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

LUCIAN A. BEBCHUK	:	C.A. No. 2145-N
v.	:	
CA, INC.	:	

PLAINTIFF'S PRE-HEARING BRIEF

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PRELIMINARY STATEMENT

The fundamental question in this case – whether Delaware law prohibits shareholders from limiting the discretion of a board of directors in enacting poison pills – has already been answered by this Court. In *Unisuper v. News Corp.*, 2005 WL 3529317, at *6 (Del. Ch.) ("*News Corp.*"), Chancellor Chandler held that shareholders may exercise their rights (in that case by contract) to impose restrictions on a board's ability to exercise its discretion in adopting a poison pill. In denying the defendants' motion to dismiss in that case, Chancellor Chandler necessarily *rejected* the very arguments advanced by Defendant CA, Inc. ("CA" or the "Company") here.

In its brief, CA's central argument is that the proposed bylaw (the "Proposed Bylaw") submitted by Professor Lucian Bebchuk for inclusion in CA's 2006 proxy materials is illegal under Delaware law because *any* limitation on the ability of the Company's Board of Directors (the "Board") to adopt or define terms for poison pills must be set forth in the Company's certificate of incorporation and may not be imposed by the shareholders. *See* Defendant's Opening Pre-Hearing Brief ("Def. Br.") at 1. Despite this effort to ignore and reject *News Corp.* – a view that is apparently shared by

other members of the corporate bar community – Chancellor Chandler's decision in *News Corp.* is the law of this state and governs this dispute. CA's arguments to the contrary are just plain *wrong*.

The Proposed Bylaw at issue here is perfectly consistent with Delaware law. The Proposed Bylaw would establish a process by which the CA Board could exercise its discretion in adopting a poison pill. It does no more than require the unanimous vote of the Board to adopt any poison pill, and require the Board to consider annually the advisability of keeping any such pill in place. Section 109 of the Delaware General Corporation Law (the "DGCL") broadly authorizes shareholders to enact bylaws "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" so long as such bylaws are "not inconsistent with law or with the certificate of incorporation." 8 Del. C. § 109. Nothing in Delaware law precludes corporations from adopting bylaws that establish bounds within which the directors may, by resolution, exercise their business judgment in implementing a poison pill.

CA's argument that Section 109 only permits shareholders to adopt bylaws in areas where other provisions of the DGCL specifically contemplate regulation by bylaw lacks support or reason. To the contrary,

the broad language of Section 109 permits shareholder-enacted bylaws provided that such bylaws are not inconsistent with law or the company's certificate of incorporation. The inquiry, then, is not whether a bylaw enacted by shareholders pursuant to Section 109 is authorized by any other provision of the DGCL, but whether such a bylaw is inconsistent with either the DGCL or the company's certificate of incorporation.

CA incorrectly theorizes that two provisions of the DGCL prohibit shareholders from enacting bylaws relating to poison pills: Section 157 (which relates to rights and options respecting stock); and Section 141 (which relates to the responsibilities of boards of directors). The Proposed Bylaw is not inconsistent with either provision. Section 157 gives directors the ability to, by resolution, establish the terms for stock rights issued by a company. Because the Proposed Bylaw undeniably would not take away the CA Board's ability to adopt a resolution implementing a poison pill, or purport to issue or preclude the issuance of stock rights through the bylaw itself, the Proposed Bylaw does not violate Section 157. The fact that the Proposed Bylaw would establish parameters within which the Board could adopt such a rights plan by resolution does not render the Proposed Bylaw improper. Section 157 does not require that every limitation on a board's

discretion in defining the terms of a poison pill must appear in the certificate of incorporation. This was demonstrated by the Court's decision in *News Corp.*, as well as the Court's prior decision in *In re National Intergroup, Inc. Rights Plan Litig.*, 1990 WL 92661, at *2 (Del. Ch.) (enforcing limitation on board's ability to implement poison pill created by shareholder resolution).

The Proposed Bylaw also does not usurp the Board's "authority" to manage the business and affairs of the corporation pursuant to Section 141(a). The Proposed Bylaw would not take away from the Board the power to maintain a pill indefinitely, but would only impose a procedural requirement that the Board consider the advisability of maintaining a pill on an annual basis.

Furthermore, the premise behind CA's entire argument here – that Section 141(a) vests in the board of directors some kind of unfettered discretion in all things management-related – is simply incorrect and contrary to established Delaware precedent. Section 141(a) vests in the Board the responsibility, not the unfettered right, to manage the affairs of the corporation. And the structure of the DGCL makes clear that in exercising this responsibility, the directors are not free to disregard the bylaws of the corporation, even under the guise of exercising their business judgment. For

this reason, CA's reliance on caselaw holding that directors may not abdicate their fiduciary responsibilities in managing the business and affairs of a corporation under Section 141 by ceding such authority to third parties is completely inapposite. Directors may not cede their fiduciary duties to third parties, but just as the shareholders may exercise contractual rights to limit the directors' ability to adopt a poison pill, the shareholders may, pursuant to Section 109, enact bylaws that define the limits within which their elected representatives on corporate boards may act.

At bottom, CA's arguments here represent nothing more than an attempt to revisit the issues already decided by the Chancellor in *News Corp.* CA's argument – that any limitation on the Board's ability to adopt a poison pill must appear in the Company's certificate of incorporation – was rejected in *News Corp*. and should likewise be rejected here. The Court should enter a declaratory judgment in favor of Plaintiff.

FACTUAL BACKGROUND

On March 23, 2006, Professor Lucian A. Bebchuk ("Bebchuk") submitted a proposal (the "Proposal") to CA for inclusion in the Company's 2006 proxy materials and for consideration by CA's shareholders at the Company's 2006 Annual Meeting. CA does not contest Bebchuk's

eligibility to submit the Proposal, which asks CA's shareholders to adopt the following Proposed Bylaw:

> 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.

Declaration of Michael J. Barry In Support Of Plaintiff's Pre-Hearing Brief ("Barry Decl."), Ex. A. The Proposed Bylaw was accompanied by the following supporting statement:

> 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.

Id.

In a letter dated April 21, 2006 to the Division of Corporation Finance (the "Division") of the SEC ("April 21, 2006 Letter"), CA stated that it intended to exclude the bylaw from the Company's 2006 Proxy Statement based solely on its belief that the Proposed Bylaw violates Delaware law.[1] CA's April 21, 2006 Letter was supported by an opinion letter by its counsel Richards, Layton & Finger, PA ("Opinion Letter") stating that the Proposed Bylaw would cause the company to violate state law if enacted, specifically 8 Del C. § 141(a) and 8 Del. C § 157. Based on arguments in the two letters, CA invoked the SEC's "no-action" review process by which the Company stated its intent to exclude Prof. Bebchuk's proposal and sought the Division's assurance that it would not recommend an enforcement action against the Company if Prof. Bebchuk's proposal was excluded.

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[1] In its April 21, 2006 letter, CA asserted that the Proposal could be excluded from its proxy materials pursuant to Rule 14a-8(i)(2) which allows the exclusion of a proposal which would "if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2).

NATURE AND STAGE OF PROCEEDINGS

On May 11, 2006, Prof. Bebchuk filed this action seeking a declaratory judgment that the Proposed Bylaw would not cause the Company to violate Delaware law and filed a motion for expedited consideration.[2] Prof. Bebchuk and CA agreed to have a hearing on the merits on June 16, 2006. CA submitted Defendant's Pre-Hearing Opening Brief on May 26, 2006.

ARGUMENT

CA's arguments in this case rest on two incorrect assertions: (1) any limitation on directors' abilities to adopt poison pills must appear in the certificate of incorporation; and (2) shareholders may not limit directors' discretion to adopt poison pills. *See* Def. Br. at 6. Unfortunately for CA, both of these arguments were rejected by the Chancellor in *News Corp.* The first aspect of the Chancellor's holding in *News Corp.* that is relevant here is that directors' discretion in adopting poison pills *may* be restricted by sources *other than* the company's certificate of incorporation. The fact that

[2] On the same date, Plaintiff sent a letter to the Division requesting that it not rule on CA's No-Action request so that the Delaware Chancery Court could resolve this issue of Delaware law. On June 5, 2006, noting this ongoing litigation, the Division declined to express any opinion in response to CA's No-Action request. *CA, Inc.*, SEC No-Action Letter, 2006 WL 1547985, *1 (June 5, 2006).

the particular limitation appeared in that case in the form of a contract between the directors and the shareholders is of no consequence with respect to the argument asserted by CA in the case at bar. The point is that this Court held that such a limitation may be enforceable without regard to the fact that it did not appear in the certificate of incorporation. This aspect of the Court's holding is fatal to CA's argument that, under Section 157 of the DGCL, any limitation on the Board's ability to adopt and maintain a poison pill must be set forth in the Company's certificate of incorporation. If Section 157 required that any limitation on the directors' ability to adopt poison pills appear in the company's certificate of incorporation, then the Chancellor would have had to dismiss the contract and unjust enrichment claims in *News Corp*. However, the Chancellor did not dismiss those claims.

The second aspect of this Court's holding in *News Corp.* that is important here is the fact that the Chancellor sustained the shareholders' exercise of authority to limit directors' abilities to implement poison pills. The Chancellor did so not only on the motion to dismiss, but also in his approval of the settlement which limited the News Corp. board's authority to

adopt a poison pill for the next twenty years.[3] This demonstrates that ***there is no prohibition under Delaware law against shareholders limiting a board's authority on issues relating to poison pills.*** CA's argument, therefore, that the Proposed Bylaw is illegal simply because it would, if adopted, constitute shareholder action that in some respect would limit the Board's discretion in adopting a poison pill is wrong under the Chancellor's holding in *News Corp.*

CA tries to distinguish *News Corp.* by suggesting that the *board* may adopt provisions that place limitations on the directors' discretion in implementing a poison pill, but that the *shareholders* are legally precluded from doing so. Def. Br. at 9-10. In other words, CA's position implies that the Board could adopt the bylaw proposed by Prof. Bebchuk but that the stockholders cannot.

This distinction is contrary to Delaware law. Section 109 does not distinguish between the enforceability of a bylaw based on the identity of who adopted it. Either the bylaw is valid or it is not. Similarly, if either Section 141(a) or Section 157 required that any limitation on a board's

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[3] *See Unisuper v. News Corp.*, No. 1699, Stipulation of Settlement ¶ 21(f)(i-iii), ¶ 21(i) (Del. Ch. April 12, 2006) (Barry Decl. Ex. B); *Unisuper v. News Corp.*, No. 1699, Order and Final Judgment (Del. Ch. June 1, 2006) (Barry Decl. Ex. C).

discretion in adopting a poison pill be set forth in a company's certificate of incorporation, as CA claims, then a limitation *not* in the certificate would be invalid even if the board "voluntarily" agreed to it. And, if any limitation on a board's ability to adopt a poison pill somehow were inconsistent with a board's fiduciary duties, as CA claims, then any limitation would be invalid as a matter of law regardless of whether the present board agreed to it. Thus, CA's effort to distinguish the *News Corp.* decision based on the argument that corporate boards are somehow empowered to acquiesce to limitations that may not be imposed by shareholder action is completely ineffective.

I. THE PROPOSED BYLAW IS PERMITTED UNDER 8 Del. C. § 109.

Pursuant to Section 109(a) of the DGCL, "[a]fter a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote." 8 Del. C. § 109(a).[4] While Section 109(a) also permits a corporation to confer the power to adopt, amend or repeal bylaws upon the directors in its certificate of incorporation, "[t]he fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the

[4] The bylaws of a corporation are "the self-imposed rules and regulations deemed expedient for … [the] convenient functioning" of the corporation. *Gow v. Consolidated Coppermines Corp*., 165 A. 136, 140 (Del. Ch. 1933).

stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws." *Id*. The only restriction on the subject matter of a bylaw is set forth in Section 109(b), which provides that corporate bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." 8 Del C. § 109(b).

Delaware courts consistently have interpreted the grant of authority in Section 109(a) as permitting shareholders to adopt bylaws, even when perceived as limiting the operation of the board of directors or affecting the management of the corporation. For example, in *Frantz Mfg. Co. v. EAC Indus.*, the Delaware Supreme Court upheld the validity of a shareholder-enacted bylaw that "required attendance of all directors for a quorum and unanimous approval of the board of directors before board action can be taken, and they thereby limited the functioning of the Frantz board." 501 A.2d 401, 407 (Del. 1985).[5] Similarly, in *American Int'l Rent a Car, Inc v. Cross*, 1984 WL 8204 at *3 (Del. Ch.), this Court rejected a shareholder

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[5] In *Frantz*, the Delaware Supreme Court also noted that "[t]he power to make and amend the bylaws of a corporation has long been recognized as an inherent feature of the corporate structure." 501 A.2d at 407.

challenge to a board-enacted bylaw amendment, noting:

> If a majority of American International's stockholders in fact disapproved of a Board's amendment of the bylaw, several recourses were, and continue to be, available to them. They could vote the incumbent directors out of office. ***Alternatively, they could cause a special meeting of the stockholders to be held for the purpose of amending the bylaws and, as part of the amendment, they could remove from the Board the power to further amend the provision in question***.

(emphasis supplied). More recently, in *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1078-81 (Del. Ch. 2004), aff'd 872 A.2d 559 (Del. 2005), this Court rejected an argument that a controlling shareholder could not adopt bylaw amendments which abolished a committee created by the board of directors because that power was reserved to the board by DGCL § 141. While the Court in *Hollinger* ultimately rejected the specific bylaws because they were "adopted for an inequitable purpose and have an inequitable effect" (*id*. at 1080), this Court unequivocally rejected essentially the same argument CA makes in this case:

> For similar reasons, I reject International's argument that that provision in the Bylaw Amendments impermissibly interferes with the board's authority under § 141(a) to manage the business and affairs of the corporation. ***Sections 109 and 141, taken in totality, and read in light of Frantz, make clear that bylaws may pervasively and strictly regulate the process by which boards act, subject to the constraints of equity***.

Id. at 1080 n. 136 (emphasis supplied).

In fact, CA concedes that "Section 109(a) gives stockholders the right to amend by-laws" (Def. Br. at 16) but then baldly asserts that shareholders can only exercise this power when an independent DGCL provision so provides. *Id.* at 16-17. In other words, CA argues that despite the fact that Section 109 gives the power to adopt and amend corporate bylaws *to shareholders*, shareholders may only exercise this right if another provision of the DGCL serves as an "enabling statute" explicitly authorizing a bylaw in a particular subject area. This argument is baseless, and in fact, this Court rejected a similar argument in *Jones Apparel Group, Inc. v. Maxwell Shoe Co., Inc*., 883 A.2d 837 (Del. Ch. 2004).

In *Jones Apparel*, this Court upheld the validity of a provision in the company's charter despite the fact that the Delaware statute on the issue did not specifically authorize a charter provision on the subject. Specifically, Section 213 of the DGCL permits directors to establish a record date for shareholders to consider a consent solicitation. 8 Del. C. § 213(b). The charter of Maxwell Shoe Company, Inc. ("Maxwell"), however, contained a provision that established the record date for any consent solicitation of the company's stockholders. 883 A.2d at 841. Maxwell's directors attempted to establish a record date that was earlier than that provided in the

company's charter, arguing that the specific charter provision at issue was somehow invalid because it "usurped" the directors' supposed right to designate the record date under Section 213. In doing so, Maxwell's directors advanced an argument similar to the argument CA does here, *to wit*, that the charter provision was not authorized by DGCL § 102(b)(1) and was invalid because it:

> . . .conflicts with what Maxwell contends is § 213(b)'s clear empowerment of boards to set record dates. In support of this argument, Maxwell focuses on a feature of the DGCL. Currently, our corporate code contains 48 separate provisions expressly referring to the variation of a statutory rule by charter. Those provisions generally lay out various statutory rules, but include prefatory language such as "unless otherwise provided in the certificate of incorporation." Section 213(b) is not one of the statutes that contain language of that kind. Maxwell argues that the failure to include such language in § 213(b) was not unintentional, and that the General Assembly therefore did not intend to permit a charter provision eliminating the board's authority to set the record date.

Id. at 844. Maxwell, like CA, also argued that its charter provision impermissibly conflicted with DGCL § 141(a) because it impermissibly eliminated a statutory grant of power to the board. *Id*. at 845. This Court flatly rejected these arguments:

> The primary argument that Maxwell advances in this regard is based on the absence of any specific language in § 213(b) indicating that the power of a board to set the record date was subject to alteration by a charter provision. In essence, Maxwell

> contends that unless a DGCL provision granting certain powers to a board contains the magic words "unless otherwise provided in the certificate of incorporation," then neither § 102(b)(1) nor § 141(a) permit a certificate provision to deprive a board of the authority granted.

Id. at 847. This Court rejected this "magic words" argument, noting that "Maxwell's reading of the magic words deprives §§ 102(b)(1) and 141(a) of any real force." *Id*. at 848. Just as CA's argument in the instant case would render DGCL § 109(b) meaningless, the Court in *Jones Apparel* noted:

> More fundamentally, Maxwell's argument is unconvincing to me because it leaves little room for §§ 102(b)(1) and 141(a) to operate, despite their obvious status as general provisions of broad application. If § 102(b)(1) may be utilized only when the specific statute granting the board authority contains the magic words, then there is no independent utility to § 102(b)(1). The magic words themselves would be what authorized the restriction on board authority, not § 102(b)(1).

Id. Indeed, if the drafters of the DGCL intended to so-limit the exercise by shareholders of the authority conferred by DGCL § 109(a), then there would be no need for or purpose of DGCL § 109(b). In other words, if shareholders' ability to adopt bylaws under Section 109(a) was limited only to areas where other provisions of the DGCL specifically permitted deviation of a statutory presumption by bylaw, then the statement in Section 109(b) that "[t]he 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" would be wholly irrelevant. Such an illogical result cannot possibly have been intended. *See also Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996) ("In determining legislative intent in this case, we find it important to give effect to the whole statute, and leave no part superfluous.").

In fact, the fallacy of CA's argument that the bylaws may only contain provisions that are specifically authorized by the DGCL is demonstrated, perhaps most clearly, by the fact that CA's existing bylaws contain provisions on subject-areas that are not even addressed in the DGCL.[6] Thus, nothing in Section 109 of the DGCL precludes shareholders from adopting a

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[6] *See* By-Laws of CA, Inc. (As Amended, Effective as of March 7, 2006), Article II, Sec. 11 (relating to nomination of directors); Article V (relating to contracts, loans, checks and deposits); Article VII (establishing the Company's fiscal year); and Article VIII (describing the Company's seal) (Barry Decl., Ex. D).

bylaw that relates to the process to be employed by a corporate board when deciding to implement a poison pill.[7]

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[7] Indeed, belying CA's claim that the Proposed Bylaw is invalid, other Delaware corporations already have adopted bylaws which similarly – or more pervasively – regulate boards' implementation of poison pills. *See, e.g.*, Bylaws of Bristol-Myers Squibb Company as Amended March 7, 2006, No. 24 "Board of Directors – Stockholder Rights Plan" (requiring supermajority (two-thirds) board approval to adopt or extend poison pill and providing that any poison pill shall expire after one year unless approved by shareholders) (Barry Decl., Ex. E); Amended and Restated Bylaws of UAL Corporation, as amended and restated on February 1, 2006, Article 7, Section 7.6, "Rights Plan" (providing that: (i) the board shall not adopt a poison pill without prior shareholder approval unless a majority of the board's independent directors deem it necessary to do so without delay; (ii) any rights plan adopted by the board without prior shareholder approval shall be put to a shareholder vote within one year and shall expire after one-year unless approved by shareholders; and (iii) requiring any poison pill adopted by the board to include provision "requiring a committee of the Board comprised solely of independent Directors to review the Rights Plan at least every three years" and to report its recommendation to the board – supported by a report and recommendation from investment bankers and attorneys engaged by the committee – as to whether the board should terminate or modify the poison pill) (Barry Decl., Ex. F).

CA's position is also inconsistent with the widespread and increasingly common practice by Delaware corporations to adopt poison pill policies or guidelines which provide (with minor variations) that: (1) subject to a "fiduciary out" provision, a corporation will not enact a poison pill without first submitting it to a shareholder vote; and (2) in the event a poison pill is enacted without first being put to a shareholder vote, then the poison pill shall automatically expire after 1 year, unless approved by shareholders. *See* Thaddeus C. Kopinski, *Shareholders Continue Efforts to Limit Poison Pills*, ISS Corporate Governance Weekly, April 22, 2005 ("The trend is for companies to redeem their existing poison pill provision and pledge not to institute new ones without shareholder approval") (Barry Decl., Ex. G); John

II. THE PROPOSED BYLAW IS CONSISTENT WITH 8 DEL. C. § 157

The Proposed Bylaw also does not run afoul of Section 157 of the DGCL. Section 157, in pertinent part, states:

> (a) Subject to any provisions in the certificate of incorporation, 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.
>
> (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, 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 as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.

8 Del C. § 157.

Laide, *Research Spotlight, Poison Pill Policy*, SharkRepellant.net, Oct. 11, 2005 (reporting that 78 companies had adopted a poison pill policy as of October 11, 2005) (Barry Decl., Ex. H). These policies impose far greater restrictions upon a corporation's ability to issue poison pills than the Proposed Bylaw would, if adopted.

According to CA, these provisions vest absolute authority on all matters relating to poison pills in the Board, subject *only* to the Company's certificate of incorporation. Def. Br. at 6-12. CA is wrong. First, Section 157(a) states: "Subject to any provisions in the certificate of incorporation, every corporation may create and issue . . . rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock." Furthermore, Section 157(a) provides that "such rights or options . . . shall be approved by the board of directors." The Proposed Bylaw is entirely consistent with Section 157(a) because it does not take power away from CA to adopt a shareholder rights plan and maintains the requirement that the Board approve such plans. To the contrary, the Proposed Bylaw does nothing more than effectively create a voting requirement stating that a poison pill must be renewed – and therefore must be approved by the board of directors consistent with the mandate in Section 157(a) – on an annual basis.[8]

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[8] In this regard, the Proposed Bylaw is also consistent with the principle articulated in *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985) and *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) that directors have a continuing obligation to consider defensive measures in light of changing circumstances. *See Moran,* 500 A. 2d at 1357 ("While we conclude for present purposes that the Household Directors are

The Proposed Bylaw does not violate subsection (b) of Section 157 either. Under Section 157(b), "[t]he terms upon 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 …" 8 Del. C. § 157(b). CA argues, with the strategic use of bracketed text, that this provision renders illegal any bylaw that purports to relate to the terms of any poison pill. Def. Br. at 7-8. Once again, CA is mistaken. Section 157(b) merely says that the terms of any stock rights may be established either by a provision in a corporation's certificate of incorporation or by a resolution adopted by the Board. It does *not*, as CA suggests, affirmatively preclude bylaws on the subject. In this regard, Section 157(b) is notably different from other provisions of the DGCL that establish default rules that can *only* be altered in the certificate of

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protected by the business judgment rule, that does not end the matter. The ultimate response to an actual takeover bid must be judged by the Directors' actions at that time, and nothing we say here relieves them of their basic fundamental duties to the corporation and its stockholders."); *Quickturn*, 721 A. 2d at 1291 (discussing *Moran* and noting that that "the use of [a] Rights Plan [is to] be evaluated when and if the issue arises").

incorporation.[9] Section 157 does *not* provide directors have some kind of "exclusive right and power to adopt rights plans" (Def. Br. at 1) "unless otherwise provided in the certificate of incorporation," and as such does not preclude bylaws on the subject. Indeed, as noted above, several companies already have adopted bylaws regarding poison pills.

The fact that Section 157 permits directors to define the terms of a poison pill by adopting a resolution does not preclude a bylaw on the subject. Indeed, when adopting any resolution, a board of directors is always constrained by the bylaws of the corporation. "[B]ylaws are generally thought of as having a hierarchical status greater than board resolutions, and that a board cannot override a bylaw requirement by merely adopting a resolution." *Hollinger Int'l, Inc.*, 844 A.2d at 1080. In fact, if

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[9] For example, the following provisions of the DGCL establish default rules "unless otherwise provided in the certificate of incorporation" (or words to that effect) *without* reference to the bylaws or other provisions of the DGCL: 8 Del. C. §§ 122(a), 125, 211(b) and (e), 215(b), 228(a) and (b), 243(b), 251(f) and (g), and 272. Similarly, Section 109 provides that "any corporation may, *in its certificate of incorporation*, confer the power to adopt amend or repeal bylaws upon the directors." 8 Del. C. § 109(a). *See Lion's Gate Entm't Corp. v. Image Entm't Inc.*, No. 2011-N at 16 (Del. Ch. June 5, 2006) (directors may be granted authority to amend bylaws through the certificate of incorporation). The fact that Section 157 permits the terms of poison pills to be set forth in a company's certificate of incorporation *or* a resolution adopted by the board does not preclude the adoption of a bylaw pursuant to which the board must comply when adopting any resolution on the subject.

directors were allowed to adopt resolutions inconsistent with bylaws, the requirement in Section 109(a) that the certificate of incorporation must grant directors authority to "adopt, amend, or repeal bylaws" would by entirely superfluous; directors would be entirely free to circumvent any bylaw requirement by passing an inconsistent board resolution or policy. Therefore, where the terms of a poison pill are in a board resolution, those terms must be consistent with the corporation's bylaws.

Defendant cites numerous cases, starting with *Moran v. Household Int'l Inc.*, 500 A.2d 1346, 1356 (Del 1985), for the proposition that Section 157 confers power on directors to enact a poison pill. Plaintiff does not dispute that Section 157 grants directors such power. However, that grant of power should be read consistently with the broad grant of power in Section 109(b) to shareholders to enact bylaws "relating to the business of the corporation." *See Hubbard v. Dunkleberger*, 1995 WL 131789, *6 (Del.) ("If two statutes conflict somewhat, the court must, if possible, read them so as to give effect to both …"). There is nothing inconsistent between a board's ability to adopt resolutions regarding poison pills under Section 157 and the provisions of a company's bylaws enacted pursuant to Section 109.

Leonard Loventhal Account v. Hilton Hotels Corp., 2000 WL 1528909 at *9 (Del. Ch.), *aff'd* 780 A.2d 245, (Del. 2001), cited by Defendant for the proposition that directors have the power to enact a poison pill, also illustrates that directors are limited by a corporation's bylaws when enacting a poison pill. In that case, this Court analyzed a poison pill to determine *if it was consistent with the company's bylaws*. *Id*. But if Defendant's assertion that bylaws may not limit the Board's power to adopt poison pills were correct, then of course there would have been no need for the Court to conduct such an analysis. Accordingly, while directors unquestionably are authorized by Section 157 to enact poison pills, there is little question that the bylaws may impose restrictions upon the boards exercise of that power.[10]

[10] Defendant cites a number of cases where the board of directors abdicated or neglected their fiduciary duty to shareholders, including *Smith v. Van Gorkom*, 488 A.2d 858, 888 (Del. 1985) (holding that "a director may not abdicate that duty [to make an informed deliberate decision to approve a merger] by leaving to the shareholders alone the decision to approve or disapprove the agreement") and *James v. Furman*, C.A. No. 597-N at 8 (Del. Ch. Nov. 16, 2004) (holding that directors can't delegate their authority to approve a poison pill to management). These cases have nothing to do with whether a company can have bylaws on the subject matter of poison pills.

III. THE PROPOSED BYLAW IS CONSISTENT WITH 8 DEL. C. § 141(a).

CA also argues that, independent of Section 157, the Proposed Bylaw is invalid under Section 141(a) because "it seeks to usurp the Board's power to manage the business and affairs of the Company." Def. Br. at 12-18. This argument misconstrues both: (i) the nature of the Proposed Bylaw itself – which demonstrably does not materially limit the Board's discretion to unilaterally adopt or extend a poison pill; and (ii) DGCL § 141 – which vests in the Board the responsibility to manage the affairs of the corporation but *does not* grant the Board *carte blanche* to ignore bylaws.

A. *News Corp.* Rejected The Very Argument CA Advances Here.

In *News Corp.*, this Court held that Section 141(a) does not grant directors plenary power to run a company but rather "simply describes who will manage the affairs of the corporation and . . . precludes a board of directors from ceding that power to outside groups or individuals." 2005 WL 3529317, at *6.

> Delaware's corporation law vests managerial power in the board of directors because it is not feasible for shareholders, the owners of the corporation, to exercise day-to-day power over the company's business and affairs. ***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.

Id. (emphasis added).

News Corp. illustrates that shareholders can – consistent with DGCL § 141(a) – restrict a corporate board's ability to adopt a poison pill far more pervasively than the Proposed Bylaw would if enacted. In *News Corp*., the directors of News Corp. agreed – in exchange for shareholder approval to reincorporate in Delaware – that any poison pill adopted by the board would "have a one-year sunset clause unless shareholder approval is obtained for an extension." *Id*. at *3. News Corp.'s board also agreed that it would "not circumvent the voting requirement by 'rolling over' a poison pill for successive one year terms." *Id*.

After the News Corp. board adopted a poison pill and breached its promise by extending the poison pill without seeking shareholder ratification, shareholders brought suit to enforce the contract. *Id*. News Corp. attempted to convince this Court that its agreement not to extend its poison pill could not be enforced under Delaware law. Invoking the exact same argument that CA makes in the instant case, News Corp. asserted that: "[T]he alleged agreement is inconsistent with the general grant of

managerial power authority to the board in Section 141(a) of the Delaware General Corporations Law … Section 141(a) vests power to manage the corporation in the board of directors and requires that any limitation on this power be in the certificate of incorporation." *Id*. at *6.

However, this Court expressly rejected the argument that Section 141(a) prevents shareholders from asserting control over the company and drew a sharp distinction between "putting into *shareholders'* hands the decision whether to keep a poison pill" and measures "used [by corporate boards] in order to take power *out* of shareholders' hands." *Id*. at *7. The Court noted that:

> Section 141(a) does not say the board cannot enter into contracts. ***It simply describes who will manage the affairs of the corporation and it precludes a board of directors from ceding that power to outside groups or individuals***. The fact that the alleged contract in this case gives power to the shareholders saves it from invalidation under Section 141(a). The alleged contract with ACSI did not cede power over poison pills to an outside group; rather, it ceded that power to shareholders. In effect, defendants' argument is that the board impermissibly ceded power to the shareholders. Defendants' argument is that the contract impermissibly restricted the board's power by granting shareholders an irrevocable veto right over a question of corporate control.

Id. at *6 (emphasis added). In doing so, the Court distinguished *Quickturn Design Sys. v. Shapiro*, 721 A.2d 1281, 1287 (Del. 1995), relied upon by CA here (Def. Br. at 13-15), noting that:

> The contracts in *Paramount* and *Quickturn* were defensive measures that took power out of the hands of shareholders. The contracts raised the "omnipresent specter" that the board was using the contract provisions to entrench itself, *i.e.*, to prevent shareholders from entering into a value-enhancing transaction with a competing acquiror. In this case, the challenged contract put the power to block or permit a transaction directly into the hands of shareholders. Unlike in *Paramount* and *Quickturn*, there is no risk of entrenchment in this case because shareholders will make the decision for themselves whether to adopt a defensive measure or leave the corporation susceptible to takeover.

2005 WL 3529317, at *7 (footnotes omitted).[11]

Accordingly, *News Corp*. makes explicit that Section 141(a) *does not* preclude shareholders from directly exercising power over the affairs of the corporation, notwithstanding the fact that such power is ordinarily exercised on their behalf by the board of directors. Therefore, CA's contention that

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[11] As described by this Court in *News Corp*., "In *Quickturn* the board amended the company's poison pill so that no newly elected board could redeem the pill for six months after taking office. This 'delayed redemption provision' was adopted as a defensive measure in response to a tender offer by a would-be acquiror. The Supreme Court held that the provision was invalid and unenforceable because it would prevent a future board from rescinding the poison pill, even in circumstances where the future board concluded that redeeming the pill was in the best interests of shareholders." 2005 WL 3529317, at *7 (footnotes omitted).

Section 141(a) prohibits shareholders from enacting a bylaw which merely reflects the shareholders' determination that *the board* should periodically assess the advisability of maintaining a poison pill (in stark contrast to the limitation deemed enforceable in *News Corp*.) is incorrect.

B. The Proposed Bylaw Would Not Substantially Limit The Board's Ability To Adopt Or Extend A Poison Pill

Even aside from being wholly inconsistent with this Court's holding in *News Corp.*, CA's argument is also factually incorrect. CA argues that the Proposed Bylaw would violate Section 141(a) (Def. Br. at 12-17) because it would "substantially limit" the "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," Def. Br. at 14. While the limitation approved by this Court in *News Corp.* would substantially limit a board's power to use a poison pill – by precluding it from maintaining a pill for more than one year without shareholder approval – the Proposed Bylaw would not do so. CA simply ignores a fundamental aspect of the Proposed Bylaw which the accompanying supporting statement makes explicit:

> 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.

Barry Decl., Ex. A (emphasis supplied). The Proposed bylaw would in no way hinder the directors from exercising their fiduciary duty to thwart an inadequate or coercive tender offer. Nowhere does the Proposed Bylaw require that a Board-enacted poison pill ever be put to a shareholder vote. Moreover, the Proposed Bylaw itself also affirmatively provides that it may be repealed or amended by the Board. *Id.* (at Section 3). Thus, the only "limitation" the Proposed Bylaw would place upon the Board is that the Board itself must periodically reconsider whether maintaining a poison pill remains in the best interest of shareholders.

C. Section 141(a) Does Not Prohibit Shareholders From Adopting Bylaws Authorized by Section 109

Even assuming *arguendo* that the Proposed Bylaw sought to shift the power over poison pills from the Board to shareholders (which it does not), for instance by requiring the Board to put the adoption or extension of a poison pill to a shareholder vote, it would still be valid under Delaware law. While the management of the business and affairs of a corporation is

generally entrusted to the discretion of the board of directors, this delegation of power is not without limitations.[12] Specifically, Section 141(a) provides:

> (a) 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 maybe otherwise provided in this chapter or in its certificate of incorporation***. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by

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[12] CA's rote citation (Def. Br. at 13-14) of *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)*, In re Walt Disney Co. Derivative Litig.,* 2005 WL 2056651, at *40 (Del. Ch. Aug. 9, 2005), *McMullin v. Beran,* 765 A.2d 910 (Del. 2000), *Abercrombie v. Davies*, 123 A.2d 892, 898 (Del. Ch. 1956), *Maldonado v. Flynn*, 413 A.2d 1251, 1255 (Del. Ch. 1980), *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173 (Del.,1986), *Adams v. Clearance Corp*., 121 A.2d 302 (Del. 1956), and *Mayer v. Adams,* 141 A.2d 458 (Del. 1958) merely as cumulative support for the general proposition that directors are entrusted with managing the business and affairs of the corporation adds no support for its contention that the Proposed Bylaw is invalid under the DGCL. None of these authorities addressed the issue of whether shareholders may enact bylaws which guide the board's exercise of its management authority, nor do any of those cases stand for the proposition that the board's authority in this regard is absolute. Moreover, in *In re Walt Disney Co. Derivative Litig.,* the Court continued: "[o]f course, given the large, complex organizations though which modern multi-function business corporations often operate, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance. Thus Section 141(a) of DGCL expressly permits a board of directors to delegate managerial duties to officers of the corporation, ***except to the extent that the corporation's*** certificate of incorporation or ***bylaws may limit or prohibit such a delegation***." 2005 WL 2056651 at *40 (emphasis supplied).

> this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

8 Del. C. § 141(a) (emphasis supplied). Thus, as the unambiguous terms of this statutory provision make clear, the delegation of power to a corporation's board of directors is not absolute. *Id*. Because Section 109 is in the same chapter as Section 141, bylaws may limit the Board's authority.[13] Had the legislature intended Section 141(a)'s reference to "this chapter" to be limited to "Subchapter IV," it presumably would have said so. Indeed, within the DGCL where the legislature intended to limit a statute's application to a particular "subchapter," it plainly expressed that intent. *See*, *e.g.*, 8 Del. C. §§ 103, 283, 341, 344, 345, 346, 348, 356, 377(c), 378, 384, 385.[14]

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[13] Title 8 of the Delaware Code, entitled "Corporations" is divided into three chapters. Chapter 1 is the General Corporation Law, or the "DGCL." The DGCL, in turn, is divided into 17 subchapters. Section 109 is contained in "Subchapter I. Formation;" Section 141(a) is contained in "Subchapter IV. Directors and Officers." Both sections, however, are contained within "Chapter 1. General Corporation Law."

[14] CA wholly ignores the language "except as may be otherwise provided in this Chapter" and instead asserts that CA's Certificate of Incorporation does not provide for management of the Company by persons other than directors" (Def. Br. at 12) and therefore "confirms that the Board possesses the full power and authority to manage the business and affairs of the Company granted by Delaware law." *Id*. at 12-13. However, if adopted the

The fact that Section 141(a) does not somehow preclude shareholder action on poison pills is confirmed not only by this Court's recent decision in *News Corp.*, but by *In re National Intergroup, Inc. Rights Plan Litig*., 1990 WL 92661, at *2 (Del. Ch.) as well. In that case, the Court enforced a shareholder resolution initiated by institutional investors and adopted at a company's 1989 annual meeting that required that certain provisions be added to a company's poison pill. The resolution: (i) required the company's poison pill would expire in three years unless approved by shareholders; (ii) required that if the poison pill was extended, shareholders would have to approve a poison pill every three years to maintain it; and (iii) required shareholder ratification for any new poison pill that was adopted. *Id.* at *3. The resolution was passed by an overwhelming margin after the board recommended that shareholders vote in favor of the proposal. *Id.* Subsequently, the board attempted to change the poison pill by triggering the rights when a shareholder reached 10 percent of shares, rather than 20 percent. The court held that this change amounted to enacting a new poison pill and therefore would not be valid unless "approved by a vote of NII

Proposed Bylaw would not take away any power of the Board to manage the business and affairs of the corporation consistent with CA's certificate; rather it merely establishes guidelines – like any other bylaw – that directors must follow when exercising such discretion.

shareholders." Id. at *7. *National Intergroup* stands in direct conflict with CA's argument that Section 141(a) precludes shareholder action on the subject of poison pills since the shareholder resolution in *National Intergroup* unambiguously placed limitations on the board's ability to adopt a rights plan.

IV. THE PROPOSED BYLAW DOES NOT IMPERMISSIBLY LIMIT THE BOARD'S ABILITY TO EXERCISE ITS FIDUCIARY DUTIES

CA's argument that the Proposed Bylaw is illegal because it would "affect adversely the Board's ability to thwart an unfair takeover offer" (Def. Br. 18-20) is wholly without merit. While CA stresses that the purpose of a poison pill is to enable boards to prevent inadequate and/or coercive offers, it fails to specify how the Proposed Bylaw would thwart that goal. Under the Proposed Bylaw, as long as a board views an offer as inadequate and/or coercive, the board would be able to extend the pill as needed. Thus, there is no basis for the claim that a requirement that the board periodically review the necessity of maintaining the poison pill would open the door to unfair takeover offers.

Furthermore, directors do not violate their fiduciary duties when they conform their conduct to the governing instruments of a corporation,

including the corporation's articles of incorporation and bylaws. Delaware Courts have held that director action must conform to the bylaws even if directors wish to act contrary to bylaws. *See e.g.*, *Lion's Gate Entm't Corp.*, No. 2011-N, at 27 (Del. Ch. June 5, 2006) (holding that a board of directors was powerless to classify a board in 2005 where a bylaw stated that the board would remain unclassified until the company's 2006 Annual Meeting). If a board feels its fiduciary duties require them to act inconsistent with a bylaw *and* the certificate of incorporation gives them the power to amend the bylaws, then they must amend the bylaws before undertaking the prohibited action. *See Hollinger*, 844 A.2d at 1080 ("[A] board cannot override a bylaw requirement by merely adopting a resolution."). However, CA cannot claim that bylaws are impermissible merely because they limit the board's discretion in exercising their fiduciary duty of care; the purpose of the bylaws is to define and regulate the manner in which a board acts. *Id*. ("[B]ylaws may pervasively and strictly regulate the process by which boards act, subject to the constraints of equity.").

Defendant cites numerous cases that stand for the uncontroversial position that under the DGCL, corporate boards have the authority to adopt a poison pill in order to protect the corporation from inadequate tender offers.

For example, Defendant cites *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, 501 A.2d 1239, 1247 (Del. Ch. 1985), *aff'd* 506 A.2d 173 (Del. 1985), for the proposition that directors have "the right, even the duty, to adopt defensive measures to defeat" a takeover attempt that is harmful to the corporation. Def. Br. at 17. However, cases that merely recite that board has this power under the DGCL without reference to a company's articles of incorporation or bylaws are irrelevant to the present dispute: whether a bylaw may restrict directors' discretion in adopting a poison pill.[15] Prof. Bebchuk does not dispute that directors may exercise their business judgment in adopting a poison pill, but merely points out that when the directors do so, they must comply with the company's governing instruments – including the bylaws. Not one of the cases cited by CA contests, or even addresses, this point.

Similarly, the slew of cases cited by CA in support of its argument that directors may not abdicate their responsibilities in adopting poison pills

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[15] Defendant's reliance on *Paramount Commc'ns, Inc. v. Time Inc.*, 1989 WL 79880, at *30 (Del. Ch.), *aff'd*, 571 A.2d 1140 (Del. 1980), is also misplaced. In that case, the Court held that a board may maintain a poison pill, even if a majority of shareholders wished to tender their shares. This has nothing to do with whether corporate bylaws can regulate the process by which a corporation's board may determine to implement a poison pill in the first place.

are completely inapposite. In *Quickturn*, for example, the Court merely held that a board could not act to restrict a future board from redeeming a poison pill, even in response to a generous tender offer, in no way speaks to the issue of whether a shareholder may adopt a bylaw limiting actions that a board can take. Where directors unilaterally take action disabling or abandoning their fiduciary duty, courts guard against the possibility that they are acting in their self interest, not in the interest of shareholders. *See Carmody v. Toll Bros. Inc.*, 723 A.2d 1180, 1186 (Del. Ch. 1998) (holding that complaint where plaintiff alleged that directors enacted a poison pill that could not be redeemed by future directors was sufficient to plead that the directors acted for entrenchment purposes). *See also Abercrombie v. Davies*, 123 A.2d 892, 897 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957) (holding agreement between a number of directors and a number of stockholders of a corporation where directors agreed to always vote similarly on issues was invalid as directors abdicated their fiduciary duty to independently exercise their business judgment)[16]; *Field v. Carlisle Corp.*,

[16] The unenforceable agreement in *Abercrombie*, 123 A.2d at 897, between shareholders and directors is distinguishable from the enforceable agreement in *News Corp*. because the agreement in *News Corp*. enabled shareholders to act collectively through a vote to restrict director power. *News Corp.*, 2005 WL 3529317, at *8. The *Abercrombie* decision involved directors

68 A.2d 817, 820 (Del Ch. 1949) (holding that directors could not delegate "the duty to determine the value of the property acquired as consideration for the issuance of stock" to an appraiser). The same concerns of director entrenchment simply don't apply where shareholders, rather than directors, limit the board's authority, particularly where there is no immediate threat to the corporation.

Defendant's argument that directors' fiduciary duty of care prevents shareholders from unilaterally adopting a bylaw that regulates the Board is without merit. *See* Def. Br. 18 n.2. "Fiduciary duties exist in order to fill the gaps in the contractual relationship between the shareholders and directors of the corporation. Fiduciary duties cannot be used to silence shareholders and prevent them from specifying what the corporate contract is to say." *News Corp.*, 2005 WL 3529317, at *8. Therefore, although directors have fiduciary duties to shareholders, shareholders may limit the areas where directors have the power to exercise their fiduciary duties where they act consistent with Delaware law.

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abdicating their fiduciary duties to individual shareholders. *Abercrombie,* 123 A.2d at 897. While shareholders acting collective may act as principals, an individual director cannot cede power to an individual shareholder.

Defendant's attempt to distinguish *News Corp*. misunderstands the central issue in the case. In a footnote, Defendant states that *News Corp*. is a "case of a board agreeing with stockholders as to what is advisable and in the best interest of the corporation." Def. Br. 18-19 n.2. However, *News Corp*. expressly held that a shareholder vote that could have the effect of prohibiting certain director action would not cause the board to violate its fiduciary duties:

> To the extent defendants argue that the board's fiduciary duties would be disabled after a hypothetical shareholder vote, this argument also misconceives the nature and purpose of fiduciary duties. Once the corporate contract is made explicit on a particular issue, the directors must act in accordance with the amended corporate contract.

2005 WL 3529317 at *8.

CONCLUSION

For all the forgoing reasons, Plaintiff respectfully submits that the Court should reject CA's argument that the Proposed Bylaw, if adopted, would cause CA to violate Delaware law, and should declare that the Proposed Bylaw is valid under Delaware law.

DATED: June 9, 2006

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