IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

DEFENDANT'S OPENING PRE-HEARING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Lucian Bebchuk has proposed that the stockholders of CA, Inc. ("CA" or the "Company") approve an amendment to CA's by-laws that violates Delaware law. Specifically, plaintiff's proposed by-law would, among other things, prohibit CA's board of directors (the "Board") from exercising its statutorily delegated authority to adopt a stockholders rights plan expiring more than one year from the date of adoption, or from amending such plan (including CA's existing rights plan) to extend the plan's term by more than one year, unless the plan or amendment is ratified by the Company's stockholders.

Plaintiff's proposed by-law is invalid as a matter of law. Under Sections 157 and 141(a) of the Delaware General Corporation Law ("DGCL"), boards of directors -- not stockholders -- are vested with the power to create rights and options respecting stock of a Delaware corporation. Section 157 provides that "[s]ubject to any provisions in the certificate of incorporation ... [rights plans] shall be approved by the board of directors." CA's certificate of incorporation contains no provision modifying this statutory mandate. Moreover, under Section 141(a), "[t]he business and affairs of every corporation ... shall be managed by or under the direction of a board of directors."

Plaintiff asks this Court to ignore clear statutory language and at least two decades of Delaware law confirming that, unless otherwise provided in the certificate of incorporation, boards of directors have the exclusive right and power to adopt rights plans and to determine their terms and duration. There is no basis for the Court to do so, however. Although stockholders certainly have a right to amend by-laws under Section

109 of the DGCL, stockholders cannot exercise this right in an area that has been explicitly committed to the discretion of the board of directors, unless otherwise provided in the certificate of incorporation. Accordingly, this Court should declare the proposed by-law invalid as a matter of law.

Delaware courts have long recognized that rights plans are powerful mechanisms to protect corporations and their stockholders from unfair or inequitable takeover tactics. When faced with such threats, directors need the flexibility and discretion to take actions which directors believe are in the best interest of the corporation and its stockholders. Plaintiff's proposed by-law would limit that flexibility and discretion at a time when it is needed most, as in the midst of a hostile offer.

STATEMENT OF FACTS

A. The Parties.

Plaintiff Lucian Bebchuk purports to own 140 shares of stock of CA. Compl. ¶ 4.

CA is a Delaware corporation with its principal place of business in Islandia, New York. CA creates and delivers information technology management software for customers worldwide. Compl. ¶ 5.

B. Plaintiff's Proposed By-law.

On March 23, 2006, plaintiff submitted to CA a proposal to amend CA's by-laws (the "Proposed By-law"). Plaintiff requested that CA include the Proposed By-Law in CA's proxy statement to be mailed to stockholders in connection with CA's 2006 annual meeting of stockholders. Compl. ¶ 9.

Under his proposal, plaintiff seeks stockholder approval of the following amendment to CA's by-laws:

> It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article IX of the Company's By-Laws, the Company's By-Laws are hereby amended by adding Article XI as follows:
>
> > **Section 1.** Notwithstanding anything in these By-laws to the contrary, the adoption of any stockholder rights plan, rights agreement or any other form of "poison pill" which is designed to or has the effect of making an acquisition of large holdings of the Company's shares of stock more difficult or expensive ("Stockholder Rights Plan") or the amendment of any such Stockholder Rights Plan which has the effect of extending the term of the Stockholder Rights Plan or any rights or options provided thereunder, shall require the affirmative vote of all the members of the Board of Directors, and any Stockholder Rights Plan so adopted or amended 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.

Section 2. Section 1 of the Article shall not apply to any Stockholder Rights Plan ratified by the stockholders.

Section 3. Notwithstanding anything in these By-laws to the contrary, a decision by the Board of Directors to amend or repeal this Article shall require the affirmative vote of all the members of the Board of Directors.

This By-law Amendment shall be effective immediately and automatically as of the date it is approved by the vote of stockholders in accordance with Article IX of the Company's By-laws.

Compl. ¶ 9; Asay Aff., Ex. 1.[1]

On April 21, 2006, CA submitted a no-action request (the "No-Action Request") regarding the Proposed By-law to the Securities and Exchange Commission ("SEC") pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934. In the No-Action Request, CA stated that the Company believed that plaintiff's proposal may be omitted from the proxy statement pursuant to Rule 14a-8(i)(2), because, if implemented, the Proposed By-law would violate Delaware law. *See* Asay Aff., Ex. 2. CA stated its intent to omit the Proposed By-law from the proxy statement and requested that the SEC confirm that it would not recommend enforcement action against CA if the Company omitted the Proposed By-law from CA's proxy statement. *Id.*

In connection with the No-Action Request, CA provided the SEC with an opinion of its Delaware counsel that the Proposed By-law, if implemented, would violate Delaware law. The 17-page, single-spaced opinion set forth several reasons for its

[1] Citations to "Asay Aff." refer to the affidavit of Addie P. Asay filed contemporaneously herewith.

conclusion that the Proposed By-law was invalid, including that the Proposed By-law (i) violates Section 157 of the DGCL; (ii) violates Section 141(a) of the DGCL and (iii) impermissibly limits the Board's exercise of its fiduciary duty of care. Asay Aff., Ex. 3.

C. Plaintiff Institutes This Action.

On May 11, 2006, plaintiff filed the complaint in this action. The complaint ignores the arguments set forth in the No-Action Request and the supporting opinion. Rather, plaintiff simply alleges that the Proposed By-law is valid because, "under the DGCL, bylaws may require unanimity of directors to constitute an act of the board," and because the Proposed By-law "is not inconsistent with CA's certificate of incorporation." Compl. ¶¶ 18, 19. Plaintiff requests that the Court (i) declare that the Proposed By-law is valid, and (ii) order CA to withdraw the No-Action Request. *Id.* ¶ 13.

Also on May 11, 2006, plaintiff submitted a letter to the SEC in response to CA's No-Action Request. Once again, plaintiff did not address the substance of the No-Action Request. Rather, plaintiff simply informed the SEC that he had filed this lawsuit and indicated that "pursuant to Staff Legal Bulletin No. 14 (CF) (July 31, 2001), we respectfully submit that the staff should express no view in response to CA's No-Action Request." *See* Asay Aff., Ex. 4 at 2.

The parties have agreed that this action raises no factual issues and that the Court may render a judgment as a matter of law. As set forth below, the Court should declare that the Proposed By-law is invalid.

ARGUMENT

I. THE PROPOSED BY-LAW IS INVALID UNDER DELAWARE LAW.

The Proposed By-law is invalid under Delaware law for at least three reasons. First, the Proposed By-law violates the express language of Section 157 of the DGCL ("Section 157"), because it would divest the Board of its statutory right to create and determine the terms of rights and options issued with respect to corporate stock. Second, the Proposed By-law would usurp the Board's power to manage the business and affairs of the corporation in violation of Section 141(a) of the DGCL ("Section 141(a)") and impermissibly prevent the Board from discharging its fundamental management duties. Finally, the Proposed By-law would hinder the Board's ability to exercise its fiduciary duty of care when responding to an unfair takeover offer. For each of these reasons, the Proposed By-law is invalid, and CA is entitled to judgment in its favor.

A. The Proposed By-law Violates Section 157 Of The DGCL.

The Proposed By-law is invalid under Delaware law because it would divest the CA Board of its statutory authority to create and to determine the terms of rights and options issued in respect of corporate stock. 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."); *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *5 (Del. Ch. Oct. 10, 2000), *aff'd,* 780 A.2d 245, 249 (Del. 2001) ("As *Moran* clearly held, the power to issue the Rights to purchase the Preferred Shares is conferred by 8 *Del. C.* § 157.") (footnote omitted).

Section 157 expressly grants to the board of directors the power to create and issue rights and to determine the duration for which rights may be issued and maintained, subject to the certificate of incorporation. The provisions of Section 157 do not contemplate any role for stockholders or corporate by-laws:

> (a) Subject to any provisions in the certificate of incorporation [*it does not say "or by-laws"*], every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors [*It does not say "or stockholders."*].
>
> (b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration may be determined) for which any such shares may be 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 providing for the creation and issue of such rights or options [*it does not say "or in the by-laws"*], and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. In the absence of actual fraud in the transaction, the judgment of the directors [*it does not say "or stockholders"*] as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.

8 *Del. C.* § 157 (emphasis added).

The text of Section 157 conclusively establishes the invalidity of the Proposed By-law. Notably, Section 157 does not contemplate that stockholders shall have any power with regard to the creation of rights plans, but rather specifically directs that any rights or options "*shall be approved by the board of directors.*" 8 *Del. C.* § 157(a) (emphasis added). Similarly, the terms of any such rights or options "*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). Section 157 does not permit a corporation's by-laws to modify this statutory grant of authority to the board; only the certificate of incorporation can limit this discretion. *See* 8 *Del. C.* § 157(a).

Where authority is committed by statute to the discretion of the board, as is the case with Section 157, stockholders cannot interfere with the exercise of this discretion. Delaware courts have held that stockholders cannot direct, supplant, or be delegated the decision-making authority of a board of directors with respect to functions specifically assigned to the board by statute. *See, e.g., Smith v. Van Gorkom*, 488 A.2d 858, 888 (Del. 1985) (stockholders cannot assume the board's statutory responsibility under Section 251 of the DGCL to determine whether a merger agreement is advisable); *Jackson v. Turnbull*, 1994 WL 174668, at *4 (Del. Ch. Feb. 8, 1994), *aff'd*, 653 A.2d 306 (Del. 1994) (an investment advisor cannot supplant the decision making of a board of directors with respect to setting the amount of consideration to be received in a merger approved pursuant to Section 251(b) of the DGCL); *Field v. Carlisle Corp.*, 68 A.2d 817, 820 (Del. Ch. 1949) (an appraiser cannot be delegated the board's statutory responsibility under Section 152 of the DGCL to fix the consideration to be received by a corporation for the issuance of its stock); *Clarke Mem'l College v. Monaghan Land Co.*, 257 A.2d 234, 235 (Del. Ch. 1969) (officers cannot be delegated the board's statutory authority to negotiate a binding agreement for the sale of all corporate assets under Section 271 of the DGCL).

Accordingly, to the extent not fixed in the certificate of incorporation, only the board of directors may decide whether to create and issue rights, and only the board of directors may dictate the terms of such rights. This Court recently confirmed that decisions with respect to rights plans are committed to the discretion of the board of directors under Section 157. In *James v. Furman*, C.A. No. 597-N (Del. Ch. Nov. 16, 2004), the Chancellor denied a motion to dismiss a claim that a board of directors had impermissibly delegated to corporate officers and counsel the authority to make changes to the terms of a rights plan in violation of Section 157. Specifically, the Court held that "Section 157 requires that before issuing rights and options the board of directors shall approve them, and the board may not delegate the authority to fix any of the terms or conditions of rights." *Id.* *Furman* thus confirms that decisions with respect to rights plans are committed to the discretion of the board of directors by statute.

This Court's opinions in *Unisuper Ltd. v. News Corp.*, 2005 WL 3529317 (Del. Ch. Dec. 20, 2005), and in *In re National Intergroup, Inc. Rights Plan Litigation*, 1990 WL 92661 (Del. Ch. July 3, 1990), are not to the contrary. In *News Corp.*, the Court held that a *board of directors* of a Delaware corporation could agree, by adopting a board policy and promising not to revoke the policy in the future, to submit the final decision on whether or not to adopt a stockholder rights plan to a vote of the corporation's stockholders. *News Corp.*, 2005 WL 3529317, at *6-8. Similarly, in *National Intergroup*, the Court found that a *board of directors* could agree by a contract with its stockholders not to adopt a new stockholder rights plan or to extend the term of its existing plan without a stockholder vote. *Nat'l Intergroup*, 1990 WL 92661, at *6-7.

Thus, both *News Corp.* and *National Intergroup* involved a *board of directors* exercising its discretion to make a contractual agreement with stockholders to limit the board's managerial authority with respect to the efficacy of a stockholder rights plan. Boards of directors frequently limit their discretion by contract. For example, loan agreements often limit a board's ability to take certain actions without lender approval. *See, e.g.*, John C. Coates & Bradley C. Faris, *Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives*, 56 Bus. Law 1323, 1331 (Aug. 2001) (noting that the Delaware Supreme Court's decision in *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998), should not be construed as prohibiting such contractual agreements because to read the case otherwise "would be absurd, as it would render unenforceable normal loan agreements (which frequently limit a board's authority to authorize certain corporate actions, such as dividends), golden parachutes (which limit a board's ability to terminate an executive's employment without severance compensation")). But a voluntary contractual agreement by a board of directors to limit its discretion with respect to a stockholder rights plan cannot be compared to a unilateral stockholder mandate like the Proposed By-law. For this reason, *News Corp.* and *National Intergroup* are distinguishable from the instant case.

Moreover, certain *dicta* in *News Corp.* are directly contrary to prior decisions of the Delaware Supreme Court. In *News Corp.*, the Court stated: "Nonetheless, when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. This is because the board's power -- which is that of an agent's with regard to its principal -- derives from the shareholders,

who are the ultimate holders of power under Delaware law." *News Corp.*, 2005 WL 3529317, at *6. Thus, the Court suggests that directors are obligated to follow the wishes of the holders of a majority of the corporation's shares since directors are mere agents of the stockholders. This proposition is contrary to a long line of Delaware Supreme Court cases, holding that directors, not stockholders, manage the business and affairs of Delaware corporations. For example, the Delaware Supreme Court's decision in *Leonard Loventhal Account v. Hilton Hotels Corp.*, 780 A.2d 245, 249 (Del. 2001), notes that requiring a board of directors to submit a stockholder rights plan to a vote of stockholders was contrary to Delaware law. In addition, *News Corp.* did not account for the dispositive impact of 8 *Del. C.* § 157.

In summary, the Proposed By-law is invalid because it impermissibly would deprive the Board of its statutory authority to adopt and maintain a stockholders rights plan as the Board deems necessary. Section 157 is unambiguous in its mandate that the terms of any rights or options given to a corporation's stockholders shall be determined by the board of directors unless otherwise provided in the certificate of incorporation. Plaintiff does not -- because he cannot -- allege that any provision of the Restated Certificate of Incorporation of CA, Inc. (the "Certificate of Incorporation") permits or can be read to permit stockholders to divest the CA Board of its authority to enact and maintain a rights plan, or to allow stockholders to exercise such authority themselves. Accordingly, CA's stockholders cannot direct the Board to exercise its authority with regard to stockholders' rights and options in any particular way, divest the Board of such authority or delegate to themselves the authority to exercise such power. Because that is

precisely what the Proposed By-law seeks to do, the Proposed By-law violates Delaware law.

B. The Proposed By-law Violates Section 141(a) Of The DGCL.

In addition to Section 157, the power of a board of directors to adopt and maintain a rights plan rests on Section 141(a). *See Moran*, 500 A.2d at 1356 ("The directors adopted the [Rights] Plan pursuant to statutory authority in 8 *Del. C.* §§ 141, 151 [and] 157."); *Hilton*, 2000 WL 1528909, at *5 ("Under *Moran* and *Revlon*, the Hilton Board has the power to adopt the Plan under 8 *Del. C.* §§ 141 and 122(13). As *Moran* clearly held, the power to issue the Rights to purchase the Preferred Shares is conferred by 8 *Del. C.* § 157.") (footnote omitted). Thus, the Proposed By-law is also invalid under Section 141(a), because it seeks to usurp the Board's power to manage the business and affairs of the Company.

Specifically, Section 141(a) provides:

> The business and affairs of every corporation organized under this chapter 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). Significantly, if there is to be any variation from the mandate of Section 141(a), it can be only as "otherwise provided in this chapter or in its certificate of incorporation." *See, e.g., Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966). The CA Certificate of Incorporation does not provide for management of the Company by persons other than directors. In fact, Article SEVENTH, Section 1 of the CA Certificate of Incorporation provides that "[t]he management of the business and the conduct of the affairs of the corporation shall be vested in its Board of Directors." Asay Aff., Ex. 5.

The CA Certificate of Incorporation therefore confirms that the Board possesses the full power and authority to manage the business and affairs of the Company granted by Delaware law. Because the Proposed By-law purports to deprive the Board of its authority to adopt a stockholder rights plan with a term of more than one year or to extend an existing rights plan for more than one year, without ratification by the Company's stockholders, the Proposed By-law is inconsistent with Section 141(a) and the CA Certificate of Incorporation.

The distinction implicit in Section 141(a) between the role of stockholders and the role of the board of directors is well established. As the Delaware Supreme Court consistently has stated, "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also In re Walt Disney Co. Derivative Litig.*, 2005 WL 2056651, at *40 (Del. Ch. Aug. 9, 2005) ("A fundamental precept of Delaware corporation law is that it is the board of directors ... that has ultimate responsibility for the management of the enterprise."); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.") (citing 8 *Del. C.* § 141(a)); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) ("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.") (footnote omitted).

This principle has long been recognized in Delaware. For example, in *Abercrombie v. Davies*, 123 A.2d 893, 898 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957), the Court stated that "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy." Similarly, in *Maldonado v. Flynn*, 413 A.2d 1251, 1255 (Del. Ch. 1980), *rev'd on other grounds sub nom., Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), the Court stated:

> [T]he board of directors of a corporation, as the repository of the power of corporate governance, is empowered to make the business decisions of the corporation. The directors, not the stockholders, are the managers of the business affairs of the corporation.

See also 8 *Del. C.* § 141(a); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985); *Adams v. Clearance Corp.*, 121 A.2d 302 (Del. 1956); *Mayer v. Adams*, 141 A.2d 458 (Del. 1958).

Based on the foregoing, it is settled under Delaware law that stockholders cannot substantially limit a board's ability to make business judgments on matters of management policy. *See, e.g., Chapin v. Benwood Found., Inc.*, 402 A.2d 1205, 1211 (Del. Ch. 1979), *aff'd sub nom., Harrison v. Chapin*, 415 A.2d 1068 (Del. 1980) (refusing to "give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters") (citing *Abercrombie*, 123 A.2d at 899).

A board's ability to exercise its business discretion on whether to adopt or extend a rights plan in the context of a sale of the corporation is a fundamental matter of management policy that cannot be substantially limited under Delaware law. In

Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998), the Delaware Supreme Court held that a future board's ability to redeem a rights plan implicated a fundamental "matter [ ] of management policy" -- the "sale of [a] corporation" -- and therefore could not be substantially restricted under Delaware law by contract. *Id.* at 1292. Specifically, the Delaware Supreme Court noted:

> 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 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation. The Quickturn certificate of incorporation contains no provision purporting to limit the authority of the board in any way. The [contested provision], however, would prevent a newly elected board of directors from *completely* discharging its fundamental management duties to the corporation and its stockholders for six months. While the [contested 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 [contested 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); *see also Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1191 (Del. Ch. 1998) (finding that a "dead hand" provision of a rights plan impermissibly interfered with a current board's authority under Section 141(a) "to protect fully the corporation's (and its shareholders') interests in a transaction [for the sale of a corporation]") (footnote omitted); *Davis Acquisition, Inc. v. NWA, Inc.*, 1989 WL 40845, at *3 (Del. Ch. Apr. 25, 1989) (adoption of a rights plan "is a defensive measure that the *board* has legal power to take" in connection with the "sale" of a corporation) (emphasis added); *Moran v. Household Int'l Inc.*, 490 A.2d 1059, 1083 (Del. Ch. 1985) (finding that "the adoption of the Rights Plan is an appropriate exercise of

managerial judgment under the business judgment rule" in connection with the "sale" of a corporation).

The Proposed By-law impermissibly seeks to limit the Board's discretion to manage the Company according to the Board's business judgment. By divesting the Board of the ability to adopt a stockholder rights plan with a term of more than one year without stockholder approval or to amend an existing plan to extend its term for more than one year, the Proposed By-law limits the Board's authority with respect to "an area of fundamental importance to the shareholders -- negotiating a possible sale of the corporation." *Quickturn*, 721 A.2d at 1291-92. Accordingly, the Proposed By-law, if enacted, would be invalid as a matter of Delaware law.

* * *

Of course, plaintiff will argue that stockholders have the power to amend corporate by-laws pursuant to Section 109 of the DGCL. *See* Compl. ¶¶ 15-16. CA does not dispute that Section 109(a) gives stockholders the right to amend by-laws. *See* 8 *Del. C.* § 109(a). That power can be exercised, however, only with respect to areas that may be regulated by corporate by-laws. For the reasons set forth above, Sections 157 and 141(a) clearly establish that any modification of the rule that boards of directors adopt and determine the terms of rights plans must be set forth in the certificate of incorporation. Accordingly, Section 109 cannot save the Proposed By-law.

This Court's decision in *Hollinger Int'l, Inc. v. Conrad Black*, 844 A.2d 1022 (Del. Ch. Feb. 26, 2004), *aff'd*, 872 A.2d 559 (Del. 2005) is not to the contrary. In *Hollinger*, the Court held that a stockholder-adopted by-law amendment that disbanded most of the

committees of the board of directors of Hollinger International Inc. did not violate Section 141(a) of the DGCL. The Court found that Section 109 of the DGCL (which expressly provides stockholders with the authority to amend a corporation's by-laws) when read together with Section 141(c)(2) (which expressly provides for the regulation of board committees through the adoption of by-laws) permitted the stockholder-adopted by-law at issue. *Hollinger*, 844 A.2d at 1080. Unlike the by-law amendments at issue in *Hollinger*, there is no statutory basis for stockholders, through amendment to the by-laws or otherwise, to restrict the power of the board of directors to adopt or extend a rights plan.

C. The Proposed By-law Limits The Board's Exercise Of Its Fiduciary Duty Of Care.

The Proposed By-law also is invalid because, if enacted, the Proposed By-law would adversely affect adversely the Board's ability to thwart an unfair takeover offer. Directors of Delaware corporations have a duty to protect the corporation's stockholders from an unfair takeover offer. *See, e.g., MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, 501 A.2d 1239, 1247 (Del. Ch. 1985), *aff'd*, 506 A.2d 173 (Del. 1985) ("In the face of a hostile acquisition, the directors have the right, even the duty, to adopt defensive measures to defeat a takeover attempt which is perceived as being contrary to the best interests of the corporation and its shareholders."); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (Del. 1985) (finding in the context of corporate takeovers that a board has a duty to "protect the corporate enterprise, which includes [ ] [protecting] shareholders, from [ ] harm"); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d

1334, 1345 (Del. 1987) ("Newmont's directors [have] both the duty and the responsibility to oppose the threats presented by Ivanhoe and Gold Fields.").[2]

The duty to protect stockholders from harm derives from a board's fiduciary duty of care. *See Unocal*, 493 A.2d at 955 ("As we have noted, [the directors'] duty of care extends to protecting the corporation and its owners from perceived harm whether a threat originates from third parties or other shareholders."); *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1146 (Del. 1990) (finding that the duty of "care ... prevent[s] a board from being a passive instrumentality in the face of a perceived threat to corporate control").

The Delaware Supreme Court has explicitly addressed the ability of a board of directors unilaterally to adopt a rights plan in response to takeover bid:

> *Moran* addressed a fundamental question of corporate law in the context of takeovers: whether a board of directors had the power to adopt unilaterally a rights plan the effect of which was to interpose the board between the shareholders and the proponents of a tender offer. *The power recognized in Moran would have been meaningless if the rights plan required shareholder approval.* Indeed it is difficult to harmonize *Moran's* basic holding with a contention that questions a Board's prerogative to unilaterally establish a rights plan.

Hilton, 780 A.2d at 249 (emphasis added); *see also In re Pure Resources, Inc., S'holders Litig.*, 808 A.2d 421, 431 (Del. Ch. 2002), *aff'd*, 812 A.2d 224 (Del. 2002) (noting that the adoption of a rights plan is the "*de rigueur* tool of a board responding to a third-party

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[2] In *News Corp.*, the Court held that a board of directors could effectively agree by contract with the corporation's stockholders what is advisable and in the best interests of the corporation and its stockholders and that any such agreement did not operate as an impermissible limitation on the board of directors' ability to exercise its fiduciary duties under Delaware law. *See News Corp.*, 2005 WL 3529317, at *8. However, the case of a board agreeing with stockholders as to what is advisable and in the best interests of the corporation and its stockholders is distinguishable from the case of stockholders unilaterally limiting the board of

tender offer" and is quite effective at giving a target board under pressure room to breathe); *Malpiede v. Townson*, 780 A.2d 1075, 1089 (Del. 2001) (noting that a "routine strategy" for fending off unsolicited advances and negotiating for a better transaction is to adopt a poison pill); *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 481 (Del. Ch. 2000) ("The primary purpose of a poison pill is to enable the target board of directors to prevent the acquisition of a majority of the company's stock through an inadequate and/or coercive tender offer. The pill gives the target board leverage to negotiate with a would-be acquirer so as to improve the offer as well as the breathing room to explore alternatives to and examine the merits of an unsolicited bid.").

Accordingly, Delaware courts have zealously guarded a board's authority to defend against coercive takeover tactics. *See, e.g.*, *Quickturn*, 721 A.2d at 1291 ("this Court upheld the adoption of the Rights Plan in *Moran* as a legitimate exercise of business judgment by the *board of directors*") (emphasis added, footnote omitted); *Carmody*, 723 A.2d at 1186 ("It [is] settled that a corporate board [may] permissibly adopt a poison pill...."); *Davis Acquisition, Inc.*, 1989 WL 40845, at *3 (adoption of a rights plan "is a defensive measure that the *board* has legal power to take") (emphasis added); *see also* 2 David A. Drexler et al., *Delaware Corporation Law and Practice* § 17.06, at 17-30 (2005) (hereinafter "Drexler") ("Section 157 imposes upon the directors the duty to exercise *final authority* with respect to options and rights.") (emphasis added).

directors' ability to exercise its fiduciary duties as the Proposed By-law would purport to accomplish. *See also Canal Capital Corp. v. French*, 1992 WL 159008 (Del. Ch. July 2, 1992).

The fact that individual stockholders or even a majority of stockholders oppose the board's decision does not affect the board's authority. As the Court has explained:

> The 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. In fact, directors, not shareholders, are charged with the duty to manage the firm.

Paramount Communications Inc. v. Time Inc., 1989 WL 79880, at *30 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

A requirement such as the Proposed By-law that denies the Board the ability to adopt, or amend, a stockholder rights plan to provide for a term of longer than one year absent ratification by stockholders impermissibly subjects the plan's efficacy to such stockholder approval. The Proposed By-law would effectively limit the ability of the Company's directors to utilize a powerful and effective defense against unfair or inequitable takeover tactics. A shareholder vote would be required even if the Board determined in the good-faith exercise of its fiduciary duties that a rights plan with a duration of longer than one year would be in the best interests of stockholders and the most effective means of dealing with such a threat. When the Company faces a significant threat, such as inequitable takeover tactics, the directors' ability to negotiate effectively, to react expeditiously and to adopt, amend, or maintain defensive devices could be critical to discharging their fiduciary duties. Therefore, the Proposed By-law, if implemented, would violate Delaware law.

CONCLUSION

For the foregoing reasons, CA respectfully requests that this Court declare that the Proposed By-law is invalid and enter judgment in favor of CA.

OF COUNSEL:

James C. Morphy
Robert J. Giuffra, Jr.
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Raymond J. DiCamillo (#3188)
Elizabeth C. Tucker (#4468)
Addie P. Asay (#4783)
Richards Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
(302) 651-7700
Attorneys for Defendant CA, Inc.

Dated: May 26, 2006

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

AFFIDAVIT OF ADDIE P. ASAY

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

BEFORE ME, the undersigned authority, personally appeared Addie P. Asay, who being first duly sworn according to law, deposes and states as follows:

A. My name is Addie P. Asay. I am an associate attorney practicing at the firm of Richards, Layton & Finger, PA, One Rodney Square, Wilmington, DE 19899.

B. I am counsel for Defendant CA, Inc., in the above-captioned matter.

C. I submit this affidavit in support of Defendant CA, Inc.'s Opening Brief in Support of Its Motion for Judgment on the Pleadings.

D. Attached hereto as Exhibits "1" through "6" are, to the best of my knowledge, true and correct copies of the following documents:

(1) Attached to this Affidavit as **Exhibit 1** is the Shareholder Proposal of Lucian Bebchuk dated March 23, 2006.

(2) Attached to this Affidavit as **Exhibit 2** is the April 21, 2006 letter from CA, Inc. to the Division of Corporation Finance of the Securities and Exchange Commission.

(3) Attached to this Affidavit as **Exhibit 3** is the April 21, 2006 Opinion Letter from Richards, Layton & Finger.

(4) Attached to this Affidavit as **Exhibit 4** is the May 11, 2006 letter from Michael J. Barry to the Securities and Exchange Commission.

(5) Attached to this Affidavit as **Exhibit 5** is the Restated Certificate of Incorporation of CA, Inc.

(6) Attached to this Affidavit as **Exhibit 6** is the Unreported Opinion in *James v. Furman*, C.A. No. 597-N (Del. Ch. Nov. 16, 2004).

Addie P. Asay (#4783)

SWORN AND SUBSCRIBED before me
this 26th day of May, 2006.

Notary Public

My Commission expires

DEBORA L. RUBELMAN
Notary Public - State of Delaware
My Comm. Expires Nov. 7, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 26, 2006, a copy of the foregoing was served by e-file on the attorneys of record listed below:

Jay W. Eisenhofer, Esquire
Michael J. Barry, Esquire
Grant & Eisenhofer
Chase Manhattan Centre
1201 N. Market Street
Wilmington, Delaware 19801

Raymond J. DiCamillo (#3188)

EXHIBIT 1

Lucian Bebchuk
1545 Massachusetts Avenue
Cambridge, MA 02138
Telefax (617)-812-0554

March 23, 2006

VIA OVERNIGHT MAIL

CA, Inc.
ATTN: Secretary
One CA Plaza
Islandia, New York 11749

Re: Shareholder Proposal of Lucian Bebchuk

Dear Mr. Handal:

I am the owner of 140 shares of common stock of CA, Inc. (the "Company"), which I have continuously held for more than 1 year as of today's date. I intend to continue to hold these securities through the date of the Company's 2006 annual meeting of shareholders.

Pursuant to Rule 14a-8, I enclose herewith a shareholder proposal and supporting statement (the "Proposal") for inclusion in the Company's proxy materials and for presentation to a vote of shareholders at the Company's 2006 annual meeting of shareholders.

Please let me know if you would like to discuss the Proposal or if you have any questions.

Sincerely,

Lucian Bebchuk

Lucian Bebchuk

It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article IX of the Company's By-Laws, the Company's By-Laws are hereby amended by adding Article XI as follows:

> **Section 1.** Notwithstanding anything in these By-laws to the contrary, the adoption of any stockholder rights plan, rights agreement or any other form of "poison pill" which is designed to or has the effect of making an acquisition of large holdings of the Company's shares of stock more difficult or expensive ("Stockholder Rights Plan") or the amendment of any such Stockholder Rights Plan which has the effect of extending the term of the Stockholder Rights Plan or any rights or options provided thereunder, shall require the affirmative vote of all the members of the Board of Directors, and any Stockholder Rights Plan so adopted or amended 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.
>
> **Section 2.** Section 1 of this Article shall not apply to any Stockholder Rights Plan ratified by the stockholders.
>
> **Section 3.** Notwithstanding anything in these By-laws to the contrary, a decision by the Board of Directors to amend or repeal this Article shall require the affirmative vote of all the members of the Board of Directors.

This By-law Amendment shall be effective immediately and automatically as of the date it is approved by the vote of stockholders in accordance with Article IX of the Company's By-laws.

SUPPORTING STATEMENT

I believe that poison pills adopted by the Board of Directors without ratification by stockholders can deny stockholders the ability to make their own decisions regarding whether or not to accept a premium acquisition offer for their stock and, under certain circumstances, could reduce stockholder value. In my view, when one or more directors do not support a decision to adopt or extend a pill, the board should not make such a decision without obtaining shareholder ratification for the pill. Additionally, I believe that it is undesirable for a poison pill not ratified by the stockholders to remain in place indefinitely without periodic determinations by the Board of Directors that maintaining the pill continues to be advisable.

The proposed By-law amendment would not preclude the Board from adopting or maintaining a poison pill not ratified by the stockholders for as long as the Board deems necessary consistent with the exercise of its fiduciary duties, but would simply ensure that the Board not do so without the unanimous vote of the directors and without considering, within one year following the last decision to adopt or extend the pill, whether continuing to maintain the pill is in the best interests of the Company and its stockholders.

I urge you to vote "yes" to support the adoption of this proposal.

EXHIBIT 2

SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, NY 10004-2498

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.
FRANKFURT • LONDON • PARIS
BEIJING • HONG KONG • TOKYO
MELBOURNE • SYDNEY

April 21, 2006

Securities and Exchange Commission,
Office of Chief Counsel,
Division of Corporation Finance,
100 F. Street, N.E.,
Washington, D.C. 20549.

Re: CA, Inc. – Omission of Shareholder Proposal
Pursuant to Rule 14a-8(i)(2) (violation of law)

Ladies and Gentlemen:

As counsel to CA, Inc. (f/k/a Computer Associates International, Inc., the "Company") we submit this letter on behalf of the Company pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934 (the "Exchange Act"), with respect to a proposal submitted for inclusion in the Company's proxy materials for its 2006 annual meeting of stockholders (the "Proxy Materials") by Mr. Lucian Bebchuk (the "Proponent"), which the Company received on March 24, 2006. The proposal (the "Proposal") and the accompanying supporting statement (the "Supporting Statement") are attached as Annex A.

The Company believes that the Proposal may be omitted from the Proxy Materials pursuant to Rule 14a-8(i)(2) because, if implemented, it would violate the laws of the State of Delaware, which is the Company's state of incorporation. In support of this position, an opinion on Delaware law from the law firm of Richards, Layton & Finger, P.A. (the "Opinion") is attached as Annex B.

In accordance with Rule 14a-8(j), the Company hereby gives notice of its intention to omit the Proposal and the Supporting Statement from the Proxy Materials and respectfully requests the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") to confirm that it will not

recommend enforcement action to the Commission if the Company omits the Proposal and Supporting Statement from the Proxy Materials.

This letter constitutes the Company's statement of the reasons why it believes this omission to be proper. Enclosed are five additional copies of this letter, including the annexed Proposal, Supporting Statement and Opinion.

I. The Proposal

The Proposal States:

It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article IX of the Company's By-Laws, the Company's By-Laws are hereby amended by adding Article XI as follows:

> **Section 1.** Notwithstanding anything in these By-laws to the contrary, the adoption of any stockholder rights plan, rights agreement or any other form of "poison pill" which is designed to or has the effect of making an acquisition of large holdings of the Company's shares of stock more difficult or expensive ("Stockholder Rights Plan") or the amendment of any such Stockholder Rights Plan which has the effect of extending the term of the Stockholder Rights Plan or any rights or options provided thereunder, shall require the affirmative vote of all the members of the Board of Directors, and any Stockholder Rights Plan so adopted or amended 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. (emphasis added).
>
> **Section 2.** Section 1 of this Article shall not apply to any Stockholder Rights Plan ratified by the stockholders.
>
> **Section 3.** Notwithstanding anything in these By-laws to the contrary, a decision by the Board of Directors to amend or repeal this Article shall require the affirmative vote of all the members of the Board of Directors.

II. Grounds for Omission

Rule 14a-8(i)(2) permits the exclusion of a stockholder proposal if it would, "if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." The Opinion, which is attached as Annex B, sets forth a detailed analysis of the reasons why the Proposal, if adopted by the Company's stockholders, would violate the laws of the State of Delaware and why, therefore, we believe the Proposal is excludable from the Proxy Materials under Rule 14a-8(i)(2). The following is

a brief summary of the principal reasons, set forth in the Opinion, why the Proposal is excludable.

The Proposal, if adopted, would amend the Company's by-laws so as to prohibit the Company's Board of Directors (the "Board") from exercising its statutorily delegated authority to adopt a rights plan that would by its terms expire more than one year from the date of adoption, or from amending any such plan (including the Company's existing rights plan) to extend its term by more than one year, unless in each case the plan or amendment were ratified by the Company's stockholders under Section 2 thereof (the "Proposed By-law"). In substance, therefore, the Proposed By-law would dictate to the Board the maximum duration of any new rights plan, or of any extension of an existing rights plan, that the Board may adopt without further corporate action.

For the reasons summarized below, we believe that the constraints sought to be imposed by the Proposal on the authority of the Board would violate both the express provisions of the General Corporation Law of the State of Delaware (the "DGCL") that specifically vests the board of directors with the authority to adopt and fix the terms (including the duration) of rights issued by the Company (unless otherwise provided in the certificate of incorporation) and the provisions of Delaware law that grant the Board the authority to manage the business and affairs of the Company. We also believe that these constraints could impair the Board's ability to fulfill its fiduciary duties to protect the Company's stockholders from a coercive or unfair takeover offer.

We emphasize that the Proposal is not a recommendation or request for Board action. Rather, by proposing to amend the by-laws as described above, the Proposal would impose mandatory constraints upon the Board, constraints that we believe would violate both the clear language of the DGCL and Delaware common law.

A. The Proposal Directly Contradicts the Express Language of Section 157 of the DGCL that Assigns to the Board of Directors the Authority to Fix the Duration of Rights Issued by a Corporation

Delaware courts have consistently recognized the primacy of a board of directors in decisions involving potential changes of control. A board's power in this respect and, in particular, the power to adopt and maintain a rights plan for a certain duration derives from both Section 157 and Section 141(a) of the DGCL. *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."); *Leonard Loventhal Account v. Hilton Hotels Corp.*, C.A. No. 17803, slip op. at 12 (Del. Ch. Oct. 10, 2000) ("Under *Moran* and *Revlon*, the Hilton Board has the power to adopt the Plan under 8 Del. C. §§ 141 and 122(13). As *Moran* clearly held, the power to issue the Rights to purchase the Preferred Shares is conferred by 8 Del. C. § 157." Section

157(b) of the DGCL, expressly dealing with "Rights and Options Respecting Stock", provides in pertinent part that "the terms upon which, including the time or times which may be limited or unlimited in duration, . . .for which shares may be acquired from the corporation upon the exercise of any such right. . . 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. . ."[1]

The language of Section 157 is clear and unambiguous: the power to create and issue rights – and to determine the terms and conditions upon which, and the duration for which, rights may be issued and maintained – is explicitly vested in the directors and is subject only to limitations set forth in the certificate of incorporation – not the by-laws. We believe that a recent decision confirms our position. In *James v. Furmen*, C.A. No. 597-N, slip op. at 11 (Del. Ch. Nov. 16, 2004), the Delaware Court of Chancery declined to dismiss a claim that the board of directors of Greenbrier Companies, Inc. ("Greenbrier") had impermissibly delegated to Greenbrier officers and counsel the authority to make such changes to the terms of a rights plan in violation of Section 157 of the DGCL. The Delaware courts have repeatedly held that stockholders or others cannot direct, supplant or be delegated the decision-making of a board of directors with respect to functions specifically assigned to directors by statute. *See, e.g., Jackson* v. *Turnbull*, C.A. No. 13042, slip op. at 10 (Del. Ch. Feb. 8, 1994), *aff'd*, 653 A.2d 306 (Del. 1994). It is also well established that rights issued by thousands of publicly traded corporations in connection with the adoption of a shareholder rights plan are almost universally issued with a term in excess of one year, and frequently have a duration of ten years.[2]

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[1] There are no provisions in the Company's certificate of incorporation that limit the authority of the Board with respect to the issuance of rights.

[2] A recent case in the Delaware Chancery Court upheld a board policy to submit a final decision to adopt a rights plan to the stockholders. *Unisuper Ltd.* v. *News Corp.*, C.A. No 1699 (Del. Ch. Dec. 20, 2005). As discussed in the Opinion, however, the constraints on the board's authority to adopt a rights plan in the *News Corp.* case were *voluntarily adopted by the directors*, not pursuant to a by-law that the stockholders adopted. As discussed above and in the Opinion, DGCL Section 157 grants the power to adopt and fix the duration of a rights plan to the directors and only the directors. Thus, while it may be within a board's powers to *agree* with the stockholders that the board will not adopt a rights plan with a term longer than a specified limit, which was the case in *News Corp.*, it is impermissible under Delaware law for the *stockholders to require* that the board observe such a limitation, which would be the case if the Proposed By-law

footnote cont'd

Based on this reasoning, and as further detailed in the Opinion, the Proposed By-law's attempt to divest the Board of unrestricted authority to adopt a rights plan and fix a term of more than one year, or to determine to extend the Company's current rights plan beyond one year following its expiration would violate the express statutory provision of the DGCL.

B. Delaware Law Grants Exclusive Authority to Manage CA to the Board of Directors and this Authority Cannot Be Usurped by Stockholders

Section 141(a) of the DGCL states:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as otherwise provided in this chapter *or in its certificate of incorporation.* 8 Del. C. § 141(a).

Delaware courts have acknowledged that the authority to manage a corporation's affairs resides with the directors. The Supreme Court of Delaware holds as "a cardinal precept of the General Corporation Law of the State of Delaware", that "directors rather than shareholders, manage the business and affairs of the corporation". *Aronson* v. *Lewis*, 473 A.2d 805, 811 (Del. 1984). Section 141(a) makes clear that a restriction on that authority is only permissible if it is set forth in a provision of the DGCL or a company's certificate of incorporation. Unlike other sections of the DGCL, Section 141(a) makes no reference to the by-laws; therefore, we do not believe stockholders can limit a director's managerial authority under Section 141(a) by virtue of a by-law provision. *Compare, e.g.*, DGCL § 141(b), (c), § 202(b) and § 211(a). In drawing the distinction between the role of directors and stockholders, the Delaware Court of Chancery has noted that under the corporation law of Delaware, directors are not obligated to "follow the wishes of a majority of shares" in exercising their powers to manage the firm. *Paramount Communications Inc.* v. *Time Inc.*, C.A. Nos. 10866, 10935, slip op. at 77-78 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989). This is precisely what this Proposed By-law seeks to do.

A board's fiduciary duty of care is implicated when it is faced with a takeover offer. In very strong language, the Delaware Supreme Court has declared that

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footnote cont'd
were adopted. Consequently, we do not believe that the *News Corp.* case is relevant to the Company's case or changes the analysis summarized above.

directors of Delaware corporations have a fiduciary duty to protect the corporation's stockholders from an unfair takeover offer. *See, e.g., Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995) ("When a corporation is not for sale, the board of directors is the defender of the metaphorical medieval corporate bastion and the protector of the corporation's shareholders."). Moreover, it is well established that, among the powers conferred upon directors under Section 141(a), is the power to adopt and maintain defensive measures, such as a stockholder rights plan, prior to or in response to a takeover proposal. *See, e.g., MacAndrews & Forbes Holdings, Inc.* v. *Revlon, Inc.*, 501 A.2d 1239, 1247 (Del. Ch. 1985), *aff'd*, 506 A.2d 173 (Del. 1985) ("In the face of a hostile acquisition, the directors have the right, even the duty, to adopt defensive measures to defeat a takeover attempt which is perceived as being contrary to the best interests of the corporation and its shareholders."). Thus, circumscribing the Board's ability to adopt a stockholder rights plan with a term of more than one year, or to maintain the Company's current stockholders rights plan beyond one year following its expiration, could impair the ability of the Company's directors to exercise one of their fundamental duties as directors.

In *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998), the Delaware Supreme Court held that a future board's ability to redeem a rights plan implicated a fundamental "matter[ ] of management policy" – the "sale of [a] corporation" – and therefore could not be substantially restricted under Delaware law other than by the certificate of incorporation. *Id.* at 1292. Specifically, the Delaware Supreme Court held:

> 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 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation. The Quickturn certificate of incorporation contains no provision purporting to limit the authority of the board in any way. The [contested provision], however, would prevent a newly elected board of directors from completely discharging its fundamental management duties to the corporation and its stockholders for six months. While the [contested 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 [contested 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.

In *Quickturn*, the Delaware Supreme Court dealt with a provision, adopted by the board, that only limited the ability of a *new* board of directors to redeem the rights issued under a stockholders rights plan. The Proposed By-law is far more egregious because it would limit the authority of *any* board of directors of the Company, current and future, to adopt, amend and fix the terms of a stockholder rights plan as they deem appropriate in the exercise of their fiduciary duties. As *Quickturn* makes clear, interfering with a board's authority in this area, even "in only one respect", is invalid.

Based on the foregoing, we believe that the Proposal, which would seek to use a by-law to restrict the authority of the Board to determine the duration of a Company rights plan or amendment to such a plan, is inconsistent with Section 141(a) of the DGCL and the extensive body of case law regarding the exclusive authority of directors pursuant to Section 141(a) with respect to rights plans.

Overall, whether the Board's authority with respect to the adoption, duration and extension of a stockholder rights plan arises under DGCL Section 157 or 141, the common law of fiduciary duties, or some combination thereof, in our view it cannot be overridden by a stockholder-adopted by-law. *See Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) ("A bylaw that is inconsistent with any statute or rule of common law ... is void...."). As such, for the reasons summarized above, and set forth more fully in the Opinion, the Proposal, if adopted by the Company's stockholders, would violate Delaware law. Accordingly, we believe the Proposal may be excluded from the Proxy Materials pursuant to Rule 14a-8(i)(2).

III. Recent Applicable Authority

Exclusion of the Proposal from the Proxy Materials is consistent with the Staff's prior positions that similar stockholder proposals, if implemented, would violate Delaware law. *See Toys R Us, Inc.* (April 9, 2002) and *Mattel, Inc.* (March 27, 2002). In those letters, the Staff found a basis for the view that a stockholder proposal to adopt a by-law to prevent a company from enacting or maintaining a stockholder rights plan without stockholder approval was excludable under Rule 14a-8(i)(2). The Staff reached a different conclusion in *Alaska Air Group, Inc.* (March 17, 2005) although it did not indicate the reasons for doing so. As stated in the note to clause (i)(1) of Rule 14a-8, the Commission believes that most proposals cast as recommendations or requests that the directors take certain action are proper under state law. As stated above, the Proposal, in contrast, would amend the Company's bylaws to impose constraints on the Board and is therefore mandatory, not precatory.

We emphasize that the Proposal is not a recommendation or request for Board action; rather, by proposing to amend the by-laws as described above, the Proposal would impose mandatory constraints upon the Board, constraints that we believe would violate Delaware law.

IV. Request for Staff Concurrence

The Company respectfully requests that the Staff confirm that it will not recommend enforcement action to the Commission if the Proposal and Supporting Statement are excluded from the Proxy Materials for the reasons set forth in the Opinion and summarized above.

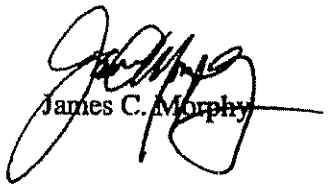
In accordance with Rule 14a-8(j), the Company is contemporaneously notifying the Proponent, by copy of this letter, of its intention to omit the Proposal and Supporting Statement from its Proxy Materials. The Company anticipates that it will mail its definitive Proxy Materials to stockholders on or about July 14, 2006.

* * * * *

If you have any questions regarding this request or need any additional information, please telephone the undersigned at 212-558-3988 or, in the undersigned's absence, David B. Harms at 212-558-3882.

Please acknowledge receipt of this letter and enclosed materials by stamping the enclosed copy of the letter and returning it in the enclosed self-addressed stamped envelope.

Very truly yours,



James C. Morphy

(Enclosures)

cc: Lucian Bebchuk
Kenneth V. Handal, Esq.
Lawrence M. Egan, Esq.
(CA, Inc.)

Annex A

Lucian Bebchuk
1545 Massachusetts Avenue
Cambridge, MA 02138
Telefax (617)-812-0554

March 23, 2006

VIA OVERNIGHT MAIL

CA, Inc.
ATTN: Secretary
One CA Plaza
Islandia, New York 11749

Re: Shareholder Proposal of Lucian Bebchuk

Dear Mr. Handal:

I am the owner of 140 shares of common stock of CA, Inc. (the "Company"), which I have continuously held for more than 1 year as of today's date. I intend to continue to hold these securities through the date of the Company's 2006 annual meeting of shareholders.

Pursuant to Rule 14a-8, I enclose herewith a shareholder proposal and supporting statement (the "Proposal") for inclusion in the Company's proxy materials and for presentation to a vote of shareholders at the Company's 2006 annual meeting of shareholders.

Please let me know if you would like to discuss the Proposal or if you have any questions.

Sincerely,

Lucian Bebchuk

It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article IX of the Company's By-Laws, the Company's By-Laws are hereby amended by adding Article XI as follows:

> **Section 1.** Notwithstanding anything in these By-laws to the contrary, the adoption of any stockholder rights plan, rights agreement or any other form of "poison pill" which is designed to or has the effect of making an acquisition of large holdings of the Company's shares of stock more difficult or expensive ("Stockholder Rights Plan") or the amendment of any such Stockholder Rights Plan which has the effect of extending the term of the Stockholder Rights Plan or any rights or options provided thereunder, shall require the affirmative vote of all the members of the Board of Directors, and any Stockholder Rights Plan so adopted or amended 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.
>
> **Section 2.** Section 1 of this Article shall not apply to any Stockholder Rights Plan ratified by the stockholders.
>
> **Section 3.** Notwithstanding anything in these By-laws to the contrary, a decision by the Board of Directors to amend or repeal this Article shall require the affirmative vote of all the members of the Board of Directors.

This By-law Amendment shall be effective immediately and automatically as of the date it is approved by the vote of stockholders in accordance with Article IX of the Company's By-laws.

SUPPORTING STATEMENT

I believe that poison pills adopted by the Board of Directors without ratification by stockholders can deny stockholders the ability to make their own decisions regarding whether or not to accept a premium acquisition offer for their stock and, under certain circumstances, could reduce stockholder value. In my view, when one or more directors do not support a decision to adopt or extend a pill, the board should not make such a decision without obtaining shareholder ratification for the pill. Additionally, I believe that it is undesirable for a poison pill not ratified by the stockholders to remain in place indefinitely without periodic determinations by the Board of Directors that maintaining the pill continues to be advisable.

The proposed By-law amendment would not preclude the Board from adopting or maintaining a poison pill not ratified by the stockholders for as long as the Board deems necessary consistent with the exercise of its fiduciary duties, but would simply ensure that the Board not do so without the unanimous vote of the directors and without considering, within one year following the last decision to adopt or extend the pill, whether continuing to maintain the pill is in the best interests of the Company and its stockholders.

I urge you to vote "yes" to support the adoption of this proposal.

Annex B

RICHARDS, LAYTON & FINGER
A PROFESSIONAL ASSOCIATION
ONE RODNEY SQUARE
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April 21, 2006

CA, Inc
One CA Plaza
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Re: Bylaw Amendment Proposal Submitted By Lucian Bebchuk

Ladies and Gentlemen:

We have acted as special Delaware counsel to CA, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by Lucian Bebchuk (the "Proponent") which the Proponent intends to present at the Company's 2006 annual meeting of stockholders. In this connection, you have requested our opinion as to a certain matter under the General Corporation Law of the State of Delaware (the "General Corporation Law").

For purposes of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents: (i) the Restated Certificate of Incorporation of the Company, as amended through March 8, 2006 (the "Certificate"); (ii) the By-Laws of the Company, dated March 7, 2006; and (iii) the Proposal and its supporting statement.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed, photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above, and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal reads as follows:

It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article IX of the Company's By-Laws, the Company's By-Laws are hereby amended by adding Article XI as follows:

> **Section 1.** Notwithstanding anything in these By-laws to the contrary, the adoption of any stockholder rights plan, rights agreement or any other form of "poison pill" which is designed to or has the effect of making an acquisition of large holdings of the Company's shares of stock more difficult or expensive ("Stockholder Rights Plan") or the amendment of any such Stockholder Rights Plan which has the effect of extending the term of the Stockholder Rights Plan or any rights or options provided thereunder, shall require the affirmative vote of all the members of the Board of Directors, and any Stockholder Rights Plan so adopted or amended 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.
>
> **Section 2.** Section 1 of this Article shall not apply to any Stockholder Rights Plan ratified by the stockholders.
>
> **Section 3.** Notwithstanding anything in these By-laws to the contrary, a decision by the Board of Directors to amend or repeal this Article shall require the affirmative vote of all the members of the Board of Directors.

This By-law Amendment shall be effective immediately and automatically as of the date it is approved by the vote of stockholders in accordance with Article IX of the Company's By-laws.

In connection with the adoption of a stockholder rights plan or the extension of the term of an existing rights plan by the board of directors of the Company (the "Board"), the bylaw proposed for adoption pursuant to the Proposal (the "Rights Plan Bylaw") would purport

to require the Board to provide for the termination of such plan or amendment within one year from the later of its adoption and amendment unless the plan or amendment is ratified by the Company's stockholders.

Discussion

You have asked our opinion as to whether the Rights Plan Bylaw, if adopted by the stockholders, would be valid under the General Corporation Law. For the reasons set forth below, in our opinion the Rights Plan Bylaw, if adopted by the stockholders, would not be valid under the General Corporation Law.

In reaching this opinion, we start from the proposition that, as a general matter, the stockholders of a Delaware corporation have the power to amend the bylaws. This power, however, is not unlimited and is subject to the express limitations set forth in 8 Del. C. § 109(b), which 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.

(Emphasis added). We turn, therefore, to consideration of whether the Rights Plan Bylaw is "inconsistent with law or with the certificate of incorporation."

The Rights Plan Bylaw Violates Section 157 of the General Corporation Law.

Under Section 157 of the General Corporation Law, the power to create and issue rights and to determine the duration for which rights may be issued and maintained is explicitly vested in the directors, not in stockholders or others. The provisions of Section 157 are themselves quite instructive for what they say and for what they do not say:

> (a) Subject to any provisions in the certificate of incorporation [*it does not say "or bylaws"*], every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors. [*It does not say "or stockholders."*]
>
> (b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration

> may be determined) for which any such shares may be 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 providing for the creation and issue of such rights or options [*it does not say "or in the bylaws"*], and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. In the absence of actual fraud in the transaction, the judgment of the directors [*it does not say "or stockholders"*] as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.

8 Del. C. § 157 (emphasis added). Accordingly, the questions of whether to create and issue rights and for what duration the rights may be issued and maintained are to be determined by the board, not by the stockholders or others (acting through a bylaw or otherwise). Indeed, in a recent decision, James v. Furman, C.A. No. 597-N, slip op. at 11 (Del. Ch. Nov. 16, 2004), the Delaware Court of Chancery declined to dismiss a claim that the board of directors of Greenbrier Companies, Inc. ("Greenbrier") had impermissibly delegated to Greenbrier officers and counsel the authority to make changes to the terms of a rights plan in violation of Section 157 of the General Corporation Law. Thus, Furman confirms that decisions with respect to rights plans are committed to the discretion of the board of directors by statute.

The Delaware courts have repeatedly held that stockholders or others cannot direct, supplant or be delegated the decision-making authority of a board of directors with respect to functions specifically assigned to directors by statute. See, e.g., Jackson v. Turnbull, C.A. No. 13042, slip op. at 10 (Del. Ch. Feb. 8, 1994), aff'd, 653 A.2d 306 (Del. 1994) (finding that an investment advisor cannot supplant the decision making of a board of directors with respect to setting the amount of consideration to be received in a merger approved pursuant to Section 251(b) of the General Corporation Law); Smith v. Van Gorkom, 488 A.2d 858, 888 (Del. 1985) (finding that stockholders cannot assume the board's statutory responsibility under Section 251 of the General Corporation Law to determine that a merger agreement is advisable); Field v. Carlisle Corp., 68 A.2d 817, 820 (Del. Ch. 1949) (finding that an appraiser cannot be delegated the board's statutory responsibility under Section 152 of the General Corporation Law to fix the consideration to be received by a corporation for the issuance of its stock); Clarke Mem'l College v. Monaghan Land Co., 257 A.2d 234, 235 (Del. Ch. 1969) (finding that officers cannot be delegated the board's statutory obligation to negotiate a binding agreement for the sale of all of a corporation's assets pursuant to Section 271 of the General Corporation Law); accord Nagy v. Bistricer, 770 A.2d 43, 60-65 (Del. Ch. 2000); 2 William Meade Fletcher, Cyclopedia of the Law of Private Corporations §§ 495-99 (perm. ed. rev. vol. 2005) (hereinafter "Fletcher"). Adopting and extending a stockholders rights plan and setting the duration of such a plan or extension are functions specifically assigned to the board of directors of a Delaware corporation by statute -- i.e., by Section 157 of the General Corporation Law. Accordingly, absent a provision in the corporation's certificate of incorporation to the contrary, a board of directors of a Delaware corporation cannot be directed to exercise such authority in any particular way, be divested of

such authority or delegate to stockholders or others the authority to exercise such power. But see Unisuper Ltd. v. News Corp., C.A. No. 1699-N, slip op. at 15-17 (Del. Ch. Dec. 20, 2005).[1]

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[1] In Unisuper Ltd. v. News Corp., C.A. No. 1699, slip op. at 15-17 (Del. Ch. Dec. 20, 2005), the Delaware Court of Chancery held that a board of directors of a Delaware corporation could agree, by adopting a board policy and promising not to subsequently revoke the policy, to submit the final decision on whether or not to adopt a stockholder rights plan to a vote of the corporation's stockholders. Similarly, in In re Nat'l Intergroup, Inc. Rights Plan Litig., C.A. Nos. 11484, 11511 (Del. Ch. July 3, 1990), the Court of Chancery found that a board of directors could agree by a contract with its stockholders not to adopt a new stockholder rights plan or extend the term of its existing plan without a stockholder vote. Thus, each of News Corp. and In re Nat'l Intergroup involved a board of directors exercising its discretion to make a contractual agreement with stockholders to limit its managerial authority with respect to the efficacy of a stockholder rights plan. Boards of directors frequently limit their discretion by contract. For example, loan agreements often limit the ability of the board of directors to take certain actions without lender approval. See, e.g., John C. Coates & Bradley C. Faris, Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law 1323, 1331 (Aug. 2001) (hereinafter referred to as "Coates and Faris") (noting that the Delaware Supreme Court's decision in Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998), should not be construed as prohibiting such contractual agreements because to read the case otherwise "would be absurd, as it would render unenforceable normal loan agreements (which frequently limit a board's authority to authorize certain corporate actions, such as dividends), and golden parachutes (which limit a board's ability to terminate an executive's employment with severance compensation"). However, a voluntary agreement by a board of directors to contractually limit its discretion with respect to the efficacy of a stockholder rights plan is distinguishable from the instant case in which the manner in which the Board may exercise its discretion is purported to be dictated by stockholders. In the latter case, the Board is impermissibly divested of the authority to exercise its own business judgment on whether limiting its discretion with respect to the efficacy of a stockholder rights plan is advisable and in the best interests of the Company and its stockholders, whereas in the former case the board is not divested of such discretion. For this reason, News Corp. and In re Nat'l Intergroup are distinguishable from the instant case.

Moreover, certain dictum in the News Corp. decision is directly contrary to prior decisions of the Delaware Supreme Court. In News Corp., the Delaware Court of Chancery stated: "Nonetheless, when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. This is because the board's power -- which is that of an agent's with regard to its principal -- derives from the shareholders, who are the ultimate holders of power under Delaware law." Slip op. at 17. Thus, the Court suggests that directors are obligated to follow the wishes of a majority of the corporation's shares since directors are mere agents of the stockholders. This proposition is contrary to a long line of Delaware Supreme Court cases, supra, pp. 6-7, holding that directors, not stockholders, manage the business and affairs of Delaware corporations, and to the Delaware Supreme Court's decision in Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245,

The Rights Plan Bylaw Violates Section 141(a) of the General Corporation Law.

The power of a board of directors to adopt and maintain a rights plan derives not only from Section 157 of the General Corporation Law, but also from Section 141(a) of the General Corporation Law. 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."); Hilton Hotels, slip op. at 12 ("Under Moran and Revlon, the Hilton Board has the power to adopt the Plan under 8 Del. C. §§ 141 and 122(13). As Moran clearly held, the power to issue the Rights to purchase the Preferred Shares is conferred by 8 Del. C. § 157.") (footnote omitted). Section 141(a) of the General Corporation Law provides:

> The business and affairs of every corporation organized under this chapter 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). Significantly, if there is to be any variation from the mandate of 8 Del. C. § 141(a), it can only be as "otherwise provided in this chapter or in its certificate of incorporation." See, e.g., Lehrman v. Cohen, 222 A.2d 800, 808 (Del. 1966). The Certificate does not provide for management of the Company by persons other than directors, and the phrase "except as otherwise provided in this chapter" does not include bylaws adopted pursuant to Section 109(b) of the General Corporation Law. See, infra, pp. 12-17 (addressing the interplay between Sections 141(a) and 109(b)). Thus, the Board possesses the full power and authority to manage the business and affairs of the Company. To the extent the Rights Plan Bylaw purports to deprive the Board of such authority by prohibiting the Board from adopting a stockholder rights plan with a term of more than one year, or from extending an existing rights plan for more than one year, unless in each case the plan or extension is ratified by the Company's stockholders, the Rights Plan Bylaw is inconsistent with Section 141(a) and the Certificate.

The distinction implicit in Section 141(a) of the General Corporation Law between the role of stockholders and the role of the board of directors is well established. As the Delaware Supreme Court consistently has stated, "a cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). See also McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.") (citing 8 Del. C. § 141(a)); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate

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249 (Del. 2001), infra p. 11, in which the Court noted that requiring a board of directors to submit a stockholder rights plan to a vote of stockholders was wholly inconsistent with Delaware law. In addition, the News court failed to account for the dispositive impact of 8 Del. C. § 157 (discussed, supra, at pp. 3-5).

responsibility for managing the business and affairs of a corporation.") (footnote omitted). This principle has long been recognized in Delaware. Thus, in Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956), rev'd on other grounds, 130 A.2d 338 (Del. 1957), the Court of Chancery stated that "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy." Similarly, in Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980), rev'd on other grounds sub nom., Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), the Court of Chancery stated:

> [T]he board of directors of a corporation, as the repository of the power of corporate governance, is empowered to make the business decisions of the corporation. The directors, not the stockholders, are the managers of the business affairs of the corporation.

See also 8 Del. C. § 141(a); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985); Adams v. Clearance Corp., 121 A.2d 302 (Del. 1956); Mayer v. Adams, 141 A.2d 458 (Del. 1958). The rationale for these statements is as follows:

> Stockholders are the equitable owners of the corporation's assets. However, the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation. Instead, they have the right to share in the profits of the company and in the distribution of its assets on liquidation. Consistent with this division of interests, the directors rather than the stockholders manage the business and affairs of the corporation and the directors, in carrying out their duties, act as fiduciaries for the company and its stockholders.

Norte & Co. v. Manor Healthcare Corp., C.A. Nos. 6827, 6831, slip op. at 9 (Del. Ch. Nov. 21, 1985) (citations omitted); Paramount Communications Inc. v. Time Inc., C.A. Nos. 10866, 10935, 19835, slip op. at 77-78 (Del. Ch. July 14, 1989), aff'd, 571 A.2d 1140 (Del. 1989) ("The 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."); but see Unisuper Ltd. v. News Corp., supra, n. 1. We believe that the extensive body of Delaware case law regarding rights plans and directors' fiduciary duties is inconsistent with the concept of stockholder-dictated action controlling the duration, adoption or extension of a rights plan.

The Rights Plan Bylaw Substantially Limits the Board's Discretion.

In addition to the prohibition on delegation to, or the usurpation by, stockholders or others of decision-making with respect to matters reserved by statute to the discretion of the board of directors, stockholders or others cannot substantially limit the board's ability to make a business judgment on matters of management policy. See, e.g., Chapin v. Benwood Found, Inc., 402 A.2d 1205, 1211 (Del. Ch. 1979), aff'd sub nom, Harrison v. Chapin, 415 A.2d 1068 (Del. 1980) (finding that the court could not "give legal sanction to agreements which have the effect

of removing from directors in a very substantial way their duty to use their own best judgment on management matters") (citing Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956), rev'd in part on other grounds, 130 A.2d 338 (Del. Ch. 1957)); Grimes v. Donald, 673 A.2d 1207, 1214 (Del. 1996) (same); Canal Capital Corp. v. French, C.A. No. 11764, slip op. at 4 (Del. Ch. July 2, 1992) (same); accord Rodman Ward, Jr. et al., 1 Folk on the General Corporation Law § 141.1.3, at GCL-IV-15 (2006-2 Supp.) (hereinafter "Folk") (stating that it is the responsibility and duty of directors to determine corporate goals); Fletcher, § 495 p. 529 ("The directors of the corporation do not have the power to delegate to others those duties which are at the focal point of the management of the corporation.").

A board's ability to exercise its business discretion on whether to adopt or extend a rights plan in the context of a sale of the corporation is a fundamental matter of management policy that cannot be substantially limited under Delaware law. In Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998), the Delaware Supreme Court held that a future board's ability to redeem a rights plan implicated a fundamental "matter [ ] of management policy" -- the "sale of [a] corporation" -- and therefore could not be substantially restricted under Delaware law by contract. Id. at 1292. Specifically, the Delaware Supreme Court held:

> 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 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation. The Quickturn certificate of incorporation contains no provision purporting to limit the authority of the board in any way. The [contested provision], however, would prevent a newly elected board of directors from completely discharging its fundamental management duties to the corporation and its stockholders for six months. While the [contested 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 [contested 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 1291-1292 (emphasis added, and internal citations omitted); see also Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1191 (Del. Ch. 1998) (finding that a "dead hand" provision of a rights plan impermissibly interfered with a current board's authority under Section 141(a) "to protect fully the corporation's (and its shareholders') interests in a transaction [for the sale of a corporation]") (footnote omitted); Davis Acquisition, Inc. v. NWA, Inc., C.A. No. 10761, slip op. at 7 (Del. Ch. Apr. 25, 1989) (adoption of a rights plan "is a defensive measure that the board has legal power to take" in connection with the "sale" of a corporation) (emphasis added); Moran v. Household Int'l, Inc., 490 A.2d 1059, 1083 (Del. Ch. 1985) (finding that "the adoption of the

Rights Plan is an appropriate exercise of managerial judgment under the business judgment rule" in connection with the "sale" of a corporation). By divesting the Board of the ability to adopt a stockholder rights plan with a term of more than one year, or to amend an existing plan to extend its term for more than one year, unless in each case the plan or amendment is ratified by the Company's stockholders, the Rights Plan Bylaw indisputably would limit the Board's authority with respect to "an area of fundamental importance to the shareholders – negotiating a possible sale of the corporation." Quickturn, 721 A.2d at 1291-92.

The Rights Plan Bylaw Limits the Board's Exercise of its Fiduciary Duty of Care.

A board's fiduciary duty of care also is implicated when it is faced with an unfair takeover offer. Directors of Delaware corporations have a fiduciary duty to protect the corporation's stockholders from an unfair takeover offer. See, e.g., MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239, 1247 (Del. Ch. 1985), aff'd, 506 A.2d 173 (Del. 1985) ("In the face of a hostile acquisition, the directors have the right, even the duty, to adopt defensive measures to defeat a takeover attempt which is perceived as being contrary to the best interests of the corporation and its shareholders."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (finding in the context of corporate takeovers that a board has a duty to "protect the corporate enterprise, which includes [ ] [protecting] shareholders, from [ ] harm"); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987) ("Newmont's directors [have] both the duty and the responsibility to oppose the threats presented by Ivanhoe and Gold Fields."); see, e.g., 1 R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations, at 4-35 (3d ed. 2006) (hereinafter "Balotti & Finkelstein") ("The predominant view is that the target board has a duty to oppose tender offers which would be harmful to the corporation.");[2] 10 Corporate Counsel Weekly (BNA), No. 20, at 7 (May 17, 1995) (in which former Delaware Supreme Court Justice Andrew G.T. Moore II is quoted as stating that "failure to adopt a pill under certain circumstances could in itself be a breach of the duty of loyalty and care"). The duty to protect stockholders from harm derives from the fiduciary duty of care. See Unocal, 493 A.2d at 955 ("As we have noted, [the directors'] duty of care extends to protecting the corporation and its owners from perceived harm whether a threat originates from third parties or other shareholders."); Gilbert v. El Paso Co., 575 A.2d 1131, 1146 (Del. 1990) (finding that the duty of "care ... prevent[s] a board from being a passive instrumentality in the face of a perceived threat to corporate control"). Thus, circumscribing the Board's ability to adopt a stockholder rights plan with a term of more than one year, or to extend an existing plan for more than one year could impair the Board's exercise of its fiduciary duty of care.[3]

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[2] Messrs. Balotti and Finkelstein are directors of Richards, Layton & Finger, P.A.

[3] In News Corp., the Delaware Court of Chancery also held that a board of directors could effectively agree by a contract with the corporation's stockholders what is advisable and in the best interests of the corporation and its stockholders and that any such agreement did not operate as an impermissible limitation on the board of directors' ability to exercise its fiduciary duties under Delaware law. Slip op. at 20-22. However, the case of a board agreeing with

A requirement that the Board provide for the termination of any stockholder rights plan or amendment to extend the term of a rights plan within one year from the later of its adoption or last extension unless the amendment or plan is ratified by stockholders in all cases, thereby subjecting the plan's efficacy to such stockholder approval, effectively limits the ability of the Company's directors to utilize a powerful and effective tool in reacting to unfair or inequitable takeover tactics, even if the Board determines in the good faith exercise of its fiduciary duties that a rights plan would be in the best interests of stockholders and the most effective means of dealing with such a threat. See, e.g., In re Pure Resources Inc., S'holders Litig., 808 A.2d 421, 431 (Del. Ch. 2002), aff'd, 812 A.2d 224 (Del.) (TABLE) (noting that the adoption of a rights plan is the "de rigueur tool of a board responding to a third-party tender offer" and is quite effective at giving a target board under pressure room to breathe); Malpiede v. Townson, 780 A.2d 1075, 1089 (Del. 2001) (noting that a "routine strategy" for fending off unsolicited advances and negotiating for a better transaction is to adopt a poison pill); In re Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 481 (Del. Ch. 2000) ("The primary purpose of a poison pill is to enable the target board of directors to prevent the acquisition of a majority of the company's stock through an inadequate and/or coercive tender offer. The pill gives the target board leverage to negotiate with a would-be acquirer so as to improve the offer as well as the breathing room to explore alternatives to and examine the merits of an unsolicited bid."). Submitting to a stockholder vote the question of whether to adopt or extend a rights plan in such circumstances significantly diminishes the ability of the Board to respond as necessary to protect the interests of the Company and its stockholders. When the Company faces a significant threat, such as inequitable takeover tactics, the directors' ability to negotiate effectively, to react expeditiously and to maintain its defensive devices could be critical to discharging their fiduciary duties.

For this reason, the Delaware courts have zealously guarded the board's prerogatives in this area versus the wishes of the stockholders and others. See, e.g., Quickturn, 721 A.2d at 1291 ("this Court upheld the adoption of the Rights Plan in Moran as a legitimate exercise of business judgment by the board of directors") (emphasis added; footnote omitted); Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1186 (Del. Ch. 1998) ("It [is] settled that a corporate board [may] permissibly adopt a poison pill...."); Davis Acquisition, Inc. v. NWA, Inc., C.A. No. 10761, slip op. at 7 (Del. Ch. Apr. 25, 1989) (adoption of a rights plan "is a defensive measure that the board has legal power to take") (emphasis added); see also Martin Lipton, "Pills, Polls, and Professors Redux," 69 U. Chi. L. Rev., 1037, 1061 (Summer 2002) ("It is inconsistent with existing Delaware law for a board ... to delegate to shareholders in a referendum the fiduciary decision of whether to leave [a] pill ... in place."); 2 David A. Drexler et al., Delaware Corporation Law and Practice § 17.06, at 17-30 (2005) (hereinafter "Drexler") ("Section 157 imposes upon the directors the duty to exercise final authority with respect to

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stockholders what is advisable and in the best interests of the corporation and its stockholders is distinguishable from the case of stockholders unilaterally limiting the board of directors' ability to exercise its fiduciary duties as the Rights Plan Bylaw would purport to accomplish.

options and rights.") (emphasis added). The Delaware Supreme Court has addressed this issue explicitly:

> Moran addressed a fundamental question of corporate law in the context of takeovers: whether a board of directors had the power to adopt unilaterally a rights plan the effect of which was to interpose the board between the shareholders and the proponents of a tender offer. The power recognized in Moran would have been meaningless if the rights plan required shareholder approval. Indeed it is difficult to harmonize Moran's basic holding with a contention that questions a Board's prerogative to unilaterally establish a rights plan.

Hilton, 780 A.2d at 249. The fact that individual stockholders or even a majority of stockholders oppose the board's decision does not affect the board's authority. As the Court of Chancery has explained:

> The 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. In fact, directors, not shareholders, are charged with the duty to manage the firm.

Paramount Communications Inc., slip op. at 77-78.

The Rights Plan Bylaw is Void.

Whether the Board's authority with respect to the adoption, extension and duration of a stockholder rights plan arises under 8 Del. C. § 157 or 141(a), the common law of fiduciary duties, or some combination thereof, in our view it cannot be overridden by a stockholder-adopted bylaw. See Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985) ("A bylaw that is inconsistent with any statute or rule of common law ... is void...."); Quickturn, 721 A.2d at 1291-92; Carmody, 723 A.2d at 1191. See also Coates and Faris, Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law. at 1333-1334 ("One of the most enduring principles of the Delaware common law of corporations is that shareholders cannot limit a board in the exercise of business judgment regarding matters conferred to the board's discretion by law or charter. Had the Delaware legislature intended to allow shareholders to abrogate this rule via bylaw, it could have made this clear.") (footnotes omitted); Lawrence A. Hamermesh, Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev. 409, 479 (Dec. 1998) (hereinafter referred to as "Hamermesh-Tulane Law Review") ("stockholders lack the general authority to adopt by-laws that directly limit the managerial power of directors"); Charles F. Richards, Jr. & Robert J. Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law, 54 Bus. Law. 607, 621 (Feb. 1999) (hereinafter referred to as "Richards

and Stearn")[4] ("Based on the authority vested in the board of directors by sections 141(a) and 157, the Delaware courts have repeatedly deferred to directorial prerogative and discretion in the context of adoption, maintenance, and redemption of rights plans, subject only to the fact-specific Unocal/Unitrin proportionality test. The body of law so developed is wholly inconsistent with the concept of shareholder-dictated action regarding a rights plan....") (footnote omitted).

The drafters of the General Corporation Law did provide for specific mechanisms pursuant to which stockholders could limit the power of a board of directors to manage the business and affairs of a corporation. As discussed above, Section 141(a) provides that the board of directors shall manage the business and affairs of the corporation "except as may be otherwise provided in this chapter or in its certificate of incorporation." In addition, in forming a corporation under the close corporation statute, the stockholders thereof may either act by written agreement to restrict the discretion of the board of directors, 8 Del. C. § 350, or elect in the certificate of incorporation to permit the stockholders to manage the business and affairs of the corporation directly, 8 Del. C. § 351. However, this permitted restriction on the discretion of the directors is only applicable to close corporations. Chapin v. Benwood Found., Inc., 402 A.2d 1205 (Del. Ch. 1979), aff'd sub nom., Harrison v. Chapin, 415 A.2d 1068 (Del. 1980). See also 2 Drexler § 43.02, at 43-6 (Section 350 exempts agreements of stockholders in close corporations from the rule that stockholders may not restrict or interfere with powers of board).

Commentators Supporting the Validity of the Rights Plan Bylaw Misinterpret Delaware Law.

We are aware that several commentators have expressed the view that bylaws such as the Rights Plan Bylaw should be valid under Delaware law.[5] See, e.g., Leonard Chazen, The Shareholder Rights By-Law: Giving Shareholders a Decisive Voice, 5 Corporate Governance Advisor 8 (1997); Jonathan R. Macey, The Legality and Utility of the Shareholder Rights Bylaw, 26 Hofstra L. Rev. 835 (Summer 1998).[6] According to Messrs. Chazen and

[4] Messrs. Richards and Steam are directors of Richards, Layton & Finger, P.A.

[5] There is no Delaware case that specifically addresses the validity or invalidity of the Rights Plan Bylaw or of a similar bylaw. See, e.g., Coates and Faris, Second Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law. at 1329; Richards and Steam, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny under Delaware Law, 54 Bus. Law. at 607; Lawrence A. Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, 5 Corporate Governance Advisor 9 (1997). However, the Delaware Supreme Court's decision in Quickturn Design Sys., Inc. v. Shapiro, 7221 A.2d 1281 (Del. 1998), strongly supports the conclusion that the Rights Plan Bylaw would not be valid under Delaware law.

[6] Mr. Chazen is an attorney who has represented Mr. Guy P. Wyser-Pratte, who has advocated adoption of bylaws similar to the Rights Plan Bylaw. Mr. Macey has been Mr.

Macey, such bylaws would not be invalid under Section 141(a) of the General Corporation Law because Section 141(a)'s broad grant of authority to the board of directors is qualified by the phrase "except as may be otherwise provided in this chapter," which in their view includes (and thus permits) bylaws adopted pursuant to Section 109(b), and because a narrower reading of Section 141(a) would improperly negate Section 109(b)'s broad grant of authority for stockholders to adopt bylaws relating to the rights and powers of stockholders and directors. See Chazen, The Shareholder Rights By-Law: Giving Shareholders A Decisive Voice at 8, 17; Maccy, The Legality and Utility of the Shareholder Rights Bylaw, 26 Hofstra L. Rev. at 867-68. See also R. Matthew Garms, Shareholder By-Law Amendments and the Poison Pill: The Market for Corporate Control and Economic Efficiency, 24 J. Corp. L. 433, 441-43, 451 (Winter 1999) (same). Cf. Gordon, "Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett, 19 Cardozo L. Rev. at 547 ("Under prevailing modes of corporate statutory interpretation in Delaware, in which different statutes have 'equal dignity' or 'independent legal significance,' nothing can be resolved about the scope of section 109(b) from the reference in section 141(a) to the articles alone, not the bylaws.") (footnote omitted); Ronald J. Gilson, Unocal Fifteen Years Later (And What We Can Do About It), 26 Del. J. Corp. L. 491, 509 (2001) ("Under the equal dignity doctrine, the fact that the two sections [Section 141(a) and 109(b)] cover the same ground results not in a conflict, but in alternative approaches to the same problem.") (footnote omitted). Although no Delaware case has directly addressed the interplay of Sections 141(a) and 109(b) in this context, we are of the view that these commentators have misconstrued Section 109(b) and the "except as may be otherwise provided in this chapter" language of Section 141(a).[7]

First, most commentators on the General Corporation Law agree that the "except as may be otherwise provided in this chapter" language of Section 141(a) refers only to specific provisions of the General Corporation Law, which expressly authorize a departure from the general rule of management by directors, and not to open-ended provisions such as Section

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Wyser-Pratte's nominee in several threatened proxy fights, including threatened proxy fights involving Telxon Corporation and Rexene Corporation.

[7] In Hollinger Int'l, Inc. v. Conrad Black, C.A. No. 183-N (Del. Ch. Feb. 26, 2004), the Court of Chancery held that a stockholder-adopted bylaw amendment that disbanded most of the committees of the board of directors of Hollinger International Inc. did not violate Section 141(a) of the General Corporation Law. The Court found that Section 109 of the General Corporation Law (which expressly provides stockholders with the authority to amend a corporation's bylaws) when read together with Section 141(c)(2) (which expressly provides for the regulation of board committees through the adoption of bylaws) permitted the stockholder-adopted bylaw at issue. We do not believe that the Hollinger decision permits stockholders to make decisions in areas such as the adoption of rights plans pursuant to Section 157 of the General Corporation Law, which is specifically reserved to the board of directors by statute. Unlike the bylaw amendments at issue in Hollinger, there is no statutory basis for stockholders, through amendment to the bylaws or otherwise, to place conditions or restrictions on the power of the board to adopt or extend a rights plan.

109(b). See Balotti & Finkelstein, at 4-6 (suggesting that such language references close corporation provisions of the General Corporation Law); Drexler § 13.01[1], at 13-2 (suggesting that such language references Sections 141(c), 226, 291 and close corporation provisions); Folk, at GCL-IV-11-12 (suggesting that such language references Sections 107, 226 and close corporation provisions); Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, at 11 (The exception in Section 141(a) "addresses the narrow instances in which the General Corporation Law explicitly departs from the director management rule, as in Section 291 (authorizing appointment of a receiver for a corporation 'to take charge of its assets, estate, effects, business and affairs'), and Section 226 (permitting appointment of a custodian to exercise the powers of a receiver under Section 291). The fact that Section 141(a) is drafted to allow these limited, explicit departures from the director management norm cannot be read to allow an implied, open-ended invitation to depart from that norm through by-law provisions adopted by stockholders."). Indeed, several commentators specifically concluded that a bylaw similar to the Rights Plan Bylaw could not be accomplished under Section 109(b), notwithstanding that statute's arguably broad language. See Coates and Faris,. Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus Law. at 1335 ("[F]irst generation shareholder bylaws are likely to be struck down under Delaware law because they limit the board's authority to manage the business and affairs of the company. If the Delaware Supreme Court's decision in Quickturn does not lead one to this result, the text, history, and common law development of Delaware law does."); Hamermesh, The Shareholder Rights By-Law: Doubts From Delaware, at 13 ("Given the statutory governance scheme reflected in Section 141(a) ..., that by-law proposal is an attempt that impermissibly intrudes upon the authority of the board of directors. It cannot be accomplished by a by-law provision despite the superficially broad subject matter reach of the statute (Section 109(b)) that governs the content of by-laws."); Richards and Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny under Delaware Law, 54 Bus. Law. at 624-25 ("If the Delaware General Assembly intended in section 141(a) to permit shareholders to enact by-laws restricting the authority of the board of directors to manage the business and affairs of the corporation, it easily could have so stated in section 141(a), as other jurisdictions have done. It did not.") (footnote omitted). See also Hamermesh, Corporate Democracy and Stockholder -- Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev. at 430 ("[T]he most reasonable reading of [Sections 109(b) and 141(a)] precludes reliance on Section 109(b) as an independent source of authority for a by-law that directly limits the managerial power of the board of directors.") (footnote omitted). Thus, there is significant support for the view that the "except as may be otherwise provided in this chapter" language of Section 141(a) does not include bylaws adopted under Section 109 (except perhaps if such bylaws are also adopted pursuant to Section 141(c), which is not applicable here). See, supra, n.7.

Second, most commentators believe that Section 109's purportedly broad grant of authority for stockholders to adopt bylaws relating to the rights and powers of stockholders and directors relates to bylaws that govern procedural or organizational matters, and not substantive decisions governing the corporation's business and affairs. See Balotti & Finkelstein, § 1.10, at 1-14 ("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."); Richards and Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny under Delaware Law, 54 Bus. Law. at 625-27 (supporting procedural/substantive distinction); Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, at 14 n.20 ("A by-law removing an entire category of business decisions from board authority ... is quite distinct from a by-law that merely governs how board decisions are to be made, and poses a distinct challenge to the allocation of management authority specified by Section 141(a)."). See also id. at 10 ("by-laws of Delaware corporations do not customarily prescribe or limit the substantive content of business decisions"). Such an interpretation of Section 109(b) would harmonize 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 or under the direction of the board of directors. But see Hamermesh, Corporate Democracy and Stockholder – Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev., at 444 (suggesting that procedural/substantive distinction does not necessarily "provide a coherent analytical structure" and that "it is preferable to read section 141(a) as an absolute preclusion against by-law limits on director management authority, in the absence of explicit statutory authority for such limits outside of section 109(b)") (footnote omitted).

Mr. Macey suggests that, as a threshold matter, bylaws such as the Rights Plan Bylaw do not improperly interfere with directorial authority to manage the business and affairs of the corporation:

> Under section 109(b), shareholders retain the power to adopt, amend, and repeal corporate bylaws. This specific empowerment of shareholders should trump any vague, general norms about directors' power to run the firm, particularly because the shareholders rights bylaw does not interfere with directors' ability to make strategic decisions about the firm's operation....
>
> * * *
>
> [T]here is a strong argument that a company that adopts a shareholder rights bylaw is still managed under the direction of its board anyway.

Macey, The Legality and Utility of the Shareholder Rights Bylaw, 26 Hofstra L. Rev. at 867-69 (footnotes omitted).

This suggestion is inconsistent with Delaware law. The assertion that bylaws such as the Rights Plan Bylaw do not interfere with the directors' authority to manage the business and affairs of the corporation is incorrect, since "[f]or over a decade now, it has been settled that the term 'business and affairs' of the corporation includes ... adoption of measures intended to deter or preclude unsolicited tender offers." Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, at 9. See also Quickturn, 721 A.2d at 1292 (provision of rights plan limiting future board's ability to redeem rights impermissibly interfered with future board's authority under Section 141(a) to manage business and affairs of corporation); Carmody, 723

A.2d at 1191 (complaint challenging provision of rights plan prohibiting future board from redeeming rights stated claim that provision impermissibly interfered with board's authority under Section 141(a) to manage business and affairs of corporation).

We are aware that the Supreme Court of the State of Oklahoma has concluded that, under Oklahoma law, stockholders may adopt bylaws that restrict the board of directors' authority to create and implement shareholder rights plans. Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., 975 P.2d 907, 908 (Okla. 1999). We do not believe, however, that the Oklahoma Supreme Court's decision would be persuasive to a Delaware court.

First, we note that the Oklahoma Supreme Court did not view the Oklahoma analogue to Section 141(a) as being "of primary concern" to its decision and concluded, without analysis, that the authority of directors under the Oklahoma analogue to Section 141(a) was subject to "shareholder oversight" under the Oklahoma analogue to Section 109(b). For the reasons stated herein, we believe that a Delaware court would construe Sections 141(a) and 109(b) differently. Indeed, although the Oklahoma Supreme Court observed that "Oklahoma and Delaware have substantially similar corporation acts" and relied in part upon Delaware case law, the Court failed even to acknowledge the substantial body of Delaware case law concerning the board of directors' duty under Section 141(a) to manage the business and affairs of the corporation, including in the context of takeover proposals.

Second, we note that the Oklahoma Supreme Court determined that the authority granted under the Oklahoma analogue to Section 157 was not limited to the board of directors, a position with which, for the reasons stated herein, we believe a Delaware court would not agree under Delaware law. Moreover, the Oklahoma court ignored the substantial body of Delaware case law concerning rights plans, analogized a rights plan to a stock option plan, and relied upon, among other things, an inapposite Delaware case concerning shareholder ratification of board action that was contrary to the terms of a stock option plan.

Finally, we note that the Oklahoma Supreme Court was expressly influenced by the fact that the Oklahoma legislature had not adopted a "shareholder rights plan endorsement statute," a fact that we believe would not be persuasive to a Delaware court given the extensive and established case law in Delaware upholding the authority of the board of directors to adopt and implement rights plans. Accordingly, we are of the view that a Delaware court would not find the reasoning or conclusions of the Oklahoma Supreme Court to be persuasive. See, e.g., Andrew R. Brownstein & Igor Kirman, Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions, 60 Bus. Law. 23, 58 (Nov. 2004) ("[T]he consensus view among commentators is that the Fleming precedent would not be followed in Delaware and that a board of director's ability to adopt a poison pill in the context of a sale of the corporation is a fundamental matter of management policy that cannot be substantially limited under Delaware law."); Hamermesh, Corporate Democracy and Stockholder -- Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev. at 435-36 ("the Fleming by-law and similar direct attempts to limit specific management decisions should be rejected by the courts"); Michael D. Goldman et al., Fleming Must Be Read Narrowly, 21 Bank and Corp. Governance L. Rep. 1102 (1999) ("while

the relevant Oklahoma statutes are similar to their Delaware counterparts, it is unlikely that a Delaware court would reach the same conclusion as the Oklahoma court").

We note that the Securities and Exchange Commission (the "SEC") previously has accepted the view that stockholder proposals similar to the Proposal, if implemented, would violate Delaware law. Toys "R" Us, Inc., 2002 SEC No-Action Letter, LEXIS 571, at *1 (Apr. 9, 2002); see also Mattel, Inc., 2002 SEC No-Action Letter, LEXIS 497, at *1 (March 27, 2002) ("The proposal requests a bylaw to prevent Mattel from enacting or maintaining a shareholder rights plan without shareholder approval. There appears to be some basis for your view that Mattel may exclude the proposal under rule 14a-8(i)(2). We note that in the opinion of your Delaware counsel, Richards, Layton & Finger, implementation of the proposal would cause Mattel to violate state law. Accordingly, we will not recommend enforcement action to the Commission if Mattel omits the proposal from its proxy materials in reliance on rule 14a-8(i)(2).").

Conclusion

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that the Rights Plan Bylaw, if adopted by the stockholders, would not be valid under the General Corporation Law.

The foregoing opinion is limited to the General Corporation Law. We have not considered and express no opinion on any other laws or the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the SEC and the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

DAB/LRS

EXHIBIT 3

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April 21, 2006

CA, Inc
One CA Plaza
Islandia, NY 11749

Re: Bylaw Amendment Proposal Submitted By Lucian Bebchuk

Ladies and Gentlemen:

We have acted as special Delaware counsel to CA, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by Lucian Bebchuk (the "Proponent") which the Proponent intends to present at the Company's 2006 annual meeting of stockholders. In this connection, you have requested our opinion as to a certain matter under the General Corporation Law of the State of Delaware (the "General Corporation Law").

For purposes of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents: (i) the Restated Certificate of Incorporation of the Company, as amended through March 8, 2006 (the "Certificate"); (ii) the By-Laws of the Company, dated March 7, 2006; and (iii) the Proposal and its supporting statement.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed, photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above, and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal reads as follows:

It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article IX of the Company's By-Laws, the Company's By-Laws are hereby amended by adding Article XI as follows:

> **Section 1.** Notwithstanding anything in these By-laws to the contrary, the adoption of any stockholder rights plan, rights agreement or any other form of "poison pill" which is designed to or has the effect of making an acquisition of large holdings of the Company's shares of stock more difficult or expensive ("Stockholder Rights Plan") or the amendment of any such Stockholder Rights Plan which has the effect of extending the term of the Stockholder Rights Plan or any rights or options provided thereunder, shall require the affirmative vote of all the members of the Board of Directors, and any Stockholder Rights Plan so adopted or amended 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.
>
> **Section 2.** Section 1 of this Article shall not apply to any Stockholder Rights Plan ratified by the stockholders.
>
> **Section 3.** Notwithstanding anything in these By-laws to the contrary, a decision by the Board of Directors to amend or repeal this Article shall require the affirmative vote of all the members of the Board of Directors.

This By-law Amendment shall be effective immediately and automatically as of the date it is approved by the vote of stockholders in accordance with Article IX of the Company's By-laws.

In connection with the adoption of a stockholder rights plan or the extension of the term of an existing rights plan by the board of directors of the Company (the "Board"), the bylaw proposed for adoption pursuant to the Proposal (the "Rights Plan Bylaw") would purport

to require the Board to provide for the termination of such plan or amendment within one year from the later of its adoption and amendment unless the plan or amendment is ratified by the Company's stockholders.

Discussion

You have asked our opinion as to whether the Rights Plan Bylaw, if adopted by the stockholders, would be valid under the General Corporation Law. For the reasons set forth below, in our opinion the Rights Plan Bylaw, if adopted by the stockholders, would not be valid under the General Corporation Law.

In reaching this opinion, we start from the proposition that, as a general matter, the stockholders of a Delaware corporation have the power to amend the bylaws. This power, however, is not unlimited and is subject to the express limitations set forth in 8 Del. C. § 109(b), which 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.

(Emphasis added). We turn, therefore, to consideration of whether the Rights Plan Bylaw is "inconsistent with law or with the certificate of incorporation."

The Rights Plan Bylaw Violates Section 157 of the General Corporation Law.

Under Section 157 of the General Corporation Law, the power to create and issue rights and to determine the duration for which rights may be issued and maintained is explicitly vested in the directors, not in stockholders or others. The provisions of Section 157 are themselves quite instructive for what they say and for what they do not say:

> (a) Subject to any provisions in the certificate of incorporation [*it does not say "or bylaws"*], every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors. [*It does not say "or stockholders."*]
>
> (b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration

> may be determined) for which any such shares may be 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 providing for the creation and issue of such rights or options [*it does not say "or in the bylaws"*], and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. In the absence of actual fraud in the transaction, the judgment of the directors [*it does not say "or stockholders"*] as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.

8 Del. C. § 157 (emphasis added). Accordingly, the questions of whether to create and issue rights and for what duration the rights may be issued and maintained are to be determined by the board, not by the stockholders or others (acting through a bylaw or otherwise). Indeed, in a recent decision, James v. Furman, C.A. No. 597-N, slip op. at 11 (Del. Ch. Nov. 16, 2004), the Delaware Court of Chancery declined to dismiss a claim that the board of directors of Greenbrier Companies, Inc. ("Greenbrier") had impermissibly delegated to Greenbrier officers and counsel the authority to make changes to the terms of a rights plan in violation of Section 157 of the General Corporation Law. Thus, Furman confirms that decisions with respect to rights plans are committed to the discretion of the board of directors by statute.

The Delaware courts have repeatedly held that stockholders or others cannot direct, supplant or be delegated the decision-making authority of a board of directors with respect to functions specifically assigned to directors by statute. See, e.g., Jackson v. Turnbull, C.A. No. 13042, slip op. at 10 (Del. Ch. Feb. 8, 1994), aff'd, 653 A.2d 306 (Del. 1994) (finding that an investment advisor cannot supplant the decision making of a board of directors with respect to setting the amount of consideration to be received in a merger approved pursuant to Section 251(b) of the General Corporation Law); Smith v. Van Gorkom, 488 A.2d 858, 888 (Del. 1985) (finding that stockholders cannot assume the board's statutory responsibility under Section 251 of the General Corporation Law to determine that a merger agreement is advisable); Field v. Carlisle Corp., 68 A.2d 817, 820 (Del. Ch. 1949) (finding that an appraiser cannot be delegated the board's statutory responsibility under Section 152 of the General Corporation Law to fix the consideration to be received by a corporation for the issuance of its stock); Clarke Mem'l College v. Monaghan Land Co., 257 A.2d 234, 235 (Del. Ch. 1969) (finding that officers cannot be delegated the board's statutory obligation to negotiate a binding agreement for the sale of all of a corporation's assets pursuant to Section 271 of the General Corporation Law); accord Nagy v. Bistricer, 770 A.2d 43, 60-65 (Del. Ch. 2000); 2 William Meade Fletcher, Cyclopedia of the Law of Private Corporations §§ 495-99 (perm. ed. rev. vol. 2005) (hereinafter "Fletcher"). Adopting and extending a stockholders rights plan and setting the duration of such a plan or extension are functions specifically assigned to the board of directors of a Delaware corporation by statute -- i.e., by Section 157 of the General Corporation Law. Accordingly, absent a provision in the corporation's certificate of incorporation to the contrary, a board of directors of a Delaware corporation cannot be directed to exercise such authority in any particular way, be divested of

such authority or delegate to stockholders or others the authority to exercise such power. But see Unisuper Ltd. v. News Corp., C.A. No. 1699-N, slip op. at 15-17 (Del. Ch. Dec. 20, 2005).[1]

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[1] In Unisuper Ltd. v. News Corp., C.A. No. 1699, slip op. at 15-17 (Del. Ch. Dec. 20, 2005), the Delaware Court of Chancery held that a board of directors of a Delaware corporation could agree, by adopting a board policy and promising not to subsequently revoke the policy, to submit the final decision on whether or not to adopt a stockholder rights plan to a vote of the corporation's stockholders. Similarly, in In re Nat'l Intergroup, Inc. Rights Plan Litig., C.A. Nos. 11484, 11511 (Del. Ch. July 3, 1990), the Court of Chancery found that a board of directors could agree by a contract with its stockholders not to adopt a new stockholder rights plan or extend the term of its existing plan without a stockholder vote. Thus, each of News Corp. and In re Nat'l Intergroup involved a board of directors exercising its discretion to make a contractual agreement with stockholders to limit its managerial authority with respect to the efficacy of a stockholder rights plan. Boards of directors frequently limit their discretion by contract. For example, loan agreements often limit the ability of the board of directors to take certain actions without lender approval. See, e.g., John C. Coates & Bradley C. Faris, Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law 1323, 1331 (Aug. 2001) (hereinafter referred to as "Coates and Faris") (noting that the Delaware Supreme Court's decision in Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998), should not be construed as prohibiting such contractual agreements because to read the case otherwise "would be absurd, as it would render unenforceable normal loan agreements (which frequently limit a board's authority to authorize certain corporate actions, such as dividends), and golden parachutes (which limit a board's ability to terminate an executive's employment with severance compensation"). However, a voluntary agreement by a board of directors to contractually limit its discretion with respect to the efficacy of a stockholder rights plan is distinguishable from the instant case in which the manner in which the Board may exercise its discretion is purported to be dictated by stockholders. In the latter case, the Board is impermissibly divested of the authority to exercise its own business judgment on whether limiting its discretion with respect to the efficacy of a stockholder rights plan is advisable and in the best interests of the Company and its stockholders, whereas in the former case the board is not divested of such discretion. For this reason, News Corp. and In re Nat'l Intergroup are distinguishable from the instant case.

Moreover, certain dictum in the News Corp. decision is directly contrary to prior decisions of the Delaware Supreme Court. In News Corp., the Delaware Court of Chancery stated: "Nonetheless, when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. This is because the board's power -- which is that of an agent's with regard to its principal -- derives from the shareholders, who are the ultimate holders of power under Delaware law." Slip op. at 17. Thus, the Court suggests that directors are obligated to follow the wishes of a majority of the corporation's shares since directors are mere agents of the stockholders. This proposition is contrary to a long line of Delaware Supreme Court cases, supra, pp. 6-7, holding that directors, not stockholders, manage the business and affairs of Delaware corporations, and to the Delaware Supreme Court's decision in Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245,

The Rights Plan Bylaw Violates Section 141(a) of the General Corporation Law.

The power of a board of directors to adopt and maintain a rights plan derives not only from Section 157 of the General Corporation Law, but also from Section 141(a) of the General Corporation Law. 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."); Hilton Hotels, slip op. at 12 ("Under Moran and Revlon, the Hilton Board has the power to adopt the Plan under 8 Del. C. §§ 141 and 122(13). As Moran clearly held, the power to issue the Rights to purchase the Preferred Shares is conferred by 8 Del. C. § 157.") (footnote omitted). Section 141(a) of the General Corporation Law provides:

> The business and affairs of every corporation organized under this chapter 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). Significantly, if there is to be any variation from the mandate of 8 Del. C. § 141(a), it can only be as "otherwise provided in this chapter or in its certificate of incorporation." See, e.g., Lehrman v. Cohen, 222 A.2d 800, 808 (Del. 1966). The Certificate does not provide for management of the Company by persons other than directors, and the phrase "except as otherwise provided in this chapter" does not include bylaws adopted pursuant to Section 109(b) of the General Corporation Law. See, infra, pp. 12-17 (addressing the interplay between Sections 141(a) and 109(b)). Thus, the Board possesses the full power and authority to manage the business and affairs of the Company. To the extent the Rights Plan Bylaw purports to deprive the Board of such authority by prohibiting the Board from adopting a stockholder rights plan with a term of more than one year, or from extending an existing rights plan for more than one year, unless in each case the plan or extension is ratified by the Company's stockholders, the Rights Plan Bylaw is inconsistent with Section 141(a) and the Certificate.

The distinction implicit in Section 141(a) of the General Corporation Law between the role of stockholders and the role of the board of directors is well established. As the Delaware Supreme Court consistently has stated, "a cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). See also McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.") (citing 8 Del. C. § 141(a)); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate

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249 (Del. 2001), infra p. 11, in which the Court noted that requiring a board of directors to submit a stockholder rights plan to a vote of stockholders was wholly inconsistent with Delaware law. In addition, the News court failed to account for the dispositive impact of 8 Del. C. § 157 (discussed, supra, at pp. 3-5).

responsibility for managing the business and affairs of a corporation.") (footnote omitted). This principle has long been recognized in Delaware. Thus, in Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956), rev'd on other grounds, 130 A.2d 338 (Del. 1957), the Court of Chancery stated that "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy." Similarly, in Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980), rev'd on other grounds sub nom., Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), the Court of Chancery stated:

> [T]he board of directors of a corporation, as the repository of the power of corporate governance, is empowered to make the business decisions of the corporation. The directors, not the stockholders, are the managers of the business affairs of the corporation.

See also 8 Del. C. § 141(a); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985); Adams v. Clearance Corp., 121 A.2d 302 (Del. 1956); Mayer v. Adams, 141 A.2d 458 (Del. 1958). The rationale for these statements is as follows:

> Stockholders are the equitable owners of the corporation's assets. However, the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation. Instead, they have the right to share in the profits of the company and in the distribution of its assets on liquidation. Consistent with this division of interests, the directors rather than the stockholders manage the business and affairs of the corporation and the directors, in carrying out their duties, act as fiduciaries for the company and its stockholders.

Norte & Co. v. Manor Healthcare Corp., C.A. Nos. 6827, 6831, slip op. at 9 (Del. Ch. Nov. 21, 1985) (citations omitted); Paramount Communications Inc. v. Time Inc., C.A. Nos. 10866, 10935, 19835, slip op. at 77-78 (Del. Ch. July 14, 1989), aff'd, 571 A.2d 1140 (Del. 1989) ("The 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."); but see Unisuper Ltd. v. News Corp., supra, n. 1. We believe that the extensive body of Delaware case law regarding rights plans and directors' fiduciary duties is inconsistent with the concept of stockholder-dictated action controlling the duration, adoption or extension of a rights plan.

The Rights Plan Bylaw Substantially Limits the Board's Discretion.

In addition to the prohibition on delegation to, or the usurpation by, stockholders or others of decision-making with respect to matters reserved by statute to the discretion of the board of directors, stockholders or others cannot substantially limit the board's ability to make a business judgment on matters of management policy. See, e.g., Chapin v. Benwood Found, Inc., 402 A.2d 1205, 1211 (Del. Ch. 1979), aff'd sub nom, Harrison v. Chapin, 415 A.2d 1068 (Del. 1980) (finding that the court could not "give legal sanction to agreements which have the effect

of removing from directors in a very substantial way their duty to use their own best judgment on management matters") (citing Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956), rev'd in part on other grounds, 130 A.2d 338 (Del. Ch. 1957)); Grimes v. Donald, 673 A.2d 1207, 1214 (Del. 1996) (same); Canal Capital Corp. v. French, C.A. No. 11764, slip op. at 4 (Del. Ch. July 2, 1992) (same); accord Rodman Ward, Jr. et al., 1 Folk on the General Corporation Law § 141.1.3, at GCL-IV-15 (2006-2 Supp.) (hereinafter "Folk") (stating that it is the responsibility and duty of directors to determine corporate goals); Fletcher, § 495 p. 529 ("The directors of the corporation do not have the power to delegate to others those duties which are at the focal point of the management of the corporation.").

A board's ability to exercise its business discretion on whether to adopt or extend a rights plan in the context of a sale of the corporation is a fundamental matter of management policy that cannot be substantially limited under Delaware law. In Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998), the Delaware Supreme Court held that a future board's ability to redeem a rights plan implicated a fundamental "matter [ ] of management policy" -- the "sale of [a] corporation" -- and therefore could not be substantially restricted under Delaware law by contract. Id. at 1292. Specifically, the Delaware Supreme Court held:

> 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 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation. The Quickturn certificate of incorporation contains no provision purporting to limit the authority of the board in any way. The [contested provision], however, would prevent a newly elected board of directors from completely discharging its fundamental management duties to the corporation and its stockholders for six months. While the [contested 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 [contested 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 1291-1292 (emphasis added, and internal citations omitted); see also Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1191 (Del. Ch. 1998) (finding that a "dead hand" provision of a rights plan impermissibly interfered with a current board's authority under Section 141(a) "to protect fully the corporation's (and its shareholders') interests in a transaction [for the sale of a corporation]") (footnote omitted); Davis Acquisition, Inc. v. NWA, Inc., C.A. No. 10761, slip op. at 7 (Del. Ch. Apr. 25, 1989) (adoption of a rights plan "is a defensive measure that the board has legal power to take" in connection with the "sale" of a corporation) (emphasis added); Moran v. Household Int'l, Inc., 490 A.2d 1059, 1083 (Del. Ch. 1985) (finding that "the adoption of the

Rights Plan is an appropriate exercise of managerial judgment under the business judgment rule" in connection with the "sale" of a corporation). By divesting the Board of the ability to adopt a stockholder rights plan with a term of more than one year, or to amend an existing plan to extend its term for more than one year, unless in each case the plan or amendment is ratified by the Company's stockholders, the Rights Plan Bylaw indisputably would limit the Board's authority with respect to "an area of fundamental importance to the shareholders – negotiating a possible sale of the corporation." Quickturn, 721 A.2d at 1291-92.

The Rights Plan Bylaw Limits the Board's Exercise of its Fiduciary Duty of Care.

A board's fiduciary duty of care also is implicated when it is faced with an unfair takeover offer. Directors of Delaware corporations have a fiduciary duty to protect the corporation's stockholders from an unfair takeover offer. See, e.g., MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239, 1247 (Del. Ch. 1985), aff'd, 506 A.2d 173 (Del. 1985) ("In the face of a hostile acquisition, the directors have the right, even the duty, to adopt defensive measures to defeat a takeover attempt which is perceived as being contrary to the best interests of the corporation and its shareholders."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (finding in the context of corporate takeovers that a board has a duty to "protect the corporate enterprise, which includes [ ] [protecting] shareholders, from [ ] harm"); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987) ("Newmont's directors [have] both the duty and the responsibility to oppose the threats presented by Ivanhoe and Gold Fields."); see, e.g., 1 R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations, at 4-35 (3d ed. 2006) (hereinafter "Balotti & Finkelstein") ("The predominant view is that the target board has a duty to oppose tender offers which would be harmful to the corporation.");[2] 10 Corporate Counsel Weekly (BNA), No. 20, at 7 (May 17, 1995) (in which former Delaware Supreme Court Justice Andrew G.T. Moore II is quoted as stating that "failure to adopt a pill under certain circumstances could in itself be a breach of the duty of loyalty and care"). The duty to protect stockholders from harm derives from the fiduciary duty of care. See Unocal, 493 A.2d at 955 ("As we have noted, [the directors'] duty of care extends to protecting the corporation and its owners from perceived harm whether a threat originates from third parties or other shareholders."); Gilbert v. El Paso Co., 575 A.2d 1131, 1146 (Del. 1990) (finding that the duty of "care ... prevent[s] a board from being a passive instrumentality in the face of a perceived threat to corporate control"). Thus, circumscribing the Board's ability to adopt a stockholder rights plan with a term of more than one year, or to extend an existing plan for more than one year could impair the Board's exercise of its fiduciary duty of care.[3]

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[2] Messrs. Balotti and Finkelstein are directors of Richards, Layton & Finger, P.A.

[3] In News Corp., the Delaware Court of Chancery also held that a board of directors could effectively agree by a contract with the corporation's stockholders what is advisable and in the best interests of the corporation and its stockholders and that any such agreement did not operate as an impermissible limitation on the board of directors' ability to exercise its fiduciary duties under Delaware law. Slip op. at 20-22. However, the case of a board agreeing with

A requirement that the Board provide for the termination of any stockholder rights plan or amendment to extend the term of a rights plan within one year from the later of its adoption or last extension unless the amendment or plan is ratified by stockholders in all cases, thereby subjecting the plan's efficacy to such stockholder approval, effectively limits the ability of the Company's directors to utilize a powerful and effective tool in reacting to unfair or inequitable takeover tactics, even if the Board determines in the good faith exercise of its fiduciary duties that a rights plan would be in the best interests of stockholders and the most effective means of dealing with such a threat. See, e.g., In re Pure Resources Inc., S'holders Litig., 808 A.2d 421, 431 (Del. Ch. 2002), aff'd, 812 A.2d 224 (Del.) (TABLE) (noting that the adoption of a rights plan is the "de rigueur tool of a board responding to a third-party tender offer" and is quite effective at giving a target board under pressure room to breathe); Malpiede v. Townson, 780 A.2d 1075, 1089 (Del. 2001) (noting that a "routine strategy" for fending off unsolicited advances and negotiating for a better transaction is to adopt a poison pill); In re Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 481 (Del. Ch. 2000) ("The primary purpose of a poison pill is to enable the target board of directors to prevent the acquisition of a majority of the company's stock through an inadequate and/or coercive tender offer. The pill gives the target board leverage to negotiate with a would-be acquirer so as to improve the offer as well as the breathing room to explore alternatives to and examine the merits of an unsolicited bid."). Submitting to a stockholder vote the question of whether to adopt or extend a rights plan in such circumstances significantly diminishes the ability of the Board to respond as necessary to protect the interests of the Company and its stockholders. When the Company faces a significant threat, such as inequitable takeover tactics, the directors' ability to negotiate effectively, to react expeditiously and to maintain its defensive devices could be critical to discharging their fiduciary duties.

For this reason, the Delaware courts have zealously guarded the board's prerogatives in this area versus the wishes of the stockholders and others. See, e.g., Quickturn, 721 A.2d at 1291 ("this Court upheld the adoption of the Rights Plan in Moran as a legitimate exercise of business judgment by the board of directors") (emphasis added; footnote omitted); Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1186 (Del. Ch. 1998) ("It [is] settled that a corporate board [may] permissibly adopt a poison pill...."); Davis Acquisition, Inc. v. NWA, Inc., C.A. No. 10761, slip op. at 7 (Del. Ch. Apr. 25, 1989) (adoption of a rights plan "is a defensive measure that the board has legal power to take") (emphasis added); see also Martin Lipton, "Pills, Polls, and Professors Redux," 69 U. Chi. L. Rev., 1037, 1061 (Summer 2002) ("It is inconsistent with existing Delaware law for a board ... to delegate to shareholders in a referendum the fiduciary decision of whether to leave [a] pill ... in place."); 2 David A. Drexler et al., Delaware Corporation Law and Practice § 17.06, at 17-30 (2005) (hereinafter "Drexler") ("Section 157 imposes upon the directors the duty to exercise final authority with respect to

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stockholders what is advisable and in the best interests of the corporation and its stockholders is distinguishable from the case of stockholders unilaterally limiting the board of directors' ability to exercise its fiduciary duties as the Rights Plan Bylaw would purport to accomplish.

options and rights.") (emphasis added). The Delaware Supreme Court has addressed this issue explicitly:

> Moran addressed a fundamental question of corporate law in the context of takeovers: whether a board of directors had the power to adopt unilaterally a rights plan the effect of which was to interpose the board between the shareholders and the proponents of a tender offer. The power recognized in Moran would have been meaningless if the rights plan required shareholder approval. Indeed it is difficult to harmonize Moran's basic holding with a contention that questions a Board's prerogative to unilaterally establish a rights plan.

Hilton, 780 A.2d at 249. The fact that individual stockholders or even a majority of stockholders oppose the board's decision does not affect the board's authority. As the Court of Chancery has explained:

> The 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. In fact, directors, not shareholders, are charged with the duty to manage the firm.

Paramount Communications Inc., slip op. at 77-78.

The Rights Plan Bylaw is Void.

Whether the Board's authority with respect to the adoption, extension and duration of a stockholder rights plan arises under 8 Del. C. § 157 or 141(a), the common law of fiduciary duties, or some combination thereof, in our view it cannot be overridden by a stockholder-adopted bylaw. See Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985) ("A bylaw that is inconsistent with any statute or rule of common law .... is void...."); Quickturn, 721 A.2d at 1291-92; Carmody, 723 A.2d at 1191. See also Coates and Faris, Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law. at 1333-1334 ("One of the most enduring principles of the Delaware common law of corporations is that shareholders cannot limit a board in the exercise of business judgment regarding matters conferred to the board's discretion by law or charter. Had the Delaware legislature intended to allow shareholders to abrogate this rule via bylaw, it could have made this clear.") (footnotes omitted); Lawrence A. Hamermesh, Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev. 409, 479 (Dec. 1998) (hereinafter referred to as "Hamermesh-Tulane Law Review") ("stockholders lack the general authority to adopt by-laws that directly limit the managerial power of directors"); Charles F. Richards, Jr. & Robert J. Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law, 54 Bus. Law. 607, 621 (Feb. 1999) (hereinafter referred to as "Richards

and Stearn")[4] ("Based on the authority vested in the board of directors by sections 141(a) and 157, the Delaware courts have repeatedly deferred to directorial prerogative and discretion in the context of adoption, maintenance, and redemption of rights plans, subject only to the fact-specific Unocal/Unitrin proportionality test. The body of law so developed is wholly inconsistent with the concept of shareholder-dictated action regarding a rights plan....") (footnote omitted).

The drafters of the General Corporation Law did provide for specific mechanisms pursuant to which stockholders could limit the power of a board of directors to manage the business and affairs of a corporation. As discussed above, Section 141(a) provides that the board of directors shall manage the business and affairs of the corporation "except as may be otherwise provided in this chapter or in its certificate of incorporation." In addition, in forming a corporation under the close corporation statute, the stockholders thereof may either act by written agreement to restrict the discretion of the board of directors, 8 Del. C. § 350, or elect in the certificate of incorporation to permit the stockholders to manage the business and affairs of the corporation directly, 8 Del. C. § 351. However, this permitted restriction on the discretion of the directors is only applicable to close corporations. Chapin v. Benwood Found., Inc., 402 A.2d 1205 (Del. Ch. 1979), aff'd sub nom., Harrison v. Chapin, 415 A.2d 1068 (Del. 1980). See also 2 Drexler § 43.02, at 43-6 (Section 350 exempts agreements of stockholders in close corporations from the rule that stockholders may not restrict or interfere with powers of board).

Commentators Supporting the Validity of the Rights Plan Bylaw Misinterpret Delaware Law.

We are aware that several commentators have expressed the view that bylaws such as the Rights Plan Bylaw should be valid under Delaware law.[5] See, e.g., Leonard Chazen, The Shareholder Rights By-Law: Giving Shareholders a Decisive Voice, 5 Corporate Governance Advisor 8 (1997); Jonathan R. Macey, The Legality and Utility of the Shareholder Rights Bylaw, 26 Hofstra L. Rev. 835 (Summer 1998).[6] According to Messrs. Chazen and

[4] Messrs. Richards and Stearn are directors of Richards, Layton & Finger, P.A.

[5] There is no Delaware case that specifically addresses the validity or invalidity of the Rights Plan Bylaw or of a similar bylaw. See, e.g., Coates and Faris, Second Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law. at 1329; Richards and Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny under Delaware Law, 54 Bus. Law. at 607; Lawrence A. Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, 5 Corporate Governance Advisor 9 (1997). However, the Delaware Supreme Court's decision in Quickturn Design Sys., Inc. v. Shapiro, 7221 A.2d 1281 (Del. 1998), strongly supports the conclusion that the Rights Plan Bylaw would not be valid under Delaware law.

[6] Mr. Chazen is an attorney who has represented Mr. Guy P. Wyser-Pratte, who has advocated adoption of bylaws similar to the Rights Plan Bylaw. Mr. Macey has been Mr.

Macey, such bylaws would not be invalid under Section 141(a) of the General Corporation Law because Section 141(a)'s broad grant of authority to the board of directors is qualified by the phrase "except as may be otherwise provided in this chapter," which in their view includes (and thus permits) bylaws adopted pursuant to Section 109(b), and because a narrower reading of Section 141(a) would improperly negate Section 109(b)'s broad grant of authority for stockholders to adopt bylaws relating to the rights and powers of stockholders and directors. See Chazen, The Shareholder Rights By-Law: Giving Shareholders A Decisive Voice at 8, 17; Macey, The Legality and Utility of the Shareholder Rights Bylaw, 26 Hofstra L. Rev. at 867-68. See also R. Matthew Garms, Shareholder By-Law Amendments and the Poison Pill: The Market for Corporate Control and Economic Efficiency, 24 J. Corp. L. 433, 441-43, 451 (Winter 1999) (same). Cf. Gordon, "Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett, 19 Cardozo L. Rev. at 547 ("Under prevailing modes of corporate statutory interpretation in Delaware, in which different statutes have 'equal dignity' or 'independent legal significance,' nothing can be resolved about the scope of section 109(b) from the reference in section 141(a) to the articles alone, not the bylaws.") (footnote omitted); Ronald J. Gilson, Unocal Fifteen Years Later (And What We Can Do About It), 26 Del. J. Corp. L. 491, 509 (2001) ("Under the equal dignity doctrine, the fact that the two sections [Section 141(a) and 109(b)] cover the same ground results not in a conflict, but in alternative approaches to the same problem.") (footnote omitted). Although no Delaware case has directly addressed the interplay of Sections 141(a) and 109(b) in this context, we are of the view that these commentators have misconstrued Section 109(b) and the "except as may be otherwise provided in this chapter" language of Section 141(a).[7]

First, most commentators on the General Corporation Law agree that the "except as may be otherwise provided in this chapter" language of Section 141(a) refers only to specific provisions of the General Corporation Law, which expressly authorize a departure from the general rule of management by directors, and not to open-ended provisions such as Section

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Wyser-Pratte's nominee in several threatened proxy fights, including threatened proxy fights involving Telxon Corporation and Rexene Corporation.

[7] In Hollinger Int'l, Inc. v. Conrad Black, C.A. No. 183-N (Del. Ch. Feb. 26, 2004), the Court of Chancery held that a stockholder-adopted bylaw amendment that disbanded most of the committees of the board of directors of Hollinger International Inc. did not violate Section 141(a) of the General Corporation Law. The Court found that Section 109 of the General Corporation Law (which expressly provides stockholders with the authority to amend a corporation's bylaws) when read together with Section 141(c)(2) (which expressly provides for the regulation of board committees through the adoption of bylaws) permitted the stockholder-adopted bylaw at issue. We do not believe that the Hollinger decision permits stockholders to make decisions in areas such as the adoption of rights plans pursuant to Section 157 of the General Corporation Law, which is specifically reserved to the board of directors by statute. Unlike the bylaw amendments at issue in Hollinger, there is no statutory basis for stockholders, through amendment to the bylaws or otherwise, to place conditions or restrictions on the power of the board to adopt or extend a rights plan.

109(b). See Balotti & Finkelstein, at 4-6 (suggesting that such language references close corporation provisions of the General Corporation Law); Drexler § 13.01[1], at 13-2 (suggesting that such language references Sections 141(c), 226, 291 and close corporation provisions); Folk, at GCL-IV-11-12 (suggesting that such language references Sections 107, 226 and close corporation provisions); Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, at 11 (The exception in Section 141(a) "addresses the narrow instances in which the General Corporation Law explicitly departs from the director management rule, as in Section 291 (authorizing appointment of a receiver for a corporation 'to take charge of its assets, estate, effects, business and affairs'), and Section 226 (permitting appointment of a custodian to exercise the powers of a receiver under Section 291). The fact that Section 141(a) is drafted to allow these limited, explicit departures from the director management norm cannot be read to allow an implied, open-ended invitation to depart from that norm through by-law provisions adopted by stockholders."). Indeed, several commentators specifically concluded that a bylaw similar to the Rights Plan Bylaw could not be accomplished under Section 109(b), notwithstanding that statute's arguably broad language. See Coates and Faris, Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus Law. at 1335 ("[F]irst generation shareholder bylaws are likely to be struck down under Delaware law because they limit the board's authority to manage the business and affairs of the company. If the Delaware Supreme Court's decision in Quickturn does not lead one to this result, the text, history, and common law development of Delaware law does."); Hamermesh, The Shareholder Rights By-Law: Doubts From Delaware, at 13 ("Given the statutory governance scheme reflected in Section 141(a) ..., that by-law proposal is an attempt that impermissibly intrudes upon the authority of the board of directors. It cannot be accomplished by a by-law provision despite the superficially broad subject matter reach of the statute (Section 109(b)) that governs the content of by-laws."); Richards and Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny under Delaware Law, 54 Bus. Law. at 624-25 ("If the Delaware General Assembly intended in section 141(a) to permit shareholders to enact by-laws restricting the authority of the board of directors to manage the business and affairs of the corporation, it easily could have so stated in section 141(a), as other jurisdictions have done. It did not.") (footnote omitted). See also Hamermesh, Corporate Democracy and Stockholder -- Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev. at 430 ("[T]he most reasonable reading of [Sections 109(b) and 141(a)] precludes reliance on Section 109(b) as an independent source of authority for a by-law that directly limits the managerial power of the board of directors.") (footnote omitted). Thus, there is significant support for the view that the "except as may be otherwise provided in this chapter" language of Section 141(a) does not include bylaws adopted under Section 109 (except perhaps if such bylaws are also adopted pursuant to Section 141(c), which is not applicable here). See, supra, n.7.

Second, most commentators believe that Section 109's purportedly broad grant of authority for stockholders to adopt bylaws relating to the rights and powers of stockholders and directors relates to bylaws that govern procedural or organizational matters, and not substantive decisions governing the corporation's business and affairs. See Balotti & Finkelstein, § 1.10, at 1-14 ("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."); Richards and Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny under Delaware Law, 54 Bus. Law. at 625-27 (supporting procedural/substantive distinction); Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, at 14 n.20 ("A by-law removing an entire category of business decisions from board authority ... is quite distinct from a by-law that merely governs how board decisions are to be made, and poses a distinct challenge to the allocation of management authority specified by Section 141(a)."). See also id. at 10 ("by-laws of Delaware corporations do not customarily prescribe or limit the substantive content of business decisions"). Such an interpretation of Section 109(b) would harmonize 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 or under the direction of the board of directors. But see Hamermesh, Corporate Democracy and Stockholder -- Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev., at 444 (suggesting that procedural/substantive distinction does not necessarily "provide a coherent analytical structure" and that "it is preferable to read section 141(a) as an absolute preclusion against by-law limits on director management authority, in the absence of explicit statutory authority for such limits outside of section 109(b)") (footnote omitted).

Mr. Macey suggests that, as a threshold matter, bylaws such as the Rights Plan Bylaw do not improperly interfere with directorial authority to manage the business and affairs of the corporation:

> Under section 109(b), shareholders retain the power to adopt, amend, and repeal corporate bylaws. This specific empowerment of shareholders should trump any vague, general norms about directors' power to run the firm, particularly because the shareholders rights bylaw does not interfere with directors' ability to make strategic decisions about the firm's operation....
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> * * *
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> [T]here is a strong argument that a company that adopts a shareholder rights bylaw is still managed under the direction of its board anyway.

Macey, The Legality and Utility of the Shareholder Rights Bylaw, 26 Hofstra L. Rev. at 867-69 (footnotes omitted).

This suggestion is inconsistent with Delaware law. The assertion that bylaws such as the Rights Plan Bylaw do not interfere with the directors' authority to manage the business and affairs of the corporation is incorrect, since "[f]or over a decade now, it has been settled that the term 'business and affairs' of the corporation includes .... adoption of measures intended to deter or preclude unsolicited tender offers." Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, at 9. See also Quickturn, 721 A.2d at 1292 (provision of rights plan limiting future board's ability to redeem rights impermissibly interfered with future board's authority under Section 141(a) to manage business and affairs of corporation); Carmody, 723

A.2d at 1191 (complaint challenging provision of rights plan prohibiting future board from redeeming rights stated claim that provision impermissibly interfered with board's authority under Section 141(a) to manage business and affairs of corporation).

We are aware that the Supreme Court of the State of Oklahoma has concluded that, under Oklahoma law, stockholders may adopt bylaws that restrict the board of directors' authority to create and implement shareholder rights plans. Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., 975 P.2d 907, 908 (Okla. 1999). We do not believe, however, that the Oklahoma Supreme Court's decision would be persuasive to a Delaware court.

First, we note that the Oklahoma Supreme Court did not view the Oklahoma analogue to Section 141(a) as being "of primary concern" to its decision and concluded, without analysis, that the authority of directors under the Oklahoma analogue to Section 141(a) was subject to "shareholder oversight" under the Oklahoma analogue to Section 109(b). For the reasons stated herein, we believe that a Delaware court would construe Sections 141(a) and 109(b) differently. Indeed, although the Oklahoma Supreme Court observed that "Oklahoma and Delaware have substantially similar corporation acts" and relied in part upon Delaware case law, the Court failed even to acknowledge the substantial body of Delaware case law concerning the board of directors' duty under Section 141(a) to manage the business and affairs of the corporation, including in the context of takeover proposals.

Second, we note that the Oklahoma Supreme Court determined that the authority granted under the Oklahoma analogue to Section 157 was not limited to the board of directors, a position with which, for the reasons stated herein, we believe a Delaware court would not agree under Delaware law. Moreover, the Oklahoma court ignored the substantial body of Delaware case law concerning rights plans, analogized a rights plan to a stock option plan, and relied upon, among other things, an inapposite Delaware case concerning shareholder ratification of board action that was contrary to the terms of a stock option plan.

Finally, we note that the Oklahoma Supreme Court was expressly influenced by the fact that the Oklahoma legislature had not adopted a "shareholder rights plan endorsement statute," a fact that we believe would not be persuasive to a Delaware court given the extensive and established case law in Delaware upholding the authority of the board of directors to adopt and implement rights plans. Accordingly, we are of the view that a Delaware court would not find the reasoning or conclusions of the Oklahoma Supreme Court to be persuasive. See, e.g., Andrew R. Brownstein & Igor Kirman, Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions, 60 Bus. Law. 23, 58 (Nov. 2004) ("[T]he consensus view among commentators is that the Fleming precedent would not be followed in Delaware and that a board of director's ability to adopt a poison pill in the context of a sale of the corporation is a fundamental matter of management policy that cannot be substantially limited under Delaware law."); Hamermesh, Corporate Democracy and Stockholder -- Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev. at 435-36 ("the Fleming by-law and similar direct attempts to limit specific management decisions should be rejected by the courts"); Michael D. Goldman et al., Fleming Must Be Read Narrowly, 21 Bank and Corp. Governance L. Rep. 1102 (1999) ("while

the relevant Oklahoma statutes are similar to their Delaware counterparts, it is unlikely that a Delaware court would reach the same conclusion as the Oklahoma court").

We note that the Securities and Exchange Commission (the "SEC") previously has accepted the view that stockholder proposals similar to the Proposal, if implemented, would violate Delaware law. Toys "R" Us, Inc., 2002 SEC No-Action Letter, LEXIS 571, at *1 (Apr. 9, 2002); see also Mattel, Inc., 2002 SEC No-Action Letter, LEXIS 497, at *1 (March 27, 2002) ("The proposal requests a bylaw to prevent Mattel from enacting or maintaining a shareholder rights plan without shareholder approval. There appears to be some basis for your view that Mattel may exclude the proposal under rule 14a-8(i)(2). We note that in the opinion of your Delaware counsel, Richards, Layton & Finger, implementation of the proposal would cause Mattel to violate state law. Accordingly, we will not recommend enforcement action to the Commission if Mattel omits the proposal from its proxy materials in reliance on rule 14a-8(i)(2).").

Conclusion

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that the Rights Plan Bylaw, if adopted by the stockholders, would not be valid under the General Corporation Law.

The foregoing opinion is limited to the General Corporation Law. We have not considered and express no opinion on any other laws or the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the SEC and the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

DAB/LRS

EXHIBIT 4

GRANT & EISENHOFER, P.A.

1201 N. MARKET STREET # SUITE 2100 # WILMINGTON, DELAWARE 19801

302-622-7000 # FAX: 302-622-7100

FACSIMILE TRANSMITTAL FORM

May 11, 2006

TO:	Marc A. Rozic	**FIRM:**	Sullivan & Cromwell LLP
FAX NO.:	212-558-3588	**CONFIRMATION NO.:**	212-558-4000

If you experience problems with a transmission, please call (302) 622-7000 between 9:00 a.m and 9:00 p.m.

ORIGINAL will [ ] follow will not [x] follow

FROM: Michael J. Barry **Pages (including cover sheet): 3**

Re:

COVER MESSAGE:

Grant & Eisenhofer P.A.

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1201 North Market Street
Wilmington, DE 19801
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Benjamin J. Hinerfeld
Gregg S. Levin[‡]
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Sharan Nirmul
Russell D. Paul
Catherine Pratsinakis[a]
Brian M. Rostocki
Lauren E. Wagner
Marc D. Weinberg[a]
Kimberly L. Wierzel
Michelle T. Wirtner

a Admitted in NJ & PA Only
‡ Admitted in MA & DC Only
* Admitted in NY Only
◊ Admitted in PA Only
† Admitted in SC Only

Stephen K. Benjamin*
Of Counsel

May 11, 2006

VIA TELECOPY AND OVERNIGHT MAIL

Securities and Exchange Commission
Office of Chief Counsel
Division of Corporation Finance
100 F Street, N.E.
Washington, D.C. 20549

Re: CA, Inc Shareholder Proposal

Ladies and Gentlemen:

This letter is submitted on behalf of our client, Lucian Bebchuk in connection with the shareholder proposal that Prof. Bebchuk submitted to CA, Inc. ("CA" or the "Company") for inclusion in the Company's 2006 Proxy Statement (the "Proposal"), and responds to the letter dated April 21, 2006 from Sullivan & Cromwell, LLP on behalf of CA to the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") requesting the Staff's concurrence that it will not recommend enforcement if the Company excludes the Proposal from its 2006 Proxy Statement (the "No-Action Request").

In the "No-Action Request," CA argues that it should be permitted to exclude Prof. Bebchuk's Proposal under SEC Rule 14a-8(i)(2), arguing that the Proposal advocates the adoption of a bylaw that, if enacted, would violate Delaware law. Please be advised that earlier today, Prof. Bebchuk commenced a lawsuit against CA in the Delaware Court of Chancery seeking a declaratory judgment that the proposed bylaw is valid under Delaware law, and an injunction against CA enjoining the Company from contesting the legality, under Delaware law, of the proposed bylaw amendment. A copy of the Complaint is attached to this letter. The basis of CA's "No-Action Request, therefore, is presently the subject of litigation.

In view of the foregoing, pursuant to Staff Legal Bulletin No. 14 (CF) (July 31, 2001), we respectfully submit that the Staff should express no view in response to CA's No-Action Request.

If you have any questions or if I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

Michael Barry

Michael J. Barry

cc: Marc A. Rozic, Esquire (via telecopy, w/o enclosures)

EXHIBIT 5

EXHIBIT 3.3

RESTATED CERTIFICATE OF INCORPORATION
OF
CA, INC.
Under Section 245
of the Delaware General Corporation Law
(restated as of March 8, 2006)

CA, Inc , a corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

1. That the name of the corporation is CA, Inc. and the name under which the corporation was originally incorporated was Computer Associates Incorporated.

2. That the original Certificate of Incorporation of the corporation was filed with the Delaware Secretary of State, on the 26th day of March 1974 and that said Certificate of Incorporation was restated by the filing of a Restated Certificate of Incorporation with the Delaware Secretary of State on October 23, 1981 and further restated by the filing of a Restated Certificate of Incorporation with the Delaware Secretary of State on February 4, 1999.

3. That this restatement of the Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Section 245 of the General Corporation Law of the State of Delaware and that this Restated Certificate of Incorporation only restates and integrates (including the Certificate of Designation of Series One Junior Participating Preferred Stock, Class A as filed with the Delaware Secretary of State on June 26, 1991 and as amended as of March 8, 2006) and does not further amend the provisions of the corporation's Restated Certificate of Incorporation as theretofore restated, amended or supplemented, and that there is no discrepancy between those provisions and the provisions of this Restated Certificate of Incorporation.

4 That the text of the Restated Certificate of Incorporation of said CA, Inc., as heretofore amended, is hereby restated, without further amendment or change, to read in its entirety as follows:

RESTATED CERTIFICATE OF INCORPORATION
OF
CA, INC.

FIRST: The name of the corporation (hereinafter called the "corporation") is CA, INC.

SECOND: The address, including street, number, city, and county, of the registered office of the corporation in the State of Delaware is 2711 Centerville Road, Suite 400 New Castle County, Wilmington, Delaware 19808, and the name of the registered agent of the corporation in the State of Delaware at such address is United States Corporation Company

THIRD: The nature of the business and of the purposes to be conducted and promoted by the corporation, which shall be in addition to the authority of the corporation to conduct any lawful business, to promote any lawful purpose, and to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, is as follows:

To provide services, facilities, concepts, programs, manuals and equipment of any and all kinds in the fields of electronic data processing and the sales, licensing, franchising and any other disposition of computer hardware, software, peripherals and related supplies, equipment and facilities To purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property and assets, or any interest therein, wherever situated.

To take, lease, purchase or otherwise acquire, and to own, use, hold, sell, convey, exchange, lease, mortgage, work, clear, improve, develop, divide, and otherwise handle, manage, operate, deal in and dispose of real estate, real property, lands, multiple-dwelling structures, houses, buildings and other works and any interest or right therein; to take, lease, purchase or otherwise acquire, and to own, use, hold, sell, convey, exchange, hire, lease, pledge, mortgage, and otherwise handle, and deal in and dispose of, as principal, agent, broker, and in any lawful capacity, such personal property, chattels, chattels real, rights, easements, privileges, choses in action, notes, bonds, mortgages, and securities as may lawfully be acquired, held, or disposed of; and to acquire, purchase, sell, assign, transfer, dispose of, and generally deal in and with, as principal, agent, broker, and in any lawful capacity, mortgages and other interests in real, personal, and mixed properties

To carry on a general mercantile, industrial, investing, and trading business in all its branches; to devise, invent, manufacture, fabricate, assemble, install, service, maintain, alter, buy, sell, import, export, license as licensor or licensee, lease as lessor or lessee, distribute, job, enter into, negotiate, execute, acquire, and assign contracts in respect of, acquire, receive, grant, and assign licensing arrangements, options, franchises, and other rights in respect of, and generally deal in and with, at wholesale and retail, as principal, and as sales, business, special, or general agent, representative, broker, factor, merchant, distributor, jobber, advisor, and in any other lawful capacity, goods, wares, merchandise, commodities, and unimproved, improved, finished, processed, and other real, personal, and mixed property of any and all kinds, together with the components, resultants, and by-products thereof.

To apply for, register, obtain, purchase, lease, take licenses in respect of or otherwise acquire, and to hold, own, use, operate, develop, enjoy, turn to account, grant licenses and immunities in respect of, manufacture under and to introduce, sell, assign, mortgage, pledge or otherwise dispose of, and, in any manner deal with and contract with reference to:

(a) inventions, devices, formulas, processes and improvements and modifications thereof;

(b) letters patent, patent rights, patented processes, copyrights, designs, and similar rights, trade-marks, trade names, trade symbols and other indications of origin and ownership granted by or recognized under the laws of the United States of America, the District of Columbia, any state or subdivision thereof, and any commonwealth, territory, possession, dependency, colony, possession, agency or instrumentality of the United States of America and of any foreign country, and all rights connected therewith or appertaining thereunto;

(c) franchises, licenses, grants, and concessions.

To guarantee, purchase, take, receive, subscribe for, and otherwise acquire, own, hold, use, and otherwise employ, sell, lease, exchange, transfer, and otherwise dispose of, mortgage, lend, pledge, and otherwise deal in and with securities (which term, for the purpose of this Article THIRD, includes, without limitation of the generality thereof, any shares of stock, bonds, debentures, notes, mortgages, other obligations, and any certificates, receipts or other instruments representing rights to receive, purchase or subscribe for the same, or representing any other rights or interests therein or in any property or assets) of any persons, domestic and foreign firms, associations, and corporations, and by any government or agency or instrumentality thereof; to make payment therefor in any lawful manner; and, while owner of any such securities, to exercise any and all rights, powers and privileges in respect thereof, including the right to vote.

To make, enter into, perform and carry out contracts of every kind and description with any person, firm, association, corporation or government or agency or instrumentality thereof.

To acquire by purchase, exchange or otherwise, all, or any part of, or any interest in, the properties, assets, business and good will of any one or more persons, firms, associations or corporations heretofore or hereafter engaged in any business for which a corporation may now or hereafter be organized under the laws of the State of Delaware; to pay for the same in cash, property or its own or other securities; to hold, operate, reorganize, liquidate, sell or in any manner dispose of the whole or any part thereof; and in connection therewith, to assume or guarantee performance of any liabilities, obligations or contracts of such persons, firms, associations or corporations, and to conduct the whole or any part of any business thus acquired.

To lend money in furtherance of its corporate purposes and to invest and reinvest its funds from time to time to such extent, to such persons, firms, associations, corporations, governments or agencies or instrumentalities thereof, and on such terms and on such security, if any, as the Board of Directors of the corporation may determine

To make contracts of guaranty and suretyship of all kinds and endorse or guarantee the payment of principal, interest or dividends upon, and to guarantee the performance of sinking fund or other obligations of, any securities, and to guarantee in any way permitted by law the performance of any of the contracts or other undertakings in which the corporation may otherwise be or become interested, of any persons, firm, association, corporation, government or agency or instrumentality thereof, or of any other combination, organization or entity whatsoever

To borrow money without limit as to amount and at such rates of interest as it may determine; from time to time to issue and sell its own securities, including its shares of stock, notes, bonds, debentures, and other obligations, for such purposes and for such prices, now or hereafter permitted by the laws of the State of Delaware and by this certificate of incorporation, as the Board of Directors of the corporation may determine; and to secure any of its obligations by mortgage, pledge, or other encumbrance of all or any of its property, franchises and income

To be a promoter or manager of other corporations of any type or kind; and to participate with others in any corporation, partnership, limited partnership, joint venture, or other association of any kind, or in any transaction, undertaking or arrangement which the corporation would have power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to others

To draw, make, accept, endorse, discount, execute, and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable or transferable instruments and evidences of indebtedness whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, so far as may be permitted by the laws of the State of Delaware.

To purchase, receive, take, reacquire or otherwise acquire, own and hold, sell, lend, exchange, reissue, transfer or otherwise dispose of, pledge, use, cancel, and otherwise deal in and with its own shares and its other securities from time to time to such an extent and in such manner and upon such terms as the Board of Directors of the corporation shall determine; provided that the corporation shall not use its funds or property for the purchase of its own shares of capital stock when its capital is impaired or when such use would cause any impairment of its capital, except to the extent permitted by law.

To organize, as an incorporator, or cause to be organized under the laws of the State of Delaware, or of any other State of the United States of America, or of the District of Columbia, or of any commonwealth, territory, dependency, colony, possession, agency, or instrumentality of the United States of America, or of any foreign country, a corporation or corporations for the purpose of conducting and promoting any

business or purpose for which corporations may be organized, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations or to cause the same to be dissolved, wound up, liquidated, merged or consolidated.

To conduct its business, promote its purposes, and carry on its operations in any and all of its branches and maintain offices both within and without the State of Delaware, in any and all States of the United States of America, in the District of Columbia, and in any or all commonwealths, territories, dependencies, colonies, possessions, agencies, or instrumentalities of the United States of America and of foreign governments.

To promote and exercise all or any part of the foregoing purposes and powers in any and all parts of the world, and to conduct its business in all or any of its branches as principal, agent, broker, factor, contractor, and in any other lawful capacity, either alone or through or in conjunction with any corporations, associations, partnerships, firms, trustees, syndicates, individuals, organizations, and other entities in any part of the world, and, in conducting its business and promoting any of its purposes, to maintain offices, branches and agencies in any part of the world, to make and perform any contracts and to do any acts and things, and to carry on any business, and to exercise any powers and privileges suitable, convenient, or proper for the conduct, promotion, and attainment of any of the business and purposes herein specified or which at any time may be incidental thereto or may appear conducive to or expedient for the accomplishment of any of such business and purposes and which might be engaged in or carried on by a corporation incorporated or organized under the General Corporation Law of the State of Delaware, and to have and exercise all of the powers conferred by the laws of the State of Delaware upon corporations incorporated or organized under the General Corporation Law of the State of Delaware.

The foregoing provisions of this Article THIRD shall be construed both as purposes and powers and each as an independent purpose and power. The foregoing enumeration of specific purposes and powers shall not be held to limit or restrict in any manner the purposes and powers of the corporation, and the purposes and powers herein specified shall, except when otherwise provided in this Article THIRD, be in no wise limited or restricted by reference to, or inference from, the terms of any provision of this or any other Article of this certificate of incorporation; provided, that the corporation shall not conduct any business, promote any purpose, or exercise any power or privilege within or without the State of Delaware which, under the laws thereof, the corporation may not lawfully conduct, promote, or exercise.

FOURTH: 4.1 The total number of shares of all classes of capital stock which the corporation shall have authority to issue is one billion one hundred ten million (1,110,000,000 shares) of which ten million (10,000,000) shares shall be Preferred Stock, Class A without par value, issuable in one or more series, and one billion one hundred million (1,100,000,000) shares will be Common Stock, par value $ 10 per share.

4.2 The Board of Directors is hereby expressly authorized, at any time or from time to time, to divide any or all of the shares of Preferred Stock, Class A, into one

or more series, and in the resolution or resolutions establishing a particular series, before issuance of any of the shares thereof, to fix and determine the number of shares and the designation of such series so as to distinguish it from the shares of all other series and classes, and to fix and determine the preferences, voting rights, qualifications, privileges, limitations, options, conversion rights, restrictions and other special or relative rights of the Preferred Stock, Class A, or of such series to the fullest extent now or hereafter permitted by the laws of the State of Delaware, including, but not limited to, the variations between different series in the following respects:

(a) The distinctive designation of such series and the number of shares which shall constitute such series, which number may be increased or reduced (but not below the number of shares thereof then outstanding) from time to time by the Board of Directors;

(b) The annual dividend rate for such series, and the date or dates from which dividends shall commence to accrue;

(c) The price or prices at which, and the terms and conditions on which the shares of such series may be made redeemable;

(d) The purchase or sinking fund provision, if any, for the purchase or redemption of shares of such series;

(e) The preferential amount or amounts payable upon shares of such series in the event of the liquidation, dissolution or winding up of the corporation;

(f) The voting rights, if any, of shares of such series;

(g) The terms and conditions, if any, upon which shares of such series may be converted and the class or classes or series of shares of the corporation, or other securities, into which such shares may be converted; or

(h) The relative terms, qualifications, privileges, limitations, options, restrictions, and special or relative rights and preferences, if any, of shares of such series as the Board of Directors may, at the time of such resolution or resolutions, lawfully fix and determine under the laws of the State of Delaware.

Unless otherwise provided in a resolution or resolutions establishing any particular series, the aggregate number of authorized shares of Preferred Stock, Class A, may be increased by an amendment of the Certificate of Incorporation approved solely by a majority vote of the outstanding shares of Common Stock (or solely with a lesser vote of the Common Stock, or solely by action of the Board of Directors, if permitted by law at the time).

All shares of any one series shall be alike in every particular, except with respect to the accrual of dividends prior to the date of issuance.

Series One Junior Participating Preferred Stock, Class A, shall have the voting powers, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions as set forth on Exhibit A hereto.

4.3 Except for and subject to those rights expressly granted to the holders of Preferred Stock or any series thereof by resolution or resolutions adopted by the Board of Directors pursuant to Section 4.2 of this Article Fourth and except as may be provided by the laws of the State of Delaware, the holders of Common Stock shall have exclusively all other rights of shareholders.

4.4 Shares of Common Stock of the corporation may be issued from time to time for such consideration as may be fixed from time to time by the Board of Directors, but not less than the par value thereof; and any and all shares so issued, the full consideration for which shall have been paid and delivered, shall be deemed fully paid and non-assessable stock and not liable to any further call or assessment thereon.

FIFTH: The corporation is to have perpetual existence.

SIXTH: Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this corporation under the provisions of Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under the provisions of Section 279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation.

SEVENTH: For the management of the business and for the conduct of the affairs of the corporation, and in further definition, limitation and regulation of the powers of the corporation and of its directors and of its stockholders or any class thereof, as the case may be, it is further provided:

1. The management of the business and the conduct of the affairs of the corporation shall be vested in its Board of Directors. The number of directors which shall constitute the whole Board of Directors shall be fixed by, or in the manner provided in, the By Laws. The phrase Whole Board and the phrase total number of directors shall be

deemed to have the same meaning, to wit, the total number of directors which the corporation would have if there were no vacancies. No election of directors need be by written ballot.

2. The original By Laws of the corporation shall be adopted by the incorporator. Thereafter, the power to make, alter, or repeal, the By Laws, and to adopt any new By Law, except a By Law classifying directors for election for staggered terms, shall be vested in the Board of Directors

3. Whenever the corporation shall be authorized to issue only one class of stock, each outstanding share shall entitle the holder thereof to notice of, and the right to vote at, any meeting of stockholders. Whenever the corporation shall be authorized to issue more than one class of stock, no outstanding share of any class of stock which is denied voting power under the provisions of the certificate of incorporation shall entitle the holder thereof to the right to vote at any meeting of stockholders except as the provisions of Paragraph (c)(2) of Section 242 of the General Corporation Law shall otherwise require; provided, that no share of any such class which is otherwise denied voting power shall entitle the holder thereof to vote upon the increase or decrease in the number of authorized shares of said class.

EIGHTH: The corporation shall, to the fullest extent permitted by Section 145 of the General Corporation Law of Delaware, as the same may be amended and supplemented, indemnify any and all persons whom it shall have power to indemnify under said section from and against any and all of the expenses, liabilities or other matters referred to in or covered by said section, and the indemnification provided for herein, shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any By Law, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person

NINTH: From time to time any of the provisions of this certificate of incorporation may be amended, altered or repealed, and other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted in the manner and at the time prescribed by said laws, and all rights at any time conferred upon the stockholders of the corporation by this certificate of incorporation are granted subject to the provisions of this Article NINTH.

TENTH: No director shall be personally liable to the corporation or its shareholders for monetary damages for any breach of fiduciary duty by such director as a director, except (i) for breach of the director's duty of loyalty to the corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. If the General Corporation Law of Delaware is amended after approval by the shareholders of this article to authorize corporate action further

eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated or limited to the full extent permitted by the General Corporation Law of Delaware, as so amended.

Any repeal or modification of the foregoing paragraph by the shareholders of the corporation shall not adversely affect any right or protection of a director of the corporation existing at the time of such repeal or modification.

IN WITNESS WHEREOF, the corporation has caused this certificate to be signed by its officer thereunto duly authorized this 8th day of March 2006.

CA, INC.

By: /s/ Kenneth V. Handal
Name: Kenneth V. Handal
Title: Executive Vice President, General Counsel and Corporate Secretary

EXHIBIT 6

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM B CHANDLER III
CHANCELLOR

P O BOX 581
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5424
FACSIMILE (302) 856-5251

Submitted October 27, 2004
Decided November 16, 2004

Arthur L Dent
Potter Anderson & Corroon LLP
P O Box 951
Wilmington, DE 19899

Raymond J DiCamillo
Richards, Layton & Finger, P A
P O Box 551
Wilmington, DE 19899

Re: *Alan James v William A Furman, et al*
Civil Action No 597-N

Dear Counsel

This is my decision on the defendants' motion to dismiss I have concluded that oral argument on the pending motion is unnecessary For the reasons discussed below, the motion to dismiss is granted in part and denied in part

I. BACKGROUND

This case stems from the director defendants' adoption of a shareholder rights plan ("Poison Pill") that is triggered by any party becoming the beneficial owner of more than 12% of the common stock of Greenbrier Companies, Inc ("Greenbrier") Plaintiff Alan James ("James")

currently owns approximately 29 3% Greenbrier's common stock Greenbrier. Defendants are the directors of Greenbrier In addition, Greenbrier is a defendant. Defendant William A Furman ("Furman") also owns approximately 29 3% of the common stock of Greenbrier Defendants adopted the Poison Pill at a board of directors meeting on July 13, 2004 James, Furman and Greenbrier are parties to the Stockholders' Agreement ("Agreement") by which James and Furman granted to each other first refusal rights with respect to each other's shares. The Agreement provides that if either Furman or James desires to sell any or all of his shares to a third party, he is required to give written notice to the other, who would then have a period of sixty days within which to purchase any or all of the offering stockholder's offered shares Greenbrier is required to take action to assure that transfers of shares are made in accordance with the first refusal provision The Agreement contains an arbitration clause that reads in part.

> Any controversy, dispute or claim arising out of or relating to this Agreement, including, without limitation, the making, performance, or interpretation of this Agreement, shall be resolved by arbitration.[1]

In addition, § 7.13 of the Agreement establishes that.

> "any remedies which the parties may have upon breach of the covenants contained herein . shall be enforceable through full

---

[1] Agreement, § 7 12

equitable remedies exercised by the arbitrator and enforced by any appropriate court or tribunal "

Under the Poison Pill, both James' and Furman's ownership in excess of 12% is grandfathered so as not to activate the Poison Pill. Furthermore, although they are not considered to own beneficially each other's shares, neither Furman nor James could exercise his right of first refusal without triggering the Poison Pill

James filed his amended complaint in this case on September 30, 2004. Count I of the complaint alleges that the defendant directors breached their fiduciary duties by failing to act with good faith, loyalty and due care in adopting the Poison Pill. Specifically, James asserts that not only did the board fail to address many flaws with the Poison Pill, but also that the decision to adopt the Poison Pill was not a reasonable response to a reasonably perceived threat. James also asserts that the defendants failed to "identify a compelling justification for depriving the plaintiff of his contractual right" of first refusal. Count II alleges that the board improperly delegated authority to both Greenbrier's officers and counsel in adopting the Poison Pill. Count III alleges that the directors never found, nor could they conceivably find, that James' exercise of his first refusal rights would constitute a threat to Greenbrier or its shareholders.

II. ANALYSIS

Defendants have moved to dismiss the complaint on two separate grounds First, they argue that because plaintiff, in their opinion, is essentially asserting that the Poison Pill interferes with his right of first refusal under the Agreement, that all of his claims are covered by the arbitration clause of the Agreement and, therefore, are subject to mandatory arbitration If the claims are subject to arbitration, this Court would lack subject matter jurisdiction to hear those claims [2] Second, defendants argue that if the complaint in fact does not arise out of the rights created under the Agreement, then it should be dismissed under Rule 12(b)(6) for failure to state a claim

A The Arbitration Provision

The Supreme Court in *Parfi Holding AB v Mirror Image Internet, Inc.*, [3] stated that "[a]n arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forth in the underlying agreement. Thus, arbitration clauses should be applied only to claims that bear on the duties and obligations under the Agreement" The parties in *Parfi* agreed to submit to arbitration "any dispute, controversy, or claim

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[2] *See Elf Atochem N Am , Inc v Jaffari*, 727 A 2d 286, 295 (Del 1999)
[3] 817 A 2d 149, 156 (Del 2002)

arising out of or in connection with" the Agreement[4] The Court held that Parfi could "maintain an action based on the alleged breaches of the independent set of fiduciary duties that [a corporation] owes [stockholders] even though the claims arise from some or all of the same facts that related to the transactions that provided the basis for its contract claims"[5] The Court further stated that "fiduciary duties to [stockholders] consist of a set of rights and obligations that are independent of any contract and need be submitted to arbitration only if the claims based on fiduciary duties touch on the obligations created in the Agreement If the Agreement does not implicate [a corporation's] fiduciary duties, the arbitration clause cannot bar [a stockholder] from seeking the relief every other stockholder is entitled to under Delaware law"[6]

Turning to the arbitration provision in the Agreement, it clearly states that mandatory arbitration applies only to claims arising out of or relating to the performance or the interpretation of the Agreement The Court is convinced that plaintiff's claims, like those in *Parfi*, with one small exception, do not arise from or relate to the Agreement and, therefore, are not subject to the arbitration clause Plaintiff asserts an independent right to

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[4] *Id* at 155
[5] *Id* at 157
[6] *Id*

enforce breaches of fiduciary duty, as such duties are owed to him as a stockholder. Furthermore, plaintiff asserts his independent right under Delaware law to challenge the adoption and validity of the Poison Pill. Like *Parfi*, neither of these rights are created from, nor relate to, the Agreement and, therefore, with one small exception that will be discussed later, neither falls under the coverage of the arbitration provision.

Defendants assert that an arbitrator has the authority to hear plaintiff's claims under the arbitration provision because the arbitration provision applies to claims that "relate" to the Agreement. But the Court concludes that plaintiff's claims, again, with one exception, do not arise from or relate to the Agreement.[7] Finally, the Court finds unpersuasive defendants' argument that the arbitration provision applies to equitable claims in addition to claims arising from or relating to the Agreement because the arbitration provision includes language that the arbitrator may award "full equitable remedies." The Court interprets that language as simply allowing

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[7] The Court would also note that while plaintiff may reference both the Agreement and the right of first refusal in the complaint, that simply referencing those items does not bring plaintiff's claims under the arbitration provision. Specifically, plaintiff references the right of first refusal with respect to Counts I and III, where plaintiff alleges that the board of directors never found, nor could they conceivably find that the plaintiff's exercise of his first refusal rights would constitute a threat. Simply referencing the right of first refusal's factual existence in a claim, however, does not automatically make that claim 'relate' to the Agreement. Rather, the claim must arise from or relate to the *rights* created in the Agreement.

the arbitrator the freedom to craft an effective remedy to whatever problem may be encountered Allowing the arbitrator a broad selection of remedies, however, does not increase the universe of claims that the arbitrator has the power to hear As provided by the Agreement, the arbitrator has the power only to hear those claims arising out of the rights in the Agreement, and no more

All but one of plaintiff's claims arise from rights independent of and unrelated to the Agreement and, therefore, are not subject to dismissal in favor of the arbitration provision The only claim that incorporates a right created in the Agreement is the claim for breach of fiduciary duty with respect to the failure of the board to identify a compelling justification for depriving plaintiff of his right of first refusal by adopting the Poison Pill. Plaintiff asserts that the board impermissibly interfered with his contractual right of first refusal without first taking appropriate measures [8] Plaintiff's allegation that the board did not exercise appropriate procedures when depriving him of his right of first refusal clearly arises from, and relates to, the Agreement

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[8] The Court notes that Greenbrier is a party to the Agreement, and is charged with its enforcement

Plaintiff's right of first refusal was created by the Agreement, and as has been established, all disputes arising from or relating to the Agreement are to be resolved through arbitration. This claim turns directly on the board's alleged interference with plaintiff's right of first refusal under the Agreement. Unlike plaintiff's other claims, which arise from rights independent and separate from the Agreement, the right of first refusal arises directly from the Agreement. This claim, which arises from and relates to rights created under the Agreement, is thereby covered by all clauses of the Agreement, including the arbitration provision. This single claim, found in Count I, is dismissed in favor of arbitration.

B. Failure to State a Claim Under Rule 12(b)(6)

When considering a motion to dismiss under Rule 12(b)(6), the Court must assume the truthfulness of all well-pled allegations in the complaint and view those facts, and all reasonable inferences drawn from them, in a light most favorable to the plaintiff.[9] Dismissal is appropriate under Rule 12(b)(6) only when it appears with reasonable certainty that the plaintiff

[9] *Anglo American Sec. Fund, L.P. v. S.R. Global*, 829 A.2d 143, 148-49 (Del. Ch. 2003).

would not be entitled to relief under any set of facts that can be inferred from the pleadings.[10]

Defendants assert that if plaintiff makes no claims in relation to the Agreement, that he then has nothing more to complain about because all that occurred was a corporation adopting a poison pill in the ordinary course of business, or as they refer to it, on a clear day. Defendants assert that the adoption by disinterested directors of a rights plan in the absence of a takeover or other control threat does not provide the plaintiff grounds to state an actionable breach of fiduciary duty claim. The Court disagrees

1 Plaintiff's Breach of Fiduciary Duty Claim

Plaintiff asserts that the Poison Pill was not adopted in the ordinary course of business or on a clear day, but that it was in response to a specific threat, namely plaintiff's potential exercise of the right of first refusal Plaintiff states that.

> The adoption of a poison pill was first discussed at a meeting of the board on April 13, 2004 At that meeting the directors discussed maximizing stockholder value through possible strategic transactions Plaintiff informed the board that he and Furman had engaged in some preliminary discussions regarding the possibility of plaintiff acquiring Furman's shares, and also informed the board that he might be interested in acquiring all of the shares of the Company in a negotiated transaction The

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[10] *Leonard Loventhal Account v. Hilton Hotels Corp*, 2000 WL 1528909 at *3 (Del Ch 2000); *Solomon v Pathe Communications Corp*, 672 A 2d 35, 38 (Del 1996)

> board then determined to continue discussions regarding possible proposals for corporate transactions and plaintiff voluntarily recused himself from the meeting, in order to ensure that he would not participate in discussions in which he might have had a conflict of interest In his absence, counsel for the board discussed that the advisors likely would recommend that the board adopt a shareholder rights plan and that information regarding such a plan would be circulated to the board [11]

Because the Court is charged with viewing all facts and inferences in a light most favorable to the plaintiff, the Court finds that this allegation supports plaintiff's claim that the Poison Pill was not adopted in the ordinary course of business, but instead was adopted in direct response to a threat, namely plaintiff's intent to acquire more shares via his right of first refusal.

Under the well-known *Unocal/Unitrin* test,[12] when a board of directors adopts a poison pill plan in response to a threat it must "establish that (i) it had reasonable grounds to believe that the hostile bid constituted a threat to corporate policy and effectiveness, and (ii) that the defensive measures adopted were 'proportionate', that is, reasonable in relation to the threat that the board reasonably perceived."[13] Plaintiff has pled sufficient

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[11] Pl 's Am Compl , 6-7

[12] *See Unocal Corp v Mesa Petroleum Co* , 493 A 2d 946 (Del 1985); *Unitrin, Inc v American General Corp*, 651 A 2d 1361 (Del 1995)

[13] *Mentor Graphics Corp v Quickturn Design Systems, Inc* , 728 A 2d 25, 44-45 (Del Ch 1998) (quoting *Unocal Corp v Mesa Petroleum Co* , 493 A 2d 946, 955 (Del 1985)

facts that, if true, would entitle plaintiff to relief with respect to this breach of fiduciary duty claim.

2 Plaintiff's Improper Delegation of Authority Claim

Plaintiff also claims that in violation of 8 *Del C* § 157, Greenbrier's directors delegated authority to management and counsel to make changes to the terms of the stock rights to be issued under the Poison Pill after the board had already voted to approve it. Section 157 requires that before issuing rights and options the board of directors shall approve them, and the board may not delegate the authority to fix any of the terms or conditions of rights.[14] Plaintiff asserts that after the board adopted the Poison Pill, that management and counsel made the following changes: substantive changes to the definition of "Acquiring Person" and changes to the definition of "Affiliate" and "Associate;" changes to the redemption provision, and elimination of the "flip-over" provision.

Plaintiff has pled facts that may demonstrate that an impermissible delegation of authority resulted in counsel or management altering the terms or conditions of the stock rights issuance in violation of § 157. In that

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[14] *Accord Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 538 (Del. Ch. 1999) (the formal requirement that board authorization to issue securities take the form of a resolution adopted at a directors meeting or a unanimous written consent may be seen as having important functional significance).

circumstance, plaintiff would be entitled to relief, and the motion to dismiss this claim must accordingly be denied.

III. CONCLUSION

For the reasons set forth above, I dismiss in favor of arbitration plaintiff's claim alleging a breach of fiduciary duty against the board for failure to identify a compelling justification for depriving the plaintiff of his contractual right of first refusal. I deny the motion to dismiss plaintiff's other claims because those claims do not fall under the arbitration provision and, at this juncture, they state a claim upon which relief might be granted. Oral argument, which is presently scheduled for January 3, 2005, is cancelled. Trial, however, will go forward as scheduled on Monday, January 24, 2005, at 10:00 a.m. in Georgetown.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII.jsm

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 26, 2006, copies of the Affidavit of Addie P. Asay, Esq., were served on the following counsel of record by e-filing:

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Elizabeth C. Tucker (#4468)

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