shareholders to regulate certain matters of lesser importance by bylaw, *e.g.*, 8 *Del. C.* §§ 141(c)(2) (board's authority to exercise power through committee); 211(a)(1) (location of shareholder meetings), the DGCL provides no such role for bylaws in matters of "fundamental legal significance."

The DGCL explicitly allocates authority over fundamental corporate matters to the Board, such as issuance of capital under Section 151, issuance of rights and options under Section 157, and retirement of stock under Section 243. Similarly, without initial Board approval, shareholders may not vote to amend the certificate of incorporation under Section 242(b) or to approve a merger under Section 251.

This statutory scheme cannot be completely rewritten based on an overly broad reading of Section 109(b). If Plaintiff's reading of Section 109(b) as applied to Section 157 rights plans were correct, then by extension bylaws logically could micromanage *any* aspect of a corporation's capital structure,[7] such as:

- The terms, duration, and conditions of grants of employee stock options (DGCL § 157(b) ("The terms upon which . . . any such shares may be

[7] *See, e.g.*, Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 Tul. L. Rev. 409, 432 (1998) ("There is a further concern raised by construing section 109(b) to authorize by-laws limiting director managerial power. If section 109(b) provided such authority, it would be unbounded, at least on its face. The statute would ostensibly allow a by-law to regulate *any* aspect of managing the business and affairs of the corporation, right down to the most minute operational detail.") (emphasis in original).

acquired from the corporation upon the exercise of any such right or option, *shall* be such as *shall* be stated in the certificate of incorporation, or in a resolution adopted by the board of directors") (emphasis added));

- Whether to issue additional authorized but unissued capital stock (DGCL § 161 ("The directors may . . . issue or take subscriptions for additional shares of its capital stock up to the amount authorized in its certificate of incorporation.")); and

- Whether to declare dividends (DGCL § 170(a) ("the directors of every corporation, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends")).

Like Section 157, none of these statutes by their terms contemplate any role for shareholder action or bylaws. Like Section 157, these statutes empower the Board to take action, subject to any restrictions in the certificate of incorporation. And like Section 157, these statutes require that any action *shall* take the form prescribed by the Board or the certificate of incorporation.

### C. Every Case Cited by Plaintiff as "Evidencing" Shareholder Control Over Rights Plans Resulted from Board Action.

The cases and supporting materials presented by Plaintiff stand for the simple and unremarkable proposition that a Board, in the exercise of its discretion, may contractually agree to limit its statutory power over the terms, including the "duration," of rights plans. The two main cases cited by Plaintiff for this proposition involve situations where a board contractually ceded authority to shareholders, but later attempted to renege on its promise. Neither of these cases involved unilateral attempts by shareholders to restrict Board statutory discretion *without* prior Board approval, nor did they address the interplay between Sections 109 and 157.

### 1. *Unisuper Ltd. v. News Corp.*

In *News Corp.*, the Board sought to abrogate alleged contracts previously entered into with shareholders limiting the Board's ability to enact a poison pill. *See Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *6 (Del. Ch. Dec. 20, 2005). The facts alleged in *News Corp.* are entirely distinct from the instant case.

News Corp., an Australian corporation, sought to reincorporate in Delaware. *See id.* at *1. This required the approval of News Corp.'s public shareholders. *See id.* An Australian proxy advisory company and an advisor to Australian pension funds became concerned that "under Delaware law, the Company's board of directors would be able to institute a poison pill without shareholder approval, while under Australian law shareholder approval is required." *Id.* at *1. These Australian firms proposed to News Corp.'s board that the new *Delaware certificate of incorporation* include several corporate-governance initiatives, including a restriction on the board's ability to issue a poison pill without shareholder approval. *See id.* at *1-2.

News Corp.'s board agreed to adopt several of these proposals but refused to add a "poison pill" provision to the certificate of incorporation. *See id.* at *2-3. Instead, in an effort to garner shareholder support for the proposed reincorporation, the board stated that it would adopt a "board policy" that any rights plans enacted by the board without shareholder approval would expire after one year, unless ratified by shareholders. *See id.* at *3. Weeks later, the reincorporation was approved by News Corp's shareholders. *See id.*

Two weeks after the reincorporation, News Corp.'s board adopted a poison pill, without shareholder approval. *See id.* The board then announced that its policy might not apply in the future, but that its application would depend on whether the policy was "appropriate in light of the facts and circumstances existing at such time." *Id.* One year later, News Corp.'s board extended the poison pill without a shareholder vote. *See id.*

Certain News Corp. shareholders sued, alleging, *inter alia,* breach of contract and promissory estoppel. The Court observed that "any contract a board could enter into binds the board and thereby limits its power. Section 141(a) does not say the board cannot enter into contracts. It simply describes who will manage the affairs of the corporation and it precludes a board of directors from *ceding that power* to outside groups or individuals." *Id.* at *6 (emphasis added.) Although observing that "a promise to adopt a board policy . . . is a more transitory right than a charter provision," *id.* at *4 n.39, the Court refused to dismiss plaintiffs' claims for breach of contract and promissory estoppel, holding that "[t]he burden is now on the plaintiffs to prove that a contract or promise was actually made that the Board Policy would be irrevocable," *id.* at *10.

Chancellor Chandler's decision certifying the interlocutory appeal of *News Corp.* sheds further light on this opinion. *See Unisuper Ltd. v. News Corp.*, 2006 WL 207505 (Del. Ch. Jan. 20, 2006). Chancellor Chandler stressed:

> [F]or purposes of this appeal, *defendants have conceded that there was a contract.* In fact, it is beyond dispute that there was a "package" of contracts and promises made between plaintiffs and the Company in the months leading up to News Corp.'s re-incorporation as a Delaware corporation. It also is uncontroverted, at this stage, that without these "agreements" the re-incorporation would not have occurred.

* * *

> News Corp. thus finds itself in a stew of its own making. News Corp. easily could have included language in the Press Release or Letter to Shareholders . . . stating that the Company's board *reserved the right to rescind the board policy*.

*Id.* at *1-2 (emphasis in original).

*News Corp.* is simply inapposite to the instant case. The Court's opinion did not address Section 157. The board of News Corp. voluntarily contractually ceded a portion of its authority to shareholders. And, the arguably inequitable conduct by News Corp.'s board, putting News Corp. in a "stew of its own making," *id.* at *2, is factually distinct from Plaintiff's attempt unilaterally to seize control of CA's affairs by bylaw.

### 2. ***In re National Intergroup, Inc. Rights Plan Litigation***

In *National Intergroup*, the board endorsed a shareholder resolution that limited the board's ability, without shareholder approval, either to extend its existing rights plan or to adopt any other shareholder rights plan. *See In re National Intergroup, Inc. Rights Plan Litig.*, 1990 WL 92661, at *2 (Del. Ch. July 3, 1990). The Court enjoined a later board attempt to amend the company's existing rights plan before its expiration, finding that the existing rights plan was *contractually amended* by the resolution, and that no further amendments were permitted under the terms of the plan.

National Intergroup, Inc. ("NII") adopted a rights plan in 1986, which was set to expire in 1996. *See id.* at *1-2. In 1989, an institutional shareholder submitted a resolution that would cause the rights plan to expire in 1992, would require shareholder approval for the 1986 rights plan to be extended, and which would prohibit "the adoption

of any other stockholder rights plan" without shareholder approval. *Id.* at *2. NII's board agreed to recommend this resolution, which was added to NII's proxy statement. That proxy statement stated that the board believed that "the Plan *as modified* by the implementation of the foregoing proposals, is in the best interests of stockholders." *Id.* at *3 (emphasis added). Shareholders approved the resolution. In 1990, NII's Board attempted to amend the 1986 Rights plan, and shareholders sought to enjoin the amendment from becoming effective.

The Court held that "the 1989 Stockholder Resolution created contractual rights." *Id.* at *6. Specifically, "the 1989 Proxy Statement of NII provided that the 1986 Rights Plan, as amended, would be amended by the provisions of the 1989 Stockholder Resolution, if adopted." *Id.* The Court concluded that the section of the 1986 Rights Plan, which originally had given the board broad discretion to modify the terms of the plan, "is now subject to the provisions of the Resolution." *Id.*

### 3. The Supporting Materials Submitted by Plaintiff Are Inapposite.

Finally, Plaintiff points out that the boards of certain Delaware corporations have adopted "policies or guidelines" governing the corporation's implementation of rights plans. (Pl. Br. at 19-20 & n.7.) But these policies or guidelines were implemented pursuant to director action, consistent with Section 157, and were not imposed by shareholders without the consent of these corporations' boards.[8] Plaintiff's citation of

[8] Chancellor Chandler stressed that News Corp.'s board was in a "stew of its own making," because the board failed to reserve the right to change its policy. *See News Corp.*, 2006 WL 207505, at *2.

Bristol-Myers Squibb's and UAL Corp.'s bylaws (Pl. Br. at 19 & n.7) likewise sheds no light on the legality of such bylaws, since no court has ruled on their validity.[9]

In sum, none of the authority cited by Plaintiff stands for the bald and unsupported assertion that a shareholder bylaw, not approved by the Board, may limit the Board's statutory power under Section 157 to set the "terms" of a rights plan. At most, *News Corp.* and *National Intergroup* stand for the unremarkable proposition that a board *may contractually* cede its authority over rights plans to shareholders. But nothing in *News Corp.*, *National Intergroup*, Section 109, or Section 157 permits shareholders to enact a bylaw limiting the Board's statutory authority without the Board's consent.

## II. THE PROPOSED BYLAW ALSO VIOLATES DGCL SECTION 141.

In addition to the express grant of power in Section 157, the power of a board of directors to adopt and to maintain a rights plan rests on Section 141(a). *See Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985); *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *5 (Del. Ch. Oct. 10, 2000). By seeking unilaterally to usurp this power under Section 157 from the Board, the Proposed Bylaw also is invalid under Section 141(a).

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[9] Furthermore, Bristol-Myers Squibb's board *chose* to amend its bylaws. *See* Bristol-Myers Squibb Form 14A, filed March 22, 2006, at 7 (selected pages of which are attached hereto as Exhibit A) ("in addition to our Board-approved policy that generally requires the Board to seek stockholder approval prior to the adoption of a stockholder rights plan, we amended our Bylaws"). Similarly, UAL Corp.'s bylaw was adopted and became effective on February 1, 2006, the same day that UAL emerged from bankruptcy and began issuing stock to UAL's former unsecured creditors. There is nothing to suggest that this bylaw was unilaterally imposed on UAL by shareholders. Indeed, a Form 8-K filed the same day stated that "[i]n connection [with] the Company's reorganization and emergence from bankruptcy, *the Company* adopted the certificate and the Amended and Restated Bylaws of the Company." UAL Form 8-K, Feb. 1, 2006 (emphasis added) (attached hereto as Exhibit B).

### A. *News Corp.* Did Not Decide that Section 141(a) Permits Shareholders To Restrict the Board's Power To Adopt Rights Plans.

Plaintiff claims that "*News Corp.* illustrates that shareholders can—consistent with Section 141(a)—restrict a corporate board's ability to adopt a poison pill far more pervasively than the Proposed Bylaw would if enacted." (Pl. Br. at 27 (emphasis in original).) If Plaintiff's theory were correct, *News Corp.* would have turned on its head decades of Delaware jurisprudence regarding the proper roles of directors and shareholders. But *News Corp.* does no such thing.

As explained *supra* Section I.C.1., *News Corp.* was a contract case,[10] and reading *News Corp.* in that manner harmonizes its holding with existing Delaware corporate law. As set forth in CA's opening brief at pages 12 to 17, this Court and the Supreme Court repeatedly have confirmed that directors (not stockholders) manage the business and affairs of a Delaware corporation.

For example, in *Quickturn Design Sys., Inc. v. Shapiro*, the Supreme Court invalidated a "no hand" poison pill under which no newly elected board could redeem the rights plan for six months if the purpose of the redemption would be to facilitate a transaction with an "Interested Person." 721 A.2d 1281, 1290-92 (Del. 1998). The Supreme Court noted that this "no hand" pill impermissibly would prevent the new board from performing its duties:

> One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. *Section*

[10] Plaintiff himself concedes that *News Corp.* is a case where "shareholders brought suit to enforce the contract." (Pl. Br. at 27.)

> *141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation*. . . . While the Delayed Redemption Provision limits the board of directors' authority in only one respect, the suspension of the Rights Plan, *it nonetheless restricts the board's power in an area of fundamental importance to the shareholders -- negotiating a possible sale of the corporation*. Therefore, we hold that the Delayed Redemption Provision is invalid under Section 141(a), which confers upon any newly elected board of directors *full* power to manage and direct the business and affairs of [the] Delaware corporation.

*Id.* at 1291-92 (emphasis added, and internal citations omitted).

In *Time Warner*, the Supreme Court determined that Time Inc.'s board acted properly by enacting defensive measures to thwart a tender offer launched by Paramount:

> Paramount argues that, assuming its tender offer posed a threat, Time's response was unreasonable in precluding Time's shareholders from accepting the tender offer or receiving a control premium in the immediately foreseeable future. Once again, the contention stems, we believe, from a fundamental misunderstanding of where the power of corporate governance lies. Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives. 8 *Del. C.* § 141(a). *The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders.*

*Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1990) (emphasis added).

These decisions are the law of this State. The *News Corp.* decision did not invert the "fundamental corporate governance principle set forth in [Section] 141(a) that 'the business and affairs of every corporation . . . shall be managed by and under the direction of' the board of directors." *Grimes*, 804 A.2d at 260. Rather, *News Corp.* distinguished the *holdings* of cases like *Quickturn* and *Time Warner*—both of which invalidated

"contracts [that] raised the 'omnipresent specter' that the board was using the contract provisions to entrench itself," from a contract delegating power to the corporation's shareholders. *News Corp.*, 2005 WL 3529317, at *7.

Plaintiff simply cannot be correct that *News Corp.* announced a new principle of Delaware corporate law allowing shareholders unilaterally to overrule the board, in the face of Supreme Court cases like *Grimes*, *Quickturn*, and *Time Warner*. "Once a point of law has been settled by decision of [the Delaware Supreme] Court, it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside . . . and it should be followed except for urgent reasons and upon clear manifestation of error." *Hilton Hotels*, 780 A.2d at 248 (internal quotations omitted).

Only the Delaware General Assembly possesses the power to subordinate directorial discretion to shareholder bylaws.[11] The General Assembly plainly understands how to do so: it chose to *permit* agreements among shareholders of a close corporation that "restrict or interfere with the discretion or powers of the board of directors." 8 *Del. C.* § 350. But the General Assembly chose not to do so here: Section 141(a) remains a broad grant of authority to the board of directors.

[11] Vice Chancellor Strine notes that "traditionalists" view the corporation as a republic where "a great deal of authority [is given] to elected decisionmakers [who are held] accountable through periodic fair elections." Leo E. Strine, Jr., *Response to Increasing Shareholder Power: Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1777 (2006). Plaintiff essentially argues that *News Corp.* replaced this long-standing "corporate republic" with rule by "corporate referendum," *id.* at 1782, in a silent and bloodless coup.

### B. The Proposed Bylaw is "Inconsistent With" the Policy Considerations Underlying Subchapter V of the DGCL.

This Court has explained that, in light of the textual ambiguities between and overlapping scopes of Sections 109(b) and 141(a), courts must "resort to their understanding of the most important policy values at stake in that debate" to interpret the DGCL. *Jones Apparel*, 883 A.2d at 846. Plaintiff entirely ignores the deleterious impact of his Proposed Bylaw on the Board's ability to protect the corporation and shareholders from coercive tender offers. (*See* Pl. Br. at 35-40.)

Delaware courts have recognized that rights plans and other defensive measures legitimately give boards options for responding to tender offers, and that rights plans may be implemented even when no takeover is imminent. "Proper and proportionate defensive responses are intended and permitted to thwart perceived threats. . . . The fact that a defensive action must not be coercive or preclusive does not prevent a board from responding defensively before a bidder is at the corporate bastion's gate." *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1388 (Del. 1995).

If the defensive response is proportionate to the perceived threat, "the adoption of [a] Rights Plan is an appropriate exercise of managerial judgment under the business judgment rule." *Moran*, 490 A.2d at 1083. A board is not required to eliminate a rights plan, or refrain from implementing a rights plan, simply because it may be unpopular with shareholders. "The power recognized in *Moran* [to unilaterally adopt a rights plan] would have been meaningless if the rights plan required shareholder approval." *Hilton Hotels*, 780 A.2d at 249. More generally, "[t]he corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to

follow the wishes of a majority of shares." *Paramount Communications, Inc. v. Time Inc.*, 1989 WL 79880 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1990). The Proposed Bylaw effectively seeks to overturn this precedent.

### C. Section 109(b) Does Not Authorize Bylaws Intruding Upon the Board's Substantive Authority Granted by Section 141(a).

Throughout most of his brief, Plaintiff pretends that his Proposed Bylaw only imposes a "procedural requirement that the Board consider the advisability of maintaining a pill on an annual basis." (Pl. Br. at 4.) The Proposed Bylaw's highly restrictive (and almost certainly ill-advised) unanimity requirement is indeed a "procedural" bylaw, as *expressly authorized* by Section 141(b) of the DGCL.[12] But as shown *supra* Section I.A., the Proposed Bylaw requires more than an annual review of the advisability of a poison pill: it substantively bars the Board from exercising its power under Section 157 to set the "terms" of a rights plan, including to approve a plan of unlimited duration.

At pages 31 to 35 of his brief, Plaintiff acknowledges the broader applicability of his expansive theory of the scope of shareholder bylaws. Specifically, Plaintiff states that a hypothetical bylaw that "shift[ed] the power over poison pills from the Board to

[12] Section 141(b) provides that "[a] majority of the total number of directors shall constitute a quorum . . . unless the certificate of incorporation *or the bylaws* require a greater number. . . . The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation *or the bylaws* shall require a vote of a greater number.") (emphasis added); *see generally Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401 (Del. 1985) (bylaws requiring all directors be present for a quorum and unanimous consent for board action were permissible).

shareholders . . . by requiring the Board to put the adoption or extension of a poison pill to a shareholder vote . . . would still be valid under Delaware law." (Pl. Br. at 31.)

As set forth *supra*, Delaware law does not support Plaintiff's theory that a bylaw could, without express statutory authorization, prohibit the Board from exercising its business judgment without obtaining permission from shareholders. The Board's authority to manage the business and affairs of the corporation derives from the DGCL, and does not permit a "shareholder's veto" over the substantive decisions of the Board. Most commentators believe that Section 109's grant of authority relates only to bylaws that govern procedural or organizational matters, not substantive decisions governing the corporation's business and affairs.[13] Such an interpretation of Section 109(b) harmonizes Sections 109(b) and 141(a) without running afoul of Section 141(a)'s mandate that the corporation's business and affairs be managed by the board of directors.

Such a reading also finds support in the language of the DGCL. Specifically, there is an important distinction between the language of Section 102 of the DGCL which regulates certificates of incorporation and Section 109, which regulates by-laws. Section 102(b)(1) provides that the certificate of incorporation may contain:

---

[13] *See, e.g.*, 1 R. Franklin Balotti & Jesse A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 1.10, at 1-14 (3d ed. Supp. 2005) ("The by-laws of a corporation have been characterized as the proper place to set forth the 'the self-imposed rules and regulations deemed expedient for ... the ... convenient functioning' of the corporation."); Charles F. Richards & Robert J. Stearn, Jr., *Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law*, 54 Bus. Law. 607, 625-27 (1999) (supporting procedural/substantive distinction); Hamermesh, 73 Tulane L. Rev. at 442 (noting academic attempts to distinguish proper from improper bylaws using procedural/substantive distinction).

> Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision *creating, defining, limiting and regulating* the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the members of a nonstock corporation; if such provisions are not contrary to the laws of this State.

8 *Del. C.* § 102(b)(1) (emphasis added).

By contrast, Section 109(b) provides:

> The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, *relating to* the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

8 *Del. C.* § 109(b) (emphasis added).

This distinction cannot be ignored. Rather, the language of Sections 102(b)(1) and Section 109(b) confirm that under the DGCL, *limits* on the power of the board of directors must be contained in the certificate of incorporation. Provisions *relating to* such powers—*i.e.*, procedural and organizational matters—may be regulated by bylaw. *See* Hamermesh, 73 Tul. L. Rev. at 431 n.101.

## CONCLUSION

Plaintiff's Proposed Bylaw is "inconsistent with" Delaware law, specifically Sections 157 and 141. For the foregoing reasons, and for the reasons set forth in Defendant's Opening Pre-Hearing Brief, CA respectfully requests that this Court grant judgment in its favor and dismiss Plaintiff's complaint with prejudice.

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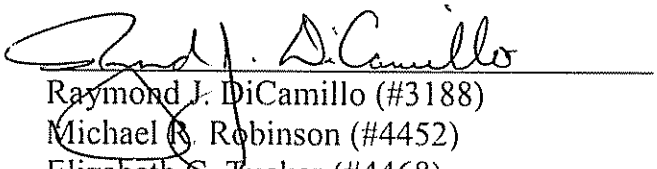
Dated: June 14, 2006



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# EXHIBIT A

## TO

## DEFENDANT CA, INC.'S

## PRE-HEARING REPLY BRIEF

DEF 14A 1 ddef14a.htm NOTICE OF ANNUAL MEETING AND PROXY STATEMENT

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# SCHEDULE 14A INFORMATION

**Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Amendment No. )**

Filed by the Registrant ☒

Filed by a Party other than the Registrant ☐

Check the appropriate box:

☐ Preliminary Proxy Statement
☒ Definitive Proxy Statement
☐ Definitive Additional Materials
☐ Soliciting Material Pursuant to §240 14a-12

☐ **Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2)**

**Bristol-Myers Squibb Company**

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

☒ No fee required

☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(4) and 0-11

(1) Title of each class of securities to which transaction applies:

(2) Aggregate number of securities to which transaction applies:

(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

(4) Proposed maximum aggregate value of transaction:

(5) Total fee paid:

☐ Fee paid previously with preliminary materials.

☐ Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

(1) Amount Previously Paid:

(2) Form, Schedule or Registration Statement No :

(3) Filing Party:

(4) Date Filed:

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# Bristol-Myers Squibb Company

March 22, 2006

NOTICE OF
2006 ANNUAL
MEETING AND
PROXY STATEMENT
TUESDAY, MAY 2, 2006
AT 10:00 A.M.
HOTEL DU PONT
11TH AND MARKET
STREETS
WILMINGTON
DELAWARE

DEAR FELLOW STOCKHOLDER:

You are cordially invited to attend the Annual Meeting of Stockholders of Bristol-Myers Squibb Company at the Hotel duPont, 11th and Market Streets, Wilmington, Delaware, on Tuesday, May 2, 2006, at 10:00 a.m.

This booklet includes the Notice of Annual Meeting and the Proxy Statement. The Proxy Statement describes the business to be transacted at the meeting and provides other information about the company that you should know when you vote your shares.

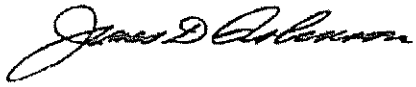
The principal business of the Annual Meeting will be the election of directors, the ratification of the appointment of an independent registered public accounting firm and the consideration of five stockholder proposals. We will also review the status of the company's business at the meeting.

Both Louis V. Gerstner, Jr. and Louis W. Sullivan, M.D. will retire from the Board of Directors at this Annual Meeting and Ellen Futter retired from the Board at the end of 2005. We thank them for their dedicated service to Bristol-Myers Squibb and our stockholders and wish them well. We also welcome Louis J. Freeh to the Board.

Last year, over 88% of the outstanding shares were represented at the Annual Meeting. It is important that your shares be represented whether or not you attend the meeting. Registered stockholders can vote their shares via the Internet or by using a toll-free telephone number. Instructions for using these convenient services appear on the proxy card. You can also vote your shares by marking your votes on the proxy card, signing and dating it and mailing it promptly using the envelope provided. Proxy votes are tabulated by an independent agent and reported at the Annual Meeting. The tabulating agent maintains the confidentiality of the proxies throughout the voting process.

Admission to the Annual Meeting will be by ticket only. **Please bring photo identification.** If you are a registered stockholder planning to attend the meeting, please check the appropriate box on the proxy card and retain the top portion of the card as your admission ticket. If your shares are held through an intermediary such as a bank or broker, follow the instructions in the Proxy Statement to obtain a ticket.

We have provided space on the proxy card for comments from our registered stockholders. We urge you to use it to let us know your feelings about the company or to bring a particular matter to our attention. If you hold your shares through an intermediary, please feel free to write directly to us.



JAMES D. ROBINSON III
Chairman of the Board

PETER R. DOLAN
Chief Executive Officer

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# Bristol-Myers Squibb Company

345 Park Avenue
New York, New York 10154-0037

## NOTICE OF ANNUAL MEETING OF STOCKHOLDERS

Notice is hereby given that the Annual Meeting of Stockholders will be held at the Hotel duPont, 11th and Market Streets, Wilmington, Delaware, on Tuesday, May 2, 2006 at 10:00 a.m. for the following purposes as set forth in the accompanying Proxy Statement:

- to elect nine directors of the Board of Directors, each for a term of one-year;
- to ratify the appointment of Deloitte & Touche LLP as the company's independent registered public accounting firm for 2006;
- to consider five stockholder proposals, if presented at the meeting; and
- to transact such other business as may properly come before the meeting or any adjournments thereof.

Holders of record of our company's common and preferred stock at the close of business on March 6, 2006, will be entitled to vote at the meeting.

By Order of the Board of Directors

Sandra Leung

SANDRA LEUNG
*Secretary*

Dated: March 22, 2006

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## YOUR VOTE IS IMPORTANT

Regardless of the number of shares you own, your vote is important.

If you do not attend the Annual Meeting to vote in person, your vote will not be counted unless a proxy representing your shares is presented at the meeting.

To ensure that your shares will be voted at the meeting, please vote in one of these ways:

(1) GO TO THE WEBSITE shown on your proxy card and vote via the Internet;

OR

(2) USE THE TOLL-FREE TELEPHONE NUMBER shown on your proxy card (this call is toll-free in the United States);

OR

(3) MARK, SIGN, DATE AND PROMPTLY RETURN the enclosed proxy card in the postage-paid envelope.

If you do attend the Annual Meeting, you may revoke your proxy and vote by ballot.

## ELECTRONIC DELIVERY OF PROXY STATEMENT AND ANNUAL REPORT

This Proxy Statement and the 2005 Annual Report are available on Bristol-Myers Squibb's Internet site at www.bms.com. Most stockholders can elect to view future proxy statements and annual reports over the Internet instead of receiving paper copies in the mail.

If you are a stockholder of record, you can choose this option and save Bristol-Myers Squibb the cost of production and mailing these documents by following the instructions provided when you vote over the Internet. If you hold your Bristol-Myers Squibb stock through a bank, broker or other holder of record, please refer to the information provided by that entity for instructions on how to elect to view future proxy statements and annual reports over the Internet.

If you choose to view future proxy statements and annual reports over the Internet, you will receive an e-mail message next year containing the Internet address to access Bristol-Myers Squibb's proxy statement and annual report. Your choice will remain in effect until you tell us otherwise. You do not have to elect Internet access each year. To view, cancel or change your enrollment profile, please go to www.InvestorDelivery.com.

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# Bristol-Myers Squibb Company

## PROXY STATEMENT

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## GENERAL INFORMATION ABOUT THE ANNUAL MEETING AND VOTING

### Why am I receiving these materials?

This Proxy Statement is being sent to all stockholders of record as of the close of business on March 6, 2006 for delivery beginning March 22, 2006 in connection with the solicitation of proxies on behalf of the Board of Directors for use at the Annual Meeting of Stockholders on May 2, 2006. Although the Annual Report and Proxy Statement are being mailed together, the Annual Report should not be deemed to be part of the Proxy Statement.

### Who can attend the Annual Meeting?

Only stockholders of Bristol-Myers Squibb as of the record date, March 6, 2006, their authorized representatives and guests of Bristol-Myers Squibb may attend the Annual Meeting. Admission will be by ticket only. In addition, please be sure to bring photo identification. The Hotel duPont is accessible to disabled persons and, upon request, wireless headsets for hearing amplification will be provided.

### How do I receive an admission ticket?

If you are a registered stockholder (your shares are held in your name) and plan to attend the meeting, your Annual Meeting admission ticket can be detached from the top portion of the proxy card.

If you are a beneficial owner (your shares are held in the name of a bank, broker or other holder of record) and plan to attend the meeting, you can obtain an admission ticket in advance by writing to Stockholder Services, Bristol-Myers Squibb Company, 345 Park Avenue, New York, New York 10154. Please be sure to enclose proof of ownership, such as a bank or brokerage account statement. Stockholders who do not obtain tickets in advance may obtain them upon verification of ownership at the Registration Desk on the day of the Annual Meeting.

Tickets may be issued to others at the discretion of the company.

### Who is entitled to vote?

All holders of record of our company's $0.10 par value common stock and $2.00 convertible preferred stock at the close of business on March 6, 2006 will be entitled to vote at the 2006 Annual Meeting. Each share is entitled to one vote on each matter properly brought before the meeting.

### How do I vote if I am a registered stockholder?

Proxies are solicited to give all stockholders who are entitled to vote on the matters that come before the meeting the opportunity to do so whether or not they attend the meeting in person. If you are a registered holder, you can vote your proxy in one of the following manners:

(i) via Internet;

(ii) by telephone;

(iii) by mail; or

(iv) in person at the Annual Meeting.

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Choosing to vote via the Internet or calling the toll-free number listed on the proxy card will save the company expense. In order to vote online or via telephone, have the voting form in hand and either call the number or go to the website indicated on the enclosed form and follow the instructions. If you vote via the Internet or by telephone, please do not return a signed proxy card.

If you choose to vote by mail, mark your proxy card enclosed with the Proxy Statement, date and sign it, and mail it in the postage-paid envelope.

If you wish to vote in person, you can vote the proxy in person at the Annual Meeting

**How do I specify how I want my shares voted?**

If you are a registered stockholder, you can specify how you want your shares voted on each proposal by marking the appropriate boxes on the proxy card. Please review the voting instructions on the proxy card and read the entire text of the proposals and the positions of the Board of Directors in the Proxy Statement prior to marking your vote.

If your proxy card is signed and returned without specifying a vote or an abstention on a proposal, it will be voted according to the recommendation of the Board of Directors on that proposal. That recommendation is shown for each proposal on the proxy card.

**How do I vote if I am a beneficial stockholder?**

If you are a beneficial stockholder, you have the right to direct your broker or nominee on how to vote the shares. You should complete a voting instruction card which your broker or nominee is obligated to provide you. If you wish to vote in person at the meeting, you must first obtain from the record holder a proxy issued in your name.

**What items will be voted upon at the Annual Meeting?**

At the Annual Meeting, the following items will be voted upon:

(i) the election of nine directors to the Board, each for a term of one-year;

(ii) ratification of the appointment of the company's independent registered public accounting firm; and

(iii) the five stockholder proposals, if presented at the meeting.

Our Board of Directors knows of no other matters that may be brought before the meeting. However, if any other matters are properly presented for action, it is the intention of the named proxies to vote on them according to their best judgment.

**What are the Board of Directors' voting recommendations?**

For the reasons set forth in more detail later in the Proxy Statement, our Board of Directors recommends a vote FOR the election of directors, FOR the ratification of the appointment of Deloitte & Touche LLP as our independent registered public accounting firm for 2006 and AGAINST each of the five stockholder proposals

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**How many votes are needed to have the proposals pass?**

A plurality of the votes cast at the meeting is required to elect directors. Our Board of Directors adopted a corporate governance policy regarding director elections that is contained in our Corporate Governance Guidelines, which are attached to this Proxy Statement as Annex A. The policy provides that in any uncontested election, any nominee for director who receives a greater number of votes "withheld" for his or her election than votes "for" such election (a "majority withheld vote") will tender his or her resignation as a director within 10 business days after the certification of the stockholder vote. The Committee on Directors and Corporate Governance, without participation by any director so tendering his or her resignation, will consider the resignation offer and recommend to the Board whether to accept it. The Board, without participation by any director so tendering his or her resignation, will act on the Committee's recommendation at its next regularly scheduled meeting to be held within 60 days after the certification of the stockholder vote. We will promptly disclose the Board's decision and the reasons for the decision in a broadly disseminated press release that will also be furnished to the Securities and Exchange Commission on Form 8-K.

The affirmative vote of a majority of the shares present in person or by proxy is required for ratification of the appointment of an independent registered public accounting firm and for the adoption of each of the five stockholder proposals.

**How are the votes counted?**

In accordance with the laws of the state of Delaware and our Restated Certificate of Incorporation and Bylaws,

(i) for the election of directors, which requires a plurality of the votes cast in person or by proxy, only proxies and ballots indicating votes "FOR all nominees," "WITHHELD for all nominees" or specifying that votes be withheld for one or more designated nominees are counted to determine the total number of votes cast;

(ii) for the adoption of all management proposals and all stockholder proposals, which require the majority of the votes cast in person or by proxy, only proxies and ballots indicating votes "FOR," "AGAINST" or "ABSTAIN" on the proposals or providing the designated proxies with the right to vote in their judgment and discretion on the proposals are counted to determine the number of shares present and entitled to vote; broker non-votes are not counted.

**Can I change my vote after I return the proxy card, or after voting by telephone or electronically?**

If you are a shareholder of record, you can revoke your proxy at any time before it is voted at the meeting by taking one of the following three actions:

(i) by giving timely written notice of the revocation to the Secretary of Bristol-Myers Squibb;

(ii) casting a new vote by telephone or by the Internet; or

(iii) by voting in person at the Annual Meeting.

If you are a beneficial owner of shares, you may submit new voting instructions by contacting your bank, broker or other holder of record. You may also vote in person at the Annual Meeting if you obtain a legal proxy.

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All shares that have been properly voted and not revoked will be voted at the Annual Meeting.

**How do I designate my proxy?**

If you wish to give your proxy to someone other than the Directors' Proxy Committee, you may do so by crossing out the names of all three Proxy Committee members appearing on the proxy card and inserting the name of another person. The signed card must be presented at the meeting by the person you have designated on the proxy card.

**Who counts the votes?**

Tabulation of proxies and the votes cast at the meeting is conducted by an independent agent and certified to by independent inspectors of election.

**Is my vote confidential?**

Yes, any information that identifies a stockholder or the particular vote of a stockholder is kept confidential.

**Who will pay for the costs involved in the solicitation of proxies?**

Bristol-Myers Squibb will pay all costs of preparing, assembling, printing and distributing the proxy materials. Management has retained Georgeson Shareholder Communications Inc. to assist in soliciting proxies for a fee of $25,000, plus reasonable out-of-pocket expenses. Our employees may solicit proxies on behalf of our Board of Directors through the mail, in person, and by telecommunications. We will, upon request, reimburse brokerage firms and others for their reasonable expenses incurred for forwarding solicitation material to beneficial owners of stock.

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## VOTING SECURITIES AND PRINCIPAL HOLDERS

At the close of business on March 6, 2006, there were 1,963,662,514 shares of $0.10 par value common stock and 6,419 shares of $2.00 convertible preferred stock outstanding and entitled to vote.

### Common Stock Ownership by Directors and Executive Officers

The following table sets forth, as of February 15, 2006, beneficial ownership of shares of our common stock by each director, each of the named executive officers and all directors and officers as a group. None of our directors and executive officers, individually or as a group, beneficially owns greater than 1% of the outstanding shares of common stock.

Unless otherwise noted, such shares are owned directly or indirectly with sole voting and investment power.

| Name | Total Shares Owned(a) | Common Shares Underlying Options(b) | Deferred Common Share Units(c) |
|---|---|---|---|
| R. E. Allen | 153,606 | 26,560 | 100,350 |
| L. Andreotti | 408,384 | 341,068 | — |
| A. R. J. Bonfield | 517,413 | 347,499 | 11,371 |
| L. B. Campbell | 42,045 | 13,939 | 25,996 |
| V. D. Coffman | 58,393(d) | 18,146 | 40,175 |
| J. M. Cornelius | 24,096 | — | 4,096 |
| P. R. Dolan | 2,405,017(e) | 1,900,285 | — |
| L. J. Freeh | 2,000 | — | 2,000 |
| L. V. Gerstner, Jr. | 100,324 | 26,560 | 42,992(f) |
| L. H. Glimcher, M.D. | 39,809 | 18,146 | 21,663 |
| D. J. Hayden, Jr. | 1,432,467 | 1,219,328 | — |
| L. Johansson | 28,500 | 13,939 | 12,561 |
| J. L. McGoldrick | 1,252,888 | 1,043,815 | — |
| J. D. Robinson III | 126,816(g) | 26,560 | 24,833 |
| E. Sigal, M.D., Ph.D. | 463,073 | 277,948 | 17,738 |
| L. W. Sullivan, M.D. | 57,697(h) | 26,560 | 22,722 |
| All Directors and Executive Officers as a Group | 10,577,550 | 7,622,224 | 326,497 |

(a) Consists of direct and indirect ownership of shares, including unvested restricted stock grants, shares credited to the accounts of the executive officers under the Bristol-Myers Squibb Company Savings and Investment Program, stock options that are currently exercisable or exercisable within 60 days and deferred common share units.

(b) Consists of stock options that are currently exercisable and stock options that will be exercisable within 60 days.

(c) For non-employee directors, represents amounts credited to their accounts under the 1987 Deferred Compensation Plan for Non-Employee Directors as deferred common share units which are valued according to the market value and shareholder return on equivalent shares of common stock. For named executive officers, represents amounts credited to their accounts under the Performance Incentive Plan as deferred common share units which are valued according to the market value and stockholder return on equivalent shares of common stock.

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(d) Includes 72 shares held by a family living trust over which neither Dr. Coffman nor his wife exercise voting nor investment power.

(e) Includes 12,271 shares owned by a family charitable foundation over which Mr. Dolan and his wife exercise shared voting and investment power. Mr. Dolan disclaims beneficial ownership of the shares owned by the family charitable foundation.

(f) Includes 7,423 deferred common share units credited to Mr. Gerstner's account in the Squibb Corporation Deferred Plan for Fees of Outside Directors which are valued according to the market value and stockholder return on equivalent shares of common stock.

(g) Includes 40,984 restricted stock units which are valued according to the market value and shareholder return on equivalent shares of common stock.

(h) Includes 543 shares owned jointly by Dr. Sullivan and his wife over which he exercises shared voting and investment power.

### Principal Holders of Common Stock

The following table sets forth information regarding beneficial owners of more than 5 percent of the outstanding shares of our common stock.

| Name | Number of Shares Beneficially Owned | Percent of Class |
|---|---|---|
| Capital Research and Management Company<br>333 South Hope Street<br>Los Angeles, California 90071 | 173,076,200(a) | 8.8%(a) |

(a) This information is based on the Schedule 13G/A dated February 10, 2006 filed by Capital Research and Management Company with the Securities and Exchange Commission reporting beneficial ownership as of December 30, 2005. The reporting person has sole voting power with respect to 47,548,200 shares, shared voting power with respect to no shares and sole investment power with respect to all 173,076,200 shares.

### Section 16(a) Beneficial Ownership Reporting Compliance

Under Section 16(a) of the Securities Exchange Act of 1934, our directors, executive officers and the beneficial holders of more than 10% of our common stock are required to file reports of ownership and changes in ownership with the U.S. Securities and Exchange Commission. To the best of our knowledge, during 2005 all applicable Section 16(a) filing requirements were met.

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## CORPORATE GOVERNANCE AND BOARD MATTERS

Our business is managed under the direction of our Board of Directors pursuant to the Delaware General Corporation Law and our Bylaws. Our Board has responsibility for establishing broad corporate policies and for the overall performance of our company. It is not, however, involved in operating details on a day-to-day basis. Our Board is kept advised of the company's business through regular written reports and analyses and discussions with the Chief Executive Officer and other officers of Bristol-Myers Squibb, by reviewing materials provided to them and by participating in Board and Board Committee meetings.

### Corporate Governance

We maintain a corporate governance webpage at http://www.bms.com/aboutbms/corporate_governance/data/.

Our Board of Directors adopted Corporate Governance Guidelines in 2002. From time to time, our Board revises the Corporate Governance Guidelines in response to changing regulatory requirements, evolving best practices, and the concerns of our stockholders and other constituents. The Corporate Governance Guidelines are attached to this Proxy Statement as Annex A and may be viewed on the company's website at www.bms.com.

Consistent with these goals, the Committee on Directors and Corporate Governance and the Compensation and Management Development Committee have reviewed various corporate governance and executive compensation issues during the past year and made recommendations to our Board. Based on these recommendations, our Board of Directors adopted the following corporate governance initiatives.

- Our Board adopted a policy providing that in an uncontested election for directors, any nominee for director who receives a greater number of votes "withheld" for his or her election than votes "for" such election will tender his or her resignation for consideration by the Committee on Directors and Corporate Governance and by the other members of the Board of Directors.

- In addition to our Board-adopted policy that generally requires the Board to seek stockholder approval prior to the adoption of a stockholder rights plan, we amended our Bylaws to require that all stockholder rights plans be approved by a minimum of two-thirds of the Board and that such plans must expire one year after Board adoption unless approved by our stockholders.

- We will update the political contributions disclosure on our website on a semi-annual basis.

- Beginning with the 2007 long-term incentive grants, we will reduce the portion of long-term incentives provided in the form of restricted stock for named executive officers from approximately 30% to approximately 15%. The value from the decreased restricted stock grants will be allocated across the long-term performance award plan and stock options with exercise thresholds, thus tying approximately 85% of long-term incentives to specific performance criteria

These changes supplement the corporate governance initiatives previously approved by our Board of Directors which include:

- The recommendation that stockholders approve the amendment to the Restated Certificate of Incorporation to effect the elimination of all supermajority vote requirements, except the requirement of a supermajority vote to return to a classified Board structure which was approved by stockholders;

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- The adoption of a policy requiring stockholder approval for any future agreements providing executives cash severance payments in excess of 2.99 times the executive's base salary and cash bonus;
- The adoption of a policy wherein the Board will seek reimbursement of bonuses paid to an executive if such executive engaged in misconduct that caused or partially caused a restatement of financial statements; and
- The disclosure on our website of all political contributions made by our company and by our company-sponsored employee political action committee, to political committees, parties or candidates on both state and federal levels. The report is also available to stockholders upon written request

### Director Independence

It is the policy of our Board that a substantial majority of its members be independent from management and the Board has adopted independence standards that meet, and in some areas exceed, the listing standards of the New York Stock Exchange. In accordance with our Corporate Governance Guidelines, our Board undertook its annual review of director independence. Our Board considered, any and all commercial and charitable relationships of directors, including transactions and relationships between each director or any member of his or her immediate family and Bristol-Myers Squibb and its subsidiaries. Following the review, our Board determined, by applying the independence standards contained in the Corporate Governance Guidelines which are attached to this Proxy Statement as Annex A, that each of our directors nominated for election at this Annual Meeting is independent of Bristol-Myers Squibb and its management in that none has a direct or indirect material relationship with our company, except for Peter R. Dolan. Mr. Dolan is not considered an independent director because of his employment as Chief Executive Officer of the company.

The independent directors are Robert E. Allen, Lewis B. Campbell, Vance D. Coffman, James M. Cornelius, Louis J. Freeh, Louis V. Gerstner, Jr., Laurie H. Glimcher, M.D., Leif Johansson, James D. Robinson III and Louis W. Sullivan, M.D. In addition, all members of the Audit Committee, the Compensation and Management Development Committee and the Committee on Directors and Corporate Governance satisfy the standards of independence applicable to members of such committees established under applicable law and the listing requirements of the New York Stock Exchange.

### Meetings of our Board

Our Board meets on a regularly scheduled basis during the year to review significant developments affecting Bristol-Myers Squibb and to act on matters requiring Board approval. It also holds special meetings when an important matter requires Board action between scheduled meetings. Members of senior management regularly attend Board meetings to report on and discuss their areas of responsibility. In 2005, the Board of Directors met eight times. The average aggregate attendance of directors at Board and Committee meetings was over 96%. No director attended fewer than 88% of the aggregate number of Board and Committee meetings during the periods he or she served.

### Annual Meeting of Stockholders

Directors are not required, but are strongly encouraged to attend the Annual Meeting of Stockholders. In 2005, all of the Directors attended the Annual Meeting of Stockholders.

# EXHIBIT B

## TO

## DEFENDANT CA, INC.'S

## PRE-HEARING REPLY BRIEF

8-K 1 a06-3892_18k.htm CURRENT REPORT OF MATERIAL EVENTS OR CORPORATE CHANGES

# UNITED STATES
# SECURITIES AND EXCHANGE COMMISSION

**Washington, DC 20549**

# FORM 8-K

## CURRENT REPORT

**Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

**Date of Report: February 1, 2006**
(Date of earliest event reported)

# UAL CORPORATION

(Exact name of registrant as specified in its charter)

| **Delaware** | **1-6033** | **36-2675207** |
|---|---|---|
| (State or other jurisdiction of incorporation) | (Commission File Number) | (I.R.S. Employer Identification No.) |

**1200 East Algonquin Road, Elk Grove Township, Illinois 60007**
(Address of principal executive offices)

**(847) 700-4000**
(Registrant's telephone number, including area code)

**Not Applicable**
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

**ITEM 1.01. Entry into a Material Definitive Agreement.**

On February 1, 2006 (the "Effective Date"), UAL Corporation (the "Company") consummated the transactions contemplated by its Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan"). Pursuant to the terms of the Plan, upon the Effective Date, the UAL Corporation 2006 Management Equity Incentive Plan (the "MEIP") and the UAL Corporation 2006 Director Equity Incentive Plan (the "DEIP"), which were previously adopted by the Board of Directors of the Company (the "Board") on January 10, 2006, became effective. The aggregate number of shares of Common Stock, par value $.01 per share, of the Company (the "Common Stock") reserved for grant under (i) the MEIP is 9,825,000 shares, as may be adjusted for any stock dividend, stock split, recapitalization, reorganization, merger or other subdivision or combination of the Common Stock, and (ii) the DEIP is 175,000 shares. For a full description of the MEIP and DEIP, reference is made to the description of such plans in the Company's Current Report on Form 8-K filed with the Securities and Exchange Commission on January 11, 2005, which is incorporated by reference herein. The description of the MEIP and DEIP is qualified in its entirety by reference to the full text of the MEIP and DEIP, copies of which are filed herewith as Exhibits 10.1 and 10.2 and are incorporated by reference herein.

The information described under Item 2.03 below "Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant" is incorporated herein by reference.

On January 23, 2006, the Nominating/Governance Committee of the Company's Board of Directors approved a five-year travel benefit to certain of the directors of the Company who are departing the Board of Directors on the Effective Date. From and after the Effective Date, each such director, his spouse and dependent children, if any, will be entitled to unlimited, positive space, pleasure travel on United Airlines, including travel on United Express, as well as an annual tax gross-up payment with respect to the value of such travel benefits.

**ITEM 1.02. Termination of a Material Definitive Agreement.**

In connection with the Company's reorganization and emergence from bankruptcy, all existing shares of the Company's capital stock were canceled pursuant to the Plan, as confirmed with the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court") on January 20, 2006. Therefore, upon the Effective Date, as set forth in the Plan, the Company's 2000 Incentive Stock Plan (the "2000 Plan") and the Company's 2002 Share Incentive Plan (the "2002 Plan") were terminated. As of the Effective Date, any and all awards granted under the 2000 Plan and the 2002 Plan were terminated and will no longer be of any force or effect.

The 2000 Plan was filed with the Securities and Exchange Commission (the "Commission") as Exhibit 10.1 to the Company's Quarterly Report on Form 10-Q for the quarter ending on June 30, 2000. The 2002 Plan was filed with the Commission as Exhibit 10.1 to the Company's Quarterly Report on Form 10-Q for the quarter ending on September 30, 2002. The descriptions contained in this Current Report of the 2000 Plan and the 2002 Plan are qualified in their entirety by reference to the full text of the Plans set forth in the respective exhibits.

In addition, as set forth in the Company's Current Report on Form 8-K as filed on October 28, 2005 (the "October 8-K"), on October 27, 2005, the Board adopted an amendment to the Company's 1995 Directors Plan (the "1995 Plan") and resolved that upon the Effective Date, the 1995 Plan and any rights to receive stock under the 1995 Plan would be terminated, except that eligible cash fees which have been deferred and are not subject to an election to receive stock would continue to be due under the 1995 Plan and would be payable in accordance with the terms of the 1995 Plan. The description of the amendment and termination of the 1995 Plan discussed herein is qualified in its entirety by reference to the full text of the amendment to the 1995 Plan set forth as Exhibit 10.1 to the October 8-K, which is incorporated by reference herein.

Under the terms of the Plan, the underlying option agreements pursuant to the 2000 Plan, the 2002 Plan and the 1995 Plan, together with the Agreement among the Company, United Air Lines, Inc. and Douglas A. Hacker, dated as of April 27, 2001, were rejected and terminated as of the Effective Date.

**ITEM 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

**Exit Facility**

On the Effective Date, the Company's wholly owned subsidiary, United Air Lines, Inc. ("United"), entered into a new senior secured revolving credit facility and term loan (the "Exit Facility") provided by a syndicate of banks and other financial institutions led by J.P. Morgan Securities Inc. and Citicorp Global Markets Inc., as joint lead arrangers and joint bookrunners, JPMorgan Chase Bank, N.A. ("JPMCB") and Citicorp USA, Inc. ("CITI"), as co-administrative agents and co-collateral agents, General Electric Capital Corporation, as syndication agent, and JPMCB, as paying agent. The Exit Facility provides for a total commitment of up to $3.0 billion, comprised of two separate tranches: (i) a Tranche A consisting of up to $200 million revolving commitment available for Tranche A loans and for standby letters of credit to be issued in the ordinary course of business of United or one of its subsidiary guarantors and (ii) a Tranche B consisting of a term loan commitment of up to $2.45 billion available at the time of closing and additional term loan commitments of up to $350 million available upon, among other things, United's acquiring unencumbered title to some or all of the airframes and engines that are currently subject to United's 1997 EETC transaction. The loans mature on February 1, 2012.

Borrowings under the Exit Facility bear interest at a floating rate, which can be either a base rate, or at our option, a LIBOR rate, plus an applicable margin of 2.75% in the case of the base rate loans and 3.75% in the case of the LIBOR loans. The Tranche B term loan requires regularly scheduled semi-annual payments of principal equal to 0.5% of the original principal amount of the Tranche B term loan. Interest is payable on the last day of the applicable interest period but in no event less often than quarterly. At any time prior to February 1, 2007, United may use the proceeds from any lower cost refinancing to redeem some or all of the term loans at a price equal to 101% of the principal amount plus accrued and unpaid interest, if any, to the date of redemption.

The obligations under the Exit Facility are unconditionally guaranteed by the Company and certain of the direct and indirect domestic subsidiaries of the Company (other than United) (the "Guarantors") and are secured by a security interest in substantially all of the tangible and intangible assets of the Guarantors. The obligations under the Exit Facility are also secured by a pledge of the capital stock of United and its direct and indirect subsidiaries, except that a pledge of any first tier foreign subsidiary is limited to 65% of the stock of such subsidiary and such foreign subsidiaries are not required to pledge the stock of their subsidiaries.

The Exit Facility contains covenants that will limit the ability of United and the Guarantors to, among other things, incur or guarantee additional indebtedness, create liens, pay dividends on or repurchase stock, make certain types of investments, restrict dividends or other payments from United's direct or indirect subsidiaries, enter into transactions with affiliates, sell assets or merge with other companies, modify corporate documents or change lines of business. The Exit Facility also requires compliance with several financial covenants, including (i) a minimum ratio of EBITDA to the sum of cash interest expense, aircraft rent and scheduled debt payments, (ii) a minimum unrestricted cash balance of $1.2 billion, to be reduced to $1.0 billion after December 31, 2006, and (iii) a minimum ratio of market value of collateral to the sum of (A) the aggregate outstanding amount of the loans plus (B) the undrawn amount of outstanding letters of credit, (C) the unreimbursed amount of drawings under such letters of credit and (D) the termination value of certain interest rate protection and hedging agreements with the exit lenders and their affiliates, of 150%.

The Company will use the borrowings under the Exit Facility to finance working capital needs and for other general corporate purposes.

The Exit Facility is attached hereto as Exhibit 10.1 and is incorporated herein by reference. The foregoing summary does not purport to be complete and is qualified in its entirety by reference to the Exit Facility which is filed as Exhibit 4.1 to this Form 8-K.

**Indentures**

On the Effective Date, the Company issued $500,000,000 aggregate principal amount of 6% Senior Notes due 2031 (the 6% Notes) to the Pension Benefit Guaranty Corporation ("PBGC"), pursuant to an Indenture, dated as

of the Effective Date, between the Company, United, as guarantor, and The Bank of New York Trust Company, N.A., as trustee (the "PBGC Indenture"). The PBGC Indenture also provides for the issuance of up to $500,000,000 aggregate principal amount of 8% Contingent Notes (the "8% Notes" and, together with the 6% Notes, the "PBGC Notes"), issuable upon certain financial trigger events. Also on the Effective Date, the Company issued $149,646,114 aggregate principal amount of 5% Senior Convertible Notes due 2020 (the "O'Hare Notes" and together with the PBGC Notes, the "Notes") to the respective trustees (the "Trustees") for certain holders of unsecured Chicago municipal bond claims for distribution to or on behalf of such holders, pursuant to an Indenture, dated as of the Effective Date, between UAL Corporation, United Air Lines, Inc , as guarantor, and The Bank of New York Trust Company, N.A., as trustee (the "O'Hare Indenture"). The Notes were issued pursuant to Section 1145 of the Bankruptcy Code, which exempts the issuance of securities from the registration requirements of the Securities Act of 1933, as amended (the "Securities Act").

*PBGC Notes*

The 6% Notes were issued to the PBGC upon the Company's exit from bankruptcy. The PBGC Indenture and form of 6% Note, which is attached as an exhibit to the PBGC Indenture, provide, among other things, that the 6% Notes will bear interest at a rate of 6 percent per year (payable semi-annually in cash or, on or prior to December 31, 2011, in common stock or 6% Notes, in arrears on June 30 and December 31 of each year, beginning on June 30, 2006), and will mature on February 1, 2031. The 8% Notes are contingently issuable to the PBGC in up to eight equal tranches of $62.5 million (with no more than two tranches issued on a single date), in any year from the fiscal year ending December 31, 2009 to the fiscal year ending December 31, 2017 in which there is an issuance triggered. Issuance is triggered when the Company's earnings before interest, taxes, depreciation, amortization and rents exceed $3 5 billion over the prior twelve months, provided that an issuance would not cause a default under any other securities then existing (in which case the Company must issue common stock having a value of $62.5 million in lieu of the prohibited tranche of 8% Notes). Each issued tranche would mature 15 years from its respective issuance date. The PBGC Indenture and form of 8% Note, which is attached as an exhibit to the Indenture, provide, among other things, that the 8% Notes will bear interest at a rate of 8 percent per year (payable semi-annually in cash in arrears). The Company will pay interest in cash on overdue principal and overdue installments of interest at the rate borne by the PBGC Notes plus 1% per annum.

The Company may redeem the PBGC Notes at its option, in whole or in part on a pro rata basis at any time and from time to time at a purchase price equal to 100% of the principal, plus accrued and unpaid interest, if any, to the date of purchase, payable in cash or in common stock. Upon a change in ownership or a fundamental change (each as defined in the PBGC Indenture) of the Company, each holder of the PBGC Notes will have the right to require the Company to purchase such holder's PBGC Notes at a purchase price equal to 100% of the principal amount of the PBGC Notes, together with accrued and unpaid interest, if any, to the date of purchase, payable in cash or in common stock.

The PBGC Notes will be senior unsecured obligations of the Company. The 6% Notes will rank senior in right to the 8% Notes and notes issued under the Plan to employee groups (the "Employee Notes") and *pari passu* with the O'Hare Notes. The 6% Notes will rank junior to the Company's credit facility, the Company's and the guarantor's obligations under the Ninth Amendment to the Co-Branded Card Marketing Services Agreement between the Company, Guarantor, Chase Bank U.S.A., N.A. and various other parties (the "Card Marketing Agreement") and other secured indebtedness of the Company; provided, that the 6% Notes will be *pari passu* with such indebtedness of the Company to the extent any such indebtedness is unsecured. The 8% Notes will rank junior to the 6% Notes, the Company's credit facility, the Card Marketing Agreement and other secured indebtedness of the Company and the O'Hare Notes, and will be *pari passu* with the Employee Notes. The PBGC Notes will be fully and unconditionally guaranteed by United Air Lines, Inc. The guarantee will be the guarantor's unsecured obligations and will be effectively subordinated to the guarantor's secured indebtedness to the extent of the value of assets securing such indebtedness.

The PBGC Indenture provides that the Company may not consolidate with or merge into any person or convey, transfer or lease all or substantially all of its assets to another person unless: (i) (A) in the case of a merger or consolidation, the Company is the surviving person, or (B) in the case of a merger or consolidation where the Company is not the surviving person and in the case of any such conveyance, transfer or lease, the resulting, surviving or transferee person is a corporation organized and existing under the laws of the United States or any

state thereof and such corporation assumes all the Company's obligations under the PBGC Notes and the PBGC Indenture; (ii) if, as a result of such transaction the PBGC Notes become convertible or exchangeable into common stock or securities issued by a third party, such third party guarantees all of the Company's obligations under the PBGC Notes and the PBGC Indenture; (iii) after giving effect to the transaction no event of default, and no event that, after notice or passage of time, would become an event of default, has occurred and is continuing; and (iv) other conditions described in the PBGC Indenture are met

The PBGC Indenture also provides that a guarantor may not consolidate with or merge into any person or convey, transfer or lease its properties and assets substantially as an entity to another person unless (i) after giving effect to the transaction no event of default, and no event that, after notice or passage of time, would become an event of default, has occurred and is continuing; and (ii) the guarantor survives or the surviving person assumes the obligations of such guarantor

The PBGC Indenture governing the PBGC Notes contains customary events of default Under the PBGC Indenture, events of default include (i) default in payment of any interest under the PBGC Notes, which default continues for 30 days; (ii) default in the payment of any principal amount with respect to the PBGC Notes, when the same becomes due and payable; (iii) the Company fails to provide notice of a change in ownership or a fundamental change; (iv) default in the performance of, or breach of, any covenant or warranty with respect to the PBGC Notes, which default continues for 60 days after receipt of notice by holders of at least 25% in aggregate principal amount of the outstanding PBGC Notes of that series; provided, however, that breaches of covenants with respect to notice of change in ownership, notice of default, compliance certificates and changes in organizational documents do not require notice by holders; (v) certain events of bankruptcy, insolvency or reorganization affecting the Company or the guarantor; and (vi) any guarantee ceases to be in full force and effect or is declared null and void or any guarantor denies that it has any further liability under any guarantee, or gives notice to such effect (other than by reason of the termination of the PBGC Indenture), and such condition shall have continued for a period of 30 days after written notice of such failure requiring the guarantor or the Company to remedy the same will have been given to the Company by the trustee or to the Company and the trustee by the holders of 25% in aggregate principal amount at maturity of the PBGC Notes of such series affected outstanding If an event of default occurs, other than for certain events of bankruptcy or insolvency, either the trustee or the holders of not less than 25% in aggregate principal amount of the PBGC Notes of such series affected then outstanding may declare the principal of the PBGC Notes of that series and any accrued and unpaid interest through the date of such declaration immediately due and payable In the case of certain events of bankruptcy or insolvency, the principal amount of the PBGC Notes of that series together with any accrued interest through the occurrence of such event shall automatically become and be immediately due and payable

The PBGC Indenture governing the PBGC Notes does not contain any financial or operating covenants or restrictions on the payment of dividends, the incurrence of indebtedness, incurrence of liens or the issuance or repurchase of securities by the Company or any of its subsidiaries

This description of the PBGC Indenture governing the PBGC Notes is qualified in its entirety by reference to the full text of the document, a copy of which is attached hereto as Exhibit 4.2, and is incorporated herein by reference

*O'Hare Notes*

The O'Hare Notes were issued upon the Company's exit from bankruptcy The O'Hare Indenture and form of O'Hare Note, which is attached as an exhibit to the O'Hare Indenture, provide, among other things, that the O'Hare Notes will bear interest at a rate of five percent per year (payable semi-annually in cash or, on or prior to February 1, 2007, in common stock, in arrears on June 30 and December 31 of each year, beginning on June 30, 2006), and will mature on February 1, 2021 The Company will pay interest in cash on overdue principal and overdue installments of interest at the rate borne by the O'Hare Notes plus 1% per annum

The Company may redeem the O'Hare Notes at its option, in whole or in part on a pro rata basis, at any time and from time to time after February 1, 2011, at a purchase price equal to 100% of the principal, plus accrued and unpaid interest, if any, to the date of purchase, payable in cash or in common stock Upon a change in ownership or a fundamental change (each as defined in the O'Hare Indenture) of the Company, each holder of the O'Hare

Notes will have the right to require the Company to purchase such holder's O'Hare Notes at a purchase price equal to 100% of the principal amount of the O'Hare Notes, together with accrued and unpaid interest, if any, to the date of purchase, payable in cash or in common stock

Holders may require the Company to purchase for cash or shares or a combination thereof, at the Company's election, all or a portion of their O'Hare Notes on February 1, 2011 and February 1, 2016 at a purchase price equal to 100% of the principal amount of the O'Hare Notes to be repurchased plus accrued and unpaid interest, if any, to the purchase date

The O'Hare Notes will be senior unsecured obligations of the Company The O'Hare Notes will rank junior to the Company's credit facility, the Card Marketing Agreement and any other secured indebtedness of the Company The O'Hare Notes will be *pari passu* to the 6% Notes, and senior to the Employee Notes and the 8% Notes The O'Hare Notes will rank *pari passu* with all current and future senior unsecured debt of the Company or the guarantor and senior to all current and future subordinated debt of the Company The O'Hare Notes will be fully and unconditionally guaranteed by United Air Lines, Inc The guarantee will be the guarantor's unsecured obligations

Holders may convert, at any time on or prior to maturity, redemption, a change in ownership or a fundamental change, any of their O'Hare Notes (or portions thereof) into shares of the Company's common stock at a conversion price which will initially be 125% of the average of last reported sales prices of the Company's common stock for the 60 consecutive trading days following February 1, 2006 In lieu of delivery of shares of the Company's common stock upon conversion of all or any portion of the O'Hare Notes, the Company may elect to pay holders surrendering O'Hare Notes for conversion cash or a combination of shares of common stock and cash

The O'Hare Indenture provides that the Company may not consolidate with or merge into any person or convey, transfer or lease all or substantially all of its assets to another person unless: (i) (A) in the case of a merger or consolidation, the Company is the surviving person, or (B) in the case of a merger or consolidation where the Company is not the surviving person and in the case of any such conveyance, transfer or lease, the resulting, surviving or transferee person is a corporation organized and existing under the laws of the United States or any state thereof and such corporation assumes all the Company's obligations under the O'Hare Notes and the O'Hare Indenture; (ii) if, as a result of such transaction the O'Hare Notes become convertible or exchangeable into common stock or securities issued by a third party, such third party guarantees all of the Company's obligations under the O'Hare Notes and the O'Hare Indenture; (iii) after giving effect to the transaction no event of default, and no event that, after notice or passage of time, would become an event of default, has occurred and is continuing; and (iv) other conditions described in the O'Hare Indenture are met

The O'Hare Indenture also provides that a guarantor may not consolidate with or merge into any person or convey, transfer or lease its properties and assets substantially as an entity to another person unless (i) after giving effect to the transaction no event of default, and no event that, after notice or passage of time, would become an event of default, has occurred and is continuing; and (ii) the guarantor survives or the surviving person assumes the obligations of such guarantor Upon the assumption of the guarantor's obligations by such person in such circumstances, the guarantor will not be discharged from its obligations under the O'Hare Notes and the O'Hare Indenture

The O'Hare Indenture governing the O'Hare Notes contains customary events of default Under the O'Hare Indenture, events of default include (i) default in payment of any interest under the O'Hare Notes, which default continues for 30 days; (ii) default in the payment of any principal amount with respect to the O'Hare Notes, when the same becomes due and payable; (iii) the Company fails to provide notice of a change in ownership or a fundamental change; (iv) default in the performance of, or breach of, any covenant or warranty with respect to the O'Hare Notes, which default continues for 60 days after receipt of notice by holders of at least 25% in aggregate principal amount of the outstanding O'Hare Notes; provided, however, that breaches of covenants with respect to notice of change in ownership, notice of default, compliance certificates and changes in organizational documents do not require notice by holders; (v) the Company defaults in its obligation to deliver shares of common stock of the Company, cash or other property upon conversion of a holder's exercise of their right to convert its O'Hare Notes; (vi) certain events of bankruptcy, insolvency or reorganization affecting the Company or the guarantor; and (vii) any guarantee ceases to be in full force and effect or is declared null and void or any guarantor denies that it has any

further liability under any guarantee, or gives notice to such effect (other than by reason of the termination of the O'Hare Indenture), and such condition shall have continued for a period of 30 days after written notice of such failure requiring the guarantor or the Company to remedy the same will have been given to the Company by the trustee or to the Company and the trustee by the holders of 25% in aggregate principal amount at maturity of the O'Hare Notes of such series affected outstanding. If an event of default occurs, other than for certain events of bankruptcy or insolvency, either the trustee or the holders of not less than 25% in aggregate principal amount of the O'Hare Notes then outstanding may declare the principal of the O'Hare Notes and any accrued and unpaid interest through the date of such declaration immediately due and payable. In the case of certain events of bankruptcy or insolvency, the principal amount of the O'Hare Notes together with any accrued interest through the occurrence of such event shall automatically become and be immediately due and payable.

The O'Hare Indenture governing the O'Hare Notes does not contain any financial or operating covenants or restrictions on the payment of dividends, the incurrence of indebtedness, incurrence of liens or the issuance or repurchase of securities by the Company or any of its subsidiaries.

This description of the O'Hare Indenture governing the O'Hare Notes is qualified in its entirety by reference to the full text of the document, a copy of which is attached hereto as Exhibit 4.3, and is incorporated herein by reference.

**PBGC 2% Convertible Preferred Stock**

Items 3.02 and 5.03 of this Current Report on Form 8-K are incorporated herein by this reference for a description of the issuance and terms of the Company's PBGC 2% Convertible Preferred Stock.

**ITEM 3.02. Unregistered Sales of Equity Securities.**

Pursuant to the Plan, upon the filing with the State of Delaware of the Company's Restated Certificate of Incorporation (the "Certificate"), the Company issued or reserved for issuance up to 125,000,000 shares of the Company's Common Stock, par value $.01 per share (the "Common Stock") as follows: (a) 115,000,000 shares to be distributed as the Unsecured Distribution and Employee Distribution (each as defined in the Plan), (b) up to 9,825,000 shares (or options or other rights to acquire shares) pursuant to the terms of the MEIP and (c) 175,000 shares (or option or other rights to acquire shares) pursuant to the terms of the DEIP. The Common Stock replaces the Company's prior common stock registered under Section 12(b) of the Act (which prior common stock was canceled concurrently as of the effective time of the Plan. In addition, pursuant to the Plan, the Company issued 5,000,000 shares of 2% Convertible Preferred Stock, par value $.01 per share, of the Company (the "PBGC Preferred Stock") to the PBGC pursuant to the terms of that certain Settlement Agreement by and among the Company, its direct and indirect subsidiaries and the PBGC. The Notes, the PBGC Preferred Stock and the Common Stock were issued pursuant to Section 1145 of the Bankruptcy Code, which exempts the issuance of securities from the registration requirements of the Securities Act of 1933, as amended.

**ITEM 5.02. Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers.**

Upon the Effective Date, the following directors have departed UAL's Board of Directors in connection with UAL's emergence from Chapter 11: W. Douglas Ford, Dipak C. Jain, Paul E. Tierney, Jr., and George B. Weiksner, Jr. Mr. Ford served as a member of the Audit Committee and Public Responsibility Committee of the Board of Directors. Mr. Jain served as Chairman of the Public Responsibility Committee and was a member of the Audit Committee. Mr. Tierney served as Chairman of the Audit Committee and was a member of the Executive Committee and Nominating/Governance Committee of the Board of Directors. Mr. Weiksner served as a member of the Public Responsibility Committee.

In addition, upon the Effective Date, in connection with UAL's emergence from Chapter 11, the following individuals are becoming members of UAL's Board of Directors by operation of its Plan of Reorganization: Richard J. Almeida, Walter Isaacson, Janet Langford Kelly, Robert D. Krebs and David Vitale.

*Committee Memberships*

The following directors will be members of the Audit Committee of the Board of Directors of UAL: David Vitale (Chairman), Richard J. Almeida, John H. Walker, Robert S. Miller and Robert D. Krebs.

The following directors will be members of the Executive Committee of the Board of Directors of UAL: Glenn F Tilton (Chairman), James J O'Connor, David Vitale, W. James Farrell, Walter Isaacson, Stephen R. Canale and Mark A. Bathurst. Mr. O'Connor will continue to serve as the lead director of the Board of Directors

The following directors will be members of the Human Resources Committee of the Board of Directors of UAL: W. James Farrell (Chairman), James J O'Connor, John H. Walker, Richard J Almeida, Janet Langford Kelly, David Vitale, Stephen R. Canale and Mark A. Bathurst.

The following directors will be members of the Human Resources Subcommittee of the Board of Directors of UAL: W James Farrell (Chairman), James J O'Connor, John H. Walker, Richard J Almeida, Janet Langford Kelly and David Vitale.

The following directors will be members of the Nominating/Governance Committee of the Board of Directors of UAL: James J. O'Connor (Chairman), W. James Farrell and Walter Isaacson

The following directors will be members of the Public Responsibility Committee of the Board of Directors of UAL: Walter Isaacson (Chairman), Janet Langford Kelly, Robert D. Krebs, Robert S Miller, Stephen R. Canale and Mark A Bathurst

Mr. Canale and Captain Bathurst serve on the Human Resources Committee, but not the Human Resources Subcommittee. Mr. Canale and Captain Bathurst are employees of United. Captain Bathurst is the Chairman of the Air Line Pilots Association ("ALPA")-Master Executive Council and an officer of ALPA. ALPA and United are parties to a collective bargaining agreement for our pilots represented by ALPA. Mr. Canale is President and Directing General Chairman of the International Association of Machinists and Aerospace Workers ("IAM") District Lodge 141. The IAM and United are parties to collective bargaining agreements for our ramp and stores, public contact employees, food service, security officers, maintenance instructors, fleet technical instructors and Mileage Plus employees represented by the IAM.

**ITEM 5.03. Amendments to Articles of Incorporation and Bylaws**

In connection the Company's reorganization and emergence from bankruptcy, the Company adopted the Certificate and the Amended and Restated Bylaws of the Company (the "Bylaws"), effective as of the Effective Date. The following sets forth a description of the key provisions of the Certificate and Bylaws. This description of the Certificate and Bylaws is qualified in its entirety by reference to the full text of these documents, which are filed as Exhibits 3.1 and 3.2 to this Current Report on Form 8-K.

**Authorized Capital Stock**

The Company's authorized capital stock consists of 1,255,000,002 shares of stock, divided into five classes, as follows: (i) 250,000,000 shares of preferred stock, without par value (the "Serial Preferred Stock"), (ii) 5,000,000 shares of PBGC 2% Convertible Preferred Stock, par value $0.01 per share (the "PBGC Preferred Stock"), (iii) one share of Class Pilot MEC Junior Preferred Stock, par value $0.01 per share (the "Class Pilot MEC Preferred Stock"), (iv) one share of Class IAM Junior Preferred Stock, par value $0.01 per share (the "Class IAM Preferred Stock" and, together with the Serial Preferred Stock, the PBGC Preferred Stock and the Class Pilot MEC Preferred Stock, the "Preferred Stock"), and (v) 1,000,000,000 shares of Common Stock, par value $0.01 per share (the "Common Stock").

*Serial Preferred Stock*

The Company's board of directors (the "Board") is authorized to (i) issue up to 250,000,000 shares of Serial Preferred Stock in one or more series and (ii) fix the number of shares in each such series, as well as the designations, powers, preferences and relative rights and restrictions thereof

*PBGC 2% Convertible Preferred Stock*

The PBGC Preferred Stock has the characteristics set forth below.

Ranking

The Board is authorized to issue up to 5,000,000 shares of PBGC Preferred Stock to the Pension Benefit Guaranty Corporation ("PBGC") which shall rank on parity with the Serial Preferred Stock and rank senior to all junior securities, including without limitation, the Class Pilot MEC Preferred Stock, the Class IAM Preferred Stock and all shares of Common Stock.

Dividends

The Company shall pay preferential dividends to the holders of the PBGC Preferred Stock, which accrue on a daily basis at the rate of 2% per annum on the sum of the liquidation value plus all accumulated and unpaid dividends thereon. The liquidation value is equal to $100, subject to increase as set forth in the Certificate. Dividends on the PBGC Preferred Stock are payable in kind. Dividends shall accrue until the earlier of (i) the date upon which the liquidation value, plus all accrued and unpaid dividends, are paid or the shares are redeemed by the Company, (ii) the date upon which the PBGC Preferred shares are converted into conversion stock (as discussed below) or (ii) the date on which the shares of PBGC Preferred Stock are otherwise acquired by the Company

Liquidation

Upon any liquidation, dissolution and/or winding up of the Company, each holder of PBGC Preferred Stock shall be paid in preference to any junior securities, an amount in cash equal to the liquidation value of each share of PBGC Preferred Stock owned by such holder, plus any accrued but unpaid dividends on such PBGC Preferred Stock.

Redemption

Upon a fundamental change (as defined in the Certificate), each holder of PBGC Preferred Stock is entitled to receive the aggregate liquidation value of the shares of PBGC Preferred Stock owned by such holder, plus all accrued and unpaid dividends thereon. The Company may at any time redeem all or any portion of the shares of PBGC Preferred Stock then outstanding, at a price per share equal to the liquidation value thereof, plus all accrued and unpaid dividends thereon

Voting Rights

The holders of PBGC Preferred Stock shall have no voting rights, except that the affirmative vote of the holders of a majority of the outstanding PBGC Preferred Stock, voting as a separate class, shall be necessary to authorize any amendment to the Certificate which would adversely affect the powers, preferences or special rights of any of the PBGC Preferred Shares

Conversion

At any time and from time to time following the earlier of (i) February 1, 2008 and (ii) any fundamental change or change of ownership (each as defined in the Certificate), any holder of PBGC Preferred Stock may convert all or any portion of his, her or its shares into a number of shares of conversion stock computed by multiplying the number of shares to be converted by such share's liquidation value and dividing the result by the

conversion price then in effect On February 1, 2021, each share of PBGC Preferred Stock shall be automatically converted into conversion stock (based on the formula set forth above) The conversion price shall be 125% of the average of the closing prices of the sales of Common Stock on all domestic securities exchanges on which such Common Stock may at the time be listed, averaged over a period beginning on the date of issuance of the PBGC Preferred Stock and ending on the 60th consecutive trading day following such date In order to prevent dilution upon certain events, such conversion price is subject to adjustment from time to time, as set forth in the Certificate

*Class Pilot MEC Junior Preferred Stock*

The Class Pilot MEC Preferred Stock shall only be issued to and held by (i) the United Airlines Pilots Master Executive Counsel ("MEC") of the Air Line Pilots Association, International ("ALPA") or (ii) a duly authorized agent acting on behalf of the MEC

Ranking

The PBGC Preferred Stock shall be deemed to rank senior to the Class Pilot MEC Preferred Stock as to amounts distributable upon liquidation, dissolution or winding up The Class IAM Preferred Stock shall be deemed to rank on parity with the Class Pilot MEC Preferred Stock All shares of Common Stock shall be deemed to rank junior to the Class Pilot MEC Preferred Stock

Dividends

The holder of the share of Class Pilot MEC Preferred Stock shall not be entitled to receive any dividends or other distributions

Liquidation

Upon any liquidation, dissolution and/or winding up of the Company, the holder of the Class Pilot MEC Preferred Stock shall be entitled to receive, in preference to any junior securities, an amount equal to $0 01 for the share of Class Pilot MEC Preferred Stock, but such holder shall not be entitled to receive any further payments or other distributions

Consolidation, Merger, etc.

Upon consummation of a Merger Transaction (as defined in the Certificate), the share of Class Pilot MEC Preferred Stock shall be converted, reclassified, changed into or exchanged for preferred stock of such successor or resulting or other company having, in respect of such company, the same powers, preferences and relative, participating, optional or other special rights, and the qualifications, limitations or restrictions thereof, that the Class Pilot MEC Preferred Stock had, in respect of the Company, immediately prior to such transaction

Redemption

Upon (i) the ALPA Termination Date (as defined below) or (ii) the transfer of such share to an unauthorized holder, the share of Class Pilot MEC Preferred Stock shall automatically be redeemed at a price of $0 01 per share

Voting Rights

Until such time as (the "ALPA Termination Date") (i) there are no longer any persons represented by ALPA employed by the Company or its affiliates, (ii) the collective bargaining agreements between ALPA and the Company has been amended so that it provides that ALPA no longer has the right to elect a director of the Company, the holder of the share of Class Pilot MEC Preferred Stock shall have the right (a) voting as a separate class, to (1) elect one director to the Board at each annual meeting of stockholders for a term of office to expire at the succeeding annual meeting of stockholders, (2) remove such director with or without cause and (3) fill any vacancies in such directorship resulting from death, resignation, disqualification, removal or other cause, and

(b) voting together as a single class with the holders of Common Stock and the holders of such other classes or series of stock that vote together with the Common Stock as a single class, to vote on all matters submitted to a vote of the holders of Common Stock of the Company (other than the election of directors), except as otherwise required by law For purposes of the foregoing, the share of Class Pilot MEC Preferred Stock shall have one vote. In addition, the affirmative vote of the holder of the share of Class Pilot MEC Preferred Stock voting as a separate class is necessary to authorize an amendment to the Certificate which would adversely affect the powers, preferences or special rights of the Class Pilot MEC Preferred Stock.

*Class IAM Junior Preferred Stock*

The Class IAM Preferred Stock shall only be issued to and held by (i) the International Association of Machinists and Aerospace Workers (the "IAM") or (ii) a duly authorized agent acting on behalf of the IAM

Ranking

The PBGC Preferred Stock shall be deemed to rank senior to the Class IAM Preferred Stock as to amounts distributable upon liquidation, dissolution or winding up The Class IAM Preferred Stock shall be deemed to rank on parity with the Class Pilot MEC Preferred Stock. All shares of Common Stock shall be deemed to rank junior to the Class IAM Preferred Stock.

Dividends

The holder of the share of Class IAM Preferred Stock shall not be entitled to receive any dividends or other distributions

Liquidation

Upon any liquidation, dissolution and/or winding up of the Company, the holder of the share of Class IAM Preferred Stock shall be entitled to receive, in preference to any junior securities, an amount equal to $0 01 for the share of Class IAM Preferred Stock, but such holder shall not be entitled to receive any further payments or other distributions.

Consolidation, Merger, etc.

Upon consummation of a Merger Transaction, the share of Class IAM Preferred Stock shall be converted, reclassified, changed into or exchanged for preferred stock of such successor or resulting or other company having, in respect of such company, the same powers, preferences and relative, participating, optional or other special rights, and the qualifications, limitations or restrictions thereof, that the Class IAM Preferred Stock had, in respect of the Company, immediately prior to such transaction.

Redemption

Upon (i) the IAM Termination Date (as defined below) or (ii) the transfer of such share to an unauthorized holder, the share of Class IAM Preferred Stock shall automatically be redeemed at a price of $0 01 per share.

Voting Rights

Until such time as (the "IAM Termination Date") (i) there are no longer any persons represented by IAM employed by the Company or its affiliates, (ii) the letter agreement between IAM and the Company no longer provides that IAM has the right to elect a director of the Company, the holder of the share of Class IAM Preferred Stock shall have the right (a) voting as a separate class, to (1) elect one director to the Board at each annual meeting of stockholders for a term of office to expire at the succeeding annual meeting of stockholders, (2) remove such director with or without cause and (3) fill any vacancies in such directorship resulting from death, resignation, disqualification, removal or other cause, and (b) voting together as a single class with the holders of Common Stock and the holders of such other classes or series of stock that vote together with the Common Stock as a single class, to

vote on all matters submitted to a vote of the holders of Common Stock of the Company (other than the election of directors), except as otherwise required by law. For purposes of the foregoing, the share of Class IAM Preferred Stock shall have one vote. In addition, the affirmative vote of the holders of the share of Class IAM Preferred Stock voting as a separate class is necessary to authorize an amendment to the Certificate which would adversely affect the powers, preferences or special rights of the Class IAM Preferred Stock.

*Common Stock*

Dividends

The holders of Common Stock shall be entitled to receive dividends, if and when declared payable from time to time by the Board.

Liquidation

Upon any liquidation, dissolution and/or winding up of the Company, after all securities ranking prior to the Common Stock have been paid in full that to which they are entitled, the holders of the then outstanding Common Stock shall be entitled to receive, pro rata, the remaining assets of the Company available for distribution to its stockholders.

Voting Rights

Each outstanding share of Common Stock of the Company shall entitle the holder thereof to one vote on each matter submitted to a vote at a meeting of stockholders.

**Preemptive Rights**

The Certificate does not grant any preemptive rights.

**Foreign Ownership Limitation**

The Certificate limits the total number of shares of equity securities held by all persons who fail to qualify as citizens of the United States to having no more than 24.9% of the voting power of the outstanding equity securities.

**Restrictions on Issuance of Securities**

The Certificate provides that the Company shall not issue nonvoting equity securities on or prior to the second anniversary of the Company's emergence from protection under Chapter 11 of the Bankruptcy Code to the extent prohibited by Section 1123(a)(6) of the United States Bankruptcy Code for so long as such section is in effect and applicable to the Company. In addition, except as required by law or as approved by the Company's stockholders, the Company shall not issue serial preferred stock with voting rights (unless such serial preferred stock is convertible into Common Stock, in which case such serial preferred stock may vote with the Common Stock on an as-converted basis).

**5% Ownership Limit**

The Certificate provides, subject to certain exceptions therein, that any attempted transfer of the Company's securities prior to the earliest of (A) February 1, 2011, (B) the repeal, amendment or modification of Section 382 of the Internal Revenue Code of 1986, as amended ("Section 382") in such a way as to render the restrictions imposed by Section 382 no longer applicable to the Company, (C) the beginning of a taxable year of the Company in which no Tax Benefits (as defined in the Certificate) are available, and (D) the date on which the limitation amount imposed by Section 382 in the event of an ownership change of the Company, would not be materially less than the net operating loss carry forward or net unrealized built-in loss of the Company (the "Restriction Release Date"), or any attempted transfer of the Company's securities pursuant to an agreement entered

into prior to the Restriction Release Date, shall be prohibited and void *ab initio* insofar as it purports to transfer ownership or rights in respect of such stock to the purported transferee (y) if the transferor is a Five-Percent Shareholder (as defined in the Certificate) or (z) to the extent that, as a result of such transfer either (1) any person or group of persons shall become a Five-Percent Shareholder or (2) the percentage stock ownership interest in the Company of any Five-Percent Shareholder shall be increased. The Certificate provides an exception to this limitation for securities held by the PBGC.

**Number of Directors**

The Certificate provides that the Board shall be fixed by a resolution of the Board, but in no event shall be fewer than five. The initial number of directors shall be 12, and shall not be increased to more than 12 directors prior to February 1, 2008. Directors shall hold office until the next annual meeting and may resign at any time upon written notice to the Company. Notwithstanding the foregoing, during any period when the holders of any series of Preferred Stock have the right to elect additional directors as provided for or fixed by or pursuant to the provisions of the Certificate, then upon commencement and for the duration of the period during which such right continues: (i) the then otherwise total authorized number of directors of the Company shall automatically be increased by such specified number of directors, and the holders of such Preferred Stock shall be entitled to elect the additional directors so provided for or fixed by or pursuant to said provisions, and (ii) each such additional director shall serve until such office terminates pursuant to said provisions, whichever occurs earlier, subject to his or her earlier death, disqualification, resignation or removal; provided however whenever such holders are divested of such rights pursuant to the provisions of such series of Preferred Stock, the terms of office of all such additional Directors elected by the holders of such series of Preferred Stock, or elected, or fill any vacancies resulting from the death, resignation, disqualification or removal of such additional directors, shall forthwith terminate and the total authorized number of directors of the Company shall be reduced accordingly.

**Removal of Directors**

The Bylaws provide that any director may be removed with or without cause, except as provided by law.

**Vacancies on the Board of Directors**

The Certificate and Bylaws provide that, except as may be otherwise provided pursuant to the obligations of the Company to certain holders of Preferred Stock, any vacancy on the Board that results from an increase in the number of directors may be filled by a majority of the Board then in office. Any director of any class elected to fill a vacancy resulting from an increase in the number of directors of that class will hold office for a term that coincides with the remaining term of that class.

**Stock Certificates**

The Bylaws provide that the shares of Common Stock shall be uncertificated and that all other shares of the Company shall be represented by certificate or shall be uncertificated, as determined by the Board.

**Stockholder Action by Written Consent**

The Certificate provides that no stockholder action may be taken except at an annual or special meeting of stockholders and that stockholders may not take any action by written consent.

**Amendment to Certificate of Incorporation**

The Certificate provides that the Company reserves the right to amend, alter, change or repeal any provision contained in the Certificate in a manner in keeping with the Certificate or the Delaware General Corporation Law ("GCL"), and that all rights conferred upon stockholders are granted subject to that reservation.

**Amendment of Bylaws**

The Certificate provides that the Board may alter, amend or repeal the Bylaws; provided, that no bylaws adopted shall invalidate any prior act of the Board that would have been valid if such bylaws had not been adopted. The Bylaws provide that they may be amended or altered or adopted either: (i) by the affirmative vote of at least the majority of the votes entitled to be cast by the Board or (ii) by the affirmative vote of the holders of at least a majority in voting power of the stock entitled to vote thereon

**Special Meeting of Stockholders**

The Bylaws provide that special meetings of the stockholders may be only be called by the chief executive officer of the Company, the chairman of the Board or the Board.

**Quorum**

The Bylaws provide that the holders of a majority of the capital stock issued, outstanding and entitled to vote at a meeting of stockholders, present in person or represented by proxy, will constitute a quorum at any meeting of the stockholders held for the transaction of business.

**Notice of Stockholder Meeting**

The Bylaws provide that written notice of meetings of stockholders, stating the place, date and hour of the meeting and the purpose(s) for which the meeting is called, must be given, personally or by mail, to each stockholder of record entitled to vote whenever stockholders are required or permitted to take any action at any meeting not less than 10 nor more than 60 days before the date of the meeting.

**Delivery & Notice Requirements of Stockholder Nominations and Proposals**

The Bylaws provide that at any annual stockholders' meeting only such business may be transacted as has been: (i) specified in the notice of meeting or any supplement thereto given by or at the direction of the Board or any duly authorized committee thereof; (ii) otherwise properly brought by or at the direction of the Board or any duly authorized committee thereof; or (iii) otherwise properly brought by any stockholder of the Company (A) who is a stockholder of record on the date of the giving of the notice provided for in the Bylaws and on the record date for the determination of stockholders entitled to notice of and to vote at such annual meeting, and (B) who complies with the notice procedures set forth in the Bylaws

Nominations of directors, other than those directors appointed pursuant to the Certificate by a union affiliated with the Company (the "union directors"), may be made at any annual or special meeting of stockholders called for the purpose of electing such directors, (i) by or at the direction of the Board or any duly authorized committee thereof; or (ii) by any stockholder of the Company (A) who is a stockholder of record on the date of the giving of the notice provided for in the Bylaws and on the record date for the determination of stockholders entitled to notice of and to vote at such annual meeting, and (B) who complies with the notice procedures set forth in the Bylaws.

When proposing to nominate a director, other than a union director, a stockholder's written notice to the secretary of the Company must set forth (A) with respect to any nominee: (i) the name, age and addresses of the person, (ii) such person's principal occupation or employment, (iii) the class and number of shares which are beneficially owned by the nominee, (iv) any other information that would be required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for elections of directors pursuant to the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder, (v) such nominee's written consent to serve as a director if so elected and (vi) such other information as may be reasonably necessary to permit the Corporation to determine that the nominee satisfies the qualification requirements set forth in the Certificate and that no violation of the Clayton Act will occur and (B) as to the proposing stockholder, (i) the name and address of record of the stockholder; (ii) the class and number of shares which are beneficially owned by the stockholder; (iii) a description of all arrangements or understandings between the stockholder and any other person or persons (including their names) pursuant to which the nomination is to be

made by such stockholder; (iv) a representation that the stockholder intends to appear in person or by proxy at the meeting to nominate the person named in the notice and (v) any other information that would required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for elections of directors pursuant to the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated there under.

For a proposal, other than nominations of persons for election to the Board, to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely written notice thereof to the secretary of the Company and such business must be a proper matter for stockholder action. A stockholder's written notice to the secretary for either an annual meeting or a special meeting, other than with respect to nomination of directors, must set forth: (i) a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the meeting; (ii) the name and address of record of the stockholder proposing that business; (iii) the class and number of shares which are beneficially owned by the stockholder; (iv) a description of all arrangements or understandings between the stockholder and any other person or persons (including their names) in connection with the proposal and any material interest of the stockholder in the business; and (v) a representation that the stockholder intends to appear in person or by proxy at the meeting to bring the business before the meeting.

**Board Committees**

Except as otherwise provided in the Restated Certificate, the Board may, by resolution adopted by the affirmative vote of at least a majority of the votes entitled to be cast by the entire Board, designate one or more committees of the Board, each such committee to consist of one or more directors.

**Limitation of Personal Liability of Directors**

The Certificate provides that no director will be personally liable to the Company or any of its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability for (i) any breach of the director's duty of loyalty to the Company or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the GCL or (iv) for any transaction from which a director derived an improper personal benefit.

**Indemnification of Officers & Directors**

The Certificate provides that each person who was or is made a party or is threatened to be made a party or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a "proceeding"), by reason of the fact that he or she, or a person of whom he or she is the legal representative, is or was a director, officer, or employee, of the Company or is or was serving at the request of the Company as a director, officer, or employee of another corporation or of a partnership, joint venture, trust or other enterprise shall be indemnified and held harmless by the Company to the fullest extent authorized by the GCL, as the same exists or may hereafter be amended, against all expense, liability and loss actually and reasonably incurred or suffered by such person in connection therewith. Such indemnification shall continue as to a person who has ceased to be a director, officer, or employee and shall inure to the benefit of his or her heirs, executors and administrators. Notwithstanding anything to the contrary, the Company shall not be obligated to indemnify a director, officer, or employee for costs and expenses relating to proceedings (or any part thereof) instituted against the Company by such director, officer, or employee (other than proceedings pursuant to which such director, officer, or employee is seeking to enforce such director's, officer's, or employee's indemnification rights hereunder). The right to indemnification shall include the right to be paid by the Company the expenses incurred in defending any such proceeding in advance of its final disposition.

The right to indemnification shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, provision of the Certificate, by-law, agreement, vote of stockholders or disinterested directors or otherwise.

In addition, the Certificate provides that the Company may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Company or another corporation, partnership, joint venture,

trust or other enterprise against any such expense, liability or loss, whether or not the Company would have the power to indemnify such person against such expense, liability or loss under the GCL.

**No Stockholder Rights Plan**

Except as set forth in the Bylaws, the Board shall not adopt a stockholder rights plan without the approval of the Company's stockholders prior to, or within one year following the adoption of any such rights plan.

**ITEM 9.01. Financial Statements and Exhibits**

| Exhibit No. | Description |
|---|---|
| 3.1 | Restated Certificate of UAL Corporation |
| 3.2 | Amended and Restated Bylaws of UAL Corporation |
| 4.1 | Revolving Credit, Term Loan and Guaranty Agreement, dated as of February 1, 2006, among United Air Lines, Inc., as borrower, UAL Corporation and the subsidiaries of United Air Lines, Inc. and UAL Corporation, as guarantors, the lenders party thereto, JPMorgan Chase Bank, N.A., as co-administrative agent, co-collateral agent and paying agent, Citicorp USA, Inc , as co-administrative agent and co-collateral agent, J.P. Morgan Securities Inc. and Citigroup Global Markets, Inc , as joint lead arrangers and joint bookrunners, and General Electric Capital Corporation, as syndication agent |
| 4.2 | PBGC Indenture, dated as of February 1, 2006, between UAL Corporation, as issuer, United Air Lines, Inc , as guarantor, and The Bank of New York Trust Company, N A , as trustee |
| 4.3 | O'Hare Indenture, dated as of February 1, 2006, between UAL Corporation, as issuer, United Air Lines, Inc , as guarantor, and The Bank of New York Trust Company, N A., as trustee |
| 10.1 | UAL Corporation 2006 Management Equity Incentive Plan |
| 10.2 | UAL Corporation 2006 Director Equity Incentive Plan |

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated: February 1, 2006

UAL CORPORATION

By:/s/ Paul R. Lovejoy
Name: Paul R. Lovejoy
Title: Senior Vice President, General Counsel and Secretary

## EXHIBIT INDEX

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| 10.1* | UAL Corporation 2006 Management Equity Incentive Plan |
| 10.2* | UAL Corporation 2006 Director Equity Incentive Plan |

* Filed herewith electronically.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 14, 2006, copies of Defendant's Pre-Hearing Reply Brief, were served on the following counsel of record by e-filing and hand delivery:

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June 14, 2006

**BY E-FILING AND HAND**

The Honorable Stephen P. Lamb
Vice Chancellor
New Castle County Courthouse
500 North King Street
Wilmington, Delaware 19801

Re: **Bebchuk v. CA, Inc., C.A. No. 2145-N**

Dear Vice Chancellor Lamb:

Enclosed are courtesy copies of Defendant's Pre-Hearing Reply Brief which was filed today.

I am available at the Court's convenience should Your Honor have any questions regarding this matter.

Respectfully submitted,

Raymond J. DiCamillo (#3188)

Enclosures
cc: Jay W. Eisenhofer, Esq. (via e-file)
Michael J. Barry, Esq. (via e-file)