IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BAXTER INTERNATIONAL INC. : C.A. No. 11609-CB

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, January 15, 2016
10:06 a.m.

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BEFORE: HON. ANDRE G. BOUCHARD, Chancellor.

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ORAL ARGUMENT ON BAXTER INTERNATIONAL INC.'S MOTION FOR AN ORDER UNDER SECTION 205 and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

APPEARANCES:

EDWARD P. WELCH, ESQ.
JENNESS E. PARKER, ESQ.
BONNIE W. DAVID, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Baxter International Inc.

GREGORY P. WILLIAMS, ESQ.
BROCK E. CZESCHIN, ESQ.
SARAH A. CLARK, ESQ.
Richards, Layton & Finger, P.A.
Special Counsel for Interested Parties

MARTIN S. LESSNER, ESQ.
Young, Conaway, Stargatt & Taylor LLP
for Third Point

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THE COURT: Good morning, Counsel.

MR. WELCH: Good morning, Your Honor.

THE COURT: You may proceed.

MR. WELCH: Thank you.

THE COURT: How are you today, Mr. Welch?

MR. WELCH: Thank you, Your Honor, very much. I appreciate it.

With me here today are Jenness Parker, who I think Your Honor has met on many occasions --

THE COURT: Certainly.

MR. WELCH: -- also, Bonnie David, recently of the Vice Chancellor Glasscock's clerkship. She joined us awhile back, but we're happy to have her with us as well.

Your Honor, the applicant here, Baxter, is a Delaware corporation, which produces a wide variety of hospital products, renal dialysis, medical products, things of that nature.

On September the 15th, the Baxter board adopted the resolution that is in issue here, recommended declassification of the board of directors, resolved to conduct -- or count, rather, the shareholder votes on a certificate of amendment on

a per-share and not per-capita basis. Baxter seeks an order under Section 250 declaring validation of that resolution, that aspect of it in particular with respect to the count. 205(a)(4), of course, is the subsection we invoke which allows validation of any corporate act.

Notice was given to shareholders at Your Honor's direction in an 8-K. Because no shareholder came forward, special counsel for Mr. Williams was appointed by the Court. And he has filed an opposition brief, and did an excellent job in doing so.

Your Honor, we want to thank you very much for expediting the matter. We greatly appreciate it.

Your Honor, the opposition brief appears to take no issue with the ultimate conclusion we seek, namely, that the vote should be on a per-share basis. It doesn't seem to be much of a dispute about that. Now, they certainly raise some other issues, and I want to talk about that. But beyond that, there doesn't seem to be any factual issue here, either. The ultimate conclusion, the facts themselves don't appear to be in dispute.

There's no dispute on the disclosure issues, namely, that there was a conflict, I think, between the proxy statement disclosures and the registration statement as well. We talked about a number of things in our opening brief, which are also not apparently contested. There's discussion about Baxter's assertion that a per-capita standard of using and counting the votes would be at odds with Section 212 and 242. We also go into some length into the Salamone case. I don't think there's any dispute about how that case should be applied in circumstances like this.

The reality, though, is with respect to the various preexisting disclosures in the form of the proxy statements and the registration statements is this: Baxter faces serious uncertainty about the vote. The Genelux decision by this court, as well as I think Numoda as well, makes pretty clear that 205 was intended to allow the Court to eliminate uncertainty. And that's, very respectfully, what we have in mind here today.

In our opening brief we also talked at some length and presented the classified board provision, as well as the amendment section. The

amendment section, of course, says that Article SIXTH, which is the classification section, can't be amended or repealed without the vote of at least two-thirds of the holders of all the securities of the corporation then entitled to vote. So that's out there.

Now, it's interesting. It's interesting. The proxy materials that went out in '87 also made the point that the voting clause was designed to prevent frustration of the purposes of Article SIXTH. And, of course, the voting clause calls for a two-thirds vote. And what they're aiming at apparently at that time was parties who might simply try to get control by achieving a simple majority, the two-thirds vote was contrasted with that. And that was apparently indicated to make things perhaps a bit more difficult when it came to that issue.

Now, the per-capita standard could be achieved with less than a simple majority. So I think that's a data point for Your Honor's thinking, perhaps, as well.

THE COURT: Well, that always varies depending on what your shareholder profile looks like.

MR. WELCH: Yes, sir. Yes, sir. I

agree --

THE COURT: It would be a procedent standard.

MR. WELCH: Yes, sir.

THE COURT: All right.

MR. WELCH: I agree. Now, the snapshot that we have, which is in the Burch affidavit, tells us that you could have two-thirds of the shares and it would amount to about, if memory serves, 0.12 percent --

THE COURT: Right.

MR. WELCH: -- of the --

THE COURT: So Third Point, for example, could distribute one share to -- I forgot what it was, 33,000 recordholders -- probably to 16,000 recordholders, one share apiece, get your per-capita vote.

MR. WELCH: That's correct. Now, the Salamone case does, of course, refer to that as an absurd result. And I'll simply leave it at that. But that obviously was discussed there.

But, again, two-thirds of the holders could be a very small percentage of the shareholders.

Now, a number of shareholder proposals

were made over the years to repeal the classified board provisions. I think there were five separate years where proposals were made. I won't burden the Court with that. And, of course, ultimately that led to a number of actual presentations of the issue to stockholders in 2006, 2011, and 2013 in which it was counted on a per-capita basis. And it obviously did not achieve that per-capita basis; but at the same time, it did achieve a high supermajority of those voting. I think 2013 was something like 99 percent of the shares voting supported the notion of repealing the classified board provision.

In the evolution of these events, Your Honor, I think the next thing that I think about is the Salamone decision. More than a year after the 2013 vote on the classified board provision failed, Salamone was decided. Salamone granted rights -- the issue in that case involved a voting agreement, not a charter agreement --

THE COURT: Right.

MR. WELCH: -- as our situation does. But in that case the voting agreement granted rights to designate the directors to the majority of holders of the Series A preferred stock.

Now, that language parallels the language of the voting clause that we have here to a certain degree, which references two-thirds of the holders of all securities.

The Supreme Court, Your Honor, in Salamone determined that the voting provision in that case was ambiguous and then went on to apply the presumption. The Court looked at certain evidentiary matters as well but ultimately decided that they weren't conclusive and went on to apply the presumption. And the presumption in that case provided for a per-share vote, while, as the Supreme Court pointed out, you simply don't want to disenfranchise a majority of stockholders, which a per-capita vote could do; and the Supreme Court, therefore, applied that presumption against disenfranchising shares.

THE COURT: Right. And remind me, though. You could only get to the point of applying presumption if it found the term "holders" ambiguous in the first place; right?

MR. WELCH: I think that's right, yes, sir. That's correct. And, of course, the language here of our charter provision is very similar to what

the Court construed in that case, which the Court ultimately did find to be ambiguous.

Now -- and, of course, as I noted a moment ago, they did look at extraneous evidence. Here, I don't think that's necessary for the Court. There is some out there, but we've talked about it. But because this is a certificate of incorporation, I think the Court indicates in Salamone that you can proceed right up-front with application of the presumption.

THE COURT: On the four or five times in the past when the company has applied the vote on a per-capita basis, when efforts have been made to modify Article SIXTH, did anybody ever seek a judicial resolution of that issue?

MR. WELCH: To our knowledge, Your Honor, no, no one did seek to do that. I think this is the first time --

THE COURT: All right.

MR. WELCH: -- a judicial resolution of that has been sought.

Now, the other point that we address in our opening brief and is also touched upon in our reply is that a per-capita vote, Your Honor, we think

is inconsistent with Section 242 and Section 212. So in addition to conflicting with the judicial presumption in Salamone, interpreting the voting clause as providing for a per-capita vote could run into problems with both those statutes. Section 242 requires an absolute majority of shares. And with a per-capita vote you can come well south of that. Of course, this would be a supermajority vote; but at the same time, there's a conflict baked into that, I think. Beyond that, Section 212 imposes a one share/one vote requirement, unless, of course, there's clear evidence that the charter requires otherwise. That said, there is no such clear evidence, I don't think. And I think the construction of 212 is --

THE COURT: So in your 212 argument, I mean, wouldn't one have to conclude that per-capita voting is per se invalid under Delaware law, period, end of discussion, not just in your case, but in any case?

MR. WELCH: That argument is potentially out there. I don't think Your Honor has to --

THE COURT: How could you say something short of that and think there's a conflict

with Section 212?

MR. WELCH: Well, I guess I go a couple ways on that. The Sagusa case does approve a per-capita vote.

THE COURT: Right.

MR. WELCH: But, on the other hand, Sagusa was interesting because the way it was set up was they complied with 212 because they got the majority-of-shares vote, and then on top of that they baked in the per-capita vote.

So I don't think Sagusa is any evidence or support for the proposition that there's some broad potential use of per-capita voting in the 212 context that would work here. I don't think there's much -- any authority beyond that. And, of course, Salamone had one provision in the voting agreement that was determined to be a per-capita vote. On the one hand, that particular provision dealt not with election of directors. It dealt with nominations, and the Court found that to be acceptable.

I understand Your Honor's point that a per-capita vote, you know, if --

THE COURT: Well, the point I'm

getting at, though, is if you're trying to say that the per-capita vote here is inconsistent with Section 212 because 212 embraces the one-share-per-one-vote concept, then the logical extension of that argument is that there could never be a circumstance where you have per-capita votes. But, on the other hand, as you point out, there are a number of circumstances where it's been recognized to be valid. And I don't know, you know -- how could that not be the logical extension of the argument? There's, like, no nuance built into 212, "while per share/per vote except." You know, there's no nuance to that. It's --

MR. WELCH: Well --

THE COURT: -- sort of like either/or.

MR. WELCH: Your Honor, I can understand that.

THE COURT: Yeah.

MR. WELCH: I understand the argument, and I don't disagree with it. I guess I'm always cautious in a context like this about trying to generalize the outcome of a ruling when the facts are those that are before us.

I think there are powerful reasons why

Your Honor should, in fact, grant the relief that's requested here. But I don't think there's a need necessarily to reach out and try to articulate, you know, beyond what the issues that are presented here today. And I think that's probably true as well with respect to the scope of Your Honor's authority under 205, 205(a)(4), which is incredibly broad. I don't have any doubt about that. But, on the other hand, I don't think Your Honor needs to circumscribe it today.

THE COURT: Yeah. So here's the issue that's most difficult on my mind, which is -- and I don't know that you're disagreeing with it at one conceptual level, both sides here, but that a corporate act has to be something done, already taken, historical in nature. And I get the thrust of your argument to be, well, the resolution is a historical fact. It's an act. It's, you know -- and, therefore, you satisfy the necessary statutory standard.

The problem with that, though, is it may be true that a resolution was adopted and that's a historical act, but you're not asking me to determine, for example, if they had the right number of people approve the resolution or something surrounding the validity of the act of the resolution. You're asking

me to approve a statement of intention of something that has not happened yet baked into the resolution, namely, that "When we have this meeting in the future, we want to count votes a certain way and bless that." That's a very different thing.

So tell me why that is a historical act that would be appropriate for relief under 205.

MR. WELCH: I appreciate that, Your Honor. Thank you.

Again, I guess I'll go a couple ways on that. I think it's a lot more than a statement of present intention. It's a decision by -- I don't think there's any dispute about this particular issue -- by a quorum of the board. It's a decision that not only is -- was not only passed and I think is backed up by a whole host of other factors, which I hope to get to; but at the same time, it's an act that was taken in September, months ago. It's an act that's incredibly important to the upcoming meeting which is now set for early May. It's an act that focuses directly on the construction of the certificate of incorporation. And there is no more important document in the corporate governance structure in this company than the certificate of

incorporation. It's an act that involves election of directors. And perhaps there isn't -- there are too many acts that are even more --

THE COURT: But the voting resolution -- I mean, you may have an election coming up this meeting, but the resolution only concerns the modification to the charter amendment.

MR. WELCH: Well, that's true, but the charter provision itself directly -- I respect that, Your Honor.

THE COURT: Yeah.

MR. WELCH: But the provision itself that's going to come in or get out relates to the election of directors and classification in three classes. That's --

THE COURT: Oh, okay. All right.

MR. WELCH: That's pretty important.

THE COURT: Sure.

MR. WELCH: Your Honor, I would respectfully suggest that that's very important. So you're dealing with a critical event in the life of the corporation, namely, the upcoming meeting. You're dealing with the election of directors. You're dealing with construction of the certificate of

incorporation.

But even beyond that, you're dealing with it in the context that I think you're not likely to see in too many cases going forward. I have, respectfully, never seen this happen. But when you look at the somewhat chaotic history behind this provision and the somewhat chaotic disclosures that occurred, then -- and the potential impact of that on the stockholder votes that, in fact, took place as to which there was overwhelming shareholder support in the form of -- on a per-share basis, which is how things are routinely calculated, but on a per-capita basis it failed. A small minority was able to veto the decision of the overwhelming, in a couple cases -- I'm sorry.

THE COURT: Why wouldn't it be better to do the following: Do what you say you're going to do. Proceed. Have your meeting. Take your vote. Amend your charter and come back to the Court then? Then we don't have the problem of knowing for sure whether or not they're going to get both the per-capita and per-share votes; knowing for sure something in the intervening period of time doesn't occur at this company that obviates a need for this

vote, or somebody doesn't change their mind. All those issues go away, and then coming back with something that is an act, namely, that you will have counted votes a certain way and amended your charter and say "Give us relief now validating that act." Why isn't that a much better way for me to proceed?

MR. WELCH: Well, Your Honor, stockholders are going to get a proxy statement. We know from Genelux, we know from Numoda that the whole purpose of 205(a), and 205(a)(4) in particular, is to avoid confusion. Now, the amount of confusion that might be baked into that particular proxy statement I think would be difficult for any of us in the courtroom at the moment to quantify. We have, you know, a decade or more of disclosures about one form of vote counting. We have a decade or more of the -- of another form of vote counting in the registration statements. So I think --

THE COURT: I presume in your proxy statement you're going to tell people "We plan to count the votes this way."

MR. WELCH: Of course. But aren't stockholders entitled to know? Isn't a fair construction of Section 205, and particularly (a),

205(a)(4), that if we can do something for stockholders to not put them through that, to not make them guess? I mean, should we put out a proxy statement that says "We don't know the answer to this, we don't"?

THE COURT: But there are --

MR. WELCH: There is inherent --

THE COURT: -- consequences of your application for other companies that want basically the Court to weigh in in advance with a legal position on things that may never come to pass.

MR. WELCH: Your Honor, I think it is highly unlikely that -- and I recognize that 205 gives Your Honor discretion. But it is highly unlikely that you're going to see facts like these, undisputed facts.

THE COURT: No. But it's the concept. It's the concept. Baked into your resolution is a request for a legal determination basically of the right way to count shares. Why can't people all the time say in advance of ever doing something and having ripe controversies seek the same kind of relief?

MR. WELCH: Because, Your Honor, here -- perhaps they can. But, on the other hand,

they're not going to be able to bring to bear the kind of equities that apply here where you have this track record of utterly inconsistent disclosures concerning the applicable standard. What is the company to say to them about the propriety of the decision they made? We went one way on one occasion -- on a number of occasions; we went one way, a different way on other occasions. We really don't know what the standard is.

Is that the right thing to say to stockholders? Your Honor, I respectfully submit it is not the right thing to say. We should not be going to stockholders. Baxter shouldn't be forced to do that. It shouldn't be forced to go to stockholders and say "There's a lot of chaos in the background here. There's some ambiguity baked into the '87 proxy statement as well as the amendment provisions that govern that. We've done" -- "tried to do it a couple different ways. The will of the stockholders has been to go with one way, and we've counted them another way. We don't really know."

It seems to me, Your Honor, these are compelling circumstances. These are really compelling circumstances. I don't think you're likely to see that. I'm mindful of the answering briefs, which

was -- which was, obviously, well-crafted. The argument that "Well, perhaps a board can pass a resolution declaring a merger advisable and bring that to Your Honor," well, there's no equity supporting that, none whatsoever.

Here, it's different. This thing -- this looks like the very kind of situation where a company, a Delaware corporation is faced with a serious problem, a serious disclosure problem, right, and where 205 provides a solution. And it's not a difficult solution. We, of course, had the intervening event of the Salamone case and Salamone has told us how to do this. That's one explanation; but, on the other hand, we don't have clarity in terms of what's intended. And to say to stockholders -- I think stockholders of a Delaware corporation, Your Honor, are deserving of better than that. And I think that's what not only 204 but 205 in particular is intended to deal with. It's the kind of thing that -- this is the kind of thing that cries out for the input of the Court. And that's what -- and that is exactly what 205 gives Your Honor the authority to do.

This is not a routine situation. This is not -- it's easy to catastrophize, in my mind, and

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THE COURT: Catastrophize --

MR. WELCH: Pardon me, Your Honor?

THE COURT: Catastrophize. I haven't heard it used in that form.

MR. WELCH: Well, no; but it is in the sense that, you know, I -- did we reflect upon the fact that, you know, that special counsel has raised this argument about the merger agreement? Yes, of course, we did, you know. And it's also easy to imagine that other -- there might be a line outside the door of people coming and wanting validation of corporate acts.

That's not this case. We've got more than a decade -- we've got more than a decade. I'm understating it, Your Honor. We have a problem since 1987 with extraordinarily potentially confusing disclosures, and now we have an event coming up -- well, stopping there.

We have very confusing disclosures, inconsistent disclosures. We've had three stockholder votes on these. And each one of these, the overwhelming majority of stockholders voting in the 90 percentile range wanting to do it, but the per-capita

vote thing wouldn't allow it. Now, this is the first time in -- you know, since the statute was passed that we now have an opportunity, we now have a vehicle that we can bring to the Court. And it's a simple one. It's narrow. It's focused. It's backed up by Salamone. It's backed up by the ambiguity that requires the presumption to be triggered. The ambiguity here is pervasive. The ambiguity here is beyond dispute.

And to pass to Baxter that opportunity to have clarity -- but to its stockholders as well, to the overwhelming majority of that voted on three different occasions to get rid of this -- wouldn't it be a good thing, Your Honor, respectfully, for this stockholder base, after having gone through problems since 1987, confusing issues, how can that confusion possibly be definitively eliminated while a stockholder is voting or a stockholder's thinking about what to do without a validation from Your Honor? And it's a simple one. It's not broad based. The request for validation doesn't overreach. It's simply limited to that voting standard.

I think Your Honor will -- is it possible that others could come along with powerful

equities? If that's the case -- perhaps that's what the legislature intended -- perhaps it should happen. I'm willing to wager, with respect, Your Honor, that's -- you're not going to get facts like these for a very long time, if ever. These are unique circumstances. 29 years of problems, 29 years of confusion. Multiple stockholder votes, which were confusing. Multiple stockholder votes that went the opposite way of the majority -- of the stockholders voting. That's not good. That should be fixed. And this new statute is a wonderful thing.

THE COURT: Recite for me exactly -- and I'll tell you why I'm asking this question this way --

MR. WELCH: Yes, sir.

THE COURT: -- what is the statement of validation you're looking for? One of the reasons I'm asking is, the form of order submitted with your papers essentially says "Motion GRANTED." What was validated in that order? Is somebody going to go back through the papers and figure out what the Court did?

MR. WELCH: Your Honor, we can probably do better than that.

THE COURT: Well, I want to hear what

it is.

MR. WELCH: Yeah. The motion itself was similar. I think what happened was the motion asked for validation of the request for relief in the petition. And so -- and the last line of the petition seeks validation of the stockholder vote. Obviously, Your Honor, we can fix that. In other words, the order itself, as well as the motion, relate back to the petition and the ad damnum clause in that --

THE COURT: It was ultimately, though, seeking validation of counting votes on a per-share basis.

MR. WELCH: That's all. That's all it is, Your Honor. It's nothing more than that. And it's that issue, backed up by 29 years of confusion, multiple stockholder votes, with the will of the majority being undercut.

But I don't think it's -- that we can go back to stockholders without Your Honor's -- without an appropriate order from Your Honor and say, "Well, here's clearly the standard." There's ambiguity that's baked into the original charter provision. There's ambiguity baked into what's happened, you know, over the years with respect to the

efforts to get rid of this thing, right, and a whole host of other issues.

So, Your Honor, I don't think -- as I said, I do believe it's easy and appropriate to think about potential, you know, floodgates of cases coming in and to give thought to that and to be cautious about that. I respect that. I respect that what they put in their brief about that issue. It helped me focus on it, about the merger application. That seems like a very easy one.

But where you got this kind of factual record, it's different. It really is different. And this is an opportunity for the Court to do something for a Delaware corporation and its stockholders which could really make a difference.

Now, I guess I might have gotten a little bit offtrack there, Your Honor.

THE COURT: Cover anything you want to cover.

MR. WELCH: I appreciate it very much.

I know our colleagues filed an excellent brief, claims that this matter isn't ripe. You know, I obviously -- we obviously disagree with that. The resolution was passed on how to count votes

on a per-share basis. It's an incredibly important topic for the stockholders of this company. It's already occurred. It's not a future event. Those are the standards that the K&K case uses to determine ripeness. It correctly, we believe, interprets the Article SIXTH amendment provision. We think it does it right. We perhaps can't know that with certainty until Your Honor speaks to it, and neither can the stockholders, but we think that's the case.

Now, our colleagues cite the Diceon matter. A little bit different situation. That was a shareholder proposal for a bylaw amendment that would have qualified -- or provided qualifications for directors. The Court in that case did say -- it denied invalidation of it. That's what happened there. Obviously these cases preceded the adoption of 205 by a long stretch, but the Court said, "Look, it hasn't been passed. It hasn't" -- you know, "it may never become effective." So dealing with the substance of something that might never become effective was a problem for the Court in that case. However, again, I think that's entirely different than what's happening here.

What we're looking for is not a

determination of the outcome of the vote. We're not asking Your Honor to do that. We're looking simply for the correct way of tabulating the vote.

All right. So I think the same analysis applies to General DataComm. Again, it was restricted stock options in a stockholder-proposed bylaw. Those wouldn't have been corporate acts. Those would be stockholder acts proposing those events. This, of course, is a corporate act in the sense that it was passed by the board of directors. And as we know from 141(b), the only way that a board can act is through corporate resolutions passed by -- under appropriate circumstances.

So I don't think -- I think Diceon and General DataComm are helpful. They provide some insight. They involve substantially different circumstances. They don't involve the powerful equities that we have here and maybe are offset by the KLM case which, again, I mean, that situation there was a pill that was challenged and the ripeness argument was made, and the Court said, "I don't think so. I think the appropriate thing is to go forward." The pill hadn't been triggered. I mean, just like the meeting hasn't been held here. But the Court said,

"It's the right thing to do. It is the right thing to do." And so the Court went forward with KLM.

I think ripeness is a -- it's an interesting doctrine, Your Honor. It calls for balance. And, again, obviously Diceon and General DataComm balance things one way. KLM balanced it another way; but beyond that, to me, even the more important cases involve -- Boilermakers, it was a really important issue. Delaware lawyers were obviously concerned about for a long period of time. No one had challenged the forum selection bylaw that was in place; but they went to then-Chancellor, now Chief Justice Strine and said, "This would be a great benefit to stockholders." And thank goodness he said yes. Would this be a benefit to stockholders? It sure would be.

Now, would a 205(a)(4) on the very narrow issue of what the right count is after this incredible history be a benefit to stockholders? Your Honor, I think it sure would. I absolutely believe it would.

Same thing with the K&K case that we cite. The Court said the practical impact outweighs postponing review. Now, that was -- I think that was

an asset sale deal and hadn't been challenged yet and they were looking for declaratory judgment there.

Those involve, I think it's fair to say, some unique facts. And the Court said it would benefit stockholders. There's good reason to do this. The balance favors moving forward. And the Court did it. And, again, I think here, it's very much the same result ought to apply.

Now, I did talk a little bit about what I keep characterizing as the powerful equities, but I genuinely see it that way, Your Honor. Again, I start with the notion that -- I'll just touch on these briefly, but the vote is far from certain. Genelux and Numoda, they say we should be looking for certainty. And that's what we're looking for and for a lot of good reasons.

I mean, when you look at Article SIXTH, does "two-thirds" modify "holders"? Does "two-thirds" modify "shares"? I think that's part of the problem here. And, of course, that's part of the problem that arose when the proxy statements and registration statements were prepared; but there's no dispute that there's a lot of uncertainty, 29 years' worth of it.

Certificate of incorporation, there's no more important document. Board elections, classified or not, stockholders ought to be able to know what the standard is when they cast their votes, Your Honor.

Without validation, I think we're going to have some really confusing potential proxy materials. Now, maybe, maybe some stockholder will sue and claim and raise issues, and maybe they won't. Now, maybe, maybe if somebody doesn't sue --

THE COURT: Not too many stockholders sue to maintain classified boards, but --

MR. WELCH: Your Honor, I don't --

THE COURT: -- it's possible, I guess.

MR. WELCH: -- disagree, but there's a whole bar out there that addresses these issues. And it seems to me if -- you may get a lawsuit, but you may not. Now, if you don't get a lawsuit, maybe, Your Honor, it's worse. Maybe it's worse, because then the uncertainty doesn't have an opportunity for resolution.

205 is the mechanism. It was a radical change in the law, and it's a solution to a 29-year-old problem. It's designed to remedy this

kind of harm, right.

So I think there's -- you know, the case is clearly ripe. The equities here are powerful in a -- and I think in a way that's really profound.

Now, our colleagues say, "Well, you know, maybe it could all become moot." And they're right about that. I mean, is it possible? Of course it's possible. It was possible in KLM. It was possible in Boilermakers. It was possible in the other cases that we cited to Your Honor, but that didn't mean the Court wouldn't step up and do what at least the Court, I think, perceived as the right thing to do to solve a problem for the stockholders in those cases.

So I don't think we should confuse mootness with ripeness. I mean, a mootness case, to get mootness fees, it has to have been meritorious when filed. So, again, I think mootness, ripeness --

THE COURT: What relevance does that have here?

MR. WELCH: Pardon me?

THE COURT: What relevance does --

MR. WELCH: Well --

(Overlapping speakers)

THE COURT: -- (Inaudible) standard have on this application?

MR. WELCH: Boilermakers was meritorious when filed.

THE COURT: Right.

MR. WELCH: The K&K case was meritorious when filed. The KLM case was meritorious when filed. Any one of them could have come undone in a mootness context, right. But, nevertheless, the Court decided it was the right thing to do to move forward and solve the problem, and the Court did. I think, Your Honor, that's the relevance of it. You know, mootness -- you can have a case that's absolutely meritorious when filed. I think this case is absolutely meritorious when it was filed.

So I don't think we should walk away from solving a difficult but long-standing and profound problem in a way that could highly benefit stockholders simply because there's a possibility that it could be moot. Stockholders ought to know when they cast their vote, respectfully, Your Honor, what the standard is. And that's what we're looking for here.

We did talk a little bit, Your Honor,

about the corporate act point. And I appreciated Your Honor's input and views and questions on that. I can't -- I have trouble concluding that this is not a corporate act. As I said, the only way boards can act is by board resolution. And, again, I think all the equities support the notion that this is not just an act; this is a really important act.

205 allows validation of any corporate act. Now, our colleagues say, "Well, you know, you're using an awfully broad scope in making your arguments." I suppose, from one point of view, that may be true. On the other hand, 205(a)(4) ought to be applied as is written. The Court may validate any corporate act. I think Your Honor needs -- and I would note, no doubt, just for a moment, you need good reasons to do it. You need equities that support it. But, as I said -- I, perhaps, said it enough, but I think these equities are profound and not likely to be duplicated under any circumstances.

The Cheniere case with which we had some involvement in was also a voting standards case, although the way it evolved, it was interesting. The voting standards was the subject of the first argument. The question was whether or not the

computation of the standard should be done, if memory serves, under Section 710 of the NYSE market rules or should be under 216, which is a majority quorum standard. And the big issue was -- the important issue there was whether or not abstentions would be counted. And the Court never got to that. Ultimately, the matter was settled, and the settlement was approved also under 205(a)(4), as I understand it.

But Vice Chancellor Laster said, "Look" -- in his ruling I think he said pretty clearly that he, you know, would have ruled on the application of the standard going forward. In other words, it was a serious enough problem that the voting standard, being as important an issue as it is, that he would have ruled on it. He didn't have to rule on it going forward. He would have, but he said he didn't. I think the implication was he didn't have to. Why? Because the shares, the 27 million shares were being validated in that case. But he would have done it. And I think the equities there were powerful. The equities here are even more powerful.

Impermissible advisory opinion. Again, our colleagues raise that issue, and I understood and expected that they would. I think I'll

go three ways on that one, Your Honor, on the impermissible advisory opinion argument. The conclusion is, respectfully, that it's not an impermissible advisory opinion. Three reasons are: No. 1, 205(c) makes very clear you don't even need a case or controversy in the sense of having an adversarial presentation. Here, of course, we do have that. We're fortunate to have it, and Your Honor is, too. But 205(c) makes clear you don't have to have an opposing party on the other side.

No. 2, under the Wine case and the Trupanion case, there was not an opposing party. And the Court looked at it and said, "Well, these equities are again important enough to deal with it," and the Court went forward and solved the Delaware corporation's problem.

And, of course, I mean, the article done by Steve Bigler and Mark ...

MR. WILLIAMS: Zeberkiewicz.

MR. WELCH: Thank you. Thank you.

And Mark's a wonderful guy and a great lawyer. (Continuing) ... Mark Zeberkiewicz pointed out, and I think in no uncertain terms, that the Native American case was effectively overruled by 205.

So that, again, I think -- I think that that argument, I think, can be put to rest.

Your Honor, validation here is appropriate. 205(a)(4) is not limited to procedural defects. It is not limited -- there's not a category of issues that it covers and it doesn't cover other ones. That's not the case. Indeed, substantive validity is clearly within the scope of validation as we look at it when you look at what the then-Chancellor, now Chief Justice did in Boilermakers. Well, he dealt with substantive validity, and he declared it to be held, basically. Why? Because he found the matter to be ripe and it was an important issue and should have been resolved. And that's where we are here today.

204(h)(2) defines, you know, failure of authorization to include failure of -- or failure to comply with the certificate of incorporation. That's what we're looking for here, Your Honor. We want to make this opportunity to go to stockholders, one that's clear and that's fair and that works and lets them know when they make their decision, at least, at a very minimum, whatever their decision is, it's going to be tabulated by the current standard.

The Salamone case, we think, supports the notion that this should be validated. It is a development in our law based upon past precedent, of course, as all cases are. But I think it points clearly in the direction of supporting the notion that the resolution is right, the proposed resolution the board has adopted is right, and we need Your Honor's support for that.

The Salamone Court's application of the presumption, I think, should be readily duplicated here and points in only one direction. This is not a per-capita case. This is a per-share case. Stockholders need to know that.

I don't think any further evidence is required in this circumstance. This is a certificate of incorporation. Stockholders, of course, don't get involved in negotiating the contents of certificates of incorporation, things of that nature in the usual case. No evidence of that here. The presumption itself, I think, gets us where we need to be.

The '87 proxy didn't intend per-capita voting, either. The '87 proxy made the point that an absolute majority is ordinarily required under 242. We're going to go -- we're going to make it a little

more difficult so somebody can't sweep in and just buy a majority position. And now -- and then subsequent to that, there was applications of it that applied per capita.

Your Honor, this points in the direction that the resolution is right. The simple fact is a per-capita vote could be satisfied with 0.12 percent of the shares. And that doesn't make common sense, either.

Again, the unique circumstances, the powerful equities here, I think, all point to -- they all point in one direction. I think this company, Your Honor, needs the help that 205(a)(4) provides. I think, as I said, the equities support it. This is not going to be duplicated in a whole floodgate situation of cases. I think our stockholders need to know. I've said that enough, Your Honor, and I apologize for repeating it again.

We very much respectfully request validation of the voting standard to be applied, the past act voting standard determined by the board to be applied to the upcoming meeting.

THE COURT: All right. Thank you very much.

MR. WELCH: Your Honor, thank you very much.

THE COURT: Mr. Lessner, did you have anything you were going to present today or not?

MR. LESSNER: Your Honor, I wasn't going to present. I was just -- I wanted to let the Court know on -- that we do agree with Mr. Welch's statements. And in -- particularly, I just wanted to emphasize that this is the reason that people incorporate in Delaware, is to be able to go to the Court of Chancery and have these types of disputes and have these types of disputes settled.

As Mr. Welch said, this is -- these are unique facts. I don't think the Court has to worry about a floodgates argument. And in this type of case, you know, I think it's general policy that the legislature encourages corporations to come to this court and settle disputes. I mean, it's somewhat ironic that this court itself was trying to set up an arbitration scheme to have parties come and settle the disputes. Here, you have a serious issue of corporate law in which a Delaware corporation seeks the help of this court.

There is a statute that permits the

Court to make this decision, as Mr. Welch says, a very important -- it's a very important decision. It permits the Court to make it, and there's no good reason on these facts in any equitable way or any policy way that the Court should simply turn its back and say "I'm sorry. I'm not going to resolve this dispute."

THE COURT: What's the context of this voting resolution insofar as Third Point's concerned? This is part of some sort of deal between Third Point and the company; is that right?

MR. LESSNER: The -- yes. The support agreement was an agreement between Baxter and Third Point.

THE COURT: But what's the -- I don't have much in the record about -- is that deal public or not public? I don't want to put you on the spot on something you can't discuss. I'm trying to understand, sort of, what the deal was that was cut. Obviously this is one aspect of it. There presumably are other features of it.

MR. LESSNER: I do believe the support agreement is certainly referenced in the public filings.

THE COURT: Okay. All right. Well, I guess it's neither here nor there for today's purposes.

MR. LESSNER: Yes, and I don't think it's important for the decision today.

THE COURT: All right. Thank you.

Mr. Williams.

MR. WILLIAMS: Good morning, Your Honor.

THE COURT: Good morning.

MR. WILLIAMS: Thank you for the opportunity to assist the Court.

Your Honor, before we get to -- there are a lot of points flying around in the briefs and argument this morning. Before we get there, I'd like to step back a little bit and just kind of put this in context and talk about and see what others have said about Section 204 and Section 205, which bring us here today.

The courts and commentators have been very clear that Sections 204 and 205 deal with the ratification and validation of defective corporate acts. And that's not surprising. Section 204 is entitled "Ratification of defective acts and stock."

Section 205 is entitled "Proceedings regarding validity of defective corporate acts and stock." And so when you look at what the courts have done, there's not a lot of time for this court to interpret the statute, but there have been a couple of cases.

In Genelux, Vice Chancellor Parsons described Section 205 which Baxter seeks to enlist here, as follows: "... Section 205 confers on the Court of Chancery exclusive jurisdiction to hear a petition brought by a corporation or other enumerated party to 'determine the validity of' or to 'ratify' a corporate act or stock that, but for the statute, would otherwise be considered defective and incurable." And, of course, we know that's the genesis of this statute.

In Numoda, Vice Chancellor Noble describes Section 205 as follows: "The legislation thus empowers the Court to grant an equitable remedy for corporate acts that once would have been void at law and unreachable by equity." That's the genesis.

Real quickly, Wolfe and Pittenger make the same comments, and they say, "Section 205 confers jurisdiction on the ... Court ... to hear two types of actions" -- I'm summarizing -- "One, actions to

determine the validity of defective corporate acts under circumstances in which the corporation's board have ratified or attempted to ratify the defective corporate act and, second, actions to validate a defective corporate act where no prior attempt at ratification has occurred."

And then, finally -- and I'm done with this introduction, Your Honor -- the Folk treatise in Section 205.01 states, "Section 205 provides the Court of Chancery a statutory mechanism to [validate] defective corporate acts or validate the ratification thereof upon application by the corporation, its stockholders or other persons."

I submit there can be no controversy that this statute is designed to deal with defective corporate acts.

And I want to now turn to the assertion by Baxter that Section 205(a)(4) provides a statutory path to granting the relief that they seek.

Baxter's correct that 205(a)(4), that particular clause of the statute, does not contain the word "defect" or "defective." I want to come back to that, but let me just address their argument on its face.

Even if Section 205(a)(4) authorizes the Court to determine the validity of any corporate act or transaction regardless of whether there is any conclusion with, is the product of, or it constitutes a defective act within the meaning of the statute, Baxter is not entitled to the relief it seeks. Baxter says in its papers at certain places that it's asking the Court to validate a corporate act, with the act being the board resolution. That's really not what they're asking you to do. And you don't have to take my word for it, Your Honor. We can look at what they say themselves. Baxter is seeking a determination not as to the validity of a resolution, the supposed act under 205(a)(4), but it's clearly -- and Mr. Welch acknowledged, as he should as an officer of the Court -- it's asking the Court to bless the board's interpretation of the Baxter charter.

Now, that's very clear in their own papers. If we look at page 10 of our brief, we quote the board's resolution. And here's the resolution: It says, "RESOLVED, that pursuant to the terms of the Support Agreement" -- that's the agreement that we heard about. I'm going to tell you more about that agreement -- "the Board hereby approves the filing of

a verified application, in the Court of Chancery ... seeking a determination that an affirmative vote of at least two-thirds of the Company's shares of Common Stock would be sufficient under the Charter to effect an amendment of ..." the classified board provision. There's no mention of any resolution, the validity of a resolution. It's a determination of the vote standard.

And if you look at the Baxter reply brief at page 2, Baxter states, "... the Board's decision" -- and then they have a parenthetical -- "(memorialized in the Board Resolution) to count votes on the Charter Amendment on a per share basis rather than a per capita basis, is what Baxter has requested the [board] to validate."

It's the board's decision on the vote standard, and the resolution is a parenthetical. We know from our grammar school, you can understand the substance of a sentence by omitting, deleting the parenthetical information. The resolution is just a vehicle. They have dumped the board's determination into a resolution. And it's more form than substance, Your Honor.

And, finally, at page 20 of the

scheduling hearing transcript the following exchange occurred:

"Question: So what you are asking for is essentially to bless an interpretation in anticipation of a future stockholder vote. Is that right?

"Answer: Your Honor, that is correct."

There is nothing in Section 205 which authorizes the Court to validate, to bless a board's interpretation of the corporation's governing documents, the board's interpretation of the law, or any other determination that a board might make. This is just no different than Baxter asking the Court to advise its board of directors how the directors should determine the result of an election yet to come. And that's a job for Skadden Arps, one of the great law firms in the world. And they've already advised the board on that, and the board has made its determination.

Now, I don't dispute that a corporate resolution could be an act within the meaning of the statute, but not every board resolution is going to constitute the type of corporate act that gives this

court jurisdiction. And there's been a lot of talk about the nightmare scenario of what could happen. But I would suggest that -- and I really want to come -- and I'm going to discuss the uncertainty issue. But it is, in fact, the truth logically. You have to determine this analysis on a logical basis. If you buy their argument, there are, in fact, lots of situations where boards can come in and say "Your Honor, we have put into a resolution the substance of an issue and we'd like you to bless it." And maybe you would try to distinguish this case, but I think that analytically you would have to entertain those applications.

So let me talk for a second now about the fact that 205(a)(4) does not contain the word "defective," which it obviously does not.

THE COURT: Before you do that, let me ask this question.

MR. WILLIAMS: Yes.

THE COURT: So -- because I just want to understand, sort of, the full extent of the position outlined in the brief you put together.

So let's assume I agreed with your side and said now is not the time for this, for a

variety of reasons, but they go ahead with their meeting anyway. They count the votes the way they say they intend to count the votes. They don't get -- they get the per-share threshold, but they don't get the per-capita threshold. Nonetheless, they deem that a valid amendment of Article SIXTH. They file with the Secretary of State their amendment documents and they come back to the Court at the time and say, "Please validate what we just did, because there could be a cloud over this." Would you, in your judgment, think that would be an appropriate occasion for utilizing 205?

MR. WILLIAMS: I do not.

THE COURT: Okay.

MR. WILLIAMS: I think it's a closer question. I think it clearly would be the better way to present the question to the Court, but I don't think it would be appropriate, because I think the statutory context -- and if you look at the way Vice Chancellor Parsons analyzed the statute in Genelux, the same analysis would apply here -- the statutory context is to deal with defective acts, not uncertain acts. And so I don't think that's an appropriate use of 205(a)(4). It's closer because you

would, in fact, have some historic act --

THE COURT: You'd have a concrete set of facts.

MR. WILLIAMS: You've got a concrete set of facts. It takes away a lot of the advisory opinion aspect of it.

But I also think -- again, I think it has to be in the context of a defective act, an action related to or the consequence of a defective act. For example, I can think of scenarios where the board might issue stock and that issuance is defective because the board didn't have authorized stock to issue and then the board pays a dividend on that stock.

Now, the payment of the dividend on the stock is not invalid per se. There's stock that's out there and they've paid a dividend, but it's a consequence of a defective act. So I could see that someone could come and seek validation of something like that. But I believe that to use this statute, there has to be some connection to a defective corporate act.

And if you look at 204, if you stop -- I'm not suggesting Your Honor hasn't done this. But

if you read 204 and 205, you know, front to back, I believe you come to the same conclusion. You look at all the definitions, look at the statements of what the Court can do in 205, it all deals with these situations that gave rise to this legislation where there was an inadvertent invalid action. And we need to find a way to make it right. I don't think it's just simply there's uncertainty, now we've done something, we come back, because that really would be completely rewriting the whole declaratory judgment statute. And I don't see the intent to do that. But I agree, it would be a closer question, Your Honor.

THE COURT: Yeah, because the consequence of that is, I mean -- I'm putting a value judgment in the following statement.

MR. WILLIAMS: Yeah.

THE COURT: It would seem to be a good thing from the standpoint of franchise rights policy to declassify a board, notwithstanding the fact that Baxter didn't think so on a number of occasions when it conveniently construed the thing in an opposite way that they're interpreting it now or are seeking interpretation of it now; and if they went ahead and, in fact, did count them on a per-share basis, that

would be an event that occurred. And it may well be one that runs afoul of their language; but if I can't fix it in 205 land and their shareholder profile doesn't change dramatically from what it looks like now, it can never be fixed outside of doing, I guess, some crazy -- you could reincorporate, I guess, and eliminate it, right, with a new charter. You could reincorporate the company, right, with probably majority vote or whatever threshold is in their current charter and get rid of the charter provision, or you could sprinkle shares all over the place and do another workaround. I mean, I guess those kinds of things, but they're sort of far-out-there kind of ways to deal with it. But just using the provision as it is, it couldn't get done otherwise.

MR. WILLIAMS: I'm not sure I follow that.

THE COURT: Yeah.

MR. WILLIAMS: Let me explain why I don't. Let's assume that they have -- they've said how they're going to count the shares, right.

THE COURT: Right.

MR. WILLIAMS: They've made a determination. So let's assume they have a vote and

they get a sufficient number -- sufficient vote on a per-share basis but not a per-capita basis.

THE COURT: Right.

MR. WILLIAMS: They've said, "We are going to file a certificate of amendment with the Secretary of State" --

THE COURT: Right.

MR. WILLIAMS: -- "because we deem that amendment to be effectively adopted."

THE COURT: Right.

MR. WILLIAMS: Okay? So it's done. The charter is amended --

THE COURT: Right.

MR. WILLIAMS: -- unless -- just like any other charter amendment, unless someone challenges it.

THE COURT: Uh-huh.

MR. WILLIAMS: And if someone challenges it because -- and I believe it is highly, highly unlikely anyone would. And we can talk about why --

THE COURT: Right.

MR. WILLIAMS: -- that is. I mean, every vote they've taken gets 99 percent of the shares

voting in favor. And one stockholder out there -- conceivably somebody could be -- but who is looking to litigate questions of destaggering a board when the management --

THE COURT: "Please classify my board."

MR. WILLIAMS: -- yeah, when the management of the company supports destaggering of the board. But that actually will be done. That will be no problem. It will be their new charter unless and until someone challenges it. I don't think anybody ever would. And if someone challenges it, too late; that action would be time-barred.

So it's not unlike any other action that happens. And it's -- could there be -- there are lots of things that happen where we file certificates with the Secretary of State where there could be some difference of opinion as to how we went about doing things. But it is, in fact, an effective action unless somebody challenges it. And if somebody challenges it, then this court will have an opportunity to decide the issue.

So let me talk about this -- why I think that their argument that you can determine the

validity of acts, even if there's no connection to any defective act, why I think it proves too much.

First, there's no statement in the legislative history, there's no statement in any of the commentary to the effect that this provision of 205 generally applies to any corporate act. And if Baxter's interpretation were correct, it would be really big news. If it were correct that you could have a board adopt a resolution with a statement of its interpretation of an issue, interpretation of the charter, whatever, and its intent as to how it's going to act in the future and come in to this court and get it blessed, that would be earth shattering. That would change the game here in Delaware.

So if that were, in fact, an intended consequence of the statute, someone would have said so, one of the commentators, one of the smart people like Steve Bigler or John Mark Zeberkiewicz or the Folk treatise or whomever. No one has done that. And as we discuss in our brief, courts interpret statutes as a whole, reading each section of the statute in light of all the other sections of the statute to produce a harmonious whole. And we cite the Taylor versus Diamond State case and the Leatherbury case.

And as I said just a second ago, Your Honor, when you read 204 and 205 in their entirety, the fact is these statutes pertain to defective acts.

And let's look at, for example, 205(b). It sets forth the type of relief the Court can grant in a 205 action. It deals with defective acts. It deals with defective stock issuances, largely speaking. 205(b), the issues the Court may consider, authorization and defective acts.

So I also want to direct Your Honor to Vice Chancellor Parsons' decision in Genelux. It's analogous. There, the plaintiff relied on 205(a)(4), and it sought to invalidate a corporate act, the issuance of stock. And the Court said that "The plaintiff insists that I read 205(a)(4) in isolation. I look at the words. It says you have to" -- "you can determine the validity of any act, and if you can determine the validity of any act, presumably you could determine there is no validity to this act." But the Court rejected that approach. He looked at the totality of the statute. He looked at and quoted the analysis of the commentators, the same ones we're looking at here, and he held, "Section 205 was intended to be a remedial statute designed, in

conjunction with Section 204, to cure otherwise incurable defective acts, not a statute to be used to launch a challenge to stock issuances on grounds already available through the assertion of plenary-type claims based on alleged breaches of fiduciary duty or common law fraud or a Section 225 action ...."

And the same analysis applies here. I mean, if there is a claim, if anyone wants to assert this claim, there are vehicles that they can use to assert it. And I will get to that.

So, Your Honor, when you read the statutes in their entirety, I do submit that an action under Section 205(a)(4) must involve corporate acts that are defective or that are the offspring of or related to corporate acts that are defective.

And now that the thrust of the argument by Baxter in their papers and certainly here today is that there is great uncertainty in this situation and that uncertainty should motivate Your Honor to act, I quote their brief where they say, "The legislative purpose, plain language of the statute, and limited case law construing Section 205 make clear that the statute was enacted to expand the Court's

discretion in order to eliminate uncertainty for stockholders."

That's the reply brief at page 2. Major theme of their brief, that "This is the purpose of this statute and there's uncertainty; please cure it."

But look at what they actually cite. They cite as support for that the Genelux case. That's the only case that they cite, and they cite Lexis page 16. Here's what the Court actually says. It does mention uncertainty but in context. It says, "When read both as a whole and together with Section 204, however, Section 205 also appears to provide enumerated plaintiffs and the Court with a mechanism to eliminate equitably any uncertainty regarding the validity of arguably defective acts by validating those acts, not invalidating them."

So the uncertainty that he was talking about was uncertainty associated with defective acts.

And later in their reply brief they cite Numoda as authority for the proposition that "... Section 205" -- and this is what they say in their brief -- "is designed to correct failures of corporate governance)." So if you have a failure of corporate

governance, use 205.

When you look at the Numoda case at the provision they cite, *10, the Court makes clear that it is speaking of defective corporate acts. It says, "Furthermore, it is unlikely that the General Assembly intended the legislation to extend far beyond failures of corporate governance features. The Court does not now draw specific limiting bound on its powers under Section 205, but it looks for evidence of a bona fide effort bearing resemblance to a corporate act but for some defect that made it void or voidable."

So there really is no authority for this proposition that the whole statutory purpose here was to empower this court to eliminate uncertainty. And as powerful as this court is, it can't eliminate all uncertainty that's out there for stockholders.

And let's talk now about this specific uncertainty. Mr. Welch, my friend, effectively argued this morning and said a number of times -- and in their brief they said four times in the reply brief, by my count -- that "powerful equities" are present in this case and they should motivate you to act.

Respectfully, I don't see it, Your

Honor. I don't see the powerful equities. This board has determined how it will count the votes. It's resolved any uncertainty. There's no indication that any stockholder disagrees with the interpretation. Look what happened. You told them they had to send out notice and tell the stockholders, "This is what we're going to seek blessing of, the way in which we're going to count the votes." No one has bothered to show up. No one has even sent in a letter. I would say most all decisions of any significance by boards present the board with two alternatives, two possible determinations. Often they're both reasonable. The board has to make a choice. This situation is no different.

It really comes down to the fact that they've interpreted the charter provision differently in the past. But I submit that doesn't create some type of overwhelming equity that should justify the Court reaching out under Section 205 here.

Whatever relief this court could afford, if you granted the relief that they've asked you for, it would have no effect on the prior interpretations. That's done. There's still going to be, you know, some issue in maybe somebody's mind as

to whether what they did back then was appropriate when, you know, 99 percent of the shares came in. And they, nonetheless, decided that the vote hadn't been achieved.

There's nothing that you can do that is going to resolve that for Baxter. That's a problem that is of Baxter's own making. I'm not criticizing them for anything. I'm sure they were doing what they felt was appropriate. But Baxter then contends, without advice from this court, the description of the voting standard would be confusing -- this is in their brief -- because "The proxy statement could not, in light of disclosures in prior years, say with certainty what standard should be properly applied." That's the reply brief at page 10.

With all due respect, I don't understand that, either, Your Honor. I'll take a crack at it here and -- I'm not a disclosure lawyer. And, believe me, I'm sure --

THE COURT: Skadden has a few of them.

MR. WILLIAMS: -- there would be more bells and whistles than this. But, quote -- a hypothetical disclosure -- "In prior years the board has determined elections with respect to amending the

charter on a per capita basis. In light of the 2014 decision of the Delaware Supreme Court interpreting a similar voting provision as requiring that the outcome of the vote be determined on a per share basis, the Board has determined to count the vote on a per share basis with respect to the upcoming election."

It's not uncertain. I mean, it's not hard to write "We've made this determination. We base it, either in part or in whole, on this new case law. Here's what we're doing." So, you know, there are just lots of decisions by boards that are disclosed in proxy statements that can't be disclosed as having the blessing of a court as being correct. And that's not something this court can fix.

Baxter's position is directly contrary, I submit, to then-Vice Chancellor Strine's decision in General DataComm cited at 18 of our brief where he notes that the courts should not issue advisory opinions to corporations "as a method of shaping their annual ... proxy materials." And that's really what is happening here.

So, Your Honor, I submit that there really aren't powerful equities here. There may be some embarrassment on Baxter's part, but what's really

happened -- and, you know, just to put it in context, an activist investor came in and said publicly "It's crazy that you have a staggered board. Nobody has staggered boards anymore. Got to get rid of it."

The board looked at the question. The board considered the new case law and decided "We will in fact, as we count the vote, we'll take a vote on the staggered vote and we'll count it on a per-share basis." That's just what happened. And I don't think that that presents any powerful equities.

And Baxter goes even further, and it says that the company will suffer irreparable harm if Your Honor doesn't act. That's at page 11 of the reply brief. They say, "Section 205 is the only mechanism through which Baxter's shareholders can avoid the irreparable harm such uncertainty will cause as they consider how to vote on the Charter Amendment."

With all due respect, to me, that just doesn't make sense, because stockholders will determine how to vote on destaggering the board based on whether they believe the board should be destaggered. It's not a situation where, well, I'll vote one way if I know they're going to count the vote

in a certain way and another way if they're going to count it in a different way. And we know that because of history.

In the past, the board has said "We're going to count on a per-capita basis"; but, nonetheless, 97, 99, and 99 percent of the shares voting have voted in favor of destaggering the board. So there is no irreparable harm. Whatever they do, however they count the vote is not going to affect -- there's no reason to think it will affect how the stockholders cast their vote.

And Baxter is also wrong when it says that Section 205 is the only mechanism available to any aggrieved Baxter stockholder. Section 225 exists. If there is some stockholder who feels aggrieved by the board's counting of the vote -- hard to imagine, but if there were, that stockholder could file a 225 action. Once the election results are certified, you wouldn't even need a status quo order because it's the same people are on the board. Just a question of how long their terms are. No reason Your Honor couldn't determine the question in that setting.

There's yet another reason, I submit, Your Honor -- and I'm coming close here --

THE COURT: I assume at this meeting only one class of the board is probably up for election. That's got to be the case, right, until they change this provision?

MR. WILLIAMS: Your Honor, I'd have to check that. I'm not sure that that's actually the case. I think they might be -- I --

THE COURT: Unless they're sequencing the vote so that they're trying to do this one first and then do -- well, I'll ask Mr. Welch.

MR. WILLIAMS: Yeah. In any event, the same people are going to be on the board, regardless of how Your Honor determines this issue.

THE COURT: Right.

MR. WILLIAMS: And, Your Honor, one final thing that is important. You asked about the support agreement. I do think it's in the record. I think that Ms. Parker sent it to Your Honor.

THE COURT: Okay.

MR. WILLIAMS: But let me, if I could, hand it up, because I want to refer you to a particular provision. And, again, Your Honor, I'm responding to the concept that there's irreparable harm here.

THE COURT: Okay.

MR. WILLIAMS: If Your Honor would -- so this is an agreement executed by Third Point and the company.

THE COURT: Uh-huh.

MR. WILLIAMS: And if you turn to the seventh page -- I don't think they're numbered, but count seven pages in.

THE COURT: All right. Just so I'm reading the same place as you.

MR. WILLIAMS: The bottom heading says "Election of Directors."

THE COURT: Yes.

MR. WILLIAMS: Then if you turn over to the next page --

THE COURT: Okay.

MR. WILLIAMS: -- and look at section (b) there, you'll see that Baxter and Third Point have reached an agreement. First, the agreement is they have to go and ask for this relief. And so Baxter has satisfied its contractual obligation. But then they deal with what happens if the Court doesn't grant the relief. And Baxter agrees, "Well, we'll submit the charter amendment to the stockholders for a vote."

And Third Point and Baxter agree that Third Point can take actions to make sure there are enough stockholders voting in favor to satisfy not just a per-share voting standard but also a per-capita voting standard.

THE COURT: Ah, the sprinkling-of-shares concept.

MR. WILLIAMS: Yeah. "Third Point shall be permitted to pursue and take any reasonable actions related to securing the necessary votes for the approval of such amendment by stockholders. Such actions may include, but are not limited to, creating holders of Common Stock to vote to adopt the amendment."

THE COURT: I confess I had not focused on this.

MR. WILLIAMS: Well --

THE COURT: Interesting.

MR. WILLIAMS: -- and we did not in our papers, either, Your Honor. I apologize for that. It's something that I found yesterday.

And there's even more. The company agrees to cooperate with Third Point's efforts to create the common stockholders and even to reimburse

Third Point for all fees and expenses incurred in connection with those efforts.

And so, you know, there's just no reason for Your Honor to think that you're going to have to deal with this dispute. These documents were written by very sophisticated people. Gibson Dunn is shown in the papers as representing Third Point; of course, Skadden Arps representing the company. They must think this can be done or they wouldn't have provided for it expressly.

So, Your Honor, just to bring it home, the relief requested, in our view, is not ripe. They are seeking a determination of the board's interpretation of its charter and how it will act with respect to an upcoming election. We've cited cases in our brief that speak to the necessity of letting events unfold before judicial intervention occurs. The Court should not act until the dispute has ripened, such that the Court would not be issuing an advisory opinion.

My prediction is -- just a prediction for what it's worth -- you'll never have to resolve this issue one way or another. It won't be necessary.

Your Honor, there's nothing in

Sections 204 or 205 which purport to eliminate the common law doctrine of ripeness. Stroud holds that the courts of Delaware are not to issue advisory opinions. And that's exactly what this is. Your Honor should deny the application, we respectfully submit.

I understand why Baxter has made this application. It's a new statute. People look at new statutes to see how they can be of use, and there's nothing wrong with that. But I submit that they are going too far. What they've asked for would be a misapplication of the statute. And you can deny this application without losing any sleep. Baxter has fulfilled its contractual obligation to Third Point to come in and try and get the relief that it has asked for. There is no indication that any stockholder objects to the board's interpretation of the charter provision. If after the vote we see that somehow the board's interpretation was outcome determinative and someone objects to the board's actions, the issue can be resolved promptly in a 225 action.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Williams.

Mr. Welch, I'm going to let you have

as much time as you want. I just want to gauge maybe how much time for determining when to take a break; that's all.

MR. WELCH: I don't think I'll be very long.

THE COURT: Okay. Why don't you proceed.

MR. WELCH: Always hard to tell until you get started, but I don't think we'll be long.

Your Honor, it's interesting. I mean, I think one of the major themes of Mr. Williams' presentation, which was excellent but -- was that this statute, 204, 205 apply to defective acts, as simple as that, and that's it. They don't apply to other corporate acts.

Now, I mean, I think what's embedded in that is that when you look at 205(a)(1) through (5), a number of them -- I mean, most of them do refer to defective corporate acts. I mean, the theme behind that is that if some of them did, that must mean all of them did. That's not a logical or persuasive bit of statutory construction. If the language is different, it means a different result, right.

And so it seems to me the theme is, it

sounds like, in doing this litany of relevant acts that are covered, somebody forgot that it should have said "defective corporate act." Well, it's interesting, Your Honor. If that were the case, then it would seem to me it would be utterly duplicative of 205(a)(3). Nothing would have been added by 205(a)(4) because it picked up 205(a)(3) has got defective corporate acts in there and you can validate them.

A couple other thoughts. I don't think the statutory analysis works a bit. The fact the legislature chose to use different language means that, I think, it ought to be construed as written. There ought not be -- and not that Your Honor would do this -- but that there ought to be judicial restrictions baked into -- added onto the statute where they don't exist. I mean, the Great Hill case says that, makes it very clear. Plenty of other cases say that. You don't change a statute, you know, where there's simply no reason to do it. You interpret it as it's written.

So I think that's really the first point. Somebody forgot, I don't think that works.

Secondly, he says that -- applying the defective corporate act argument yet another way,

"Well, we don't think this is a defective corporate act." Well, that's true. We would not come before Your Honor and say "We think you should validate this technique for this computation standard that we've articulated" if we thought it was defective.

Now, on the other hand, it might be. There are at least two -- and actually more than that -- interpretations of that very same language from the '87 charter out there. Now, one of them is defective. They're conflicting with each other directly. One of them is defective. Stockholders, Your Honor, respectfully, are entitled to know. And that's where the irreparable harm point comes in.

The notion that you create some disclosures along the lines that we discussed and just send them out and you don't say on top of that, you know, "Stockholders, we really don't know with certainty. There's a statute out there now. It's a new statute. And what it says is its purpose is to grant certainty where it's appropriate to do it. But we don't have an answer to that. So you guys have to guess." Your Honor, I don't think that makes a lot of sense.

Now, beyond that, the notion that it's

a problem of -- I think -- perhaps this is a generic description of it and maybe not even accurate -- but a problem of Baxter's own making in not getting involved with that, I think the short answer to that is that 204 and 205, I think, almost universally deal with problems of a corporation's making. Why? Because people make mistakes. And one of the problems with our law was that you couldn't fix mistakes.

Now, obviously Waggoner versus Laster and Rusty Blades were motivating factors, but it's crystal-clear that this statute goes beyond that and provides a whole variety of mechanisms for Delaware corporations to deal with problems to solve problems in ways that are efficient, effective, and good for stockholders. Some things the board can ratify. Some things the board plus the stockholders have to ratify, There's provisions for sequential acts that have had impacts on each other.

But this provision isn't in there, too. And it provides Your Honor with the authority and the ability in a simple and concise way to clear up this problem for stockholders. And I think to write this case off, as a practical matter, Your Honor -- and I don't want to overstate it -- but it

may be to effectively write 205(a)(4) out of the books. This is a 29-year problem. It's not just happened once at the outset in 1987, but it's been moving forward for years, for decades. Not only that, we've had three votes, three votes which ultimately defeated the will of the stockholders. That doesn't make a lot of sense. And the opportunity is here on the table to fix it, to fix it in a way that stockholders can understand with a simple declaration that this is a proper way of counting the votes.

Again as to disclosures, I appreciate the suggestion that it's a simple story to tell and it could be done as was suggested. I don't think that's true. I don't think it is a simple story to tell. I think stockholders have been told for more than 10 years this was a -- in connection with actual solicitation of votes, that this was a per-capita standard.

Now -- and there's where I think the harm to stockholders comes in. If the stockholder gets this and says, "Well, you told us this was per capita, and now we're going to go with per share, but we don't really know," I mean, as a practical matter -- and I think that would have to be said,

absent a judicial declaration -- I mean, what impact would that have on stockholders? They're not going to know. They're not going to know what the standard is to tabulate the votes. They might say to themselves, "We did this three times. Enough." I don't know what they're going to say, but that risk is out there, and that risk can be eliminated by a simple direct application of 205(a)(4). Very simple, very clear. And the problem gets solved.

Respectfully, Your Honor, I think this is the time, now is the time to do it, do it right for stockholders so that when they do go to vote, they can be told what happened. They can be told what the standard is that will be applied to the casting of their votes. That's the right thing to do.

And, finally, Your Honor -- and I apologize. Final point I would put on the table is this: In terms of precedent, the cases are divergent. The cases don't necessarily, you know, bear directly on this situation. But, on the other hand, Cheniere Energy was a voting standard case, and the question was did you count abstentions or didn't you. Now, the way it was resolved and didn't have to be, the Court didn't have to resolve that, but the Court

made a point of saying "If you hadn't of settled this, I would have done it." And my guess is --

THE COURT: I guess I better be careful what I say at settlement hearings if I'm going to have that cited back to me.

MR. WELCH: I understand, Your Honor. But we quote it in the brief, and it is the fact of what happened. But it's -- it's hardly anything to be reticent about. It was a good thing to do. It would have been the right thing to do, to tell stockholders what the standards are. Tell them. Don't make a vote and then come back and go through some other procedure, other procedure involving perhaps challenges to disclosures that were made, perhaps fiduciary questions that get baked into this. It simply doesn't make sense. The time to solve this problem, this narrow problem -- other problems, deal with later, but the time to resolve this problem is now.

THE COURT: All right. Thank you, Mr. Welch.

MR. WELCH: Your Honor, thank you for your time. I really appreciate it.

THE COURT: Did you have anything else

you wanted to add?

MR. WILLIAMS: I just have one sentence, Your Honor.

THE COURT: Yes.

MR. WILLIAMS: It's really not argument.

THE COURT: And I'll come back to Mr. Lessner. If you want to go first, you can make your point, and then I'll hear from Mr. Williams.

MR. LESSNER: Just very quickly, Your Honor.

Your Honor previously asked me about the support agreement --

THE COURT: Yeah.

MR. LESSNER: -- where it was in the record. And I told Your Honor that it was in the Baxter's public filings. I couldn't recall at the time where it was in the pleadings before the Court. But it was in the initial -- in Baxter's initial filing --

THE COURT: Okay.

MR. LESSNER: -- the application. It was Exhibit 1 to Docket No. 5. So it was completely put in there. And that -- what was put in was the

public filing, was the 8-K from September 30th, which is the support agreement.

And the support agreement was mentioned in the briefing, the opening briefing at page 22. It was mentioned in the opposition brief at page 9.

And up until Mr. Williams said a minute ago, nobody had said -- certainly not Mr. Williams -- had ever said that the support agreement was a reason that this court should not act on the 205 application. The fact that the parties contracted in the support agreement to deal with a contingency of what would happen if the Court did not act has no bearing on the issue of why the Court -- as Mr. Welch has said, why the Court should act on the 205 application.

THE COURT: Although it does highlight why judicial relief may never be needed. Because you have self-help remedies available to you.

MR. LESSNER: Well, Your Honor, as I think as Mr. Welch -- I'm not going to retract the argument. Just because a situation may become moot does not mean that the Court should not -- does not mean that it's not ripe, does not mean that the Court,

for all the reasons Mr. Welch said, and for good policy reasons, the Court should not act on the 205 application.

THE COURT: All right. Thank you, Mr. Lessner.

Mr. Williams.

MR. WILLIAMS: Just one sentence. Mr. Welch said that our argument is effectively that someone forgot to write the word "defective" into 205(a)(4). That's not the case at all. We discuss our interpretation of 205(a)(4) and the absence of the word "defective" at pages 30 to 31 of our reply brief, if Your Honor is interested in that.

Thank you.

THE COURT: All right. Thank you.

Counsel, what I'd like to do is recess at this point. I want to think about this a little bit, and then I will come back and let you know if I'm in a position to rule, all right?

MR. WELCH: Thank you, Your Honor.

(A short recess was taken from 11:36 a.m. until 11:55 a.m.)

THE COURT: Thank you.

I am in a position to rule.

Let me say at the outset I appreciate the really excellent arguments that were made today to help me frame the issues. And I am deeply grateful to Mr. Williams and the Richards Layton firm for assuming the assignment at the Court's request of appearing today and presenting an opposing view and doing such a good job in that regard. I'm very grateful for that.

I understand there's some timing exigency associated with this application, which is one of the reasons I tried to give enough thought about this in advance and to reflect on the arguments to be able to give you a ruling now. So I'm going to proceed and do that.

Baxter International Inc. brings before the Court an application under Section 205 of the Delaware General Corporation Law requesting an order validating a resolution adopted by Baxter's board of directors on September 29th, 2015. For reasons I'm going to explain, I am denying Baxter's application, although I will have a qualification to that at the end of this.

I want to begin by reviewing the standards under Section 205. Section 204 and 205 of the Delaware General Corporation Law were recently

enacted to provide certain avenues for the ratification or validation of defective corporate acts. Under Section 205, a corporation or a member of its board may submit an application to the Court of Chancery for a determination of the validity and effectiveness of defective corporate acts ratified under the related Section 204. The Court is also empowered by Section 205(a)(4), the provision that applies here, to "determine the validity of any corporate act or transaction." The Court has used this power to validate, for example, an issuance of stock that suffered from procedural defects.

Section 205 confers power on the Court that is broad and flexible but not without limits. As this Court noted in the Numoda case, because the outer boundaries of the Court's powers under this section are not yet well defined, the Court must proceed with caution, keeping in mind the legislative intent behind the statute.

For instance, in delimiting its powers, this court held in the Genelux case that an applicant cannot use the provision to petition the Court to determine that a corporate act is invalid, despite the language of Section 205 that the Court may

"determine the validity of any corporate act."

With this framework in mind, I'm now going to turn to Baxter's application.

Baxter petitions the Court to validate under Section 205 a resolution that its board duly adopted on September 29th, 2015. I will refer to this as "the voting resolution." It reads as follows: "FURTHER RESOLVED, that the Board hereby determines that it is advisable and in the best interests of the Company and its stockholders that the Company count any stockholder votes on the proposed Charter Amendment on a per share basis, rather than on a per capita basis."

The charter amendment referenced in the voting resolution would eliminate the classified board provision in Article SIXTH of Baxter's charter, which was adopted in 1987. That charter provision has a restriction on amendments. Specifically, it states that the provision "may not be amended or repealed without the affirmative vote of at least two-thirds of the holders of all the securities of the Corporation then entitled to vote on such change."

Baxter's plan to count the votes on the proposed charter amendment on a per share basis in

accordance with the voting resolution thus appears to be at odds with the language in the charter restriction, which seems, on its face, to call for a per holder or per capita tally. Indeed, that is how Baxter interpreted this charter provision on a number of occasions in the past, although Baxter also has identified language in its 1987 proxy statement, which is when the charter provision was adopted, casting doubt on whether the provision originally was intended to count votes on a per capita basis.

Baxter's board plans to take the vote on the charter amendment at Baxter's annual meeting in May 2016. Baxter's application not only asks for validation of the voting resolution, it specifically asks the Court to validate "the voting standard set forth in that Resolution." And that's from the application at paragraph 6. In other words, Baxter wants the Court to validate the voting resolution because, in its view, the voting resolution sets forth the proper voting standard under Delaware law.

Turning now to my analysis of this application. I may determine the validity of the voting resolution under Section 205(a)(4) only if it is a corporate act or transaction. Baxter and the

special counsel dispute whether the voting resolution is a corporate act. I do not need to decide this issue because, in my view, a validation of the voting resolution under Section 205 would only determine the validity of the resolution itself and not provide an opinion on its underlying contents. For instance, it is possible that in some circumstance a company would ask the Court to validate a board resolution if there were defects or disputes as to whether it was duly adopted by a sufficient number of the members of a board at a properly held meeting. These sorts of issues which could affect the validity of a resolution are not at issue here. Consequently, validating the voting resolution would not serve Baxter's intended purpose.

Instead, Baxter essentially asks the Court to opine on the contents of the resolution and validate that its intention to count votes on a per-share basis is substantively correct under Delaware law. Baxter argues that I can do so because I would still be validating a corporate act that occurred in September, which is when Baxter's board adopted the voting resolution.

I disagree. In my view, Baxter is

conflating the validity of the corporate act with the correctness of certain statements made as part of the act. Although the board adopted the voting resolution in September 2015, it will not undertake the referenced act, i.e., counting votes on a per-share basis, until May 2016. And it may not do so at all. For instance, the board could change its plans. The company could undergo a transformative transaction or stockholders could accept or reject the proposed amendment on both a per share and per capita basis. Indeed, as pointed out during argument, Third Point could pursue avenues to ensure that the per capita vote is obtained as referenced in paragraph 3(h) of the support agreement.

The parties agree that a corporate act must be something that has already occurred. Thus, Section 205 does not empower the Court to bless the legal validity of a future corporate act, nor does it authorize this court to opine on the substantive correctness of a legal position, in my view. In essence, those are Baxter's requests. Baxter asks me to bless the future vote counting process and asks me to do so because, in its view, it is the legally proper interpretation of the restrictive provision in

the charter. Section 205, however, does not allow me to provide such relief merely because the request is wrapped up in a petition to validate a board resolution that was adopted in the past.

Additionally, a validation of the sort Baxter seeks would constitute an advisory opinion on an unripe issue, in my opinion. As the special counsel points out, under Baxter's interpretation of Section 205, an applicant could ask the Court to bless any future corporate action or answer any legal question by adopting a board resolution regarding those issues and asking the Court to validate the resolution. Such a regime would run counter to this court's well-established aversion to advisory opinions. As the Court stated in KLM Royal Dutch Airlines versus Checchi, such opinions "ill-serve the judicial branch and the public by expending resources to decide issues that may never come to pass." And for the reasons I previously mentioned, this issue may, indeed, never come to pass.

Although Baxter suggests that its Section 205 application may not have the same ripeness requirements as our other jurisprudence, I do not find this suggestion persuasive. Sections 204 and 205 are

designed to address corporate acts that have already occurred but need to be validated for some reason. They are not an avenue for seeking legal advice or pre-transaction blessings from this Court, and I decline to provide that endorsement.

I should also add I have the utmost confidence that the folks representing Baxter have the ability to draft a proxy statement that can sufficiently provide clarity to stockholders going into the May 2016 meeting.

So for all the reasons I've stated, I am denying Baxter's application under Section 205.

Now the qualification. Notwithstanding my ruling today, I want Baxter to know that I am receptive to its point that Section 205 is a flexible provision intended to promote equitable outcomes and to provide certainty to stockholders, and that it may become appropriate at some point as a vehicle for this case in the future. For instance, Baxter would be better positioned to bring a Section 205 application if it follows through on its stated intention to put the charter amendment up for a vote at its upcoming annual meeting, counts the votes on the amendment on a per share basis, and if the vote

passes on that basis, amends the charter accordingly, even if it does not pass on a per capita basis. If those events were to occur, an application for relief under Section 205 would address a corporate act that has actually occurred.

Such an application could focus on, among other things, the various factors enumerated in Section 205(d) that the Court may consider in Section 205 applications, including the last factor in that section, which concerns "considerations that the Court deems just and equitable."

In that regard, Baxter has made a number of arguments suggesting that a per share voting process may be better aligned with the policy of Delaware law to vindicate the franchise rights of stockholders. Additionally, the Court could take into account that no stockholder sought to intervene in this action or expressed any objection to Baxter's Section 205 application after Baxter, at the Court's direction, disseminated notice of this proceeding to its stockholders.

Thus, although it is not currently an issue before me and I am not prejudging the issue, it would be an avenue in which Baxter would be in a

better position to seek relief under Section 205 than its position in connection with the current application.

But to summarize again, for all the reasons I've stated, I'm denying the application in the form that it was made today.

I want to again express my gratitude to the special counsel for stepping up to the plate and helping the Court out. I don't know the law in this area. I'm sure Mr. Williams probably does. But I am open, if it's warranted under the law, for an application of fees if that's one the special counsel wants to bring on.

Thank you very much, Counsel. Have a good day.

MR. WILLIAMS: Thank you, Your Honor.

MR. WELCH: Thank you, Your Honor.

(Court adjourned at 12:09 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 89 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 79 through 89, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 19th day of January 2016.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public